

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

**IN THE MATTER OF:**  
**DOG’S DAY PET CARE LLC,**

Applicant

Matt Brown

Richard Hurney

For the Petition

Christopher Ruhlen, Esquire

Attorney for the Applicant

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Before: Lynn A. Robeson, Hearing Examiner

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OZAH Case No. CU 15-03

**HEARING EXAMINER’S REPORT AND DECISION**

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## I. STATEMENT OF THE CASE

Filed on February 5, 2015, the Applicant, Dog's Day Pet Care LLC, seeks a conditional use for an animal boarding and care facility at 7325 Damascus Road, Gaithersburg, Maryland, under Sections 59.3.1.2 and 59.3.5.1 of the Zoning Ordinance.<sup>1</sup> The Office of Zoning and Administrative Hearings (OZAH) scheduled a public hearing to be held on June 1, 2015. Exhibit 16.

Staff of the Montgomery County Planning Department (Technical Staff or Staff) issued a report recommending approval of the application on May 7, 2015, subject to seven conditions. Exhibit 18. The Planning Board recommended approval as well, adopting the conditions recommended by Staff. Exhibit 19.

On May 28, 2015, the Hearing Examiner requested additional information from Technical Staff and from the Montgomery County Department of Permitting Services (DPS) on the application, including details on proposed signage, parking, clarification of conditions of approval, an analysis of the surrounding area, and a supplemental analysis of the proposed use's inherent and non-inherent adverse impacts. Exhibit 20. From DPS, she solicited information as to the best method to enforce the requirement, contained in Section 59.3.5.1.B.2.b.1(i) of the Zoning Ordinance, that revenues from accessory uses be limited to 20% of sales. *Id.* DPS responded on May 29, 2015, indicating that a limitation on the floor area would be their preferred method to enforce the limitation on sales. Exhibit 21(b).

The June 1, 2015, public hearing proceeded as scheduled. In response to evidence presented at the hearing, the Hearing Examiner summarized the information requested from Staff, and requested additional information based on the evidence presented at the public

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<sup>1</sup> All citations in this Decision are to the 2014 Zoning Ordinance for Montgomery County, adopted September 30, 2014 (Ordinance No. 17-52), as amended.

hearing. Exhibit 33. The record was held open until June 22, 2015, for the Applicant and Staff to respond to this request. On June 3, 2015, the Applicant provided supplemental information on signage, lighting, and circulation, submitting an amended site plan showing the configuration of the parking spaces, location of the sign on the property, location and description of light fixtures, a detail of site circulation in the drop-off and pick up area, parking of commercial vehicles, and vehicle queuing. Exhibit 36. Staff submitted its supplemental report responding to the Hearing Examiner's requests on June 11, 2015. Exhibit 41.

On June 15, 2015, the Hearing Examiner requested additional information regarding illumination from the lighting at the property line, and queried Planning Staff on whether the driveway was of sufficient width. The Hearing Examiner referred the driveway access to Montgomery County Department of Fire and Rescue Services (MCDFRS) for their review, a representative of which responded in a series of e-mails on June 17, 2015. Exhibits 41, 44, 47. The Applicant submitted a revised site plan on June 22, 2015, showing two possible configurations of the driveway, and photometric, queuing, and parking information. The close of the record was extended to June 29, 2015, to permit Staff to review the additional material. Staff filed its supplemental recommendation on June 29<sup>th</sup>, and the record closed. Exhibit 53.

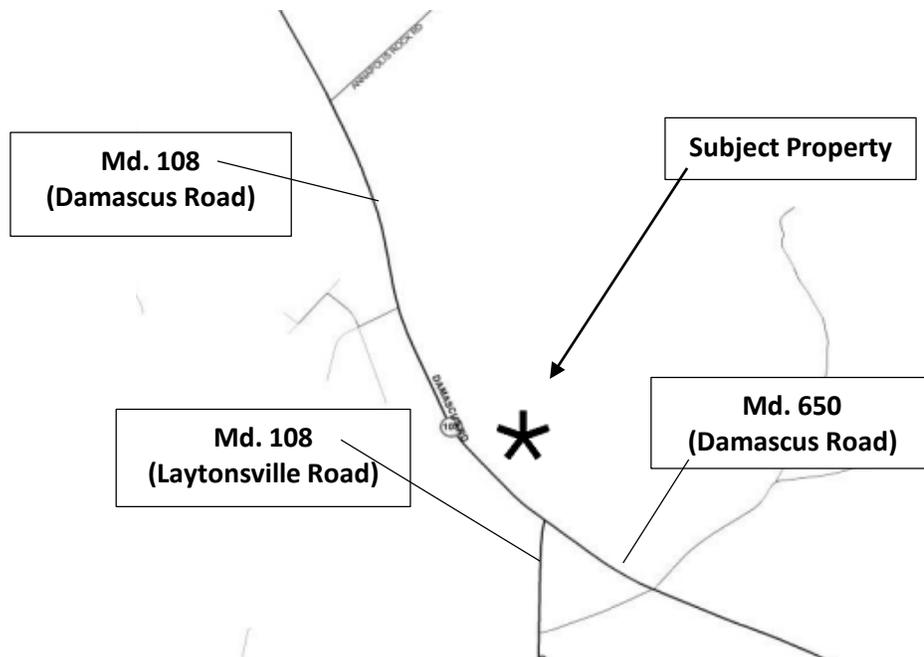
For the following reasons, the Hearing Examiner approves the conditional use application, subject to the conditions listed in Part IV of this Report and Decision (Decision.)

## **II. FACTUAL BACKGROUND**

### **A. The Subject Property**

The subject property is a 25.02-acre unrecorded parcel located approximately 2,100 feet north and west of the intersection of Maryland Route 108 and Maryland Route 650. Exhibit 18,

p. 2. A vicinity map from the Staff Report (Exhibit 18, p. 1, below) shows the general location of the property:



According to Staff, the property slopes from downward from the west and east to a low point at its center. Staff reports that there are four buildings on the property; the site plan (Exhibit 52(a)) shows an existing single-family detached dwelling, an existing outbuilding, a pole barn, a shed, and a gravel and concrete parking area located near the main house. Staff advises that the property was previously used for equestrian activities. Exhibit 18, p. 2. An aerial photograph of the property, also from the Staff Report, is on the following page.<sup>2</sup>

Access to the property is from Damascus Road via a 250-foot long gravel driveway with mature trees on each side spaced approximately 30 feet apart. The driveway apron (at the intersection with Damascus Road) is 20 feet wide, and the driveway narrows in width to between

<sup>2</sup> After the aerial photograph was taken, the Applicant planted approximately 3,000 trees on the property under the Maryland Department of Natural Resources' (DNR) Forest Stewardship Program. T. 68; Exhibit 28. None of the photographs in the record show the new plantings, although the locations are shown in the revised site plan (Exhibit 52(a)) reproduced in Part II.C.1 of this Decision.



Driveway Lined by  
Trees

Single-Family  
Residence

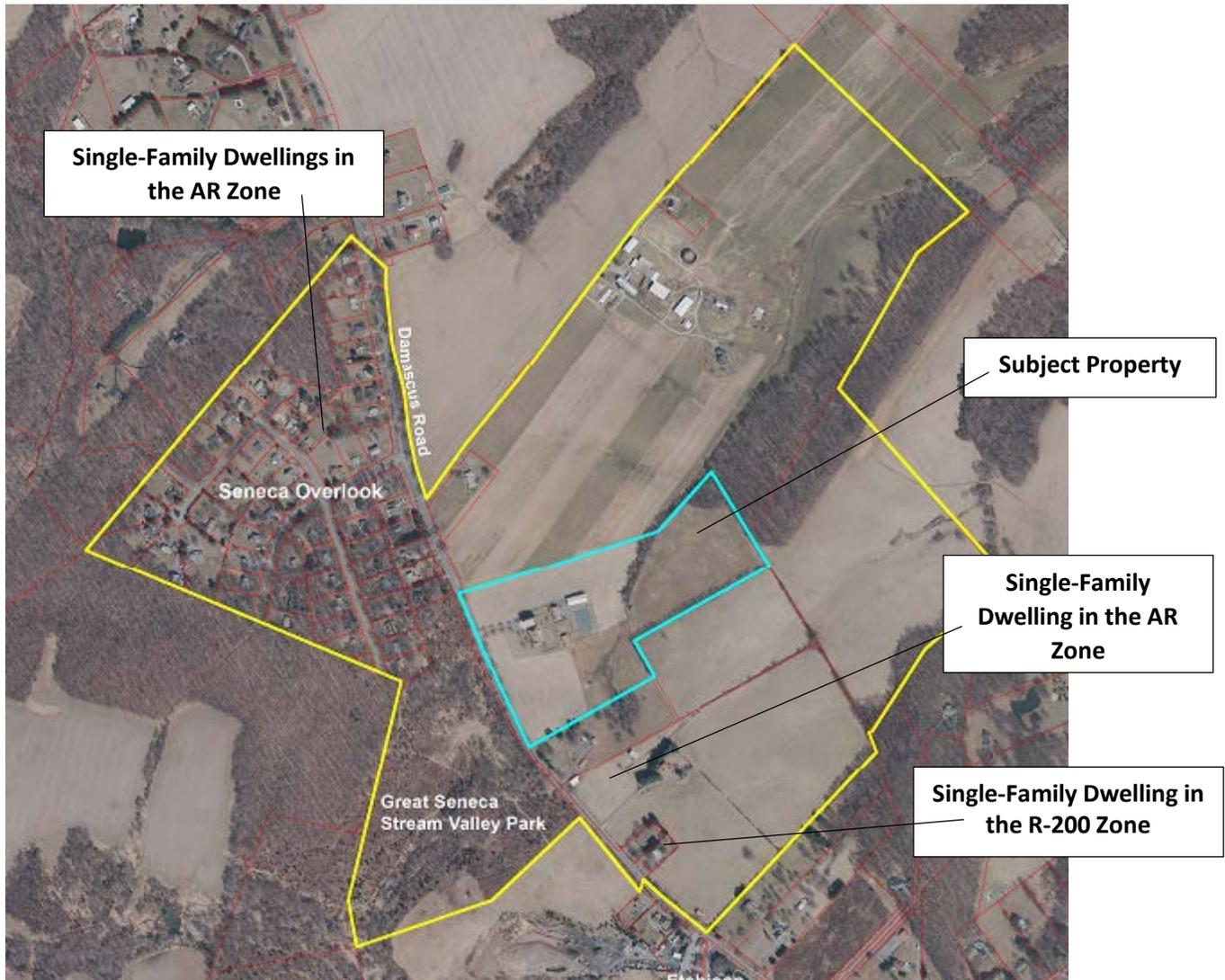
Aerial Photograph  
Exhibit 18, p. 3

12 and 17 feet, then widens again when it approaches a concrete parking pad adjacent to the existing single-family dwelling. Exhibit 53.

### **B. Surrounding Area**

For the purpose of determining the compatibility of the proposed use, it is necessary to delineate and characterize the “surrounding area” (i.e., the area that will be directly impacted by the proposed use.) Staff determined that the boundaries of the surrounding area included the Seneca Overlook subdivision to the north, a portion of the Great Seneca Stream Valley Park confronting the property across Damascus Road, and a small R-200 zoned parcel to the south.

An aerial photograph showing the boundaries (in yellow) of the defined neighborhood is below (Exhibit 29):



The surrounding area is entirely within the AR Zone, except for one single-family dwelling in the R-200 Zone. The area has a variety of land use patterns, including single-family detached houses in Seneca Overlook, the Great Seneca Stream Valley Park, a single-family

detached home in the AR Zone adjacent to the south, the single-family dwelling in the R-200 Zone and agricultural uses to the east and north.

The Hearing Examiner characterizes the area as a mix of residential single-family detached dwellings, agricultural uses and wooded parkland.

### **C. Proposed Use**

Mr. Matt Brown, an owner of Dog's Day Pet Care LLC, described his vision for the project. Brown testifies that he's been operating the business for four years from his home. The business offers pet sitting, dog walking and training services. He has been looking for properties to house the business both inside and outside of the County, but later focused on Montgomery County because he believes there is an unmet need for the service in Montgomery County. T. 14.

