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: *	
TILDEN WOODS RECREATION ASSOCIATION *	
Petitioner *	
John Reinhard *	
Barbara Ship *	
Debby Orsak *	
Karen Burgett *	
For the Petitioner *	
Soo Lee-Cho, Esquire *	
Attorney for the Petitioner *	
* *	Board of Appeals No. CBA-1383
Susan Scala-Demby, Zoning Manager *	(OZAH No. 10-17)
Department of Permitting Services *	
* *	
Patrick O'Connor, President of the Montgomery *	
County Swim Club Association. *	
Alberto Belt *	
In Support of the Modification Request *	
* *	
Donald Evans *	
Suzanne Keller *	
B. J Sadoff *	
Opposed to the Modification Request *	
* *	

Before: Martin L. Grossman, Hearing Examiner

HEARING EXAMINER'S REPORT ON REFERRAL FROM THE BOARD OF APPEALS TO HOLD A HEARING LIMITED TO SPECIFIED ISSUES REGARDING PETITIONER'S REQUEST TO ADMINISTRATIVELY MODIFY ITS SPECIAL EXCEPTION

TABLE OF CONTENTS

PAGE

I. INTRODUCTION 3

II. THE CONTROLLING PROVISIONS OF THE ZONING ORDINANCE AND THE LIMITED SCOPE OF THE HEARING EXAMINER'S REVIEW 7

A. THE ZONING ORDINANCE 7

B. SCOPE OF THIS REVIEW 10

III. SUMMARY OF FINDINGS AND CONCLUSIONS 11

IV. THE MODIFICATION REQUEST AND THE EVIDENCE RELATED TO IT 12

V. THE HEARING 19

A. PETITIONER'S CASE 21

B. GOVERNMENT WITNESS 26

C. COMMUNITY WITNESSES IN SUPPORT 29

D. COMMUNITY WITNESSES IN OPPOSITION 30

VI. RESOLVING THE ISSUES REFERRED TO THE HEARING EXAMINER 32

A. SECTION 59-G-1.3(C)(1) OF THE ZONING ORDINANCE 32

B. THE FLOOR AREA OF THE EXPANSION 34

C. THE EFFECT OF THE FLOOR AREA EXPANSION AND OPERATIONAL IMPACTS 41

VII. CONCLUSION 44

I. INTRODUCTION

The Tilden Woods Recreation Association was granted a special exception on April 26, 1963, to permit the construction and operation of a community swimming pool on property consisting of approximately two acres, described as Parcel B, Block 14, Tilden Woods Subdivision, and located at 6808 Tilden Lane, Rockville, Maryland 20852 in the R-90 Zone. Exhibit 16. The Board of Appeals' resolution authorized a community swimming pool with 350 member families, and imposed three conditions:

1. Fencing and screening of the north and west boundaries shall be in accordance with Exhibit 11 [*i.e.*, the Site Plan].
2. Instead of the five foot chain link fence proposed on the south and east, the association shall provide a five foot wooden fence along the eastern and southern boundary lines set back at least three feet from the property. The three foot planting strip between the property line and the fence shall be planted with evergreen shrubs or trees so as to adequately screen the pool from view.
3. The hours of operation shall be from 9:00 a.m. to 9:00 p.m., six days a week, and from 11:00 a.m. to 9:00 p.m. on Sunday. There may be six late nights of operation no later than 11:00 p.m.

It is undisputed that structures were added to the subject site in 1968 which were not indicated on the site plan (Exhibit 11) approved in 1963 by the Board of Appeals (hereinafter referred to as the "Board"). Tr. 8-10 and Exhibits 75 and 76. The addition of these structures (two shade structures and a below-grade storage facility), and the enlargement of the bathhouse (also referred to as the "pool-house"), led to a portion of the controversy in this case because the changes were not approved by the Board[1] and because there is a legal question as to what floor area should be counted in determining whether the statutory threshold for a major modification has been exceeded.[2]

[1] Petitioner contends they were authorized by DPS's predecessors, the Department of Inspections and Licenses (DIL) and the Department of Environmental Protection (DEP), under then prevailing practices. Exhibit 76; Tr. 8-10.
[2] §59-G-1.3(c)(4)(A) is very specific in including the floor areas of " all structures" as well as building in the calculating the size of any modification; however, the sole definition of "floor area" in Zoning Ordinance §59-A-2, refers only to the floor areas of buildings, not the "floor areas" of other structures. This issue will be discussed at some length in Part VI.B. of this report.

The Tilden Woods Pool has been in operation for more than 45 years at the authorized location. Exhibit 37. On June 23, 2009, Barbara J. Piczak of the Department of Permitting Services (DPS) inspected the premises. On June 29, 2009, Ms. Piczak issued an Inspection Report noting five violations of the special exception. The violations included 1. Incorrect fencing; 2. Early Sunday operations; 3. Nonconformance with the site plan regarding unapproved structures and parking configuration; 4. An unapproved metal storage container; and 5. Failure to maintain landscaping. Exhibit 18.[3]

Petitioner's initial response to the Violation Notice was to request, on June 29, 2009, that the Board grant a "one time waiver" so that the Swim Club could conduct its "Swim Team Lock-in" event, a sleep-over on pool property for the swim team scheduled for July 25-26, 2009. Exhibit 19. This request was opposed by neighbors B.J. Sadoff and Suzanne Keller (Exhibits 20, 21, 23 and 24). The Board treated the waiver request as a request for an administrative modification and considered it at two Board sessions, held on July 8 and July 15, 2009. At the end of the second session, a motion to approve the administrative modification (*i.e.*, the one-time waiver request) was defeated. A resolution to that effect was issued on September 18, 2009. Exhibit 39.

On December 23, 2009, the Board of Appeals received a letter from Soo Lee Cho, Esquire, on behalf of the Tilden Woods Recreation Association, requesting administrative modification of the special exception to approve a variety of changes to the physical plant and operational conditions. Exhibit 31. In summary, Petitioner proposes the following changes:

1. Approval of an updated Site Plan (Exhibit 31(a)), Lighting Plan (Exhibit 31(b)) and Landscape Plan (Exhibit 31(c)).[4]

2. Modification of Condition No. 2 in the original 1963 Opinion of the Board to allow

[3] Time for compliance with the Violation Notice was extended twice by DPS to December 31, 2009. Exhibit 27(b).
[4] These plans include structures that have already been built, but which were not expressly authorized by the Board. As mentioned above, Petitioner contends they were authorized by DPS's predecessors, DIL and DEP, under then prevailing practices. Exhibit 76.

retention of an existing chain link fence located along the site's southern, eastern and a portion of the western boundaries, as shown on the updated Site Plan.

3. Change in landscaping (removing three white pines and replacing them with 7 arborvitae evergreens).

4. Expansion of Sunday operating hours to 9:00 a.m. to 9:00 p.m. (currently begins at 11:00 a.m.).

5. Allow the Swim Club to open the pool at 8:30 a.m. during the weekdays for approximately 6 weeks out of the swim team season.

6. In order to facilitate "A" swim meet and time trial warm-ups, allow the Swim Club to open the pool no earlier than 6:30 a.m. on seven Saturdays out of the swim team season.

7. On those Wednesday evenings when the Swim Club is hosting a "B" swim meet, extend the closing hour to 9:30 p.m.

8. In addition to the above, extend one of its currently allowable late nights of operation (until 11:00 p.m.) to permit a once-a-year sleep-over event for the Swim Team members, also known as the "Annual Lock-In", which begins during normal operating hours on a Saturday and ends the next Sunday morning at 6:00 a.m.

9. Petitioner will implement measures to limit amplified music.[5]

This administrative modification request engendered opposition from the community and requests for a hearing. Exhibits 33, 34 and 35.

[5] At the time the modification request was filed, these measures were unspecified, although Petitioner did note that none of the proposed changes would involve amplified music. Exhibit 31, p. 6. At the hearing, it emerged that Petitioner had published a noise policy in its minutes. Tr. 120. Thereafter, Petitioner filed a copy of the "Tilden Woods Noise Policy," attached to Exhibit 70. It provides:

> Any function (social or otherwise) that occurs during daytime hours (defined by the County's Noise Ordinance to be from 9 AM – 9 PM on weekends, and 7 AM – 9 PM on weekdays) at Tilden Woods pool must conform to the Montgomery County Noise ordinance, which specifies that noise be no greater than 65 dBA at the noise receiving area (which for our purposes is the property line of TWRA). Any function that occurs during nighttime hours (defined by the County's Noise Ordinance to be from 9PM – 9AM on weekends, and 9PM – 7AM on weekdays) must have noise be no greater than 55 dBA at the noise receiving area. Note: the county ordinance exempts sound that is not electronically amplified created between 7 am and 11 pm for sports, amusement, or entertainment events or other public gatherings operating according to the requirements of the appropriate permit or licensing authority. Any individual in charge of a social function must be informed of this policy and agree to abide by it. The lifeguards are authorized to enforce this noise policy. The pool will maintain on site a noise meter that can be used by the lifeguards or other individuals to ensure that this policy is enforced. The pool will also maintain a log in which all sound measurements (including date, time, location measurement taken, circumstances, and measurer/recorder) will be recorded.

By resolution effective January 29, 2010 (Exhibit 40), the Board determined, *inter alia*, that:

> the administrative modification to allow installation of three arborvitae evergreens to replace a fallen tree along the western boundary adjacent to the Stonewood Terrace cul-de-sac and removal of three white pine trees, to be replaced with seven arborvitae evergreens is **granted**; and . . .
>
> . . . the administrative modification is suspended, based upon the requests for public hearing; . . .

The Board further resolved to refer

> . . . the entire modification request to the Hearing Examiner to conduct a public hearing limited to determining whether the requested modifications can be approved under Section 59-G-1.3(c)(1) of the Zoning Ordinance, and whether, under Section 59-G-1.3(c)(4)(A), the proposed modification expands the total floor area of all structures or buildings by more than 25% or 7,500 square feet, whichever is less, and if so, whether the Board should require that the special exception be brought into compliance with the general landscape, streetscape, pedestrian circulation, noise, and screening requirements of Section 59-G-1.26

Notice was issued on March 5, 2010 scheduling a hearing on April 30, 2010, to address the questions referred to the Hearing Examiner by the Board of Appeals in this case. Exhibit 43. Since this is an unusual proceeding, the Hearing Examiner issued an Order on March 17, 2010, to establish the procedure to be followed at the hearing. Exhibit 44.

Various submissions were made by the parties thereafter (Exhibits 45-47, 49-53, 55 and 56), and the hearing proceeded, as scheduled, on April 30, 2010. The hearing was limited to addressing the issues referred to the Hearing Examiner by the Board, and therefore did not directly assess the merits of the underlying administrative modification request. Witnesses were called by both sides to this controversy, and testimony was also provided, at the request of the Hearing Examiner, by Susan Scala-Demby, DPS's Zoning Manager. The record was held open until May 28, 2010, so that the Petitioner could make additional filings, and for comments by both sides thereafter. Those submissions (Exhibit 70) and final comments (Exhibits 73 – 76) were timely received, and the record closed, as scheduled, on May 28, 2010.

