

Technical Staff at the Maryland-National Capital Park and Planning Commission (“MNCPPC”) reviewed the petition and, in a memorandum dated April 2, 2007 (Exhibit 17), recommended approval of the petition with conditions.¹ Technical Staff submitted supplemental information on April 26, 2007 in response to questions from the Hearing Examiner. See Ex. 19. The Montgomery County Planning Board considered this application at its regular meeting on April 12, 2007 and voted unanimously to recommend approval with the conditions recommended by Technical Staff. See Ex. 18. Commissioner Bryant recommended that “the Hearing Examiner examine whether the vastness of the asphalt driveway needs to be enhanced with plantings (e.g., potted plants) so that the view of the house does not appear to be a business.” Ex. 18.

A public hearing was convened as scheduled on April 27, 2007, at which time evidence was presented in favor of the petition. No opposition was presented at the hearing, nor is any reflected in the record, although the case was initiated due to a complaint that led to an inspection a notice of violation. The record was held open for supplemental submissions from Petitioners and closed on May 25, 2007.

II. BACKGROUND

For the convenience of the reader, background information is grouped by subject matter.

A. The Subject Property

The subject property is located at 10948 Bellehaven Boulevard in Damascus, at the entrance to a five-home cul de sac, slightly west of Ridge Road and slightly east of Kings Valley Road. The property is approximately 31,684 square feet in size and rectangular in shape. It is classified under the RE-2C Zone.

The subject property is developed with a two-story-plus-basement, single-family detached dwelling containing approximately 5,120 square feet of space. The dwelling is set back about 60 feet from the front property line, and a covered porch at the rear of the dwelling is approximately 100 feet from the rear lot line. The property has a substantial slope towards the rear,

¹ The Staff Report is quoted and paraphrased liberally in Part II of this report.

with a 20-foot change in elevation from the front of the house to the rear property line. The front, side and rear yards are nicely landscaped with mature trees, shrubs and flowers. Parking is available on site in a two-car garage and on an asphalt driveway that is approximately 60 feet deep and widens from about 20 feet at the street line to 32 feet at the garage, creating an additional parking space to the west of the garage.

The photographs that follow show the subject property from various angles and give an impression of the immediate neighborhood.

Front of House, from Ex. 9



Rear and West Side of House, with Rear Entrance to Office Area Visible, from Ex. 9



Path from driveway to rear of house

Entrance to Office Area

Rear and East Side of House, from Ex. 9. Note Slope to Rear.



B. The Neighborhood and its Character

Technical Staff described the general neighborhood of the subject site as bounded roughly by Kingstead Road to the north, John H. Haines Park to the east, Middleboro Drive to the south and Kings Valley Road to the west. This neighborhood is shown on the aerial photograph below, which the Hearing Examiner downloaded from Google Earth.² The aerial photograph that follows, which was downloaded from Google Earth, suggests that the general neighborhood contains single family homes, large forested areas and a park. The submitted zoning map indicates that roughly the western half of the general neighborhood as described by Staff is classified in the RE-2C Zone, and the eastern half, starting just a few lots away from the subject site, in the R-200 Zone. Technical Staff reports that both sides of Bellehaven Boulevard are occupied by single-family detached dwellings with two-car garages, sitting substantial distances back from the street.