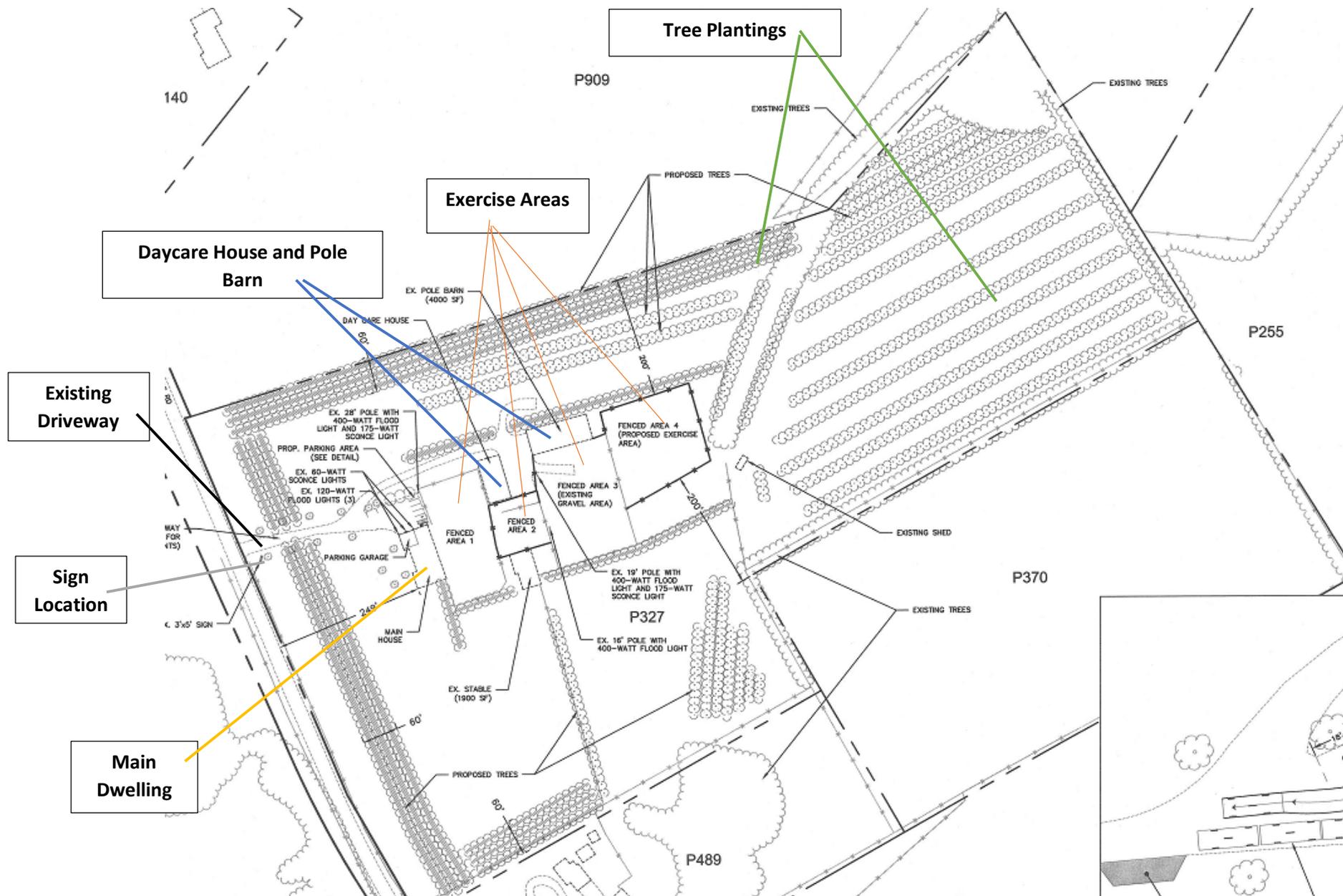
He testified that it was difficult to find a lot that could accommodate the proposed use, because of the requirement that kennels be at least 200 feet away from the nearest property line, but finally settled on the subject property, which he has purchased. He intends to expand the existing business to include dog daycare and overnight boarding. T. 15-16. According to the Statement of Operations, his business philosophy is to provide off-leash care for dogs in fenced areas for managed group play. Exhibit 13.

#### **1. Site Plan**

The final site plan submitted by the Applicant shows the details of the proposed use (Exhibit 52(a), shown on the next page.)<sup>3</sup> The Applicant proposes no changes to the existing improvements, which consist of a single-family detached dwelling, an outbuilding, called the

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<sup>3</sup> Landscaping, lighting, signage, and other aspects of the proposed use are included on the final site plan submitted (Exhibit 52(a)) rather than separate plans for each.

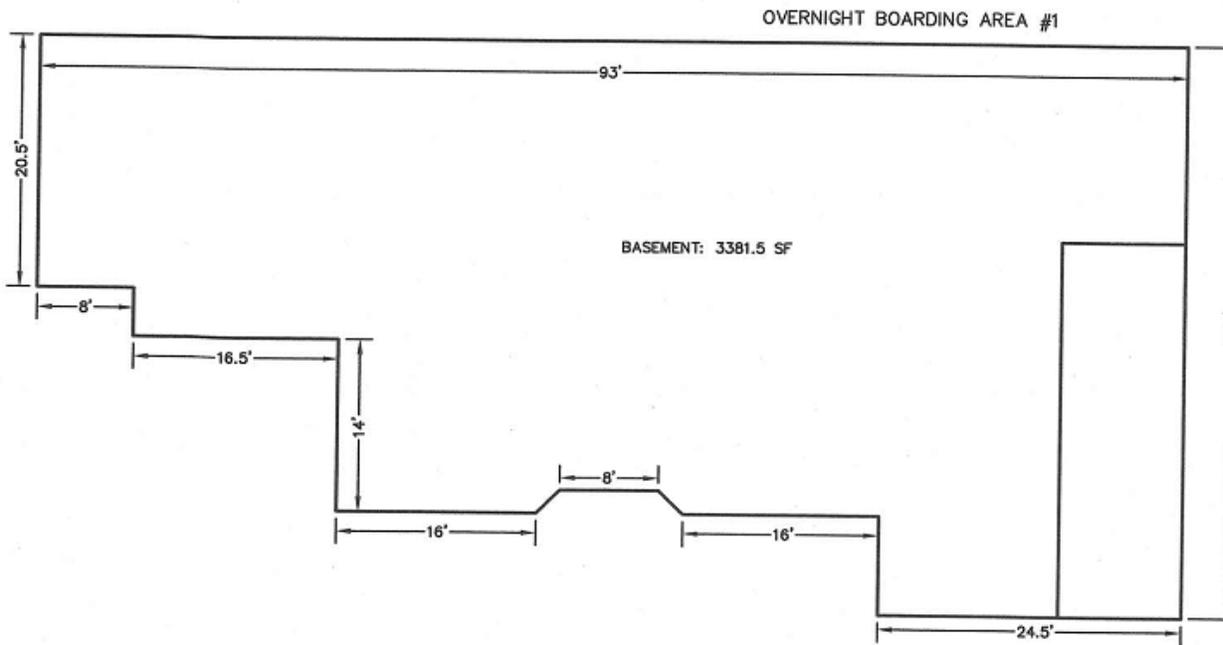


“day care house” on the site plan, a pole barn, a concrete parking area, and outdoor exercise areas that either are already fenced, or will be fenced in the future. The pole barn will provide shelter from for the dogs from the heat and inclement weather. Exercise Areas 1 and 2 will have a six-foot wooden privacy fence and Exercise Areas 3 and 4 will have a welded wire fence. T. 28. The site also shows two alternative alignments for the driveway (one with two lay-bys and one widening it to 20 feet) discussed in Part II.C.3, *infra*.

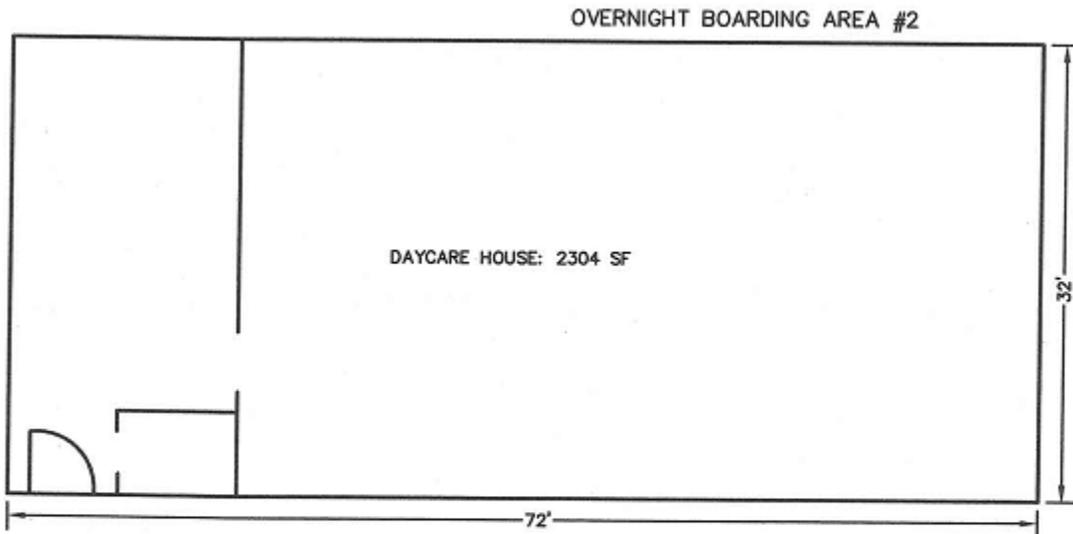
## 2. Operations

Mr. Brown testified that the main dwelling will be his family's residence and used for overnight boarding so the animals may have a home-type environment. He plans to board dogs in the large finished basement, which according to the submitted floor plans (Exhibit 52(b)), consists of approximately 3,381 square feet of floor area. During the day, the basement will also be used for the daycare. T. 19. If the maximum of 30 dogs are present overnight, they would have 15 dogs in the basement and 15 in the “daycare house” shown on the site plan. The property can accommodate four groups of dogs indoors at the same time, although they don't expect to need all of that capacity. T. 20. He clarified that the application proposes a maximum of 60 dogs at any one time, which will occur in the daytime when there are both boarded and day care dogs at the facility, and 30 dogs overnight. T. 20-21. Mr. Brown submitted floorplans to show the different areas of the existing structures that will be devoted to the use (Exhibit 52(b), shown on pages 11 and 12.)

According to Mr. Brown, the hours of operation for the daycare will be between 7:30 a.m. and 7:00 pm. Boarded dogs will be present for 24 hours. T. 22. Dogs will be exercised in four outdoor fenced areas, which are shown as Fenced Areas 1 through 4 on the site plan (above, Exhibit 52(a); T. 22-26.