II. THE CONTROLLING PROVISIONS OF THE ZONING ORDINANCE AND THE LIMITED SCOPE OF THE HEARING EXAMINER'S REVIEW

A. The Zoning Ordinance

Requests to modify special exceptions are governed by Zoning Ordinance §59-G-1.3(c):

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

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

A copy of the Board's resolution must be transmitted to the petitioner, the Planning Commission, the Department, the Department of Finance, all parties entitled to notice at the time of the original filing, and current adjoining and confronting property owners. The resolution must state that any party may, within 15 days after the Board's resolution is mailed, request a public hearing on the Board's action. The request must be in writing, and must specify the reasons for the request and the nature of the objections or relief desired. If a request for a hearing is received, the Board must suspend its decision and conduct a public hearing to consider the action taken.

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

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

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

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

Community swimming pool special exceptions are governed by Code §59- G-2.56:

Sec. 59-G-2.56. Swimming pools, community.

The provisions of subsection 59-G-1.21(a) do not apply to this section. In any zone, a community swimming pool may be allowed provided that such use of land will conform to the following minimum requirements:

(a) The swimming pool, including the apron and any buildings, must not at any point be closer than 75 feet from the nearest property line nor closer than 125 feet from any existing single-family or two-family dwelling; provided, that where the lot upon which it is located abuts a railroad right-of-way, publicly owned land or land in a commercial or industrial zone such pool may be constructed not less than 25 feet at any point from such railroad right-of-way, publicly owned land or commercial or industrial zone. Any buildings erected on the site of any such pool must comply with the yard requirements of the zone in which the pool is located.

(b) A public water supply must be available and must be used for the pool or use of a private supply of water for the pool will not have an adverse affect on the water supply of the community.

(c) When the lot on which any such pool is located abuts the rear or side lot line of, or is across the street from, any land in a residential zone, other than publicly owned land, a wall, fence or shrubbery must be erected or planted so as to substantially screen such pool from view from the nearest property of such land in a residential zone.

(d) The following additional requirements must also be met: Special conditions deemed necessary to safeguard the general community interest and welfare, such as provisions for off-street parking, additional fencing or planting or other landscaping, additional setback from property lines, location and arrangement of lighting, compliance with County noise standards and other reasonable requirements, including a showing of financial responsibility by the applicant, may be required by the Board as requisite to the grant of a special exception. Financial responsibility must not be construed to mean a showing of a 100 percent cash position at the time of application but is construed to mean at least 60 percent.

Because this is a community swimming pool, the requirements of Zoning Ordinance §59-G-1.21(a) do not apply, as specified in the opening paragraph of §59-G-2.56; however, the standards under §§ 1.22(a) (Additional Requirements); 1.23 (General Development Standards); and 1.26 (Exterior Appearance in a Residential Zone) do apply, as well as the specific standards under § 59-G-2.56 for Community Swimming Pools, quoted above.

59-G-1.22. Additional requirements.

(a) The Board, the Hearing Examiner, or the District Council, as the case may be, may supplement the specific requirements of this Article with any other requirements necessary to protect nearby properties and the general neighborhood.

59-G-1.23 Development Standards

(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.

(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.

59-G-1.26. Exterior appearance in residential zones.

A structure to be constructed, reconstructed or altered pursuant to a special exception in a residential zone must, whenever practicable, have the exterior appearance of a residential building of the type otherwise permitted and must have suitable landscaping, streetscaping, pedestrian circulation and screening consisting of planting or fencing whenever deemed necessary and to the extent required by the Board, the Hearing Examiner or the District Council. Noise mitigation measures must be provided as necessary.

B. Scope of this Review

The Board of Appeals did not refer the matter to the Hearing Examiner to decide whether the modification request should be granted; rather, the Board expressly limited the scope of the Hearing Examiner's inquiry to three questions:

1. Whether the requested modifications can be approved under Section 59-G-1.3(c)(1) of the Zoning Ordinance;
2. Whether the proposed modification expands the total floor area of all structures or buildings by more than 25% or 7,500 square feet; and if so
3. Whether the Board should require that the special exception be brought into compliance with the general landscape, streetscape, pedestrian circulation, noise, and screening requirements of Section 59-G-1.26.

Based on the language of §59-G-1.3(c)(1), the Hearing Examiner interprets the first question as also asking:

4. Whether the proposed modification is such that the terms or conditions could be modified "without substantially changing the nature, character or intensity of the use and without substantially changing the effect on traffic or on the immediate neighborhood . . ."

Moreover, in order to answer the third question, Zoning Ordinance §59-G-1.3(c)(4)(A) requires that the Hearing Examiner determine:

5. "[Whether] the expansion, when considered in combination with the underlying special exception, changes the nature or character of the special exception to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected."

This report therefore addresses those five questions. Because of the statutory language, there is an extensive discussion in this report about floor area, which is not really the major concern of the opposition. It is the operational issues (*i.e.*, hours, noise, traffic, parking, numbers of members) which mostly concern the opponents, but they (or at least Mr. Sadoff) and Petitioner have felt compelled to battle over floor-area issues and the like, in order to determine whether the thresholds of the modification provisions have been crossed. Tr. 159-161. The Hearing Examiner's interpretation of the statute is consistent with its wording and the clear legislative intent in framing it.

III. SUMMARY OF FINDINGS AND CONCLUSIONS

1. The requested modifications cannot be approved under Section 59-G-1.3(c)(1) of the Zoning Ordinance for two reasons:

   (a) The first is that the request by members of the community for a hearing removed the matter from that section and required that a hearing be held. The language of the last sentence in Zoning Ordinance §59-G-1.3(c)(1) is clear, "*If a request for a hearing is received, the Board must suspend its decision and conduct a public hearing to consider the action taken."* That would result in the matter being determined under the other subsections that govern hearings, Subsections (c)(3) and (c)(4); and
   (b) The second is that the proposed modifications, **especially with regard to operations,** are such that the terms or conditions cannot be modified "*without substantially changing the nature, character or intensity of the use and without substantially changing the effect on traffic or on the immediate neighborhood . . . .*" The proposed structural and landscaping changes (other than lighting) would not have the indicated substantial impacts, but they do factor into the "floor area" standard set forth in subsection (c)(4).

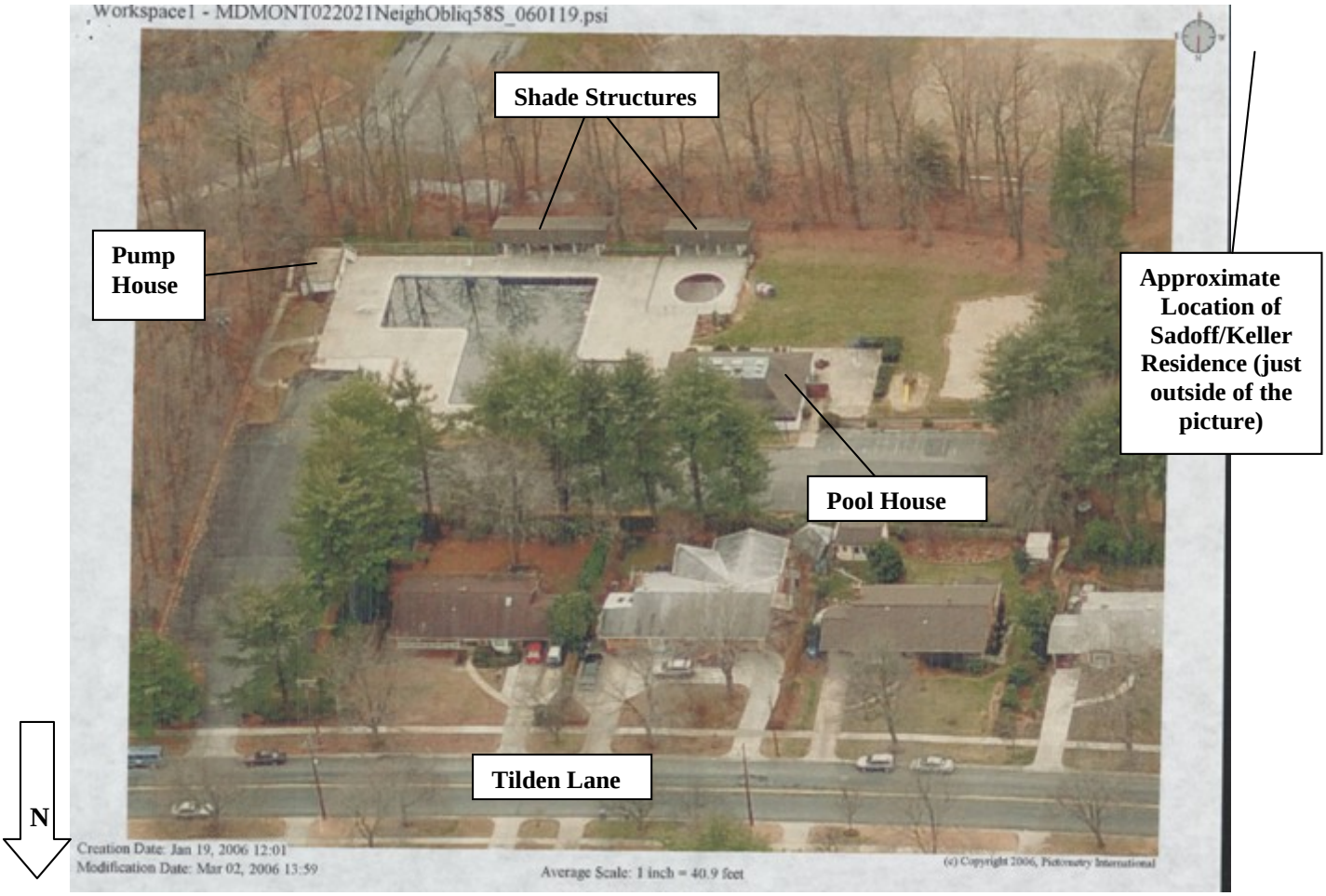
2. The proposed modifications would expand "*the total floor area of all structures or buildings by more than 25%, or 7,500 square feet, whichever is less.*" Petitioner admits the actions of DIL did not "formally 'modify' the Swim Club special exception" (Exhibit 76, p. 4), and that approval of this modification request by the Board would serve to put the Board's imprimatur on the existing, but previously unapproved, structures. Exhibit 76, p. 2. As will appear more fully below, even using Petitioner's own figures, the unapproved additions result in an expansion of floor area by more than 25%.