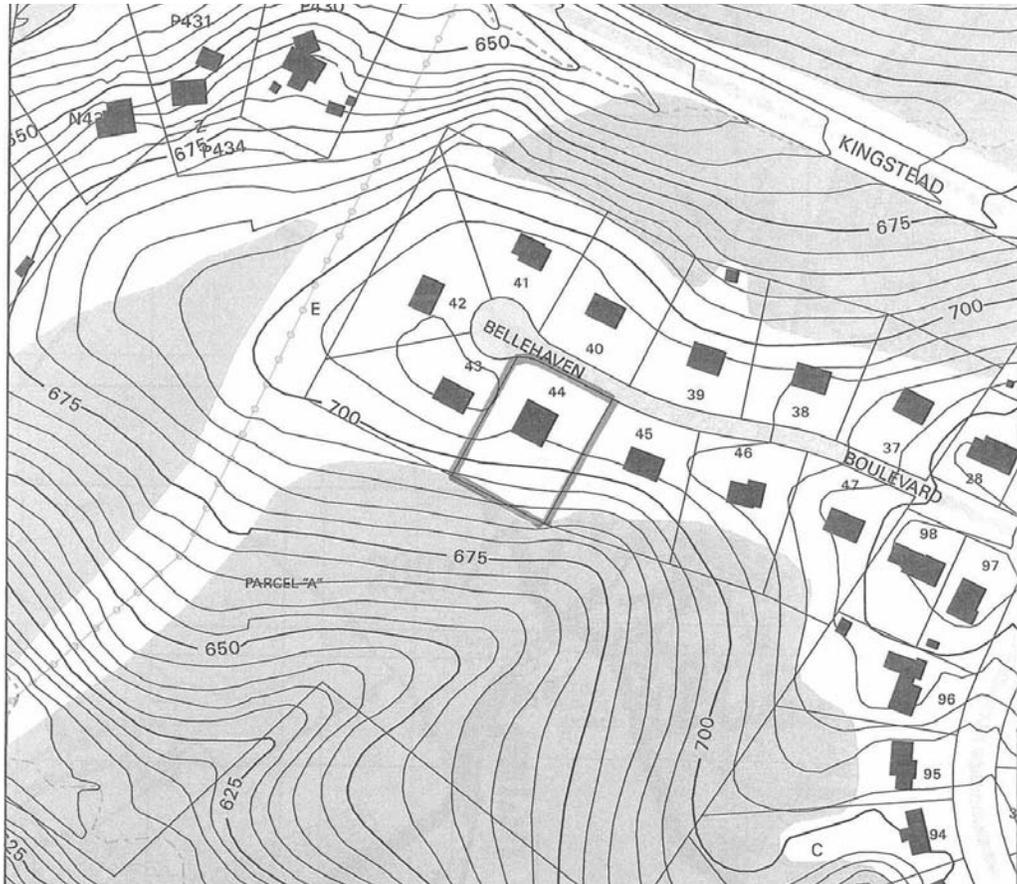
Google Earth Aerial Photograph



² The Hearing Examiner hereby takes official notice of Google Earth's widely known mapping capabilities.

The relationship of the subject property to its immediate neighbors may be seen on the vicinity map below, excerpted from the Staff Report.

Vicinity Map, from Staff Report



C. Master Plan

The subject property is located within the Neighborhood Transition Area of the 2006 *Adopted and Approved Damascus Master Plan* (the "Master Plan"). The Master Plan is silent concerning special exceptions in the Neighborhood Transition Area, but reconfirmed the existing RE-2C zoning for the subject property, which permits major home occupations by special exception.

D. Proposed Use

Petitioner Deborah K. Prettyman has operated her own tax consulting business for businesses and individuals at the subject site, in the basement of her home, for some time. Following a complaint, on April 3, 2006 the Department of Permitting Services inspected the subject property

and cited Ms. Prettyman for operating a major home occupation in an RE-2C Zone without a special exception.³ See Ex. 12(c). The Notice of Violation directed Ms. Prettyman to either cease the use or file for a special exception. The present petition was originally submitted on September 29, 2006, but was not considered complete and accepted for filing until February 5, 2007. See Ex. 15.

Ms. Prettyman proposes to continue operating her tax consultant business, American Financial Services, at the subject site. In addition to Ms. Prettyman, the business has two full-time equivalent positions for non-residents. One of these is held by a full-time employee and the other is held jointly by two part-time employees who job-share. Section 59-G-2.29 limits a major home occupation to a maximum of two non-resident employees or associates, "to be determined by the Board, taking into account the impact on neighboring residences of the resultant parking and traffic." In the Hearing Examiner's view, this language gives the Board the discretion to allow Ms. Prettyman to employ three individuals, provided that no more than two come to the site on any one day; this restriction, which Ms. Prettyman agreed to accept, would keep the number of employee trips to the site each day, and the number of non-resident employees on site at any one time, at the same level as if Ms. Prettyman had only two employees. As noted in the recommended conditions of approval, any failure to strictly adhere to this condition would be grounds to revoke the special exception.

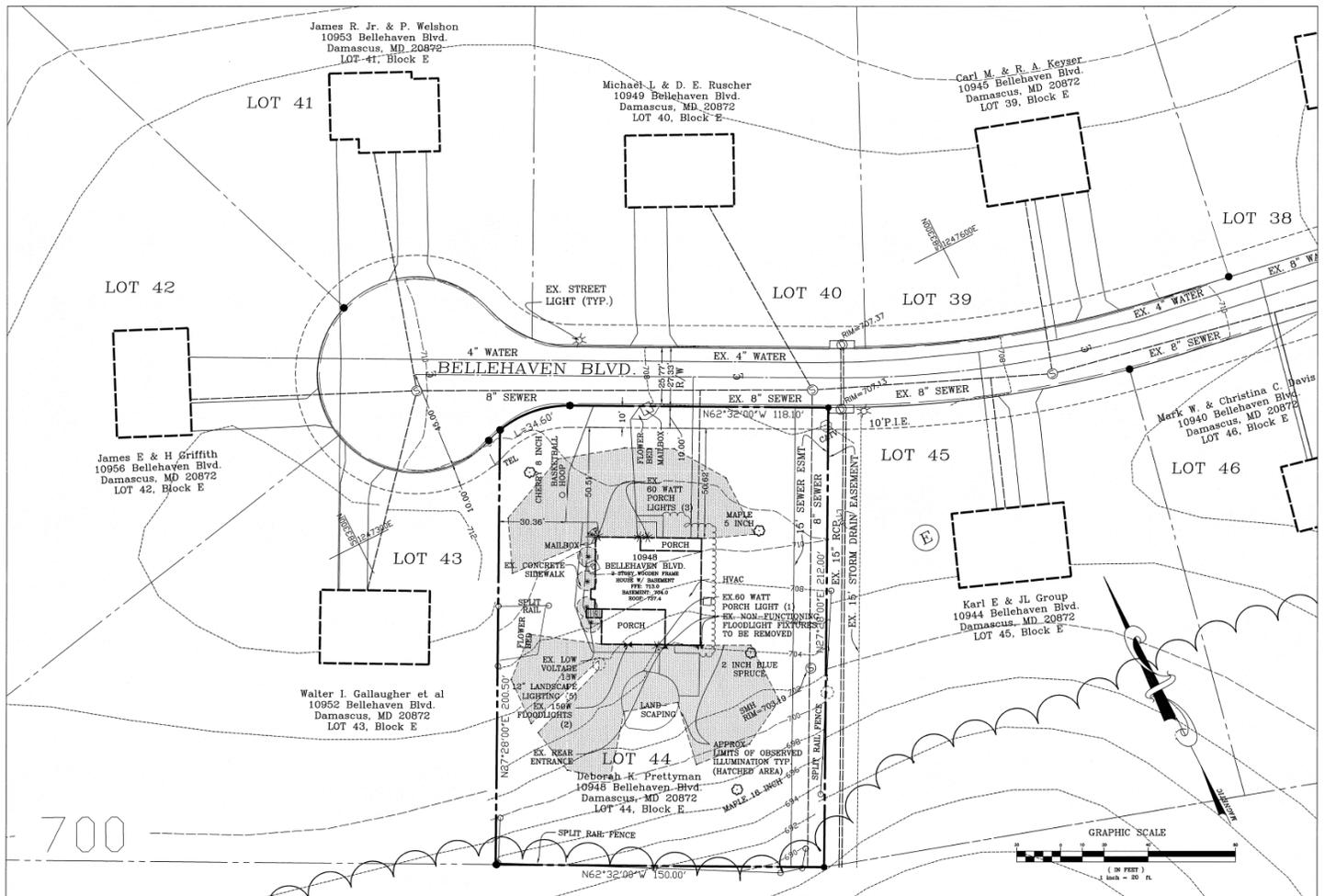
Ms. Prettyman's business operates in the basement of her home, which is accessed via a paved pathway from the driveway, along the east side and rear of the house, to a rear door into the basement. The basement contains an open work area and waiting room, as well an enclosed office for Ms. Prettyman. Hours of operation are proposed to be 9:00 a.m. to 7:00 p.m. Monday through Saturday during tax season (January through April), and 9:00 a.m. to 4:00 p.m. Monday through Thursday the rest of the year, except that on Fridays outside tax season, employees may work on