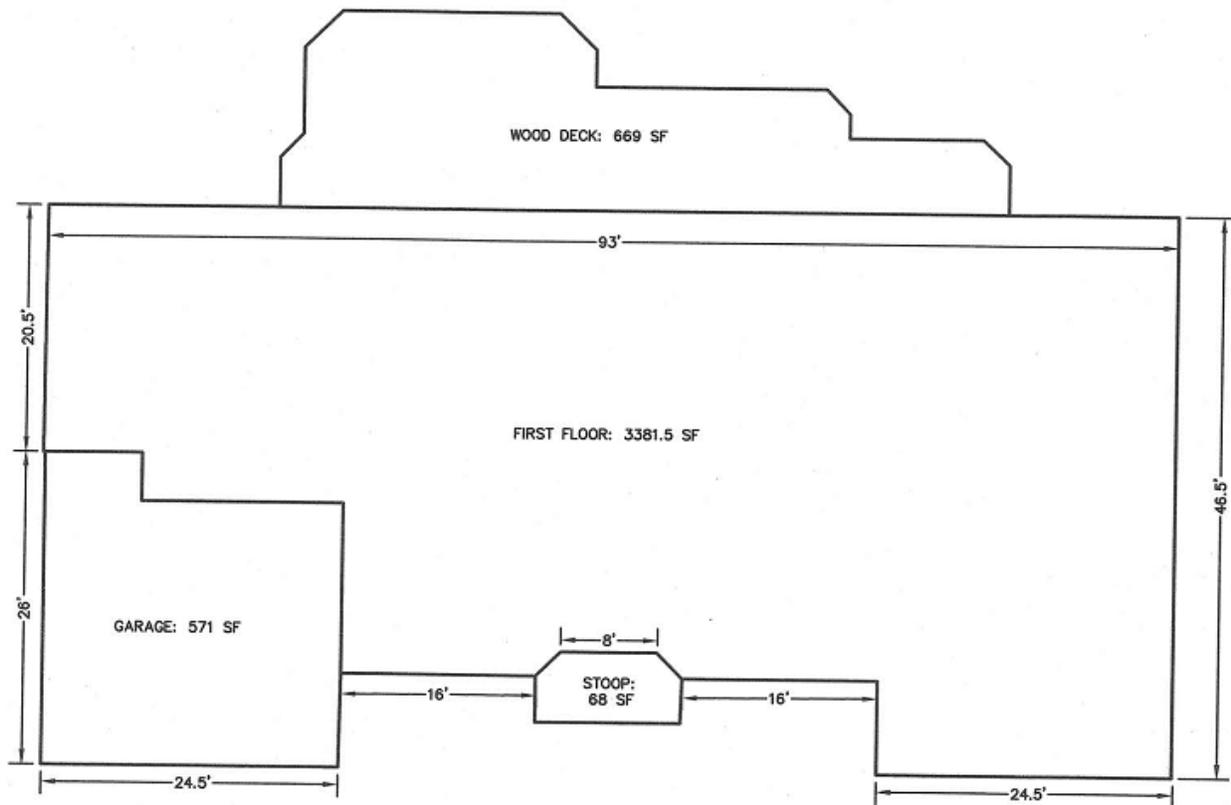


1 MAIN HOUSE: BASEMENT  
SCALE: 1"=10'



3 DAYCARE HOUSE  
SCALE: 1"=10'

Floor Plans  
Exhibit 52(b)



1 MAIN HOUSE: FIRST FLOOR  
SCALE: 1"=10'

**Floor Plans  
Exhibit 52(b)**

The business will screen potential clients, initially by phone and then by an in-person visit, to determine whether they are friendly with other dogs or bark frequently and whether they will be a good fit with other dogs in the kennel. If it appears from the phone interview that the dog will be a good fit, they propose to invite the owner to the kennel so they may meet with other dogs to see how comfortable the dog is at the facility. After that screening process, he does not anticipate accepting noisy dogs at the kennel. In his opinion, dogs are noisy when they are bored, scared, or lonely. His goal is to have happy, friendly dogs. T. 50-51. While dogs may

bark sometimes during play, employees can mitigate this behavior by distracting them with treats, calling them or bringing them indoors if that is needed. They would have to ask incessant barkers not to return to the kennel. He wants it to be a pleasant, fun environment, but not a noisy one. *Id.*

The employees will have two daytime shifts, one from 8:00 am to 3:00 p.m. and from 3:00 p.m. to 7:30 p.m. When they have the full complement of 60 dogs, as during the Christmas holidays, they would add an overnight shift from 7:30 p.m. to 8:00 a.m. According to Mr. Brown, the number of employees on-site is going to be a function of demand. T. 59. The number of employees on each shift will include him and his wife. He anticipates that no more than four employees will work on the overnight shift. T. 60. He also anticipates that there may be an overlap of staff when shifts change. T. 61.

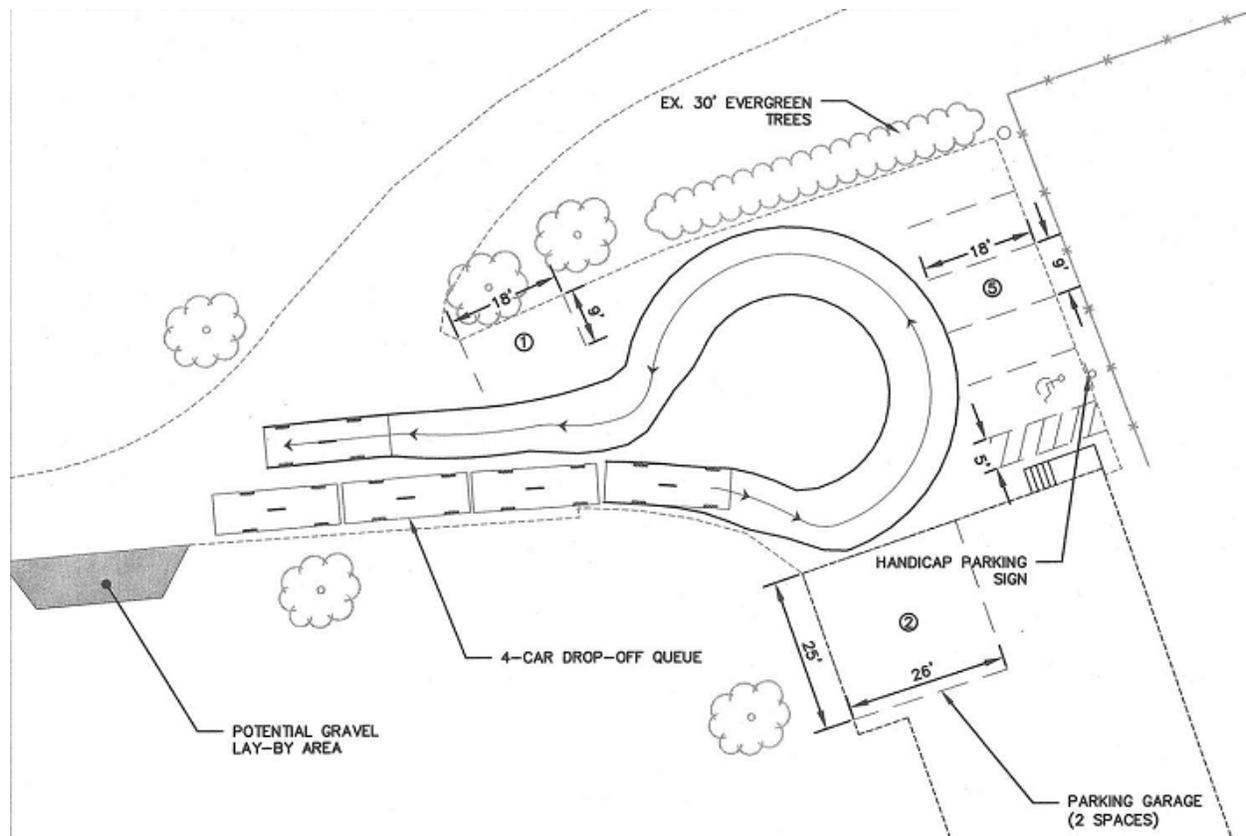
Mr. Brown stated that pet waste will be picked up and placed in a lined trash bin that would be moved to a designated location at the end of each day. They will have a trash removal company pick up the trash curbside. T. 64. In a statement submitted after the hearing, Mr. Brown's attorney confirmed that trash pick-up will occur at the street. Exhibit 36.

### **3. Site Circulation, Parking and Access**

Mr. Brown described the proposed plans for pick-up and drop-off of pets. All pick-up and drop-offs will be by appointment so that dogs may not arrive unexpectedly. He believes that they will be able to stagger pick-up and drop-offs between 7:30 a.m. and 11:00 a.m., with the bulk of the arrivals and departures occurring between 8:00 a.m. and 9:30 a.m. T. 53. He anticipates that approximately one-half of the dogs will arrive by a "pet taxi" or a van, which can carry up to 10-15 dogs. The taxi would leave at approximately 8:00 a.m. and pick-up multiple dogs off-site before returning. He anticipates that there will be no more than two round-trip taxi

runs between 7:30 a.m. until Noon. T. 54-55. He testified that the bulk of the pick-ups in the evening will be between 5:00 p.m. and 6:00 p.m. T. 70. He anticipates that individuals dropping off their dogs will pull around the circular area (marked by cones) in the concrete parking area, where a staff member would bring the dog directly from the car to the interior of the building, so the client doesn't even have to get out of the car. They do not anticipate payment during pick-up, because they plan to bill clients monthly. If a payment is due, they would know in advance and leave a check or cash, although he anticipates most payments will come with monthly invoices. T. 56. He believes that it will take only a minute or two for a dog to be dropped off and picked up because the individuals are arriving at staggered appointment times. T. 57-58. He plans to stagger appointments every 5 to 10 minutes. The circular area may accommodate at least three or four cars, but if someone arrives late, there will be space for them to park. T. 58. A detail of the concrete parking pad and pick-up/drop-off area (Exhibit 52(a)), is shown on the following page. When not in use, the vehicle used for the "pet taxi" will be parked in the pole barn. Exhibit 36.

Planning Staff advises that the proposed use requires a minimum of eight parking spaces, one of which must be ADA accessible. Two of the spaces will be in the garage of the single-family dwelling, and will be used by Mr. Brown and his wife. The balance of the spaces will be located in the concrete parking pad to the rear of the single-family dwelling. Mr. Brown doesn't anticipate any delivery trucks other than typical UPS or FedEx trucks, which have a lot of room to maneuver on the site. Because the grooming services are minimal, they will not stock large amounts of grooming supplies. Clients will bring their own food; in his opinion, it is important for the dogs to continue with the diet they are used to; many have stomach issues if they change diets. T. 62. When not in use, the "pet taxi" will be parked in the pole barn. Exhibit 36.

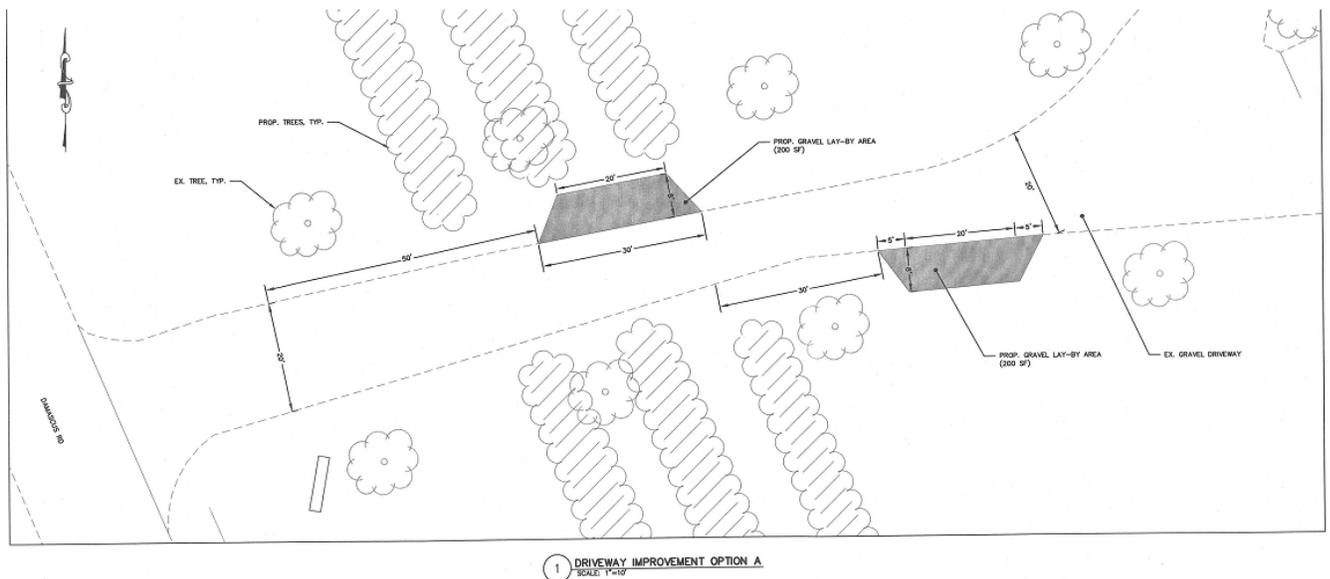


**Parking Detail  
Exhibit 52(a)**

The initial application submitted by the Applicants proposes to use the existing gravel driveway, which is approximately 250-feet long and between 12-feet and 17-feet wide. The driveway apron at Damascus Road is approximately 22-feet wide and the driveway widens again as it approaches the concrete pad to be used for parking and drop-off and pick-up. The Applicant's expert in civil engineering and land planning, Mr. Richard Hurney, testified that the driveway width was acceptable because the use would be housed in a single-family dwelling. The Hearing Examiner referred the matter to Technical Staff and the Montgomery County Department of Fire and Rescue Services (MCDFRS). Technical Staff advised that the 12-foot width was acceptable because the grade surrounding the property is relatively flat and cars could pass each other on the grass. Exhibit 41. MCDFRS responded (Exhibit 45):