3. The Board may require that the special exception "*be brought into compliance with the general landscape, streetscape, pedestrian circulation, noise, and screening requirements of Section 59-G-1.26.*, because "*the expansion* [of its operations], *when considered in combination with the underlying special exception, changes the nature or*

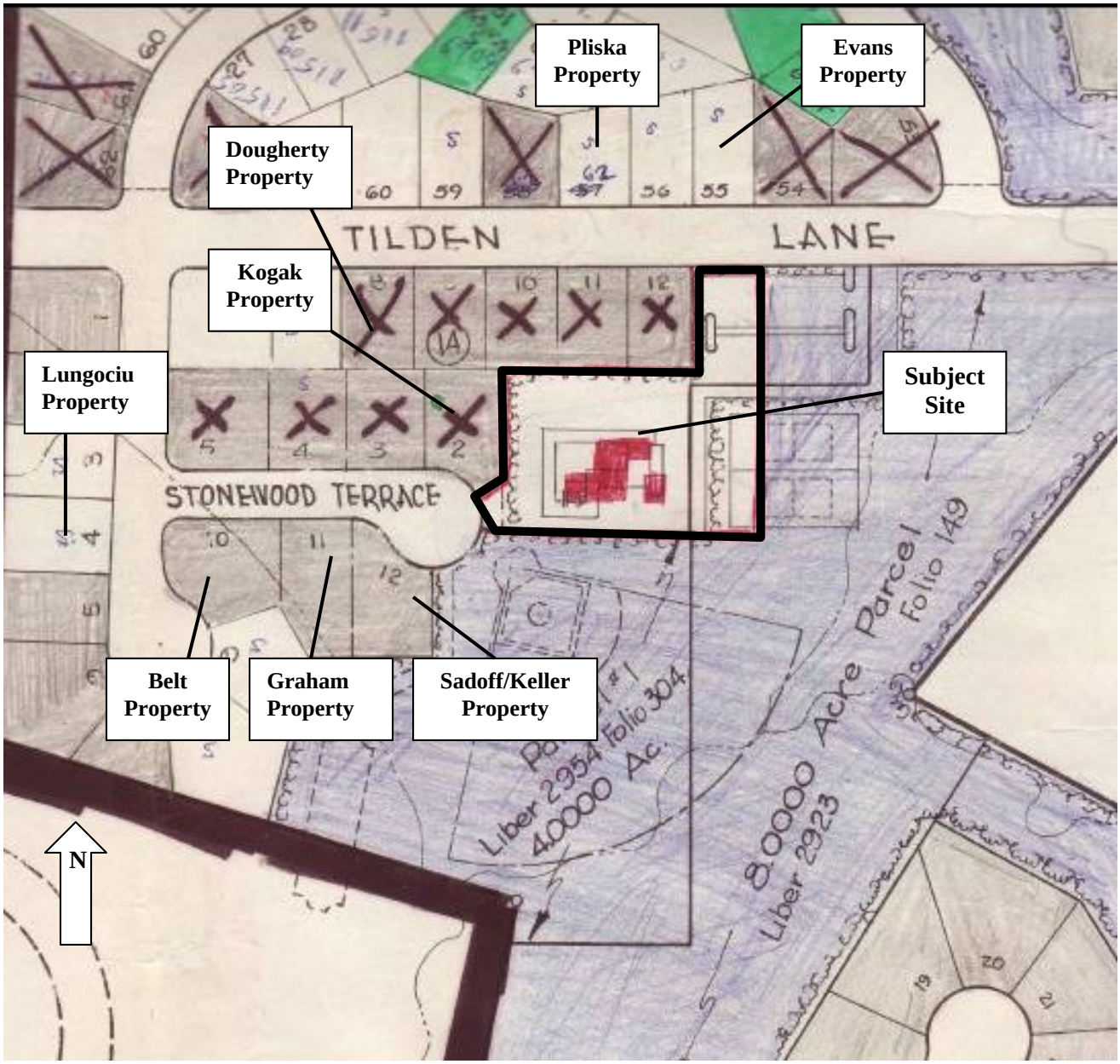
character of the special exception to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected." [Emphasis added.] Two phrases were emphasized here because, while the structural changes cross the floor-area threshold established in the statute, the structures which add floor area do not create serious impacts on the community. It is the expansion of operations and the unshielded lighting that create the most significant impacts. Therefore, the Board may elect, as the statute permits, not to review all of the parameters of the underlying special exception, but rather to ensure that there is an suitable statement of operations and appropriate lighting which will eliminate unacceptable adverse effects on the neighbors. As will be explained in more detail below, the Board cannot, as Petitioner suggests, merely approve the operational changes Petitioner requests without impacting on the community and without, in effect, approving current operations which may exceed the current authorization.

IV. THE MODIFICATION REQUEST AND THE EVIDENCE RELATED TO IT

Depicted below is an aerial view of the subject site, looking south (Exhibit 33(a), p. 22, Figure 3):



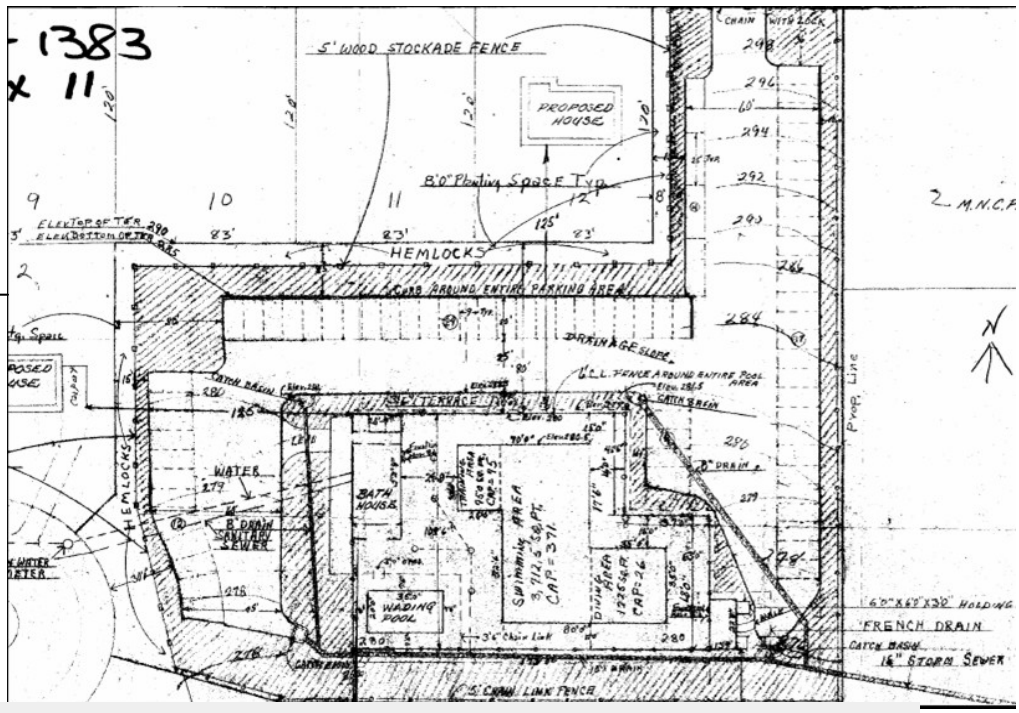
A portion of the zoning vicinity map (Exhibit 10) depicting the immediate area around the subject site is shown below, with notations showing the locations of nearby neighbors who appeared at the hearing or wrote in with their support or opposition:



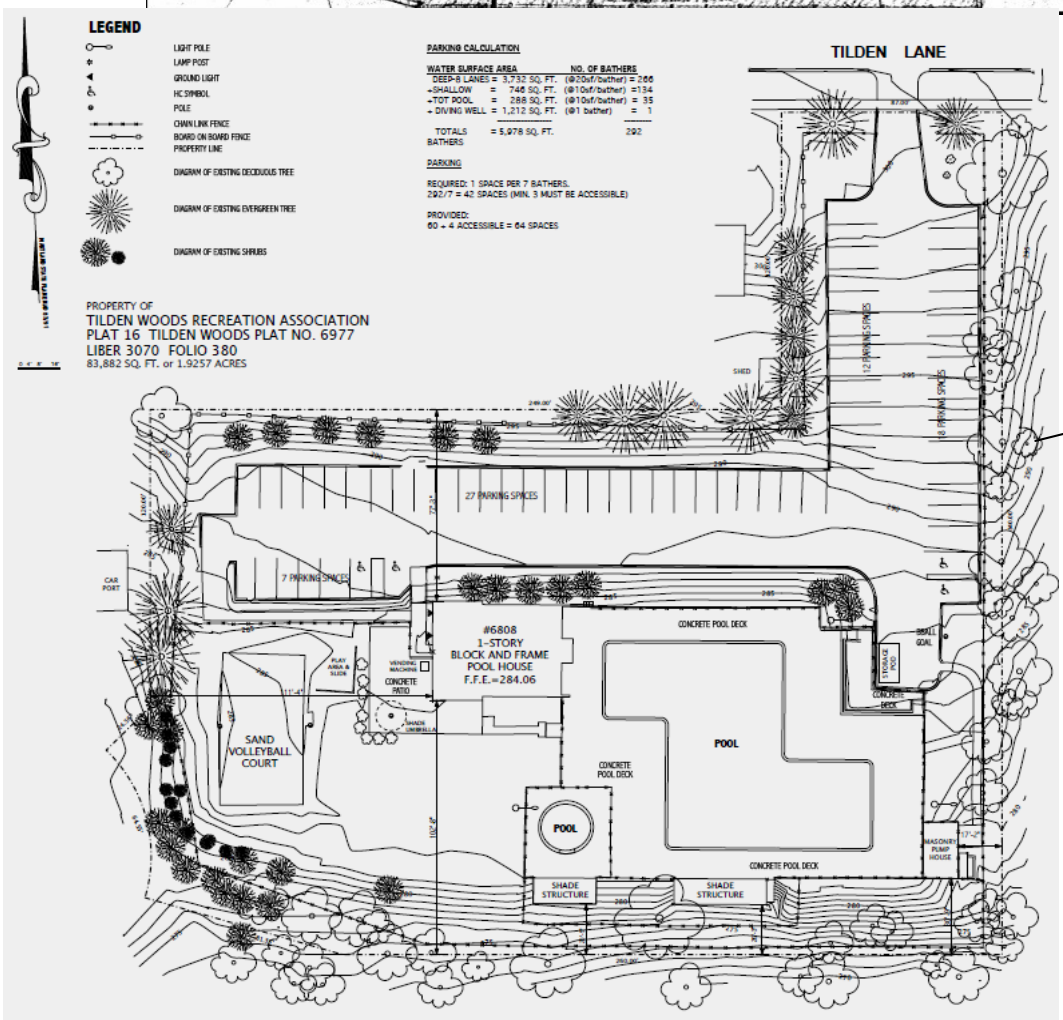
The four nearby neighbors who support the modification petition are the Kogaks, Belts, Grahams and Dougherties. The four nearby neighbors who oppose the modification petition are the Evans, Pliskas, Sadoff/Keller and Michael Lungocius.