³ The record does not indicate how long Ms. Prettyman has operated her business at this location. One of the neighbors who wrote a letter in support stated that the business has not been a problem "in all the years we have been neighbors." See Ex. 5(i). Records in the database of the Maryland Department of Assessments and Taxation indicate that Ms. Prettyman acquired the subject property in February 2005, suggesting that she has been living there for only two years. (The Hearing Examiner hereby takes official notice of the MDAT information on the subject property.) The 2005 transaction was not arms-length however, and the price is listed as zero, so the data is difficult to interpret. At a minimum, Ms. Prettyman was operating her business at the subject site at the time of the April, 2006 inspection.

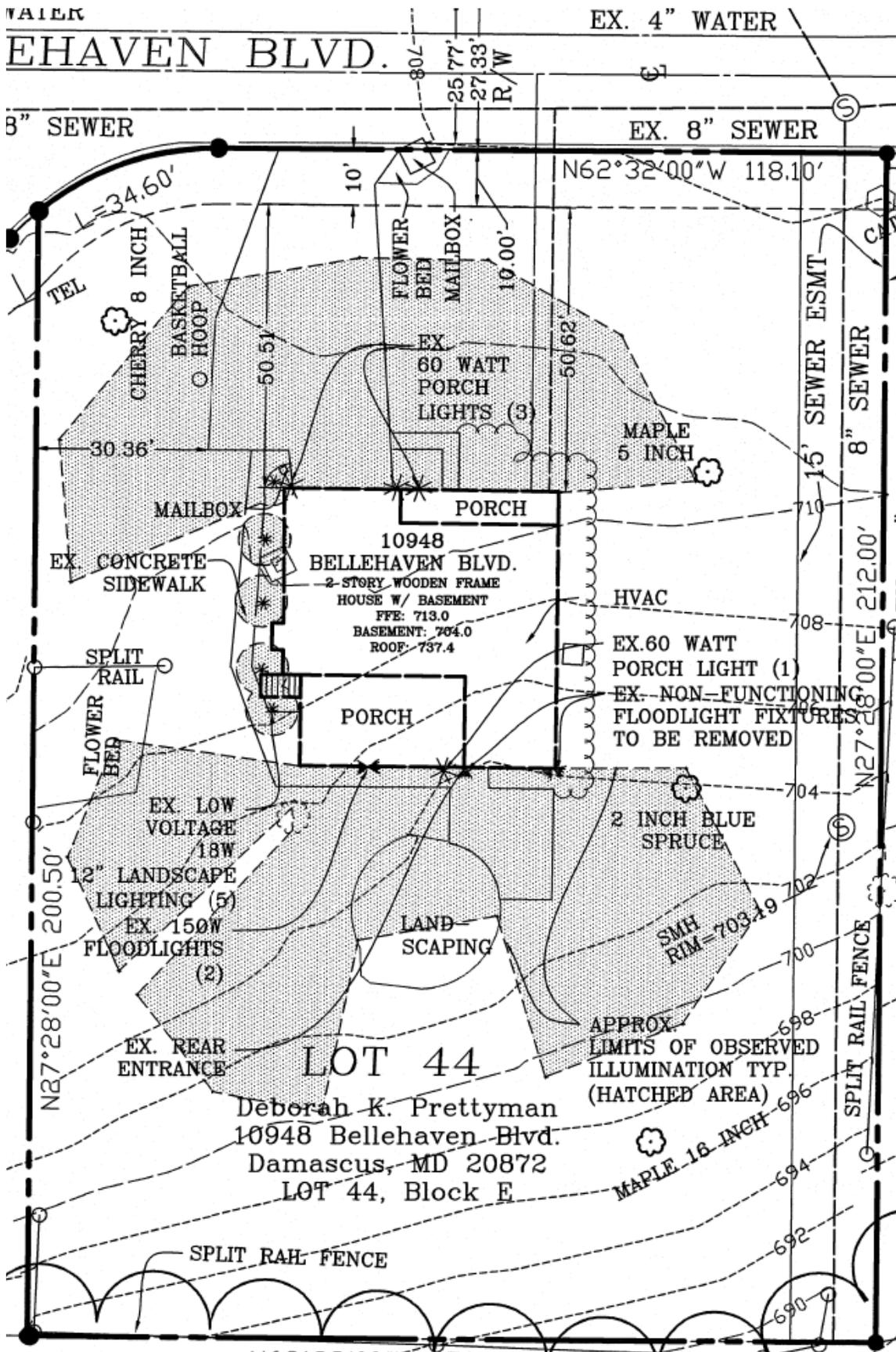
site, but no client visits would be scheduled. Ms. Prettyman requests approval for up to ten client visits per day and 50 per week during tax season, and up to three client visits per day and 10 per week the rest of the year.