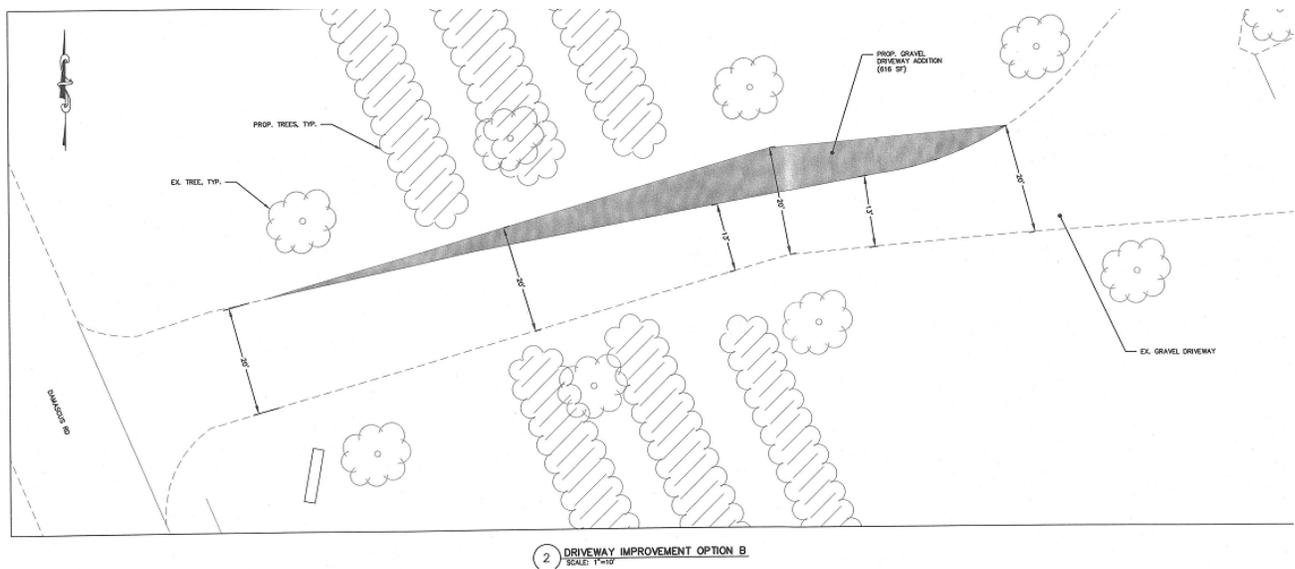
If DPS determines that the property remains residential, it meets access requirements for an existing single family occupancy. If, however, the use changes to commercial, particularly one open to employees and the public, the driveway is not compliant. Everything from the gravel surface to the driveway apron is up for review. This of course can be addressed at building permit, but the applicant should be informed.

Without making a determination that the use is residential or commercial, the Hearing Examiner requested the Applicant to demonstrate that the use *could accommodate* a commercial driveway if one is needed, so that she may make the finding that site circulation is adequate and meets all code requirements.<sup>4</sup> Exhibit 48. In response, the Applicant provided two alternative options for the driveway, in addition to the existing driveway. These two alternatives are included on the site plan (Exhibit 52(a), shown below and on the following page):



**Driveway Option A  
(Double Lay-By)**

<sup>4</sup> As explained in Part III.D.2 of this Decision, the Hearing Examiner concludes that the Zoning Ordinance requires a 20-foot driveway in this case, regardless of whether the use is commercial or residential under the building code.



**Driveway Option B  
(Widening to 20 Feet)**

Planning Staff recommended approval of Option B (Exhibit 53), stating:

Technical staff recommends Option B. Widening the driveway to a uniform width will enable vehicles traveling in opposite directions to pass without delay, reducing the time spent in picking up or dropping off dogs during transfer periods and increasing the efficiency of the property's circulation system. The modest amount of additional impervious surface, compared to Option A, is appropriate in light of the increased overall efficiency of the circulation network.

Staff advised that the driveway is located within a “transition area” (i.e., 660 feet from a stream valley buffer) in the Patuxent Primary Management Area (Patuxent PMA). Environmental guidelines promulgated by the Planning Board recommend limiting impervious area within the PMA to 10%, although that may be exceeded when, “greater imperviousness [is needed] to maintain community character, achieve compatibility or accomplish master plan goals. Imperviousness can be averaged over the entire property in those circumstances.” Staff advised that, when coupled with other impervious areas on the site, the impervious area on the site equals 10.8%. Nevertheless, Staff concluded:

The physical arrangement of the property, with main building, outbuildings, barn and outdoor exercise areas, contributes to an overall agricultural character, even if the proposed use is not strictly agricultural in nature. This arrangement is compatible with neighboring farms and furthers the master plan goal of retaining rural character in this part of the county. For these reasons, although the imperviousness associated with the use is slightly greater than 10 percent in the transition area, technical staff considers it acceptable. Overall, imperviousness on the property, including Option B, totals 4.6 percent, which is consistent with the PMA guidelines. *Id.*

#### **4. General Site Landscaping and Lighting**

As an alternative to compliance with the minimum requirements for screening in the Zoning Ordinance, the Applicant has planted approximately 3,000 evergreen and deciduous trees on the property under the "Forest Stewardship Program" (Stewardship Program) through the Maryland Department of Natural Resources (DNR). Exhibits 27, 28. Mr. Brown testified that he has already planted the trees, and will abide by the maintenance standards in the program. T. 67-68. The location of the trees is shown on the revised site plan (Exhibit 52(a), on page 9). Staff advises (although it may not have had the exact count of trees at the time), that there will be approximately 1,000 evergreen trees around the northern, southern, and western perimeters of the property with a depth of 60 feet from the property line. An additional 2,400 deciduous trees (the number is approximate) have been planted on the eastern side of the property to augment an existing stand of trees. Exhibit 18, pp. 8-9.

Both the Planning Board and Technical Staff recommended approval of the alternative landscaping, and Mr. Hurney testified that the landscaping exceeded what the Zoning Ordinance would otherwise require. Exhibit 18, T. 105. The Zoning Ordinance permits two alternatives for screening; a chart summarizing the alternatives permitted by the Zoning Ordinance, included in the Staff Report, underscores this opinion (Exhibit 18, p. 8, shown on the following page.)

Screening Standards—Chapter 59.6.5.C.7

	Option A	Option B
<b>Dimensions (minimum)</b>		
Depth	8 feet	12 feet
<b>Planting and Screening Requirements</b>		
Trees (minimum per 100 feet)		
Canopy	2	2
Understory or Evergreen	2	4
Shrubs (minimum per 100 feet)		
Large	6	8
Medium	8	12
Small	8	--
Wall, fence or berm	4 foot fence or wall	--

**Screening Alternatives Required Under Zoning Ordinance  
Exhibit 18**

Section 59.6.4.4.E of the Zoning Ordinance mandates that “outdoor lighting for a conditional use must be directed, shielded, or screened to ensure that the illumination is 0.1 footcandles or less at any lot line that abuts a lot with a detached house building type, not located in a Commercial/Residential or Employment zone.” As there is a detached house building type on adjacent property to the south, this standard applies to this use.

Staff did not initially comment on whether this requirement had been met because there was no change to the existing lighting on the property. Exhibit 18. The Zoning Ordinance requires such an analysis because the prior use of the property did not require approval of a conditional use and none of the rather extensive grandfathering provisions exempt the proposed use from this requirement (*see*, §7.7.1 of the Zoning Ordinance.)

The Applicant proposes to utilize only existing lighting on the property. This consists of the following:

1. Two existing single 60-watt sconce lights mounted to the wall of the garage on either side of the car port;

2. One single fixture containing three 120-watt flood lights mounted to the wall above the car port; and
3. Three pole mounted lights, including:
  - a. A 28-foot pole light located at the northeast corner of the concrete parking area containing one 400 flood light plus one 175-watt sconce-style light;
  - b. A 19-foot pole light on the north side of the boundary line (shown on the site plan) dividing Exercise Areas 2 and 3, containing one 400-watt flood light plus one 175-watt sconce-style light; and
  - c. A 16-foot pole light on the south side of the boundary line (shown on the site plan) dividing Exercise Areas 2 & 3, containing one 400-watt flood light.

At the Hearing Examiner's request, the Applicant provided information on estimated light illumination at the property line. According to the Applicant, all existing pole lights are no less than 235 feet from adjacent properties. Mr. Hurney modeled the existing photometric of the 28-foot light pole containing one 400-watt flood light in height and wattage on the property. Illumination levels at 87.5 feet were at 0.1 footcandles, not considering the mitigating impact of the existing buildings or tree plantings. Exhibit 50.

Lighting design standards in the Zoning Ordinance mandate that light fixtures be a "full or partial cutoff fixture." *Id.*, §59.6.4.4.B. Other than the sconce fixtures identified above, there is no evidence that the floodlight fixtures meet this requirement, however, as discussed *infra*, the Hearing Examiner finds that the tree plantings, and large size of the property, also serve as an alternative means of complying with this requirement, as explained in Part III of this Report.

## 5. Signage

Mr. Brown testified that the Applicant proposes to use an existing sign on the property, located near its frontage on Damascus Road. T. 36; Exhibit 36. After the public hearing, the Applicant submitted a statement stating that the sign is approximately 5-feet wide and 3-feet in

height, with a resulting area of 15 feet, and is 7.5 feet from ground level. It is not illuminated and is located approximately 25 feet from the property frontage on Damascus Road. *Id.* at 1. Technical Staff confirms that the sign measurements and location meet the requirements of the Zoning Ordinance. Exhibit 41, p. 1.

## 6. Noise

Section 3.1.5.B.2.b.1 of the Zoning Ordinance requires the Applicant to submit an acoustical study demonstrating that the animal boarding and care facility will meet the noise levels mandated by the Montgomery County Code. The Code limits noise levels in residential noise areas to 65 dBA in the daytime (from 7 a.m. to 9 p.m. on weekdays and 9 a.m. to 9 p.m. on weekends and holidays) and 55 dBA in the nighttime (from 9 p.m. to 7 a.m. weekdays and 9 p.m. to 9 a.m. weekends and holidays). *Montgomery County Code*, §31-5(a)(1).

The Applicant submitted an acoustical study that assumed that 15 dogs would be outside at one time. The study indicates that the trees do not provide sound attenuation because of the species, size, and planting density, although it is unclear whether the study incorporated the 3,000 trees planted under the Stewardship Program. Based on average dog noise sound levels across breeds (i.e., typically 80 dBA at 10 feet), the study estimated that daytime noise for outside dogs would be approximately 61dBA. The two exercise areas closest to the north and south property lines are approximately 200 feet from the property line. The study concluded that, if the number is increased to the maximum number of dogs permitted for either daycare or boarding (i.e., 30 dogs), the noise levels at the property line will be at 64 dBA, under the County's standard. Exhibit 9.

Nighttime sound levels took into account the estimated noise reduction from the basement area where approximately 15 dogs will sleep. The study estimated that the exterior

walls would result in noise reduction of 20%, leaving estimated nighttime levels at 44 dBA, again not exceeding the County's maximum permitted levels. As described earlier, Mr. Brown testified that pre-screening the dogs to see how they acclimate to the facility, along with full-time supervision, will keep noise levels low.