The original Site Plan for the community swimming pool (Exhibit 11) is reproduced immediately below, followed by the revised site plan proposed by Petitioner (Exhibit 31(a)):

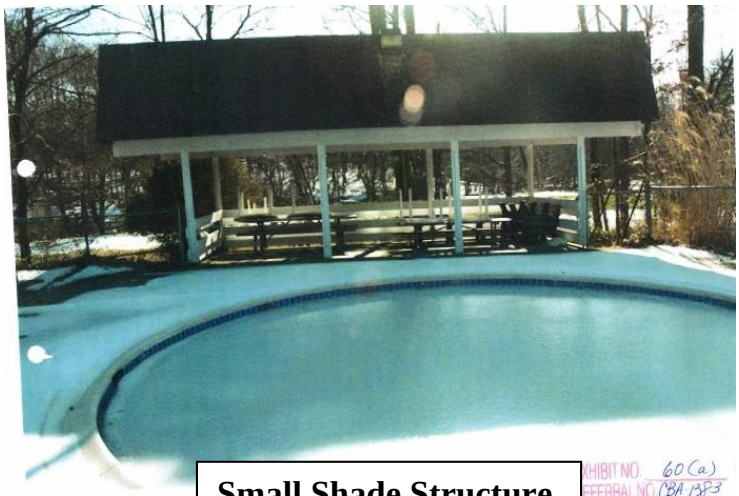
Original Site Plan



Revised Site Plan Showing Existing Conditions



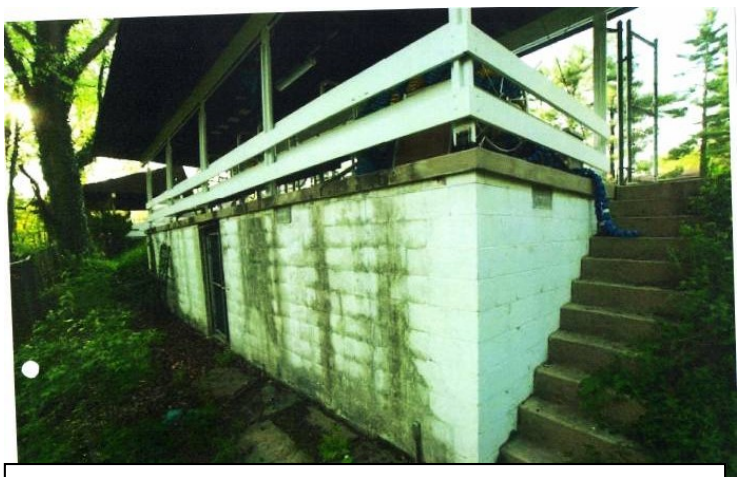
As can be seen by comparing the two plans, the bathhouse has grown since the original plan and two Shade structures have been added south of the swimming pool. Underneath the larger shade structure, a below-grade storage area has been added, but it cannot be seen on the site plan. The shade structures are depicted below (Exhibits 60(a) and (b)):



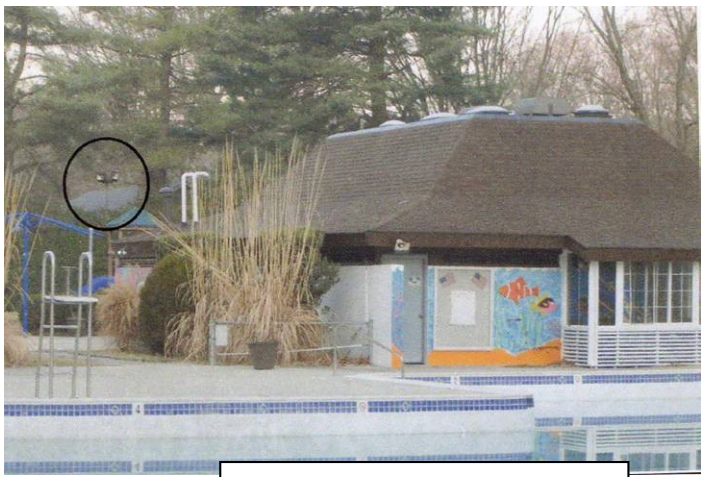
Small Shade Structure

Large Shade Structure

Underneath the large shade structure is a storage facility, which is depicted on the left, below (Exhibit 61(c)). To the right, below, is a photo of the bathhouse, reproduced from Exhibit 33(a), p. 105.



Storage Facility under Large Shade Structure



Bathhouse (Pool House)

In Part I of this report, there is a summary of the modifications requested by the Petitioner. In addition to its modification request, Petitioner called witnesses at the hearing and submitted post-hearing measurements of the shade structures, citations to its noise policy (Exhibit 70) and an argument regarding the case (Exhibit 76). Four letters of support for the pool were also received into the record (Exhibit 66), all from neighbors who live quite close to the pool, one of whom is an abutting neighbor (the Kogats).

Opposition concerns were raised by four different neighbors, Suzanne Keller and B. J. Sadoff, who confront the rear of the pool property across a cul-de-sac (Exhibits 33, 46(b) and 47); Donald and Ruth Evans, who live across Tilden Lane from the pool property (Exhibit 50); Mr. and Mrs. Leonard Pliska, who also live on Tilden Lane, across from the pool property (Exhibit 56); and Michael Lungocius, who lives on Stonewood Lane, about 450 feet from the pool property (Exhibit 73) .

The major concerns raised by the opposing neighbors are extended hours of operation (both early and late); excessive noise (especially amplified music); excessive occupancy of the pool (allegedly indicating membership beyond that authorized); resultant traffic and parking congestion; renting out of the pool to non-members; and unshielded lights on late at night. Other concerns raised include the allegedly inadequate height of the fence on the property line and the location of the portable metal storage container. The last item is moot because Petitioner will remove the metal storage container from the site. Tr. 20-21.

Very detailed submissions were made by Mr. Sadoff regarding these issues,[6] and he seeks a "more definite statement of operation, site plan, lighting plan and landscape plan . . . to bring the Special Exception into compliance with the general landscape, streetscape, pedestrian circulation,

[6] See, for example, Exhibits 33 and 46, which contain not only extensive text, but photographic displays linked to the site plan, such as Exhibit 46(d) regarding fence measurements and Exhibit 46(j) documenting glare from on-site lighting, as measured from his property line. Tr. 180-181. A similarly styled submission, Exhibit 62, details and depicts Mr. Sadoff's argument for counting the floor space in the shade structures as floor area.

noise and screening requirements . . .of the Montgomery County Zoning Ordinance and other applicable rules and/or regulations as required by DPS or M-NCPPC and state and local law and regulations." Exhibit 46(b), p. 35.

Ms. Keller writes (Exhibit 47, p.5):

> . . . I have requested a public hearing because many of the conditions of the landscape plan, the lighting plan and the site plan (for example the size and depth of the pool; the number of and placement of speakers, fixed or portable; the height and placement of fences; and the safety of the infrastructure) remain vague or absent.
>
> Policies need to be in writing and available to pool members and neighbors. A clear, concise, and expanded Statement of Operations which is enforceable is warranted. . . .

The Hearing Examiner addresses these concerns only to the extent that they demonstrate issues which warrant a hearing. The Hearing Examiner does not make findings as to whether these concerns warrant approval or denial of the modification petition, because that issue is not before him. Thus, much of this record is not directly relevant to the issues actually before the Hearing Examiner at this stage, or goes beyond what the Hearing Examiner needs to decide the issues actually before him. The same is true of remedies sought by the neighbors. Nevertheless, it is helpful to summarize some of the remedies sought in order to fully understand the impact felt by the neighbors from expanded operations on the subject site. Ms. Keller's letter (Exhibit 47) asks for the following remedies:

1. Cessation of all amplified music and movie nights. The P.A. system should be restricted to swim meets between 9 a.m. and 9 p.m.
2. Pool hours should not begin before 7 a.m. on any day, and not before 9 a.m. on weekends or holidays. Swim meets should not start before 9 a.m. or last beyond 9 p.m.
3 Pool maintenance operations should not begin before 7 a.m. on weekdays and 9 a.m. on weekends. All activities should cease after 11 p.m.
4. County noise restrictions should be followed.
5 All overgrown white pine trees should be removed and suitable replacements planted.
6. Shielded lights should be turned off before 11 p.m.
7. The perimeter fence should be built to Code for safety of the neighborhood (*e.g.,* to prevent scaling by youngsters).
8. Safe infrastructure (pump house, etc) should be required.

9. The Storage Pod should not block emergency gate to pool deck.
10. Non-swimming activities should not be open to non-members; The Pool should not be rented out between Labor Day and Memorial day.
11. Private pool parties should be properly supervised, with no amplified music or noise.
12. Technical Staff of the Maryland-National Capital Park and Planning Commission should review the matter, and a full hearing should be held.
13. An enforceable Statement of Operations should be available to all.

After the hearing (Exhibit 74), Ms. Keller also provided useful information about noise policies in other community swimming pools and advice regarding noise control from the Montgomery County Swim League (MCSL):[7]

NOISE

I. The Montgomery County Noise Ordinance (Chapter 31B of the County Code) is strictly enforced by the Montgomery County Dept. of Environmental Protection. With only two complaints needed, police (or inspectors who can measure decibel levels at adjoining properties) can issue citations and fines. It behooves each club, pool manager, social chairman, and Team Rep to ensure adherence to the Noise Ordinance.

Specifically regarding swim teams, we suggest:

a. Coaches and swimmers should keep all noise at a low (conversation) level during practices or meets that begin before 7:00 a.m. on weekdays, or before 9:00 a.m. on weekends. This means no PA or starter announcements; whistle, gun or horn starts; loud, boisterous behavior (even team cheers); boom boxes, etc. This would also apply to team parties, pep rallies, etc. after 9:00 p.m.

b. Care should be taken before morning meets to:

1. Avoid use of the large PA system before 9:00 a.m. to welcome teams, call the first event, and play the National Anthem. Use common sense when testing the volume by doing it just at 9:00 a.m., starting from low volume/master setting and increasing to a moderate level.
2. Use voice commands or send a message to teams and spectator areas to announce warm-ups, call for officials, etc. A careful use at a low setting on the starter horn may be acceptable. THIS IS EVEN MORE CRITICAL IF YOU HOST DIVISIONALS AND BEGIN AT 8 a.m., Warm-up at 7 a.m.
3. For the finish of a 'B' meet beyond 9 p.m., items 1 & 2 apply as well.
4. Reduce or curtail use of the PA and use just the starter horn whenever possible. As the crowds diminish, so should the volume of PA equipment or starter horn.

[7] Ms. Keller quoted a portion of MCSL's Noise Policy. In fairness to all, the Hearing Examiner quotes MCSL's entire noise policy statement.

5. Do not make unnecessary announcements, just those necessary to the conduct of the meet.
6. The Team Rep or a member of the Club's Board of Directors or their designee shall monitor the volume, and overrule the announcer, if necessary, on volume settings of the PA, appropriate uses of the amplification equipment, and unnecessary announcements.

c. Pools should examine speaker locations and modify them to direct announcements inward from pool perimeter toward participants and spectators, not toward neighbors. Also several well-located speakers can reduce the need to "push" the volume of only one or two central speakers toward the property lines (and toward the neighbors).

d. All MCSL visiting teams shall refrain from honking horns or squealing through the parking lot, etc., when arriving or departing. Remember, horns or other noisemakers are not permitted at swim meets.

V. THE HEARING

The hearing was held, as scheduled, on April 30, 2010. As indicated in the notice, the hearing was limited to addressing the issues referred to the Hearing Examiner by the Board, and therefore did not directly assess the merits of the underlying administrative modification request. Petitioner called four witnesses, John Reinhard, a zoning and land use consultant; Barbara Ship, Petitioner's president; and two of Petitioner's Board members, Debby Orsak and Karen Burgett. Patrick O'Connor, President of the Montgomery County Swim Club Association and Alberto Belt, a neighbor, also testified in support of the modification request. Neighbors Donald Evans, Suzanne Keller and B. J Sadoff testified in opposition. At the request of the Hearing Examiner, Susan Scala-Demby, DPS's Zoning Manager, testified regarding past practices in modifying special exceptions and how floor area has been calculated.