A Site Plan showing existing conditions on the site is reproduced on the pages that follow. No exterior changes to the site are proposed.

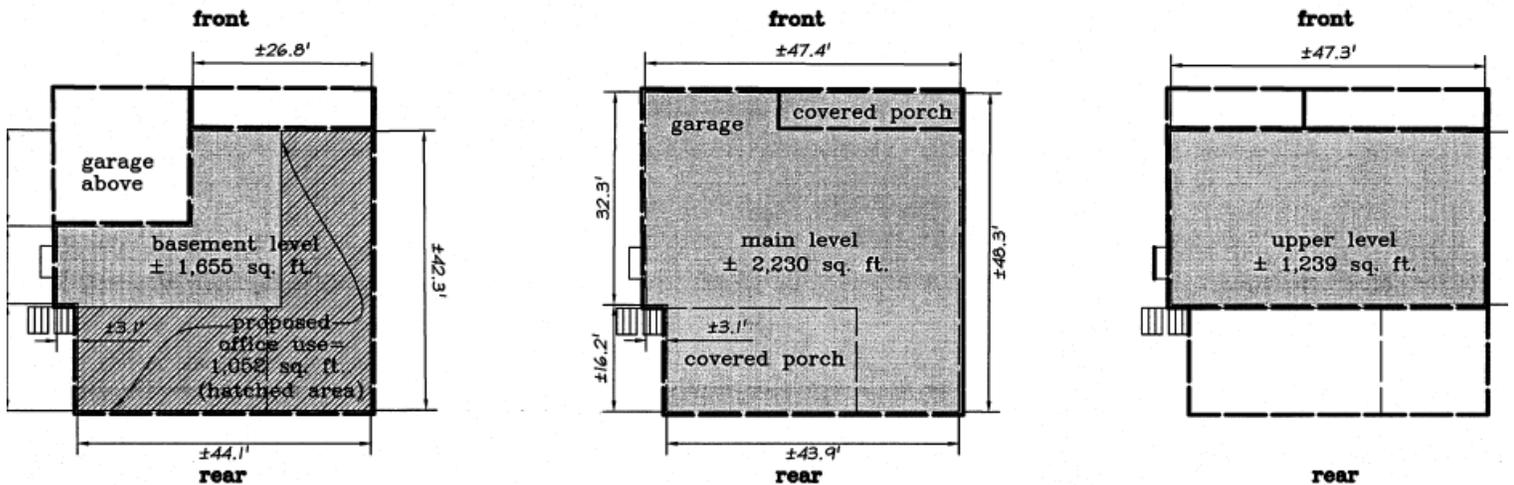
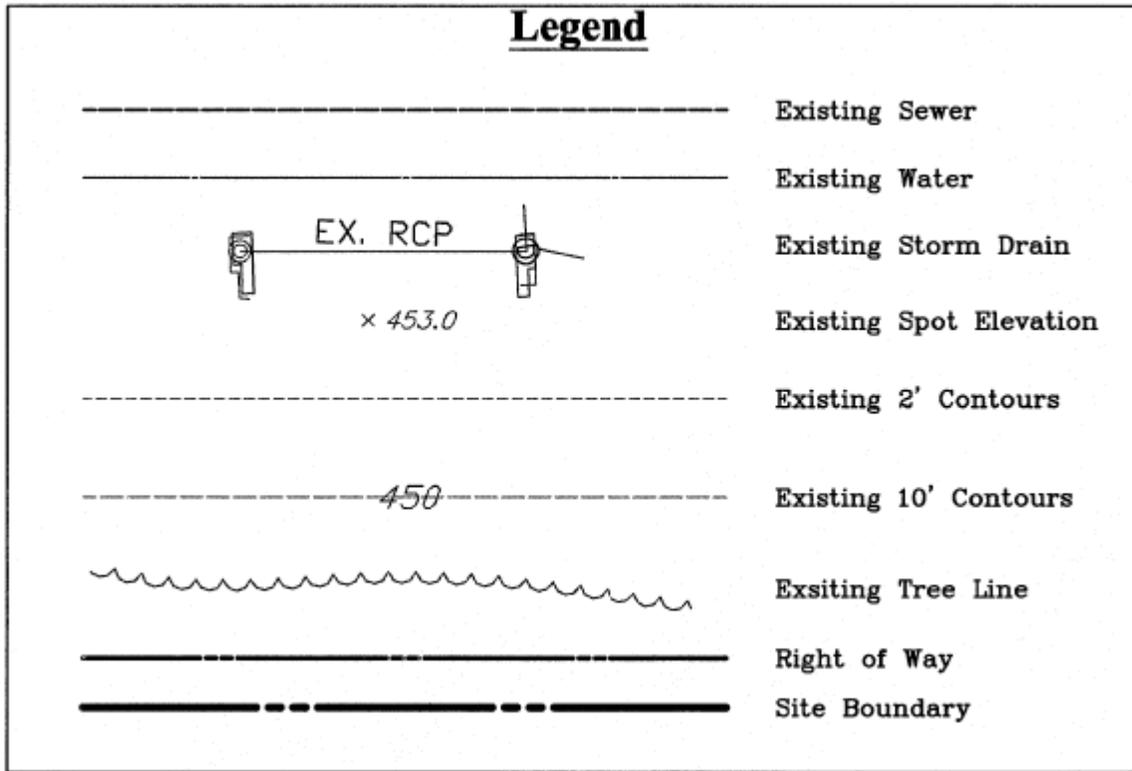
**Full Site Plan Graphics Showing Neighboring Lots, from Ex. 22(b)
(see next page for subject site at larger scale)**