### **7. Agency Recommendations**

In its initial report, Planning Staff recommended approval of the application subject to the following conditions (Exhibit 18):

1. No more than 30 dogs may board overnight at the facility, and no more than 30 dogs may be at the facility for daily care, for a facility maximum of 60 dogs;
2. No more than 30 dogs may be outdoors at any given time;
3. No dogs are permitted outside between 9:00 pm and 7:00 am;
4. All outdoor exercise and play areas must have fencing appropriate to contain dogs of varying sizes;
5. Arrivals and departures will occur by appointment only between the hours of 7:30 am and 7:00 pm;
6. Accessory services, such as bathing or transportation, may not exceed 20 percent of total revenue;
7. Petitioners must comply with the requirements of the forest stewardship plan prepared for the Property by the Maryland Department of Natural Resources, including tree planting and subsequent regular inspections.

Because some of the recommended conditions either were uncertain or difficult to enforce, the Hearing Examiner referred these to the enforcement agencies and to the Applicants for more precise or more easily enforceable conditions.

Condition No. 6 reflects one of the standards for approval particular to an animal boarding and care facility (*see, Zoning Ordinance, Section 59.3.5.1.B.2.b.i(i)*). The Hearing

Examiner queried DPS as to its preferred method of enforcing that criteria. She posed the following options:

1. Require the applicant to keep his books on-site and available for inspection.
2. Require the applicant to keep his books on-site and available for inspection and self-report annual sales to DPS. I do not want to keep requiring the Board to retain jurisdiction to monitor these types of conditions.
3. Have the applicant provide testimony as to what amount of space for accessory uses would generate no more than 20% of sales—then you can simply [measure] the amount [sic] of space devoted to the use.

DPS responded that its preferred method would be to limit the floor area of the use to an amount that would generate the limited revenue required. The Applicant, through his attorney, submitted a statement that the following proposed condition limiting the grooming and shuttle services will limit the revenue from those services to “far less than 20 percent of the total revenue.” Exhibit 36, p. 5. The Applicant proposed the following condition on the conditional use approval:

The Petitioner will confine bathing and grooming activities to a maximum area of 150 square feet, and will utilize no more than two vehicles for pet shuttle services. Any expansion of the area associated with bathing or grooming or increase in the number of vehicles utilized for shuttle services will require modification of the Conditional Use. *Id.*

The Hearing Examiner finds that the small amount of space devoted to grooming services and the limitation on the number of vehicles supports the Applicant's statement that revenue from these accessory services will not exceed twenty percent of sales, and incorporates the condition proposed by the Applicant into the conditions of approval of this conditional use.

The Hearing Examiner concludes that Condition No. 4, requiring fencing at a height “appropriate” for dogs, was too vague for enforcement by DPS. At the public hearing, the Applicant clarified that the exercise areas will have two different fences. Areas 1 and 2 will have

a six-foot wooden privacy fence. All other exercise areas will have a five-foot welded wire fencing. T. 29-30. The Hearing Examiner has modified Staff's recommended condition to mirror the Applicant's proposal for fencing.

The Hearing Examiner also modifies Staff's seventh condition relating to the Stewardship Program. At the public hearing, the Applicant testified that he had no mandatory contract with DNR requiring scheduled maintenance. At the Hearing Examiner's request, the Applicant submitted the following proposed condition (Exhibit 36, p. 5):

The Petitioner will substantially comply with the terms of the Practice Schedule for maintenance and care of the Forest Stewardship Plan described in the February 6, 2015, letter from the Maryland Department of Natural Resources (Exhibit 22), unless the Conditional Use is abandoned or subsequently modified to provide a different means of compliance with the screening requirements of Division 6.5.

#### **D. Community Response**

The record contains no opposition to this application.

### **III. FINDINGS OF FACT AND CONCLUSIONS OF LAW<sup>5</sup>**

A conditional use is a zoning device that authorizes certain uses provided that pre-set legislative standards are met. Pre-set legislative standards are both specific and general. General standards are those findings that must be made for all conditional uses. *Zoning Ordinance*, §7.3.1.E. Specific standards are those which apply to the particular use requested, in this case, an animal boarding and care facility. *Id.*, §59.3.1.5.

Weighing all the testimony and evidence of record under a "preponderance of the evidence" standard (*see, Zoning Ordinance*, §7.1.1, the Hearing Examiner concludes that the conditional use proposed in this application, with the conditions imposed in Part IV of this Report and Decision, would satisfy all of the specific and general requirements for the use.

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<sup>5</sup> All findings of fact are based on a preponderance of the evidence. *Zoning Ordinance*, §7.1.1.

### A. Necessary Findings (Article 59.7)

The general findings necessary to approve a conditional use are found in Section 59.7.3.1.E of the Zoning Ordinance. Standards pertinent to this approval, and the Hearing Examiner's standards for each finding, are set forth below:

*a. satisfies any applicable previous approval on the subject site or, if not, that the previous approval must be amended;*

Conclusion: Staff advises that there are no previous land use approvals applicable to the property. Having no evidence to the contrary, the Hearing Examiner finds that this standard is inapplicable to the subject application.

*b. satisfies the requirements of the zone, use standards under Article [59-3](#), and applicable general requirements under Article [59-6](#);*

Conclusion: The application satisfies the requirements of Article 59-3, 59-4, and Article 59-6, discussed more fully in Parts III.B, C, and D of this Decision, respectively.

*c. substantially conforms with the recommendations of the applicable master plan;*

Conclusion: The property lies within the geographic area covered by the 2006 Damascus Master Plan. The Master Plan divides the area into the "Town Center" area, "Transition Areas," and "Rural Area" with different recommendations and guidelines for each area. The subject property is within the Rural Area of the Master Plan, as shown on page 27 (Exhibit 11).

The Plan's primary goal for the rural area is to further the goals of the Agricultural Reserve by encouraging agricultural uses, along with low-density housing. *Plan*, p. 37. The Plan states:

Much of the land area within the Damascus Master Plan boundary is within the Agricultural reserve, primarily within the Rural Density Transfer (RDT) Zone, the focus of the County's

farmland preservation policies...Farms and rural landscapes are interspersed with older subdivisions and historic crossroads communities that include residential and some commercial uses.

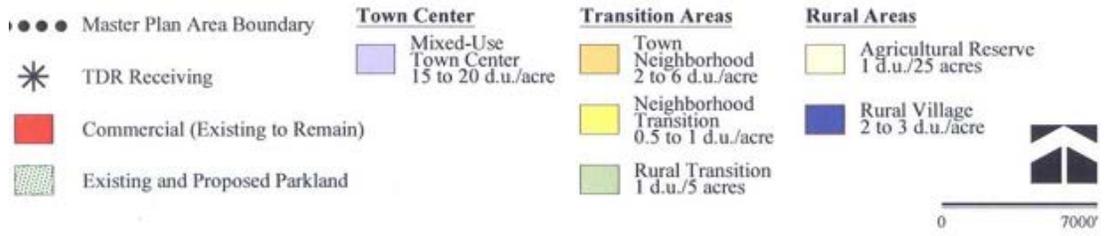
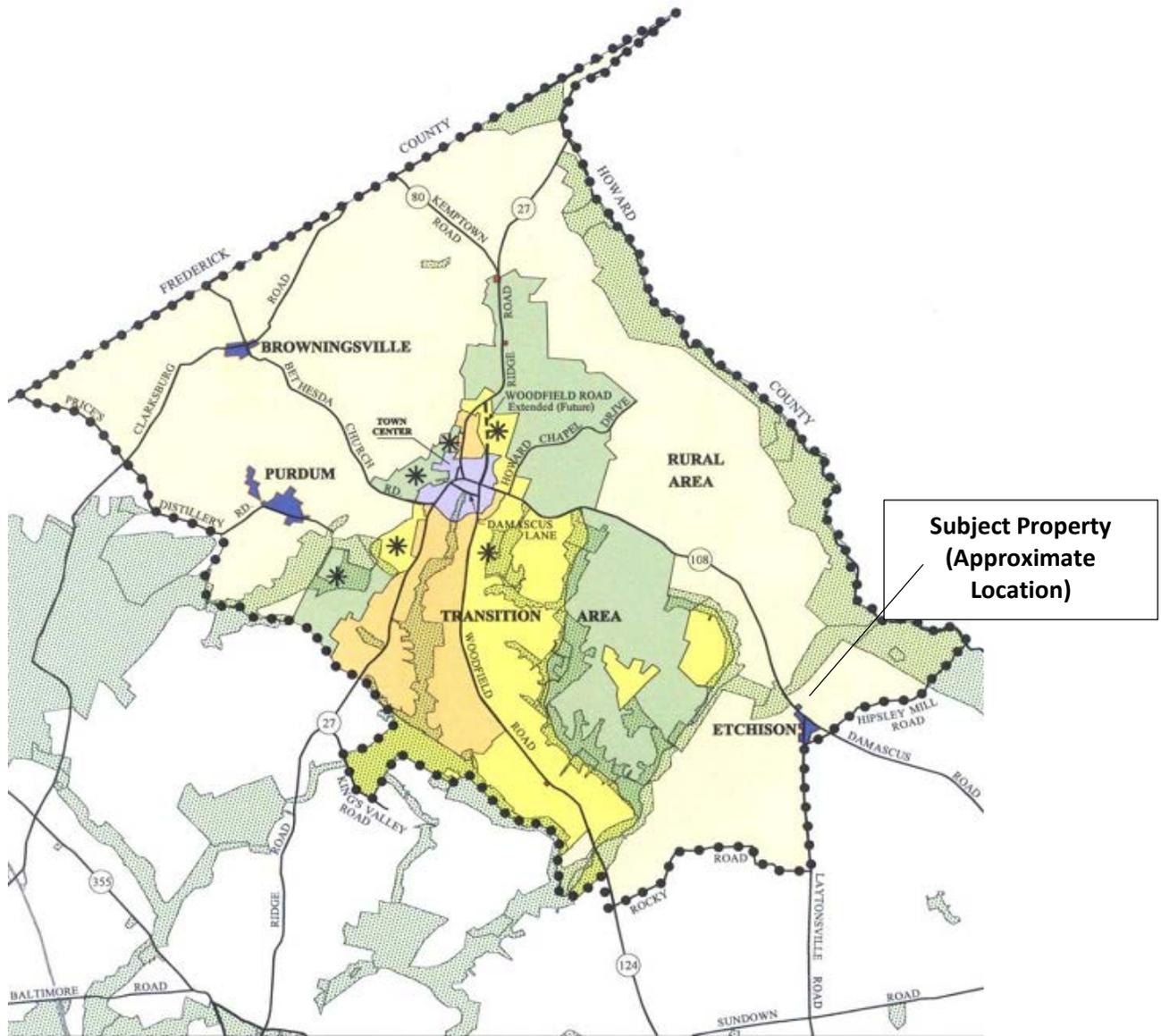
Lands within the Agricultural reserve are given special protections from urban and suburban development pressures. Non-agriculturally related commercial, industrial, or institutional uses are discouraged. Farming and agriculturally related activities are encouraged.

Preserving farmland in Montgomery County is a means to achieve quality of life, and economic and environmental goals. Agricultural land preservation in Damascus is important for maintaining the County's agricultural base, and in strengthening the role of Damascus as the rural market focus in this part of the County.

*Id.* The Plan recognized the “unique” rural aspect of the area, characterized by rural vistas and views of Damascus, which is set on a hill. According to the Plan, “[I]and uses that impede those vistas should be discouraged.” *Plan, p. 103.* To preserve this character, the Plan contains guidelines for approval of special exceptions (now conditional uses):

**Guideline for Rural Vista Protection** – The visual character of the Rural Areas surrounding Damascus are unique as they are the highest elevations in the County. When special exceptions are proposed in Transition and Rural Areas within the Damascus Master Plan area, their review should take into special consideration the preservation of these long vistas that are part of the unique character of this community. Any proposed land use that would impede those vistas should be discouraged unless it serves an important public purpose. *Plan, p. 103.*

Technical Staff concluded that the property conformed to the Master Plan because the Applicants plan to live in the home, thus adding some low-density residential housing in the



**Master Plan Proposed Land Use and Density Map  
Exhibit 11**

Rural Area. Staff also relied on the fact that the house and outbuildings are clustered nearer to Damascus Road, leaving a significant portion of the property open, and the forested area preserves open space. Exhibit 18.