At the beginning of the hearing, in response to questions from the Hearing Examiner, Petitioner's attorney outlined Petitioner's position (Tr. 8-12):

> . . . [A]ll of the main physical components of the special exception as they exist today . . . were properly reviewed and approved in 1968 by DPS. Back then it was Department of Inspection [and Licenses] . . . [DIL] . . .[and the] Department of

> Environmental Protection [DEP] . That approval under that regulatory regime and process that was in place at that time . . . constituted a *de facto* modification of the special exception.
>
> * * *
>
> The December 23, 2009 administrative modification filing with the Board of Appeals was intended to update the Board's records. And, the process today is to do it in that manner, through an administrative modification process. But, the existing improvements, the buildings, the bath house specifically, the pump house, the two shade structures, the store room along with site plans were approved by DPS in 1968. [The 1968 DIL approvals are shown in Exhibits 33(v) and (w)]
>
> * * *
>
> [T]he operational activities are within the purview of the Board today and we would need to modify our special exception in to conformance. That would be a present modification. But, the modification would only be those hours of operation that are different above and beyond, obviously, the 9:00 to 9:00 p.m. regular hours that are already approved under the special exception along with the six late night operations.
>
> * * *
>
> [W]e're asking the Board to do is just affirm those previous modifications. And, that does not trigger the 25 percent expansion of the floor area provision because there is no new floor area being expanded.

Petitioner's counsel further argued, in this context, that "The two shade structures and the below grade store room are not counted toward floor area and, as such, we don't trigger the 25 percent expansion provision which then unfolds this more expansive review into general site related issues." Tr. 21. Petitioner's final note with regard to structures was that it planned to remove the portable storage container from the site. Tr. 20-21.

As to the neighbors' concerns about operating conditions, Petitioner's counsel stated (Tr. 15-16):

> To the extent that their litany of items that they've communicated to the hearing examiner involve items dealing with operational issues beyond what was indicated in that inspection report and beyond what was proposed by the petitioner to the Board of Appeals for amendment, my position is that they're not in front of the Board. We don't plan to address much of those operational issues. There is no statement of operations in place with the special exception.

A. Petitioner's Case

1. John Reinhard (Tr. 75–92):

John Reinhard testified that he is an independent zoning and land use consultant. He started with what was then called the Department of Environmental Protection in 1971. From 1971 until 1980, he was a zoning inspector, and in 1980, he became a zoning plan reviewer. In 1988, he became the manager of the zoning review unit, and then retired in 2001. In addition to his institutional knowledge, Mr. Reinhard testified as an expert in zoning and land use.

Mr. Reinhard testified that the Department of Inspections and Licenses (DIL) came into place in roughly the mid to late 1950s. Among other things, DIL was mandated to enforce and interpret the zoning ordinance, which was one chapter of the Montgomery County Code. In 1972, DIL became the Department of Environmental Protection (DEP). In 1978, DPS was succeeded by the Department of Permitting Services (DPS).

Mr. Reinhard reviewed the permit history related to the subject site regarding the building permits and site plans of 1963 and 1968. An application for a building permit would come across the desk of what was then the Department of Inspections and Licenses. There was a rotating reviewer who was assigned to the front desk who would have looked at this application, determined what the zone of the property was, and whether or not there was a special exception assigned to that particular subject site. The way they did that was to use the same books that the Board of Appeals now has, which is a set of five or six atlases. The reviewer would have looked at the page, noted the special exception and made sure that the application was for what the special exception indicated. If it was for a structure associated with the special exception use, the reviewer would sign and approve it.

Mr. Reinhard agreed with Ms. Scala-Demby. The review was looked at in general terms of what the approval was. Even into the 1970s, the new structures, the shade structures and the store

room, could have been considered an incidental or accessory use to the pool that didn't create any impact and still was consistent with what a pool would envision -- the same as a storage shed or small equipment building, things of that nature.

According to Mr. Reinhard, once the building permit was approved by DIL, even if there were some deviation from what the Board of Appeals had approved, there likely would have been no indication to the Applicant to go back to the Board for approval, unless DIL indicated it was necessary. Since he was not there at the time, he "can only surmise," but it is likely that there was no consideration of going back to the Board to legitimize the approval. Tr. 79.

During the '70s and '80s, there was discretion in the Department to look at whether these applications would impact the use of the property under special exception in more than insignificant fashion. Looking at the shade structures at issue here that were permitted in 1968, based on his actual knowledge of procedures after that time period, those would have been the kinds of structures which would not have been sufficient change to require going back to the Board of Appeals. Tr. 80. The zoning ordinances of 1955, 1960 and 1965 set no specific standard of review for modifications. The modification procedure provisions that for the most part we know today under 59-G-1.3(c) appeared first in the 1978 zoning ordinance; they were a refinement of the 1972 ordinance, which essentially codified the prior practice. Tr. 81-82. In his opinion, the Department's review and approval, issuance of permits, would make the structures in question here lawful. Tr. 83.

Mr. Reinhard further testified that the first sentence under 59-G-2.56 – that the provisions of subsection 59G-1.21(a) do not apply – has always been a part of the swimming pool special exception. Thus, from its inception, community swimming pools were not required to meet the more stringent general conditions required of other special exceptions. However, other sections, including

1.24, 1.22(a) additional requirements, 1.23 general development standards, 1.26 exterior appearance in a residential zone, as well as the standard in 59G-2.56, continue to apply, just not 1.21(a).

2. Barbara Ship (Tr. 93-126; 170-172; 185-186):

Barbara Ship testified as Petitioner's president. She summarized the operational changes for which Petitioner seeks approval:

> With regard to the operations we've requested expanding our hours of operation. In particular, we've asked for approximately six weeks during the summer from when school is out through the third week in July to be able to open the pool at 8:30 a.m. instead of what the special exception currently calls for, which is 9:00 a.m. in order to start swim team practices. We've asked for two or three Wednesday evenings when we have swim meets to extend the hour a half hour, from 9:00 p.m. until 9:30 to allow us, if necessary, to finish the meets. We've asked for Saturday morning for, I think, six or seven Saturday mornings to allow for opening at 6:30 a.m. for some of our very top swimmers to come in and warm up prior to swim meets for an hour.
>
> And, then for the two Saturday morning meets that we have each year we've asked basically to be allowed at 7:30 to open on those two Saturday mornings. So, 7:30 instead of 9:00 a.m. as is in the current special exception. We have asked for Sunday morning our hours of operation to be allowed to begin at 9:00 a.m. instead of 11:00 so we can be consistent across the week and be nondiscriminatory [*i.e.*, so that Sunday is not different from Saturday or other days of the week]. And finally, we ask for one night per year that we be allowed to operate our swim team's annual lock-in from 11:00 p.m., which we're allowed to do, until 7:00 a.m. the -- 6:00 a.m. the following morning when it ends.

Ms. Ship feels that these changes would not substantially change the nature, character and intensity of the use, and would not substantially change the effect on traffic in the immediate neighborhood. Swim team members (20 to 40 children) would mostly walk or bike to the pool for the earlier practices. As to meets, people would leave early as they finish their events. By 9 o'clock most of the people have already left. Earlier hours are needed for weekend meets to give the participants time to warm up. Ms. Ship added, regarding Saturday meets (Tr. 99-100):

> We have about 50 swimmers from our team who participate and there will be swimmers from the team that we're swimming against. And, with those swimmers come families and coaches and that kind of stuff. The meets start at 9:00 a.m. So, the 50 kids need a chance to warm up and it usually takes about half an hour for each team

> to warm up. So, there's a half hour for one team to warm up. Our team would warm up from like 7:30 to 8:00. The other team would warm up from 8:00 to 8:30 and that leaves some time to do some administrative things prior to the start of the meet.
>
> So, that's our 50 kids and their parents coming to the pool, and 50 kids and their parents coming from the other team. There's no question, it's a lot of traffic. We do not use excessive -- we use starting equipment for our meets and we will use a lot of amplification so the kids can get lined up and get in the right event. None of that happens before 9:00 a.m. So, what I'm really talking about is having that many people at the pool two Saturday mornings from 7:30 until 9 o'clock. So, those are the Saturday mornings when we have A meets.

According to Ms. Ship, the Sunday meets have little impact because actual activity doesn't start till 10:30 or 11:00, but to appear non-discriminatory, Petitioner wanted Sunday hours to match Saturday hours. The "annual lock-in" is something Petitioner has done for about 20 years. There are a lot of activities that precede the lock-in, a talent show and other things, but all those occur during allowed operating hours. During the evening before 11:00 p.m., there are usually activities that go on, and some snacks. It's basically an overnight sleep-over. It's very well chaperoned. She offered some measures that could be taken to alleviate concerns with regard to pickup of children, such as car pools or pickups away from residences. Tr. 100-102.

Ms. Ship admitted that "there definitely have been some occasions where amplified music was too loud." Tr. 103. Last summer, she instituted a noise policy indicating that people have to be compliant with Montgomery County noise ordinance, and made somebody responsible for monitoring amplified music. The noise policy is in Petitioner's minutes, and a copy will be provided. Tr. 120. Petitioner has a sound meter and to make sure they are compliant. "We were even inspected by EPA, whatever it is, last year on July 4 during one of our swim meets and found to not be in violation of anything." Tr. 104. Amplified music is used during the swim meets.

Ms. Ship identified various photographs of the site (Exhibits 60, 61 and 65, and their subparts), and testified that the east fence is five feet tall, the north is five feet tall, and the south and

the west are all six feet tall chain link fences (not wood as required by the Board). Tr. 113-114. She feels that a wooden fence on the south and west would not screen the pool any better because of the grade.

[An issue arose during Ms. Ship's testimony about how to measure the height of the fence when debris has accumulated on the outside, thereby reducing the effective height of the fence. Mr. Sadoff felt that the lower effective height would allow kids to hop the fence and unsafely use the pool, which impacts on the community.] Tr. 122-126.

Ms. Ship further testified that total family membership last year was 300 families. This year it will be less. This consists of 280 bonded members (*i.e.*, someone who is a permanent member and who has paid for a bond), both singles and families together, and approximately 20 trial memberships, again a combination of families and single people. So, altogether, total family membership last year was 300. Bonded membership peaked a few years ago at about 320, and the membership has been dwindling Tr. 170-172.

Ms. Ship noted that, on the site plan, in the section with calculations on top, it incorrectly says there are "deep-8 lanes" in the pool. It's actually a six lane pool, but the calculations don't change. It's just a mistake in the text. Tr. 185-186.

3. Debby Orsak (Tr. 129-134):

Debby Orsak is a Board Member of the Tilden Woods Recreation Association. She testified that she lives at 11138 Stephali Lane, about a two-minute derive from the pool. Ms. Orsak stated that she had lived there for almost 13 years and has been a member of the pool for nine years. She supports the modification petition and noted that many of the complaints about the noise specifically were things that happened during normal operating hours per the special exception. She feels it is beneficial to the community to have children participating in the swim team.

Ms Orsak also introduced letters from four immediate neighbors of the pool supporting the modification petition. Exhibits 66(a) – (d)).

4. Karen Burgett (Tr. 141-143):

Karen Burgett testified that she is a Board Member of the Tilden Woods Recreation Association and lives at 11204 Luxmanor Road, about two minutes driving time from the pool. She noted that the swim club is only open in the summer, and the swim team season is six weeks. An extra 30 minutes in the morning would help the swim team a lot, while not adversely impacting the community. Most of the year, there are school buses going to the high schools about 6:45 in the morning, and people are going to work. There is other school traffic. None of that is going on during the summer. Petitioner is asking to allow "a few kids come in for swim practice earlier in the morning. It's not during the normal operating hours of the pool." Tr. 142-143. The early morning swim practice hours are just for the swim team, not for the pool membership at large.