Site Plan Graphics of Subject Site Only, from Ex. 22(b)



Site Plan Legend and Floor Plans, from Ex. 22(b)



*Existing Total Floor Area of Building= approx. 5,120 sq. ft.

*Total floor area calculations are from the dimensions of the interior walls per MCZO definition of "Floor Area of Building, Total"

Site Plan General Notes, from Ex. 22(b)

General Notes

1. The subject property is located on Montgomery County tax map FX121, Lot 44, Block E, Spring Garden Estates, Plat No. 15969.
2. The subject property is 31,684 sf, and is currently zoned RE2C (residential, one family). Lot was created through an RE-2C cluster development per a record plat prepared by Jerome J. Norris & Associates entitled "Plat 8, Lots 37-47, Block E, Spring Garden Estates" dated April, 1986.
3. The outline of the property shown hereon is taken from the recorded subdivision plat for the property, Plat 8 - Spring Garden Estates Recorded as Plat Number 15969.
4. The topography shown hereon is taken from a field topographic survey conducted by Rodgers Consulting, Inc. and is shown at a 2' contour interval.
5. Project horizontal datum: Plat Datum based on Plat 15969.
Project vertical datum: NGVD 29 - Based on observations taken on WSSC facilities in the vicinity of the project.
6. The subject property does not lie in a floodplain area as determined by the floodplain insurance rate map (firm), community panel number: 240049 0075 b.
7. There is no existing forest cover currently on the site.
8. There are no historical uses or significance on the property; within or adjacent to the site according to the locational atlas & index of historical sites in Montgomery County (1976). the master plan was also consulted and shows no recommended additional sites on or adjacent to the subject property.
9. Soils information was taken from the United States Department of Agriculture & Natural Resources Conservation Service's "Soil Survey of Montgomery County, Maryland", issued July, 1995. The property is located on map 4. All soils on the subject property are 16b - Brinklow-Blocktown Channery silt loams, w/ 3 to 8 percent slopes.

10. Existing RE-2C Cluster development standards:

<u>Standard</u>	<u>Req.</u>	<u>Existing Bldg/Lot.</u>
min. lot width (at street line):	25'	> 25'
min. setback from street:	40'	> 40'
min. side yard setback:	15'	> 15'
min. rear yard setback:	15'	> 15'

Proposed Program:

1. This site plan does not propose any future development or physical improvements and is to be used only for a Special Exception Application to allow a Major Home Occupation use on the premises and within the existing single family home subject to the provisions of Sec.59-G-2.29 of the Montgomery County Zoning Ordinance.
2. As no development is proposed, the threshold of applicability for a Natural Resources Inventory or a Forest Conservation Plan is not reached and have thus not been provided.
3. Existing total floor area= ±5,120 sq. ft. (see detail, this sheet)
4. Proposed major home occupation use floor area= 1,052 sq. ft. (1,052 sq. ft. / 5,120 sq.ft.= ±21 % of the total floor area of the dwelling unit). See detail this sheet.
5. Per Sec.59-G-2.29, maximum floor area used for major home occupation must not exceed 33% of the total floor area or 1,500 sq.ft., whichever is less (21% or 1,052 sq.ft. is proposed, see note #4).
6. Major home occupation will have two (2) full-time equivalent nonresident positions (one (1) full-time employee and two (2) job-share employees).
7. Per Section 59-G-2.29(j)(1), there must be one parking space for each nonresident employee or associate plus one parking space for every client or customer allowed by the conditions of the special exception to visit in any one-hour period. These spaces must be in addition to the number of spaces required for the residential use of the property.
 - * 2 parking spaces required for the dwelling unit (provided in garage)
 - 2 parking spaces for each nonresident position (provided in driveway)
 - 2 parking spaces for number of clients allowed to visit in any one-hour period (provided on-street pursuant to Section 59-G-2.29(j)(2))
8. A waiver for landscape screening per Section 59-E-2.83(c) has been applied for.
9. Approximate limits of exterior light fixture illumination are based on field observations and tape measurements taken on May 9th, 2007.