The Hearing Examiner finds the use is consistent with the Master Plan. The primary goal of the Master Plan is to support agricultural uses and preserve the agricultural vistas characteristic to the Damascus area. Admittedly, the proposed use is commercial rather than agricultural; nevertheless, it will not drastically alter the rural character of the area because it is directly across from Great Seneca Park, which is wooded, and will serve as a link to another treed area immediately to the east of the property. The tree plantings also serve to screen the commercial aspects of the use, thus preserving the overall agricultural nature of the area. In a supplemental report, Planning Staff notes that the arrangements and type of structures on the property are agricultural, and also preserve the agricultural character of the area. Exhibit 53. For these reasons, the Hearing Examiner finds that the use is generally consistent with the Master Plan.

*d. is harmonious with and will not alter the character of the surrounding neighborhood in a manner inconsistent with the plan;*

Conclusion: Staff found that the proposed use met this standard because no new structures were proposed and the existing agricultural structures, the retention of fields and fenced areas, and the tree plantings to create wooded areas maintained its existing character. The Hearing Examiner concludes that the “surrounding area,” as defined in Part II.B of this Decision consists of single-family homes, wooded parklands, and agricultural uses. The use proposed will extend the existing wooded areas in the Great Seneca Stream Valley Park towards the east and connect with another existing stand of trees. The single-family home will remain unaltered, and with the exception of some additional vehicular activity and noise on the site, will screen most of the

commercial aspects of the use. For these reasons, the Hearing Examiner also concludes that the use will be harmonious with the existing character of the surrounding area, which is a mix of residential and agricultural uses, and wooded parkland.

*e. will not, when evaluated in conjunction with existing and approved conditional uses in any neighboring Residential Detached zone, increase the number, intensity, or scope of conditional uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area; a conditional use application that substantially conforms with the recommendations of a master plan does not alter the nature of an area;*

Conclusion: Staff confirmed that there are no existing or approved conditional uses in any neighboring Residential Detached zone, and the sole commercial activity proposed here is compatible with the neighborhood. Thus, the Hearing Examiner finds that this standard has been met.

*f. 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. If an approved adequate public facilities test is currently valid and the impact of the conditional use is equal to or less than what was approved, a new adequate public facilities test is not required. If an adequate public facilities test is required and:*

*i. if a preliminary subdivision plan is not filed concurrently or required subsequently, the Hearing Examiner must find that the proposed development will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage; or*

*ii. if a preliminary subdivision plan is filed concurrently or required subsequently, the Planning Board must find that the proposed development will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage; and*

Conclusion: The application does not require approval of a preliminary plan of subdivision.

Exhibit 18, p. 14. Therefore, the Hearing Examiner must determine whether roadway capacity is

adequate under Section 50-35(k), as implemented by the Subdivision Staging Policy (Council Resolution 17-601, adopted on November 13, 2012) and the Planning Board's Guidelines for Local Area Transportation Review (LATR) and Transportation Policy Area Review (TPAR). LATR Guidelines are intended to determine "the adequacy of the local road network by measuring congestion at roadway intersections based on critical lane volume (CLV) and volume to capacity ratio (v/c)." *Local Area Transportation Review and Transportation Policy Area Review Guidelines* (adopted January 24, 2013) (Guidelines). LATR projects the impact of trips to be generated by the proposed development, taking into account existing development and development that is approved, but is not yet built. Applications that are expected to generate fewer than 30 trips are exempt from LATR review, but must submit a "Traffic Exemption Statement" to demonstrate that the number generated by the proposal will be under 30-trip maximum. *Guidelines*, p. 3.

The Applicants did submit a Traffic Exemption Statement estimating that the proposed use would generate a minimum of two trips in the morning and evening peak hours, leaving a balance of 26 trips for drop-off and pick up before triggering full LATR review. The two trips were generated by the "pet taxi" and one employee. According to the Traffic Exemption Statement, the available 26 trips would be more than enough to stay under the 30 trips maximum for an exemption because Applicant plans to schedule appointments for drop-off and pick-up of dogs. Exhibit 8.

Initially, Staff accepted the traffic statement because the Applicant "will structure arrivals and departures to minimize peak period trips and has submitted a traffic statement outlining its trip generation impacts." Exhibit 18, p. 14. Staff did not provide information whether the application met the TPAR requirements. *Id.*

As described above, at the public hearing Mr. Brown testified in more detail that the bulk of the pick-ups will occur between 8:00 a.m. and 9:30 p.m., and will occur between 7:30 a.m. and 11:00 a.m. Approximately 10-15 of the dogs will be picked up by the pet taxi. The bulk of the individual pick-ups in the evening will occur between 5:00 p.m. and 6:00 p.m. He plans to stagger appointments every 5 to 10 minutes. T. 53-54.

Based on this more detailed description of operations, the Hearing Examiner referred application to Staff for additional review under the LATR Guidelines to consider the impact of individual drop-off and pick-ups. In a Supplemental Report (Exhibit 41), Technical Staff estimated that the animal boarding and care facility would generate 28 trips, still under the 30-trip limit for the exemption. Exhibit 41. Based on the 5-minute staggered appointments, Staff estimated that the use will generate three trips from employees entering the site, two trips from employees leaving the overnight shift, one trip for the pet taxi, and 22 trips for drop-offs. *Id.* at 5.

TPAR requires a review of whether roadways or transit facilities are adequate to serve a larger geographic area, known as a “policy area.” It measures average transportation system performance throughout the policy area. If either roads or transit system performance does not meet certain mandates, service in the policy area is deemed inadequate and a tax may be assessed against new development if the owner does not otherwise mitigate the traffic impact of the use. *Guidelines* at 30.

The record contains no information on TPAR requirements for this use. The Hearing Examiner finds that she may reasonably infer that the TPAR test is not triggered because the Applicants plan to use the existing structures without increasing floor area. *Montgomery County Code*, §42-59(h)(1).

Section 59.7.3.1.E.1.F of the Zoning Ordinance requires a finding that other public facilities are adequate to serve the conditional use, including schools, police and fire protection, and storm drainage. Staff reported that the use will have no impact on schools because it is not a residential use (other than the existing single-family dwelling on the property) and will use existing wells and septic systems. Staff also determined that it would not have a significant impact on stormwater management beyond that required for the existing dwelling. Exhibit 18, p. 14.

Mr. Hurney testified that the existing residential well and septic systems are adequate to serve the conditional use. The well and septic systems have been sized for a four-bedroom single-family dwelling and a significant increase in that use is not expected because dog waste will be disposed of separately. He opined that use of water (i.e., to hose down areas after waste is picked up) would not overburden the existing residential capacity of the well.<sup>6</sup> T. 102.

*g. will not cause undue harm to the neighborhood as a result of a non-inherent adverse effect alone or the combination of an inherent and a non-inherent adverse effect in any of the following categories:*

*i. the use, peaceful enjoyment, economic value or development potential of abutting and confronting properties or the general neighborhood;*

*ii. traffic, noise, odors, dust, illumination, or a lack of parking; or*

*iii. the health, safety, or welfare of neighboring residents, visitors, or employees.*

**Conclusion:** This standard 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 “adverse effects created by physical or operational characteristics of a conditional use necessarily associated with a particular use, regardless of its

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<sup>6</sup> Staff did not analyze whether the additional employees would require expansion of the septic system beyond its current residential capacity. If it is later determined that the system must be re-sized and those changes affect the site plan, the Applicant will have to amend the site plan to reflect those changes.

physical size or scale of operations.” *Zoning Ordinance*, §1.4.2. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “adverse effects created by physical or operational characteristics of a conditional use not necessarily associated with the particular use or created by an unusual characteristic of the site.”

*Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a conditional use. Planning Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment.

Analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with an animal boarding and care facility. Characteristics of the proposed use that are consistent with the characteristics thus identified will be considered inherent adverse effects. Physical and operational characteristics of the proposed use that are not consistent with the characteristics identified *or* adverse effects created by unusual site conditions, will be considered non-inherent adverse effects. The inherent and non-inherent effects then must be analyzed, in the context of the subject property and the general neighborhood, to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Staff found that typical operational characteristics of animal boarding and care conditional use includes: (1) a property with indoor and outdoor spaces sufficient to accommodate daily and overnight care of the proposed number of animals; (2) traffic to and from the site by clients and staff; (3) sufficient space for efficient transfer of animals during delivery and pick up; (4) buildings and outdoor spaces far enough from neighboring structures to reduce noise from groups of animals; and (5) specified procedures for animal waste

management. Staff found that there were no non-inherent adverse impacts associated with the proposed use because there is space on the site to accommodate all of the inherent activities and that other impacts were minimal. Exhibit 41.

The Hearing Examiner would add one additional inherent operational characteristic, (although it may be subsumed in the third characteristic above)--access to the site sufficient to accommodate efficiently two-way traffic entering and exiting the site for pet drop-off and pick-up. She further finds that a 250-foot long driveway that narrows at point to a 12-foot width is a physical condition on the property that is not characteristic of this type of commercial use.

As to the adequacy of the driveway to handle drop-offs and pick-ups, Staff concluded that (Exhibit 41):

*Transportation analysis indicates that the pick up and drop off system and the taxi service help reduce trips generated by the proposed use. The analysis also indicates that there is sufficient space in the driveway to allow occasional two-way traffic without incident. It should be noted that the Patuxent Primary Management Area guidelines encourage efforts to limit imperviousness.*

Staff's supplemental traffic analysis reported that the narrow driveway was adequate because both sides of the driveway were level and cars could pass each other on the grass. Exhibit 41. The Hearing Examiner is not persuaded by this evidence or the Applicant's testimony that scheduling appointments five minutes apart will reduce the number of times cars will be required to pass each other on the driveway. Depending on the vehicles driven by pet owners, it is not guaranteed that owners will drive at normal speeds on a gravel driveway or that they will wish to pass each other on the grass, especially in inclement weather. Certainly, it could take longer than 5 minutes simply to drive to the house, turn around, and exit onto the roadway even if there is only a brief stop during drop-off and pick-up. This testimony also assumes that individuals will not be even a few minutes late for appointments. The Hearing

Examiner does not find that this site condition is mitigated solely by scheduled appointment times if they are staggered as little as 5 minutes apart.

Rather than limiting the number of drop-offs and pick-ups during peak hours, this non-inherent site condition may be mitigated by either (1) creating lay-by areas on the driveway, as shown in “Driveway Option A” on the site plan, or (2) widening the driveway to a width of 20 feet, as shown on “Driveway Option B” on the site plan. Despite its earlier concern regarding impervious area (cited above), when Staff reviewed the actual site plan showing Option B, Staff preferred that option because it would be more efficient than Option A without significantly impacting the environment. The Hearing Examiner agrees with Staff and finds that this is the preferable method of mitigating the non-inherent on-site condition. She also finds that the 20-foot driveway width is required by Section 59.6.2.5.g, as explained in Part III.D of this Decision, and therefore includes a condition of approval requiring widening the driveway as shown on Driveway Option B on the site plan (Exhibit 52(a)).

*3. The fact that a proposed use satisfies all specific requirements to approve a conditional use does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require conditional use approval.*

Conclusion: The application satisfies all specific requirements for the conditional use, and with the conditions imposed to mitigate adverse impacts, meets the standards required for approval.

*4. In evaluating the compatibility of an agricultural conditional use with surrounding Agricultural or Rural Residential zoned land, the Hearing Examiner must consider that the impact does not necessarily need to be controlled as stringently as if it were abutting a Residential zone.*

Conclusion: The Zoning Ordinance classifies an animal boarding and care facility as a commercial rather than an agricultural use. Thus, the application must meet all conditional use requirements.

**B. Standards Specific to Animal Boarding and Care Facilities (Article 59.3)**

The specific standards for approval of an animal boarding and care facility are set out in Section 59.3.5.1.B.2.b of the Zoning Ordinance. Standards applicable to this application are:

*i. In the AR, R, RC, RNC, RE-2, RE-2C, RE-1, and R-200 zones:*

*(a) The minimum lot area is 2 acres or the minimum lot area required for a detached house building type in the zone, whichever is greater.*

Conclusion: The minimum for a detached house building type in the AR zone is 40,000 square feet. *Zoning Ordinance*, §59.4.2.1.F. The property consists of a parcel of approximately 25.02 acres. Thus, the Hearing Examiner finds that this standard has been met.