B. Government Witness

Susan Scala-Demby (Tr. 24-74):

Susan Scala-Demby testified that she is DPS's Zoning Manager. The Hearing Examiner initially questioned her about statements made regarding floor area on the site by her DPS subordinate, David Niblock.[8] Ms. Scala-Demby indicated that Mr. Niblock was likely unaware at

[8] On April 22, 2010, Mr. Niblock signed a letter from Petitioner's counsel indicating his agreement with the following statements:

> With respect to the improvements located on the Tilden Woods Recreation Association property located at 6806/6808 Tilden Lane, you have indicated (after a site visit on or about March 25, 2010) that the following improvements would not be included in the site's total floor area calculation:
>
> 1) Two (2) shade structures / open pavilions: The definition of "total floor area of building" in the Zoning Ordinance contemplates the existence of "interior faces of walls" by which to measure a structure's total floor area, which the shade structures / open pavilions lack. The Department treats these types of structures much like parking structures in that, although they require building permits, they do not get counted toward a site's total or gross floor area calculations.
> 2) Store room (located underneath one of the shade structures): This enclosed area meets the Zoning Ordinance's definition of a "cellar" (i.e., at least half of its clear ceiling height is below the average elevations of the finished grade along the perimeter of the building) such that it is excluded from the site's total floor area by definition.

the time (and in fact she was unaware until being advised by the Hearing Examiner) that Zoning Code §59-G-1.3(c)(4)(A), the Code section applicable in this particular case, refers to "the total floor area of all structures or buildings," not just the floor area of buildings. She felt that it was a contradiction to the definitions in the zoning ordinance, since the zoning ordinance, in its definitional section, has a definition of floor area that does not include floor area of structures.

Ms. Scala-Demby testified that DPS has always applied that definition of floor area, and she indicated that she did not know how to calculate floor area for the shade structures because they have no walls. [The Hearing Examiner asked Petitioner to supply measurements of the shade structures, especially "the fenced-in area, in effect, the usable area under the shade structures."] Ms. Scala-Demby indicated that it was possible to determine a floor area of the space within the fenced-in area under the shade roofs (although it would not meet the definition of floor area of a building). Tr. 35-36.

Ms. Scala-Demby further testified that she agreed with Mr. Niblock's finding that the store room depicted in Exhibit 61 met the definition of cellar and, therefore, did not count toward the floor area calculation.

On cross-examination by Mr. Sadoff, Ms. Scala-Demby indicated that she did not consider the fence enclosing the shade structures to be walls because they do not go up to the roofs and don't totally enclose the space. Tr. 41-43.

Ms. Scala-Demby noted that she was not employed by DIL in 1963 [*i.e.*, when the special exception was approved]; she started with the Department in 1988 as a zoning investigator and investigated many special exceptions over her career. However, she testified as to her understanding of the past practice (Tr. 53):

> It is only in recent years that zoning investigators and anyone signing off on the zoning section of a building permit for a special exception that we did not have the authority,

> if you will, to note that something may be in a slightly different location or may be a slightly, you know, instead of a square, a circle building. We did not have to bring it back to the Board. The Board had given us authority to make those kinds of decisions. If we felt that it did not make a substantial difference to the special exception, then we could make the decisions within the Department. . .

According to Ms. Scala-Denby, since the special exception was for a swimming pool and appurtenances and bathhouse, as long as these structures were in the same general location as shown on any plan that was submitted to the Board, the Department would have approved them. She viewed the changes made in the 1963 permit and site plan (Exhibits 33(r), (s) and (t)) as substantially complying. She felt the Department could make changes if they felt that it did not substantially change the special exception. It was viewed not as authority to change a special exception, but authority to approve something that was in substantial compliance with a special exception.

Ms. Scala-Demby read Section 59-122 of the 1972 zoning ordinance. It provides, in part:

> Nothing contained herein shall be construed to prohibit the Department of Environmental Protection in its exercise of reasonable discretion to allow minor adjustments during construction which do not alter the location of structures, external appearance, use or conditions of the special exception. The Department of Environmental Protection shall immediately notify the Board of any deviations from the special exception plans as approved by the Board. Substantial changes proposed during construction shall require rehearing before the Board on 30 days notice to all persons entitled to notice of the original application.

It was her understanding that there was no obligation on the part of the special exception holder to go back to the Board of Appeals; it was the obligation of the Department to notify the Board of an changes in the approved plans. In response to the Hearing Examiner's question as to whether, back in 1968, the Department would have the authority to approve an entirely new structure to be erected that was not on the plans approved by the Board of Appeals, Ms. Scala-Demby replied (Tr. 58-59):

> If the structure that was built was not visible from the street, we probably would have approved it. It was not -- and if it did not have a large impact on the special

> exception, they didn't build a building for a new use, for example. You know, it was just something that intensified their operation possibly, more storage, something like that we would have permitted it probably without making them go back to the Board. That's not the case now.

Ms. Scala-Denby believes that is what happened with the 1968 Department approvals of the expansion of the bathhouse and the addition of the new shade structures, as shown in Exhibits 33(v) and (w). Tr. 47-66. The violation notice issued in this case essentially required Petitioner to ask the Board to bring its plans up to date, rather than to seek initial approval of those buildings. Tr. 64-65. In her opinion, the fact that the Board of Appeals, in its original grant, didn't specifically allow a swim team doesn't necessarily prohibit one from existing at a swim club as an accessory use. Tr. 66.

C. Community Witnesses in Support

1. Alberto Belt (Tr. 127-129):

Alberto Belt testified that he lives 50 yards from the corner of the subject property. He has lived in his current residence for eleven years and has been a member of the pool for eleven years. He always found the pool to be kind of the center of the summer activities. He just wanted to express his support for their expanded hours, as an immediate neighbor of the pool.

2. Patrick O'Connor (Tr. 135-140):

Patrick O'Connor testified that he is President of the Montgomery County Swim Club Association. He lives at 10 Deborah Court, Potomac, about a mile and a half from the subject site. He has been members of the Regency Estates swim club for about 15 years now, and has been on the board of directors for that pool for 12 of those 15. He feels (Tr. 137 -138):

> [T]hese community pools are the community. So, anything that happens within those pools impact the community. The community supports them. They're fully supported by the community. There's no other funds coming in. They're operated by volunteers. There's no paid employees other than hiring a management company to run the chemicals and the lifeguards and that during operations. But, the overall

> finances, rules, regulations, overall operation of a pool are run by the people who live in the community. They're run by the neighbors.

Mr. O'Conner is concerned that anything done in this case may impact other community swimming pools.

D. Community Witnesses in Opposition

1. Donald Evans (Tr. 144-152):

Donald Evans testified that he lives at 6807 Tilden Lane, right across from the pool. He and his wife are in favor of the pool, and moved in five years ago knowing it was there. However, he feels that the character, nature and intensity of the traffic and the pedestrians and noise would be affected by the petitioner's request for additional hours and so on. Since he lives directly across from the only entrance to the pool, that is where the parking problems and the traffic are involved.

Mr. Evans refers to the expansion of pool activities as "mission creep." Tr. 145.[9] In Mr. Evans' opinion, the pool has become something other than what it was originally intended when established in 1963. He referenced the letter from Mr. and Mrs. Pliska (Exhibit 56), who live just two doors from the entrance of the pool and have lived there since before the pool was constructed.

According to Mr. Evans, the number of members and the number of users are very different numbers. With the swim team and the visitors, there are many more people using the pool, not just members. That increases traffic and noise. The noise and traffic have increased significantly since he moved in, and the narrowness of the driveway entrance means that there's a big backup from time to time right in front of his house. He would like to see the driveway widened, parking reserved for residents on the street and a statement of operations. He does not want earlier hours of operation on Sunday.

[9] Misquoted in the official transcript as "Mission Creek" in a number of locations.

2. Suzanne Keller (Tr. 153-155; 188):

Suzanne Keller testified that she strongly believes that the parties' interests do not have to be out of sync. "We need to set some reasonable and measurable parameters and work together. The surrounding homes and the special exception pool are going to be neighbors well into the future. We need fences for safety. We need landscape buffering for inherent noise." Tr. 153. Since it is not possible to provide an acoustical barrier to amplified sound in such a tight space, there is a need to go further than the pool board [in restricting noise].

Ms. Keller described the pool as "a membership based business." Tr. 154. It's a nonprofit corporation organized to own and operate a community swimming pool with a membership of 350 families. So, she has questions as to whether the pool is operating within the limitations set forth when planning community events such as the fundraising event that they have planned for this summer. Ms. Keller is concerned that, lacking in specifics, the original opinion of the Board has been left to interpretation by the pool's board, swim team reps and party planners, and not the Board of Appeals. She believes that operations are far afield from the original intent of the special exception community swimming pool on the site.

Finally, Ms. Keller took umbrage at an opinion stated in Mr. Belt's letter (Exhibit 66(d)), referring to "Sadoff-Keller's [alleged] unwillingness to negotiate a good faith with the pool." Ms. Keller asserted that it was an inaccurate accusation and name calling. Tr. 188.

3. B. J. Sadoff (Tr. 155-187):

B. J. Sadoff elected not to give any direct testimony, after reaffirming that he would be given an opportunity to review the record at some point before issuance of the Hearing Examiner's report, and an opportunity to submit a response. He was cross-examined as to the authenticity of some of the exhibits (Exhibits 46(d), 46(e), 46(j) and 62) he had submitted for the record. In the course of

explaining Exhibit 46(d), Mr. Sadoff cited authority for his methodology in measuring the height of the perimeter fence at several locations. He indicated that the photos showing glare from on-site lighting in Exhibit 46(j) were taken from his property line. Tr. 180-181. Some photographs in Exhibit 46(e) show speakers mounted on the bathhouse. Tr. 183.

During the cross-examination, the Hearing Examiner asked Mr. Sadoff whether he was concerned as a neighbor about the shade structures and other structural items on the site *per se*, or is it that he wanted to show that they have a certain square footage because that is part of the test for the statutory section that governs whether or not there will be a further hearing? Mr. Sadoff responded, that it was the latter [*i.e.*, because their size is part of the statutory test]. Thus, although he is concerned about lighting, fence and screening issues, operational issues such as hours, noise, membership, traffic and the like are his primary concerns. Tr. 159-161.

Mr. Sadoff indicated his belief that most of the people drive to the pool. That increases the intensity of the use. As more people live further away from the pool, then that increases the nature, character and intensity of the use. Tr. 168.

VI. RESOLVING THE ISSUES REFERRED TO THE HEARING EXAMINER

A. Section 59-G-1.3(c)(1) of the Zoning Ordinance

The first question referred by the Board to the Hearing Examiner is whether the requested modifications can be approved under Section 59-G-1.3(c)(1) of the Zoning Ordinance. The first part of the answer is simple because the language of the last sentence in Zoning Ordinance §59-G-1.3(c)(1) is clear – "*If a request for a hearing is received, the Board must suspend its decision and conduct a public hearing to consider the action taken."* That would result in the matter being determined under the other subsections that govern hearings, Subsections (c)(3) and (c)(4), not under Subsection (c)(1).