E. Parking

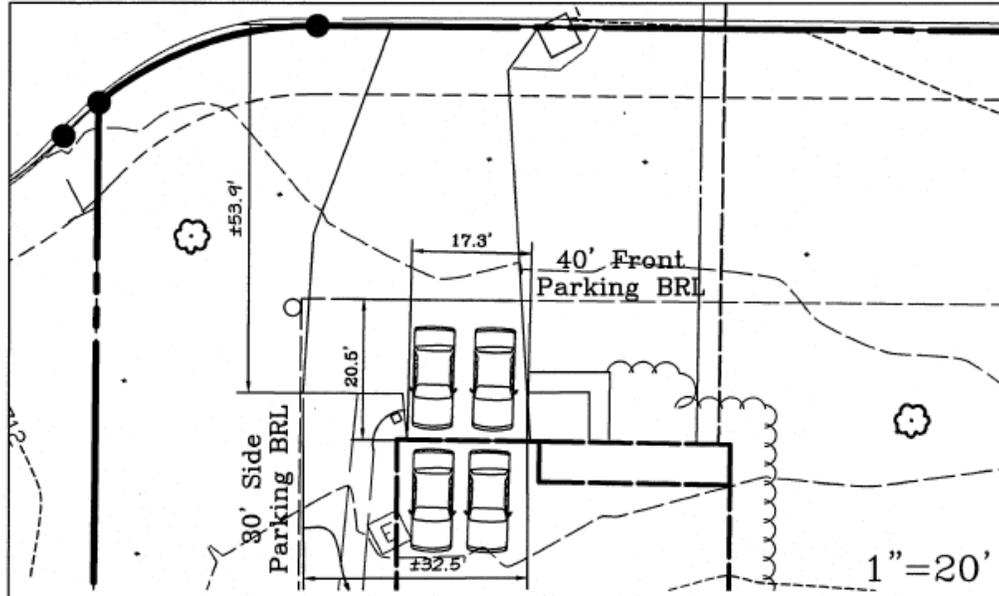
Parking in this case raises two issues: the proper location for parking and whether to require standard screening and shading. Each is addressed in turn.

A specific condition of major home occupations requires that off-street parking must be provided on-site in accordance with the relevant provisions of Article 59-E. See Section 59-G-2.29(j). The Board of Appeals is authorized to take into account the availability of on-street parking, provided that such parking would not have an adverse impact on neighboring residences. See *id.* Section 59-G-2.29 states that the required parking spaces “must be located in the side or rear yard, except that the Board may approve parking in a driveway traversing the front yard if it finds that there is inadequate space for the parking or necessary screening in the side or rear yard, and the front-yard driveway can be screened in accordance with Section 59-E-2.83.”

Per Article 59-E, a single-family, detached home requires two parking spaces and the amount of office space proposed in this case requires four spaces. Thus, the subject site requires a total of six parking spaces. Staff stated that the subject property has two parking spaces in the garage for the residential use, and four spaces in the driveway for the special exception. See Staff Report at 13. Staff describes the driveway as a “typical residential parking configuration” that will not adversely affect the residential nature of the area. In addition, Staff notes that on-street parking is available in front of the house. Staff does not support requiring parking to be placed in the side or rear yard because it would required additional impervious area and “would begin to change the appearance of the neighborhood.” Ex. 19.

Petitioner agrees that the two residential spaces are located in the garage, but proposes to provide two spaces for the special exception use in the driveway and two on the street, rather than four in the driveway. Petitioner’s landscape architect maintained in his testimony that no more than two cars can park in the driveway legally because a third car, in the driveway extension to the right, could not pull up far enough to stay out of the front parking restriction line under Section 59-E-2.81. This is illustrated on the parking diagram below, excerpted from the Site Plan.

Site Plan Parking Diagram, from Ex. 22(b)



Section 59-E-2.81, "Parking facilities within or adjoining residential zone," requires that all parking surfaces, spaces and driveways be set back a distance not less than the applicable front, rear or side yard setback required for the adjoining or confronting residentially zoned property. In the Hearing Examiner's view, following the basic rule of statutory interpretation that the specific governs the general, this section is superceded in the present case by Section 59-E-2.83, "Parking and Loading facilities for special exception uses in residential zones," which focuses specifically on special exception parking in residential neighborhoods. Section 59-E-2.83 applies to any off-street parking facility for a special exception use in a one-family residential zone if three or more parking spaces are provided. It requires that each parking and loading facility, including each entrance and exit driveway, be set back a distance not less than the applicable building front and rear yard and twice the building side yard required in the zone. It does not contain the specific reference in Section 59-E-2.81 to all parking spaces being set back per the front yard setback, so it is unclear whether that restriction is intended to apply. In the Hearing Examiner's experience, small special exceptions are frequently permitted to make use of the full length of a driveway for parking purposes.

Ms. Prettyman testified that she generally directs her employees to park in the extension of the driveway to the right of the garage, to avoid blocking the garage. She added that her

employees often park in the street, to avoid getting blocked in if Ms. Prettyman's children or their friends park in the driveway. Clients are not given any instructions as to where to park. One issue not discussed at the hearing was how many clients are on site at any one time. The Staff Report states that no more than two clients would visit the property at any one time, suggesting that Petitioner provided this information to Staff. Moreover, In light of the small size of the business, the Hearing Examiner is convinced that limiting the number of clients at one time to two, which would limit the need for parking to the four spaces required under Article 59-E, would not present a hardship. This restriction is reflected in the conditions of approval recommended at the close of this report.