*(b) Exterior areas used to exercise, walk, or keep animals must be set back a minimum of 200 feet from any lot line and screened under Division [6.5](#).*

Conclusion: Staff advises that the exercise area closest to the lot line is 200 feet from that lot line and is screened by the trees planted under the Stewardship Program. The site plan supports this and the Hearing Examiner finds that this requirement has been met.

*(c) All exterior exercise areas and runs must be fenced.*

Conclusion: Mr. Brown testified at the public hearing that Exercise Areas 1 and 2 would have a six-foot wooden privacy fence. The remaining exercise areas will have five-foot high welded wire fencing. T. 29-30. The Hearing Examiner finds that this requirement has been met, and includes the proposed fencing as a condition of approval.

*(d) Animals are prohibited from being outdoors between 9:00 p.m. and 7:00 a.m.*

Conclusion: The Applicant proposes to keep boarded animals either within the basement of the single-family detached home or, if needed, in the daycare house between these times and a

condition will be placed on the approval of the conditional use requiring compliance with the standard above.

*(e) Animals must only be walked or exercised in on-site outdoor areas.*

Conclusion: The Applicant proposes to exercise and play with dogs in four outdoor areas, a pole barn, and two indoor areas, (i.e., the basement of the single-family dwelling and the daycare house.) The Hearing Examiner includes a condition of approval requiring the Applicant to exercise dogs only in the outdoor areas designated on the site plan.

*(f) The sound level at the nearest property line must satisfy Chapter 31B.*

Conclusion: The Applicant has submitted an acoustical study estimating that noise from a maximum of 30 dogs will not exceed 64 dBA at the nearest property line during the daytime and 44 dBA at the nearest property line in the evening (when housed indoors). In addition, Mr. Brown testified that pre-screening dogs to determine how well they fit within the facility and having full-time staff supervising them reduce noise levels. The Hearing Examiner finds that this standard has been met, and consistent with the acoustical study, and imposes a condition of approval limiting to 30 the number dogs may be exercised outdoors at any time.

*(g) All buildings and accessory structures must be set back a minimum of 75 feet from any lot line.*

Conclusion: Staff advises that the closest structure to a lot line (an accessory structure) is 190 feet from the line, which is supported by the site plan. The Hearing Examiner finds that the Applicant has met this standard.

*(h) All litter and animal waste must be contained and controlled on the site.*

Conclusion: Mr. Brown testified that staff will be trained to remove waste immediately and dispose of it in lined trash bins until it can be removed during regular curb-side trash pick-up. T. 63-64; Exhibit 36. Staff found that this system will sufficiently control animal waste, as does the Hearing Examiner.

*(i) Any accessory operation, such as the sale of pet food and supplies, must be in the statement of operations and must be limited as an accessory activity to a maximum of 20% of sales.*

Conclusion: As discussed in Part II.B.7 of this Decision, the Applicant has proposed a condition limiting grooming services to 150 square feet as a means to limit the percentage of sales from this service. The Applicants also state that pet owners will bring the dog's food from home and the facility will not sell food to the dogs except in unusual circumstances, such as when the owner forgets to bring food. The Applicant also propose a condition limiting the number of vehicles used for a "pet taxi" to two vehicles. The Hearing Examiner finds from the evidence that the minimal nature of the accessory services will yield revenue under 20% of the facilities gross sales, and includes a condition proposed by the Applicant limiting the taxi service to two vehicles and the pet grooming services to 150 square feet of area.

*(j) The Hearing Examiner may regulate hours of operation. The Hearing Examiner may also regulate the number of animals that may be boarded, exercised, walked, or kept in runs or similar areas, and how the animals are boarded, exercised, walked or kept.*

Conclusion: Because the application includes overnight boarding of 30 dogs, the facility will operate 24 hours a day, 7 days a week. Arrivals and departures, however, will be permitted only between 7:30 a.m. and 7:00 p.m., and constraints are placed on where and when the dogs may be exercised. With the conditions of approval listed in Part IV of this Decision, the proposed use will have minimal impacts on the surrounding area.

*(k) If the proposed use is located in an area that uses well water and septic facilities, the applicant must prove that the use will not have any negative effect on groundwater or septic systems.*

Conclusion: The Applicant's engineer opined that the well and septic systems, which have been sized for a single-family detached four-bedroom home, will be adequate to serve the use, particularly because pet waste will be removed by a separate trash service. Exhibit 36, T. 102. Staff found that the existing well and septic system was adequate to serve the use as proposed, and having no evidence to the contrary, the Hearing Examiner finds that this standard has been met.

*(l) The applicant must submit the following:*

*(1) Acoustical engineering studies that demonstrate that the proposed use will meet required noise levels. The studies must show the worst case scenario sound level (for example, full occupancy). The statement of operations must be sufficiently detailed to allow determination of how often the worst case scenario sound level occurs.*

Conclusion: The Applicant did submit an acoustical engineering study concluding that the use, at its maximum capacity of 30 dogs for day care or overnight boarding, would be within the residential noise limits of the Montgomery County Code. At the public hearing, Mr. Brown testified that he did not expect noise at the maximum level estimated in the study (i.e., 64 dBA) would occur frequently because the dogs are pre-screened to determine how comfortable they are at the facility and will be supervised by full-time staff. Based on this evidence and testimony, the Hearing Examiner finds that this standard has been met.

*(2) Detailed floor plans that show all the interior areas, including runs and kennels.*

Conclusion: The Applicant has submitted floor plans of the interior areas to be used by the kennel, which include the finished basement of the single-family dwelling and the daycare house

shown on the site plan. Both of these are spaces relatively large, consisting of approximately 3,300 square feet and 2,300 square feet, respectively, and there is nothing indicating they are inadequate to serve the use.

*(3) Site plans that show the layout of all exterior areas used to exercise, walk, or keep animals.*

Conclusion: The site plan shows the four outdoor exercise areas and the pole barn that will be used for shelter during inclement weather. This requirement has been met.

*(m) In the AR zone, this use may be prohibited under Section [3.1.5](#), Transferable Development Rights.*

Conclusion: Section 59.3.1.5.A of the Ordinance prohibits particular uses listed in that section on parcels that are “encumbered by a recorded Transfer of Development Rights easement.” The Applicant confirmed at the public hearing that this property is subject to a TDR easement but asserts that this section does not prohibit animal care and boarding facilities because the proposed use is not specifically listed in Section 59.3.1.5.A. T. 6. The Applicant submitted an e-mail from counsel to the Planning Board stating that the language above (from Section 59.3.5.1. B.2.b.i(m)) was included by mistake when adopting the recent Zoning Ordinance and points out that all other provisions containing language similar to that section are also specifically prohibited in Section 59.3.1.5.A. According to the Applicant, an amendment to correct this mistake has been submitted to the Council, but at the time of the hearing, had not been adopted.<sup>7</sup>

The Hearing Examiner does not find it necessary to await formal amendment of the Zoning Ordinance to approve this application. The primary principal governing interpretation of ordinances is the legislative intent behind the ordinance, determined in the first instance by the plain language of the section. *Am. Civil Liberties Union Found. of Maryland v. Leopold*, 85

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<sup>7</sup> A public hearing on the bill that would make this and other amendments to the 2014 Zoning Ordinance, was held before the Council on July 14, 2015.

SEPT.TERM 2014, 2015 WL 3451717, at \*7 (Md. Ct. Spec. App. May 28, 2015). Here, the plain language of Section 59.3.5.1.B does not mandate that the use is prohibited because it uses the term “may” rather than “must.” Rather, the section refers back to the list of uses in Section 59.3.1.5.1, which do not include an animal boarding and care facility. Assuming the plain language is ambiguous, courts seek to effectuate the intent of the statute by construing it with other parts of the statutory scheme to avoid unreasonable interpretations. *Fraternal Order of Police, Montgomery County Lodge 35 v. Montgomery County*, 216 Md. App. 634, 640-41 (2014). Reading Section 59.3.5.1. B.2.b.i(m) together with Section 59.3.1.5.A, it is clear that the language in Section 59.3.5 was intended as a cross-reference to the list of prohibited uses in Section 59.3.1 to alert individuals that certain uses may be prohibited, an interpretation supported by the e-mail from counsel to the Planning Board, indicating that its inclusion in Section 59.3.5 was a mistake. For this reason, the Hearing Examiner concludes that the proposed use is *not* prohibited under Section 59.3.1.5.A, even though the property is subject to a TDR easement.

### **C. Development Standards of the Zone (Article 59.4)**

In order to approve a conditional use, the Hearing Examiner must find that the application meets the development standards of the AR Zone, contained in Article 59.4 of the Zoning Ordinance. In its report, Staff compared the minimum development standards of the AR Zone to those provided by the application in a table included in the Staff Report (Exhibit 18, p. 6, shown on the following page).

In addition to the requirements shown on the table, the AR Zone also limits the combined area of accessory buildings to 50% of the footprint of the principal building, in this case, the

Development Standards—Chapter 59.4.2.1.F

Standard	Required	Proposed
Site	25 acres	25.02 acres
Lot	40,000 square feet	25.02 acres
Lot width at front building line	125 feet	870 feet
Lot width at front lot line	25 feet	910 feet
Density	1 lot for each 25 acres	1 lot for each 25 acres
Lot coverage	10 percent	0.011 percent (12,300 sf)
<b>Principal building</b>		
Front setback	50 feet	260 feet
Side setback	20 feet	295 feet (north lot line) 490 feet (south lot line)
Rear setback	35 feet	1270 feet
<b>Accessory building</b>		
Front setback	50 feet	420 feet
Side setback	25 feet	190 feet (north lot line) 400 feet (south lot line)
Rear setback	15 feet	960 feet

**Chart Comparing Two Options for Minimum Screening Required Under the Zoning Ordinance  
Exhibit 18**

single-family detached home (Section 59.4.2.1.F):

The maximum footprint of an accessory building on a lot where the main building is a detached house is 50% of the footprint of the main building. Buildings for an agricultural use are exempt from this size restriction.

Floor plans of the daycare house submitted by the Applicant show that the structure is approximately 2,304 square feet while the house has a footprint of 3,381.5 square feet, over the 50% limit on accessory structures. Staff determined that the accessory structures were exempt from this requirement because they were originally intended for agricultural use. The Applicant argues that the structures are exempt under Section 59.7.7.1.A.1 of the Zoning Ordinance:

A legal structure or site design existing on October 30, 2014 that does not meet the zoning standards on or after October 30, 2014 is conforming and may be continued, renovated, repaired, or reconstructed if the floor area, height, and footprint of the structure is not increased, except as provided for in Section [7.7.1.C](#) for structures in Commercial/Residential, Employment or

Industrial zones, or Section [7.7.1.D.5](#) for structures in Residential Detached zones.

The Hearing Examiner agrees with the Applicant that the structures are grandfathered under Section 59.7.7.1.<sup>8</sup> Nothing in the language of the Zoning Ordinance grandfathers buildings based on their originally intended use, even if that could be truly ascertained. The plain language of the Zoning Ordinance does permit structures that met the zoning standards in effect prior to October 30, 2014, to continue as legal uses, provided their floor area, height and footprint remain unchanged. This application proposes no change to the existing accessory structures.

Staff did not provide the property's former zoning or an analysis of whether the structures were legally permitted prior to October 30, 2014. Nevertheless, it did state that the property was formerly used as an equestrian facility and it is reasonable to assume that the facility received the necessary permits for the use. Therefore, the Hearing Examiner finds that the accessory buildings are exempt from the area limitation for accessory structures contained in Section 59.4.2.1.F of the Zoning Ordinance.

The AR Zone also imposes a 50-foot height limit on principal structures within the zone. Staff did not include information on the height of the structures; however, testimony at the hearing indicates that the single-family detached house is no more than two stories, which supports a finding that the principal structure is no more than 50 feet in height. T. 85. Even were it not, the principal structure would also be grandfathered under Section 59.7.7.1.A. of the Zoning Ordinance as well.

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<sup>8</sup> Mr. Hurney testified that the accessory buildings are within 50% of the footprint of the existing building because the total floor area of the dwelling is 6,763 square feet and the daycare house is approximately 2,300 square feet. T. 84-85. The Hearing Examiner disagrees with this conclusion because the Zoning Ordinance clearly requires a comparison of the *footprints* of the structures rather than the floor area of the buildings. Comparing the footprints, the daycare house is more than 50% of the footprint of the main dwelling.