However, based on the language of §59-G-1.3(c)(1), the Hearing Examiner interprets the Board's first question as also asking whether the proposed modification is such that the terms or conditions could be modified "*without substantially changing the nature, character or intensity of the use and without substantially changing the effect on traffic or on the immediate neighborhood . . .*" The answer to this question is more complicated because the most serious impacts on the neighborhood have been from operational changes made by Petitioner without prior Board approval and for which Petitioner now seeks the sanction of the Board.[10] These include expansion of operating hours in a variety of ways (outlined on pages 4-5 of this report) and permission to hold an all-night "Annual Lock-In."

Moreover, the operational issues go further than just expanded operating hours; they include noise, traffic and parking issues, as well. Petitioner suggests that the Board can merely approve the operational changes Petitioner requests without significantly impacting on the community and without, in effect, approving other ongoing operations. The Hearing Examiner does not see how that can be done. If the hours are expanded, as requested, there will naturally be traffic and parking changes at the expanded times and potentially additional noise issues.

There is ample evidence that these additional activities are impacting the neighbors (Exhibits 33, 46, 47, 50, 56 and 73, and Tr. 144 - 188). Because of the limited scope of this inquiry, the Hearing Examiner does not attempt to decide here whether these additional activities are excessive, or merely inherent in the operation of a community swimming pool. He does find, however, that they are impacts which substantially change intensity of the use and its effect on the

[10] Mr. Sadoff and Ms. Keller have also raised issues regarding structures on the site, such as the fence and unshielded lights shining directly into their property in the evening. See, *e.g.*, Exhibits 46(d) and (j). Since Petitioner seeks to have the Board approve new site, landscape and lighting plans, the neighbors are entitled to be heard on these issues at a hearing on the merits of the modification petition. The Hearing Examiner's point, in the main text above, is that the non-operational changes proposed by Petitioner are not so serious as to warrant examination of the underlying special exception, while the operational changes are more serious. For example, the lighting issues can be easily addressed by using properly shielded lights and limiting the hours they may be on. Lighting will be further discussed later in this report.

immediate neighborhood. It should be noted that the statutory language in question is disjunctive. In other words, the statutory threshold is crossed when the proposed modifications substantially "*chang[e] the nature, character **or** intensity of the use"* and substantially *"chang[e] the effect on traffic **or** on the immediate neighborhood*." [Emphasis added.]

On the other hand, it does not appear that the proposed structural and landscaping changes would have an impact on the neighbors so significant as to change the nature, character or intensity of the use. Included in the structural changes are the addition of "as-built" shade structures, and "as built" storage area beneath the primary shade structure and "as built" expansion of the pool house. While these additions may not have significant adverse effects on the neighborhood, they do factor into the "floor area" standard set forth in subsection (c)(4) and discussed below. Their lack of significant impact also does not change the fact that the operational changes mentioned above cross the statutory threshold set forth in subsection (c)(1).

B. The Floor Area of the Expansion

The second question referred by the Board to the Hearing Examiner is whether the proposed modification expands the total floor area of all structures or buildings by more than 25% or 7,500 square feet, which is one of the statutory thresholds for determining significant changes, as set forth in Zoning Ordinance §59- G-1.3(c)(4).

Petitioner's approach to the floor area question begins with the argument, by its counsel, that "all of the main physical components of the special exception as they exist today . . were properly reviewed and approved in 1968 by DPS. Back then it was Department of Inspection [and Licenses] . . . [DIL] . . .[and the] Department of Environmental Protection [DEP] . That approval under that regulatory regime and process that was in place at that time . . . constituted a *de facto* modification of the special exception." Tr. 8-9.

The evidence adduced at the hearing does support Petitioner's claim that DPS's predecessors, DIL and/or DEP granted permits for the construction of the new structures and that their practice at the time did not necessary involve Board approval for changes of this nature. Tr. 47-66 and 75-83.[11] Some deference must be given to an administrative agency's interpretation of a statute it administers. *See, e.g., Watkins v. Secretary, Dept. of Public Safety and Correctional Services*, 377 Md. 34, 46, 831 A.2d 1079, 1086 (2003). However, as Mr. Sadoff rightly points out (Exhibit 75, p. 3-7), there was no legal authority for DIL and DEP to approve the addition of new structures to a community swimming pool special exception site without Board of Appeals approval. There was no Code provision that permitted these changes in 1968, and the successor 1972 Code, as amended in 1973, which is relied upon herein by Petitioner, limited DEP authority as follows:

> Sec. 59-122(a) *Issuance of building permits.* No building permit shall be issued for any building or other structure to be constructed, reconstructed or altered pursuant to a special exception unless such construction is in accord with the terms and conditions established by the board in its resolution to grant, including any exhibits referred to therein. . . . Nothing contained herein shall he construed to prohibit the department of environmental protection, in it exercise of reasonable discretion, to allow minor adjustments during construction which do not alter the location of structures, external appearance, use or conditions of the special exception. The department of environmental protection shall immediately notify the board of any deviations from the special exception plans as approved by the board. Substantial changes proposed during construction shall require rehearing before the board on thirty days notice to all persons entitled to notice of the original application. [Emphasis added.]

The construction of entirely new structures (*e.g.*, the shade structures) and the enlargement of the bathhouse, which is externally visible, do not fall within any authority granted to DIL/DEP by this provision.

[11] Petitioner was granted building permits which are in evidence for the structures in question back in 1963 and 1968, and all the relevant testimony (from Susan Scala-Denby and John Reinhold) was to the effect that in the 1960s, DPS or its precursor had the authority to permit structures that were not on a site plan approved by the BOA as long as they did not violate code, were not visible from the street and did not permit an additional use on the site. In other words, that was the established (if not legal) procedure of the day. Tr. 47-66 and 75-83.

Petitioner appears to concede this point by stating, "Petitioner does not contend, by offering the above, that the Department's actions served to formally modify the Swim Club Special exception." Exhibit 76, p. 4. Thus, the DIL and DEP approvals may have been the practice of the time, but that practice appears to have been beyond their legal authority. Yet, Petitioner seems to feel that the Board need not consider the additional floor area added in these additions as counting towards the floor area of the proposed modifications because they are "as built," and were *de facto* approved many years ago. Petitioner also seems to find some solace in the fact that the statute calls upon DEP, and not the special exception holder, to notify the Board of Appeals "of any deviations from the special exception plans as approved by the board." Tr. 56-57.

The Hearing Examiner does not agree with Petitioner's interpretation. If the question were whether Petitioner could somehow be punished for failing to timely notify the Board of the changes to the site plan, the statutory language and the approvals of DIL/DEP might be a defense, but that is not the issue. The question here is whether the Board must review the modifications in question, despite the actions of DIL/DEP, and the answer is approval of the Board is a prerequisite to legitimize the kinds of changes that were made to this site plan. That review is not just an "update" of the Board's records as Petitioner suggests. Tr. 9.

As pointed out by Mr. Sadoff (Exhibit 75, p. 7), there is no Board procedure for changing a site plan by an "update," other than through the modification process. That process allows the Board to consider whether the proposed changes will have significant impacts upon the community. In many cases, minor changes can be approved administratively, but in this case the administrative modification process was halted by community opposition and the demand for a hearing. When that occurs, there must be a review of the requested modification through a hearing process. We therefore now turn to the question of whether the changes exceeded the statutory floor-area threshold.

That threshold, which determines the depth of the review, is set forth in Zoning Ordinance §59-G-1.3(c)(4):[12]

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

Thus, the question is whether the floor area of the unapproved expansion exceeds the 25% or 7,500 square feet. This simple question is not so simple because the parties dispute what constitutes "floor area."

Petitioner argues that the term "floor area" does not include the floor space in the shade structures because the definition of "floor area" in Zoning Ordinance §59-A-2.1 pertains to buildings, not structures. All buildings are structures, but not all structures are buildings. Section 59-A-2.1 provides the following definitions:

> ***Building**: A structure having one or more stories and a roof, designed primarily for the shelter, support or enclosure of persons, animals or property of any kind.*
>
> ***Structure**: An assembly of materials forming a construction for occupancy or use including, among others, buildings, stadiums, gospel and circus tents, reviewing stands, platforms, stagings, observation towers, radio and television broadcasting towers, telecommunications facilities, water tanks, trestles, piers, wharves, open sheds, coal bins, shelters, fences, walls, signs, power line towers, pipelines, railroad tracks and poles.*
>
> ***Floor area of building, total:** The total number of square feet of floor area in a building, including the area of a basement and any accessory building on the same lot but excluding the area of a cellar, uncovered steps and uncovered porches. All horizontal measurements must be made between interior faces of walls.*

Petitioner's argument is supported by the testimony of Susan Scala-Denby, DPS's Zoning Manager. She testified that DPS has always applied the above-quoted definition of floor area, and

[12] The provision is quoted in full in Part II of this report.

that she did not know how to calculate floor area for the shade structures because they have no walls. Ms. Scala-Demby indicated that it was possible to determine a floor area of the space within the fenced-in area under the shade roofs (although, in her opinion, it would not meet the definition of floor area of a building). On cross-examination by Mr. Sadoff, Ms. Scala-Demby indicated that she did not consider the fence enclosing the shade structures to be walls because they do not go up to the roofs and don't totally enclose the space. Tr. 35-36; 41-43.

Mr. Sadoff argues that, under the definition of buildings in the International Building Code (IBC), the shade structures would be buildings. Exhibit 75, pp. 16-17.[13] The IBC defines a building as "Any structure used or intended for supporting or sheltering any use or occupancy," and also provides for a calculation of floor area when a building does not have surrounding walls: "Areas of the building not provided with surrounding walls shall be included in the area if such areas are included within the horizontal projections of the roof or floor above."

Having considered the entire record in this case, the Hearing Examiner concludes that the floor area of the shade structures should be counted whether or not these structures are considered buildings under the Zoning Ordinance. Moreover, one need not resolve the question of whether Ms. Scala-Denby and DPS define the word "wall" too narrowly, as Mr. Sadoff argues, to find that the floor area of the shade structures must be counted. Its inclusion is clearly required by the language of the statute we are interpreting. There is no ambiguity in the words "*the total floor area of all structures or buildings.*" The case law requires, in interpreting a statute, that we carry out the intent of the legislature. The applicable rule of statutory construction was set forth by the Maryland Court of Appeals in *Trembow v. Schonfeld*, 393 Md. 327, 336-337, 901 A.2d 825, 831 (2006),

> Our goal is to ascertain and implement the legislative intent, and, if that intent is clear from the language of the statute, giving that language its plain and ordinary

[13] Mr. Sadoff also argues that the fencing enclosing the shade structures qualifies as walls under some definitions. Exhibit 75, p. 17. *See also* Exhibit 62.

> meaning, we need go no further. We do not stretch the language used by the Legislature in order to create an ambiguity where none would otherwise exist. If there is some ambiguity in the language of the statute, either inherently or in a particular application, we may then resort to other indicia to determine the likely legislative intent. [Citations omitted.]

In this case, this is no ambiguity since the language requires us to include the floor area of structures, as well as buildings, whether or not DPS has been doing so in the past. The fact that the Zoning Ordinance does not contain a specific definition for the floor area of structures also does not mean that we may ignore the requirement to include the floor area of structures in this case. The definitional section does not say that one cannot calculate floor area of structures; rather, it just neglects to provide that definition. The IBC provision quoted above does allow a computation of floor area (albeit in what it defined as a building) when there are not enclosing walls.