Considering the testimony and the recommended limitation on the number of clients on site at one time, the notion that only two parking spaces in the driveway would be used for the special exception is plausible. Moreover, the evidence establishes that ample parking is available on the street, with 80 feet of space available in front of the site (not counting the driveway) and a neighborhood of large lots with two-car garages and wide driveways. Accepting the notion that two spaces in the driveway and two on the street comport with reality, the proposal to ratify this arrangement must be squared with the provisions of Section 59-G-2.29(j) concerning when parking may be located in the front yard. To reiterate, Section 59-G-2.29 states that the required parking spaces "must be located in the side or rear yard, except that the Board may approve parking in a driveway traversing the front yard if it finds that there is inadequate space for the parking or necessary screening in the side or rear yard, and the front-yard driveway can be screened in accordance with Section 59-E-2.83."

Petitioner's landscape architect, Mr. Leakan, testified that constructing a parking area in the side or rear yard would be difficult, expensive and inappropriate. The side yard is approximately 40 feet wide, which is only ten feet wider than the side yard setback that would be required under Section 59-E-2.83 (twice the 15-foot building side yard setback in the RE-2C Zone). Even if a waiver of the side yard setback were granted, installing a parking facility for even two or three cars would require moving or removing the walkway that leads to the office entrance in the rear, probably relocating the staircase to the porch, and regrading to deal with the existing rearward slope.

The rear yard is spacious, but installing a parking lot in that location would require all the changes listed in the previous sentence to extend the driveway through the side yard, plus considerable engineering work due to the significant change in grade, and retaining walls or expensive earth work that would probably “go against the character of the neighborhood.” Tr. at 31.

Based on the preponderance of the evidence, the Hearing Examiner concludes that there is inadequate space for parking in the side yard and inadequate usable space in the rear yard. Moreover, requiring Ms. Prettyman to extend her driveway all the way to the rear of the house, and to spoil the green open space that she and her neighbors enjoy with retaining walls and asphalt, would be counter to the purpose of 59-G-2.29(j), which is to avoid special exception parking that will commercialize a residential neighborhood or change its character.

For similar reasons, the Hearing Examiner agrees with Petitioner’s contention that no screening should be required for the driveway. Section 59-E-2.83 requires that special exception parking and loading facilities, including driveways, be “effectively screened from all abutting lots.” Screening is required to be at least six feet high, consisting of evergreen landscaping, a solid wood fence, a masonry wall, a berm, or a combination of these measures. Along a street right-of-way, screening must be at least three feet high, consisting of evergreens, solid wood fencing or a masonry wall. These screening requirements are tempered, however, by the direction that screening “must be provided in a manner that is compatible with the area’s residential character.” Section 59-E-2.83(c). In this case, as emphasized by Mr. Leakan and Technical Staff, the neighborhood has an open character that would be marred by any attempt to screen the driveway from view, whether with fencing, a wall or tall landscaping. Ms. Prettyman testified that many of her neighbors have asked her not to put up any screening along her driveway, and two of her neighbors wrote letters of support making the same request. Section 59-E-2.83 also requires that 30 percent of the parking area be shaded, which likely could not be accomplished at the subject site without detracting from the open feel of the neighborhood. Pursuant to Section 59-E-4.5, the Board of Appeals has the authority to waive any requirement of Article 59-E, including the screening and shading requirements of Section

59-E-2.83. The Hearing Examiner recommends such a waiver in this case, as does Technical Staff. See Ex. 19.

F. Landscaping, Lighting, Signage and Environmental Issues

Ms. Prettyman proposes no new landscaping. As noted earlier, the front, side and rear yards are nicely landscaped with mature trees, shrubs and flowers.

Exterior lights consist of four 60-watt lights, one near the garage, two on the front porch and one near the rear door. Two-non-functioning floodlights shown on the rear wall of the house in photographs submitted into the record were removed after the hearing. See Ex. 23(a). Mr. Leakan certified, based on observations made during a nighttime site visit, that the existing lighting causes no excessive glare or light spillover onto adjacent properties. He further opined that the exterior lighting is consistent with the style, character and levels of adjacent properties and in harmony with the character of the neighborhood. See Ex. 22(c).

Ms. Prettyman proposes no signage in connection with the proposed use.

Technical Staff reports that the subject petition raises no environmental concerns. The property contains no environmentally sensitive areas, and the proposal is exempt from forest conservation requirements because it would not result in clearing any existing forest.

G. Development Standards

The existing dwelling satisfies applicable development requirements of the zone, as set forth in the following table, adapted from the Staff Report.

Compliance with Applicable Development Standards under the RE-2C Zone

Development Standard	Required	Provided
Minimum Lot Area	25,000 sq. ft.	31,684 sq. ft.
Minimum lot width at street line	25 ft.	118 ft.
Minimum lot width at front building line	150 ft.	150 ft.
Minimum setbacks		
From street	40 ft.	Approx. 60 ft.
Side yard	15 ft.	Approx. 30 ft.
Rear Yard	15 ft.	Approx. 100 ft.
Maximum building height	50 ft.	Approx. 25 ft.
Minimum building coverage	25%	Approx. 8%

H. Traffic

Based on the small number of employees and clients visits, Technical Staff estimates that the proposed use would generate approximately two to three peak-hour vehicle trips during tax season, and even fewer outside of tax season. See Staff Report at 4. This is far below the threshold of 30 trips that requires a traffic study to comply with Local Area Transportation Review requirements. Staff opines that the proposed special exception would not adversely affect the surrounding roadway system. See *id.* at 5.