## **D. General Development Standards (Article 59.6)**

Article 59.6 sets requirements for site access, parking, screening, landscaping, lighting, and signs. The applicable requirements, and whether the use meets these requirements, are discussed below.

### **1. Site Access Standards**

The Applicant has argued that a 20-foot driveway width is not required (Exhibit 50) because the requirements for site access and design, set forth in Section 59.6.1, do not apply to this application, based on the following provision of the Zoning Ordinance (Section 59.6.1.2):

Division [6.1](#) applies to development in the Residential Multi-Unit, Commercial/Residential, Employment, Industrial, and Floating zones if:

- A. an apartment, multi use, or general building type is proposed; and
- B. a site plan or conditional use approval is required.

Developments that come within the ambit of Division 6.1 are subject to the following prohibitions in Section 59.6.1.3:

- A. Any development must:
  - 1. allow a vehicle, pedestrian, or bicycle to enter and exit the property to and from a street or an abutting site safely;
  - 2. limit vehicle access across a primary pedestrian, bicycle, or transit route wherever feasible;
  - 3. allow a vehicle to enter and exit any on-site parking area in a forward motion; and
  - 4. allow a vehicle to access any pad site from within the site.

Division 6.1 also requires minimum widths for driveways in particular zones, none of which are applicable to the AR Zone. *See, Zoning Ordinance, §6.1.4.* Nevertheless, this section also states (§59.6.1.4.B):

The applicable deciding body may require a wider driveway if there is an unusual traffic, grade, or site condition.

Regardless of whether this Division of the Zoning Ordinance mandates that the driveway be 20 feet in width, or whether this gives the authority to the Hearing Examiner (as the “deciding body”) to increase the width, the Hearing Examiner finds that the 20-foot width *is* required under Division 59.6.2, which contains the vehicle parking design standards.

## **2. Parking, Queuing and Loading Standards**

Parking, queuing and loading standards are governed by Division 6.2 of the Zoning Ordinance. This Ordinance provides that a parking drive aisle with no parking spaces on either side is “an entrance or exit drive aisle.” *Zoning Ordinance*, §59.6.2.5.G.1. Any drive aisle intended for two-way traffic must be 20 feet wide. *Id.*, §59.6.2.5.G.2. As noted, the gravel drive serves as the only entrance or exit drive aisle to and from the parking facility, and therefore must be 20 feet in width.

The Zoning Ordinance requires a total of 8 parking spaces (1 space per employee plus three additional spaces) and the Applicant has submitted a parking detail (Exhibit 52(a)) showing the spaces marked as required. *Id.*, §§59.6.2.4.B, D. The Applicant proposes a total of 8 spaces, 6 of which are located on a concrete pad adjacent to the main dwelling, including one ADA accessible space. Mr. and Mrs. Brown will use the two spaces in the garage, thus providing the full complement of spaces required.

The vehicle used as the “pet taxi” will be parked in the pole barn when not in use. While the exact type of vehicle to be used is not specified, the Applicant correctly points out that there are no restrictions on parking commercial vehicles in the AR Zone. *Id.*, §59.6.2.4.L.2.c. The parking detail also shows that the circular area to be used for drop-off and pick-up has room for four vehicles to queue. The Applicant argues that the queuing standards in the Ordinance are not strictly applicable to this because there are no drive-thru lanes proposed, however, the

information is pertinent to demonstrate that site circulation during drop-off and pick-up of pets is adequate.

### 3. Site Landscaping

Minimum standards for landscaping are set forth in Division 6.4 of the Zoning Ordinance, with a stated intent to “preserve property values, preserve and strengthen the character of communities, and improve water and air quality.” *Id.*, §59.6.4.1. The Zoning Ordinance permits alternative methods of compliance with “any requirement of Division 6.1 through Division 6.6” if the Hearing Examiner “determines there are unique site or development constraints, such as grade, visibility, an existing building or structure, an easement, a utility line, or use restrictions that preclude safe or efficient development” under the required standards and the alternative design will:

- A. satisfy the intent of the applicable Division;
- B. modify the applicable functional results or performance standards the minimal amount necessary to accommodate the constraints;
- C. provide necessary mitigation alleviating any adverse impacts; and
- D. be in the public interest.

*Id.*, §6.8.1. The Applicant here proposes an alternative to the minimum site landscaping requirements that far exceeds the requirements in the Zoning Ordinance. According to the Staff Report and Mr. Brown’s testimony and evidence submitted at the hearing, he has already planted approximately 3,000 trees on the property.

Staff recommended approval of the alternative method of compliance with the landscaping and screening requirements of the Zoning Ordinance, as did the Planning Board. Staff reasoned that the minimum screening requirements of the Zoning Ordinance would screen relatively little of the use because of the property’s “relatively large size, irregular shape and

building separation,” and that the “substantial stands of evergreen and deciduous trees will mitigate [the] visual [impact] of the boarding and care operation, [and] contribute to the rural and agricultural character of this part of the Damascus area, an important goal of the *Damascus Master Plan*.” Exhibit 18, pp. 8-9.

The Hearing Examiner agrees with Staff's appraisal of the alternative method for screening, particularly because commercial uses were discouraged (but not prohibited) by the Master Plan and the forested area contributes to the current mixed residential/agricultural/parkland character of the area by supplementing existing wooded areas and screening the commercial aspects of the use from view.

#### **4. Outdoor Lighting**

The Zoning Ordinance mandates certain design requirements for outdoor fixtures, including a requirement to have fixtures that “direct light downward and minimize the amount of light spill, any outdoor lighting fixture must be a full or partial cutoff fixture.” *Id.*, §59.6.4.4.B.1. The Applicant proposes to use existing light fixtures, which consist of wall-mounted sconces and flood lights. There is no evidence as to whether the floodlights meet the detailed requirements for fixtures, nevertheless, because of the extensive size of the property, the ample screening, and the photometric study submitted demonstrating that the pole lights will have little impact at the property line, the Hearing Examiner finds that retention of the existing lights will have little impact on surrounding properties, and the tree plantings that will screen the property provide an appropriate alternative method of compliance with this requirement.

The height of the pole lights are well under the 30-foot maximum required in a parking area, and other height limitations in Section 6.4.4.B.2 are not applicable to lighting on the property.

Section 6.4.4.E mandates that lighting from conditional uses must ensure that “illumination is 0.1 footcandles or less at any lot line that abuts a lot with a detached house building type, not located in a Commercial/Residential or Employment zone.” Because a lot with a detached house adjoins this property, that standard applies to this application.

The Applicant submitted a photometric study demonstrating that the highest pole light with the strongest wattage had an illumination of 0.1 footcandles only 90 feet away from the pole, and that the minimum distance from a pole light to the property line is 235 feet. Based on this evidence, the Hearing Examiner finds that this requirement has been met.

### **5. Parking Lot Landscaping and Lighting**

Additional landscaping standards apply to conditional uses that have parking areas with between 3 and 9 spaces (*Id.*, §59.6.2.9.B), set forth below:

1. If a property with a conditional use requiring 3 to 9 parking spaces is abutting Agricultural, Rural Residential, or Residential Detached zoned property that is vacant or improved with an agricultural or residential use, the parking lot must have a perimeter planting area that:
  - a. satisfies the minimum specified parking setback under Article 59-4 or, if not specified, is a minimum of 8 feet wide;
  - b. contains a hedge, fence, or wall a minimum of 4 feet high; and
  - c. has a minimum of 1 understory or evergreen tree planted every 30 feet on center.
2. The Hearing Examiner may increase the perimeter planting requirements for a conditional use application under Section 7.3.1.

Staff did not separately address these requirements. The Hearing Examiner assumes that their recommendation for alternative compliance (via tree plantings under the Stewardship Program) applies to these requirements as well. The AR Zone does not contain a parking setback, thus, the minimum setback here is 8 feet. The Hearing Examiner concludes that the

trees planted by the Applicant under the Stewardship Program will far exceed what is required by the above standards, and the parking area setbacks are well in excess of the 8-foot minimum. For the same reasons the Hearing Examiner approved the planting of trees under the Stewardship Program as an alternative means of compliance with the general screening requirements, she approves this as an alternative method of compliance with the parking lot screening requirements as well.

## **6. Signage**

The Applicant proposes to use one existing, non-illuminated freestanding sign to identify the business. The total of all permanent signs on property in the AR Zone may be up to 200 feet in area, subject to the following restrictions on individual signs (Section 59.6.7.7.A.1):

- a. One freestanding sign may be erected at each building or driveway entrance.
- b. The maximum sign area is 40 square feet.
- c. The minimum setback for a sign is 10 feet from the property line.
- d. The maximum height of a sign is 10 feet.
- e. Illumination is prohibited.

The Applicant has submitted evidence that the existing sign that will be used to identify the business has an area of 15 square feet, is setback 25 feet from the property line, and is 7.5 feet high. The Hearing Examiner finds that the sign complies with the requirements of the Zoning Ordinance.

## **IV. Conclusion**

As set forth above, the application meets all the standards for approval in Divisions 59.7, 59.3, 59.4 and 59.6 of the Zoning Ordinance, with the conditions imposed to mitigate adverse

impacts from the use and with the alternative methods of compliance with screening and lighting requirements.

## V. Decision

Based on the foregoing findings and conclusions and a thorough review of the entire record, the application of Dog's Day Pet Care LLC (CU 15-03) for a conditional use to operate an animal boarding and care at 7235 Damascus Road, Gaithersburg, Maryland, under Sections 59.3.1.2 and 59.3.5.1 of the Zoning ordinance is *granted*, subject to the following conditions:

1. The Petitioner shall be bound by all of his testimony and exhibits of record, and by the testimony of his witnesses and his representations identified in this report.
2. Petitioner must comply with the terms of its revised Site Plan (Exhibit 52(a), except that it shall construct only "Driveway Option B" as shown on the Site Plan.
3. No more than 60 dogs may be present at the facility at any time; no more than 30 dogs may be at the facility for daycare at any time and no more than 30 dogs may be at the facility for overnight boarding at any time.
4. No more than 30 dogs may be exercised outside at any time.
5. Outdoor exercise of dogs must occur only within the Exercise Areas shown on the site plan.
6. Exercise Areas 1 and 2 must be fenced with a 6-foot high wooden fence; Exercise Areas 3 and 4 must be fenced with a 5-foot high welded wire fence.
7. No dogs are permitted outside between 9:00 pm and 7:00 am.
8. Arrivals and departures will occur by appointment only between the hours of 7:30 am and 7:00 pm.
9. The Petitioner will confine bathing and grooming activities to a maximum area of 150 square feet, and will utilize no more than two vehicles for pet shuttle services. Any expansion of the area associated with bathing or grooming or increase in the number of vehicles utilized for shuttle services will require modification of the conditional use.
10. The Applicant will substantially comply with the terms of the Practice Schedule for maintenance and care of the Forest Stewardship Plan described in the February 6, 2015, letter from the Maryland Department of Natural Resources

(Exhibit 27), unless the conditional use is abandoned or subsequently modified to provide a different means of compliance with the screening requirements of Division 6.5.

11. Prior to receiving a Use and Occupancy Permit, the Applicant must construct the driveway labeled "Driveway Option B" shown on the site plan (Exhibit 52(a)).
12. Petitioner must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the conditional use premises and operate the special exception as granted herein. Petitioner shall at all times ensure that the conditional 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.



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Lynn A. Robeson  
Hearing Examiner

Issued this 21st day of July, 2015.

Any party of record or aggrieved party may file a written request to present oral argument before the Board of Appeals, in writing, within 10 days after the Office of Zoning and Administrative Hearings issues the Hearing Examiner's report and decision. Contact information for the Board of Appeals is listed below:

Montgomery County Board of Appeals  
100 Maryland Avenue, Room 217  
Rockville, MD 20850  
(240) 777-6600

COPIES TO:

Chris Ruhlen, Esquire  
Katherine Freeman, Executive Director  
Montgomery County Board of Appeals  
Fred Boyd, Planning Department  
Ehsan Motazed, DPS