Moreover, it makes sense to interpret the statute to include the floor area of structures because the Council clearly set up this floor area test as a measure of impact of new structures on the neighbors. To interpret the statute as Petitioner suggests would mean, in all cases, even huge structures with great potential impact on any site would not count towards the statutory test unless they are actually buildings, under the Zoning Code definition.

As stated in *Maryland-National Capital Park and Planning Commission v. Anderson*, 164 Md. App. 540, 569-570, 884 A.2d 157, 174-175 (2005), aff'd on appeal, 395 Md. 172 (2006):

> . . . In this regard, "we may … consider the particular problem or problems the legislature was addressing, and the objectives it sought to attain." *Sinai Hosp. of Baltimore, Inc. v. Department of Employment & Training*, 309 Md. 28, 40, 522 A.2d 382 (1987); see also *Romm v. Flax*, 340 Md. 690, 693, 668 A.2d 1 (1995). . . . "To effectuate the Legislature's intent, we may consider 'the consequences resulting from one meaning rather than another, and adopt that construction which avoids an illogical or unreasonable result…'"

In sum, only an interpretation which includes the floor area of structures as well as that of buildings comports with both the language of the statute and the clear legislative intent.

The consideration is somewhat different for the storage area constructed below the large shade area. Petitioner also argues that the floor space in that mostly underground storage facility does not count towards floor area. That argument is supported by the language of the Zoning Ordinance definition of floor area of buildings because that storage area is in a "cellar," and the floor space in a cellar is not counted towards total floor area of a building.[14] As can be seen from the photographs reproduced in Part IV of this report, the storage area in question is well below the grade of the large shade structure.

Even though the floor area definition in the Zoning Ordinance does not directly pertain to structures, it provides useful guidance on whether to include cellar space in any such calculation. Moreover, underground storage would have little or no impact on the neighbors to the site, so not including its floor area in any calculation would be consistent with the legislative intent in framing this test.

Having decided that the floor area measurements should include the floor area of the shade structures, we now turn to the calculation of how much the floor area on the site has been expanded by the structural additions to the site not yet approved by the Board of Appeals. Although one could argue that the floor area should be determined by the area "within the horizontal projections of the roof or floor above," as suggested in the IBC, the Hearing Examiner will use the more conservative approach and include the smallest area generated by the figures supplied by Petitioner in Exhibit 70, p.1, the "Measurement of 'inside' fence/wood railing [of the shade structures]," because that is the area that is clearly usable by the members.

Using those figures, the large shade structure adds 327.83 square feet (35.25 ft. X 9.3 ft.) and the small shade structure adds 218.55 square feet (23.5 ft. X 9.3 ft.), for a total addition of

[14] A cellar is defined in Zoning Ordinance §59-A-2.1 as "That portion of a building below the first floor joists of which at least half of its clear cellar ceiling height is below the average elevation of the finished grade along the perimeter of the building."

546.38 square feet of floor area. To this amount must be added the expansion (or "bump out") of the bathhouse, which went from 1,467 square feet to 1,840 square feet, an expansion of 373 square feet. Exhibit 33(a), p. 18. Added together, the floor area expansion amounts to 919.38 square feet (546.38 + 373). The original square footage of buildings on the site was 1,769 square feet (1,467 for the bathhouse and 302 for the filter/pump house). Dividing 919.38 by 1,769 indicates that the additional floor area amounts to an increase of about 53%, well over the 25% statutory threshold.[15]

In sum, the proposed modifications would expand "*the total floor area of all structures or buildings by more than 25%, or 7,500 square feet, whichever is less.*" Petitioner admits the actions of DIL did not "formally 'modify' the Swim Club special exception" (Exhibit 76, p. 4), and that approval of this modification request by the Board would serve to put the Board's imprimatur on the existing, but previously unapproved, structures. Exhibit 76, p. 2. Therefore, the Board must determine, at a hearing, that the modifications requested do not unduly burden the community.

C. The Effect of the Floor Area Expansion and Operational Impacts

Under the statutory language of Zoning Ordinance §59-G-1.3(c)(4)(A), the depth of the Board's inquiry depends not only on the floor-area threshold, but also upon a determination of whether "the expansion, when considered in combination with the underlying special exception, changes the nature or character of the special exception to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected. . . ." Subsection (4)(A) provides:

> *(A) After the close of the record of the proceedings, the Board must make a determination on the issues presented. The Board may reaffirm, amend, add to, delete or modify the existing terms and/or conditions of the*

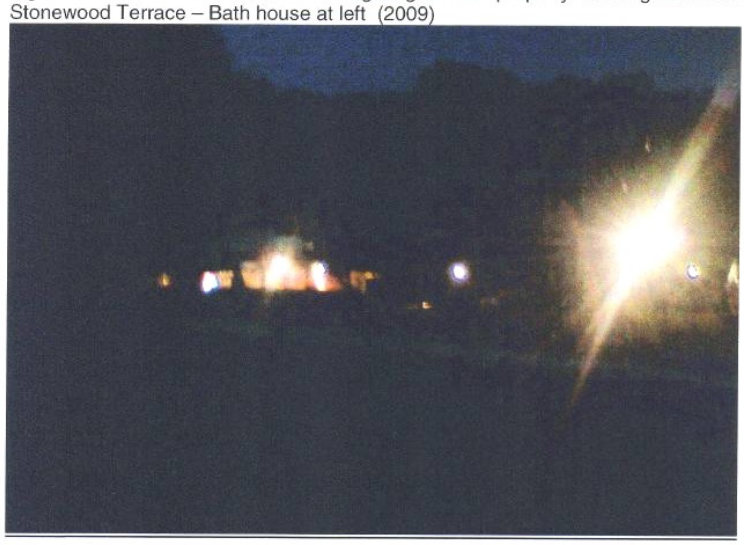
[15] Interestingly, Petitioner suggested at one point that the floor area of the pump house should not be included in the computation of the initial floor area because it is mostly below grade. Exhibit 36(a), p. 2. If one excludes the 302 square foot pump house from the computation, then the increase is an even greater percentage. In fact, if one begins the calculation counting only the bathhouse (*i.e.*, no pump house), the beginning figure is 1,467 square feet. The addition to the bathhouse alone (*i.e.*, without including the shade structures) is 373 square feet, as noted above. Dividing 373 by 1467, yields an increase of 25.43%, which figure slightly exceeds the 25% threshold.

> *special exception. The Board may require the underlying special exception to be brought into compliance with the general landscape, streetscape, pedestrian circulation, noise, and screening requirements of 59-G-1.26, if (1) the proposed modification expands the total floor area of all structures or buildings by more than 25%, or 7,500 square feet, whichever is less, and (2) the expansion, when considered in combination with the underlying special exception, changes the nature or character of the special exception to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected.* [Emphasis added.]

As noted earlier in this report, the Hearing Examiner does not find that the structural modifications which increase the floor area change the nature or character of the special exception to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected. The change in the fence may have some impacts on the neighborhood, but the Hearing Examiner does not consider them to be so significant as to be characterized as "substantial adverse effects." Lighting is both a structural and an operational issue, and it appears from the photographs supplied by Mr. Sadoff (Exhibits 46(j) and 33(a), pp. 95-99) and reproduced below, as well as his testimony (Tr. 180-181) and the letter from Ms. Keller (Ex 47), that glare is a substantial adverse effect.

Figure 65: Undirected and unshielded lighting on Pool property –looking east from Stonewood Terrace – left two lights are Bath house, right light is "Pavillion" building (2009)

Figure 66: Undirected and unshielded lighting on Pool property –looking east from Stonewood Terrace – Bath house at left (2009)



Since Petitioner has asked the Board to approve a lighting plan in its modification request, a hearing must be held to ensure that the lighting will not violate Zoning Ordinance §59-G-1.23(h):

> *(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.*

The lighting plan submitted by Petitioner for approval (Exhibit 31(b)) contains no cut sheets showing the lighting fixtures on site. Petitioner must bear in mind that the section quoted above requires not just photometric readings of 0.1 footcandles or less at the side and rear property lines, but also " *glare and spill light control device to minimize glare and light trespass."*

As already discussed in this report, it is the expansion of operations, in addition to the unshielded lighting, that creates the most significant impacts. The operational issues go further than just expanded operating hours; they include noise (especially electronically amplified sound), traffic and parking issues. There is ample evidence in the record that these additional activities are impacting the neighbors (Exhibits 33, 46, 47, 50, 56 and 73, and Tr. 144 - 188). Because of the limited scope of this inquiry, the Hearing Examiner does not attempt to decide here whether these additional activities are excessive,[16] but rather finds that they satisfy the statutory criterion of "changes the nature or character of the special exception to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected."

The same section of the Zoning Ordinance gives the Board an option in such cases. It specifies that "*The Board <u>may</u> require the underlying special exception to be brought into*

[16] The Board did not designate this matter as a major modification request, and therefore Petitioner has not been required to submit the filings that usually accompany such a request. The matter also has not been referred to Technical Staff of the Maryland-National Capital Park and Planning Commission for its review and analysis.

compliance with the general landscape, streetscape, pedestrian circulation, noise, and screening requirements of 59-G-1.26." While the Board is required to hold a hearing in this case, that does not mean it must re-review every aspect of the underlying special exception. A sensible reading of the statute would permit the Board to address the operational, fencing and lighting issues, at a hearing, without reviewing the entire special exception. At the very least, the Board should ensure that there is an suitable statement of operations and appropriate lighting, which will eliminate unacceptable adverse effects on the neighbors. Under §59-G-1.22(a),"The Board [or] the Hearing Examiner, . . .may supplement the specific requirements of this Article with any other requirements necessary to protect nearby properties and the general neighborhood."[17]

VII. CONCLUSION

The Board of Appeals referred Petitioner's modification request to the Hearing Examiner to conduct a public hearing limited to answering three questions. For the reasons summarized in Part II of the report and spelled out in more detail in Part VI of the report, the Hearing Examiner concludes the requested modifications cannot be approved under Section 59-G-1.3(c)(1) of the Zoning Ordinance; that the proposed modification expands the total floor area of all structures or buildings by more than 25%; and that the Board must hold a hearing to ensure that the special exception is brought into compliance with the lighting and operational standards necessary to avoid any undue impact upon the neighbors.

[17] This is a case which would benefit from mediation. It is in the interests of all parties to work out these differences amicably. Issues which should be addressed include amplified sound, hours of operations, special times for team warm-ups, hours allowed for maintenance; hours allowed for lighting (all of which should be properly shielded); traffic control; parking issues, and the like. Even without mediation, the Hearing Examiner would urge Petitioner to submit a proposed Statement of Operations to the Board, and a lighting plan, with cut sheets showing the various fixtures, to make it clear that all lighting is appropriately shielded. It would also be helpful to share such submissions with the opposing neighbors in an effort to get their input and work out a solution. It should be noted that Mr. Sadoff asserts in his letters that his comments should also be treated as a complaint under the Zoning Ordinance. Since such complaints can be filed with the Board or DPS, the Board should be alerted to the fact that such a complaint has been filed and calendar it as such.

Dated: June 28, 2010

Respectfully submitted,

_____
Martin L. Grossman
Hearing Examiner