I. Community Participation

The record contains ten letters in support from residents of Bellehaven Boulevard. See Exs. 5(i) through 5(x). All of the letters state that the writers have experienced no problems of any kind in connection with Ms. Prettyman's business. One writer states that he does not want "any type of natural or man-made fence placed between our properties to hide any human or automotive traffic between our homes." Ex. 5(ix). Another states that the writer has no objection "as long as there is no alteration to the existing natural beauty of our area. We do not want unsightly masonry walls erected which will obstruct our views. Our natural landscape and our woods are sufficient to create a natural barrier." Ex. 5(v).

Although the genesis of this application was a complaint to DPS, the record reflects no opposition to the petition.

III. SUMMARY OF HEARING

Petitioner's first witness, Matthew Leakan, was designated an expert in landscape architecture. He described the subject property, which is a single-family detached home with a 2,000-square foot footprint on three-quarters of an acre in an RE-2C cluster subdivision. He noted that all of the houses in the neighborhood are set back far from the street, much farther than required under the RE-2C cluster development standards. The result, Mr. Leakan explained, is to create a neighborhood with enormous front yards and a very open character. There are no sidewalks, just a roll curb for

driveway access and a 27-foot right-of-way which, without sidewalks, is essentially 27 feet of pavement, curb to curb.

Mr. Leakan stated that the total floor area of the building is approximately 5,100 square feet and the floor area used for the major home occupation occupies approximately 1,052 square feet. Thus, the home occupation occupies about 21 percent of the total floor area, well under the maximum permitted of 33 percent.

Turning to parking, Mr. Leakan noted that the Zoning Ordinance requires two spaces for the single-family residential use and four for the office use, based on its square footage, for a total of six spaces. He stated that the two spaces for the residential use are located in the garage, two spaces for the office use are on the driveway and two are on the street. Mr. Leakan explained that although the driveway is large, only two cars can park on it without the back edge of a car spilling over the parking restriction line, which he related to the building restriction line from Section 59-E-2.81 of the Zoning Ordinance. The driveway spans the width of the two-car garage, plus it has an additional area of pavement to the right of the garage (looking from the street). Mr. Leakan stated that a third vehicle can park in the part of the driveway to right of the garage. Because of a "notch" in that part of the driveway to accommodate a walkway, however, a car parked in that area would overhang into the front setback. For this reason, he explained, Ms. Prettyman does not seek to take credit for that parking space as part of her special exception application. Mr. Leakan acknowledged that ignoring the parking restriction line, as many as seven or eight cars could fit in the driveway and garage.

Ms. Prettyman testified that her employees park either on the driveway or in the street. She explained that they sometimes park in the street to have ready access in and out, because otherwise they might get blocked in if Ms. Prettyman's children or their friends have cars in the driveway. She stated that practically speaking, only one car can park on the driveway without blocking the garage – two might be able to fit, but they would be "right on top of each other." Tr. at 23. Three cars can fit across the full width of the driveway, blocking the garage. She requests employees to park in the part of the driveway that does not block the garage, and does not give particular parking instructions to her clients.

The Hearing Examiner explained that in her view, Section 59-E-2.81, which applies to any use that has a parking facility (defined as six or more parking spaces) does not apply here, partly because the special exception does not require six or more parking spaces, and partly on the general rule of statutory construction that the specific trumps the general, so the more specific requirements of Section 59-E-2.83, for special exception parking facilities in residential zones, should be applied. Tr. at 34. Petitioner's counsel interjected that if Section 59-E-2.83 applies, its screening requirements arguably do not apply with less than three parking spaces, and Ms. Prettyman is providing only two spaces in the driveway. Alternatively, if the screening requirement is considered applicable, Ms. Vaias argued that it should not be imposed because it would be incompatible with the character of the neighborhood.

Ms. Prettyman testified that her neighbors have "begged" the Board of Appeals not to require screening for her driveway because one of the things local residents love about the neighborhood is the very open feeling that it has, which would be compromised by any screening, even a hedge. She added that most neighbors have commented that they generally have more cars parked at their homes than are ever parked at Ms. Prettyman's home.

Ms. Prettyman stated that clients enter her home by following the sidewalk on the side of the house to the rear entrance. She noted that the driveway, the sidewalk and the addition at the rear of the house all existed when she bought it.

The Hearing Examiner asked Mr. Leakan whether four parking spaces, or even two parking spaces, could fit in the side yard of the property, pointing out that the Zoning Ordinance defines "side yard" to including only the space between the front line of the house, the back line of the house and the side property line. Mr. Leakan stated that parking could not be installed in that area as currently configured. He noted that to try and fit parking in that area would very likely run into topographic constraints or a horizontal constraint. One could create a long, narrow area for three cars to park one behind the other, but only with considerable alteration of the elevation of the ground. It would also require re-routing the sidewalk that provides access from the front of the house to the rear entrance into the office, as well as a staircase leading to a raised deck. When asked about putting

parking in the rear yard, Mr. Leakan stated that the rear yard has an even greater elevation change. He suggested that one could probably construct a parking area in the rear yard, but at considerable engineering expense, and with retaining walls or expensive earth work that would probably “go against the character of the neighborhood.” Tr. at 31. Mr. Leakan opined that putting a parking area in the side or rear yard of the site would not be a reasonable land planning choice, in view of the space constraints and the topography.

Mr. Leakan opined that the proposed use would have no non-inherent adverse effects. He stated that the proposed use would comply with all the standards and requirements of the RE-2C Zone and those for a major home occupation. He opined that the proposed use would satisfy each of the general and specific standards for the use.

Ms. Prettyman stated that she is a tax consultant for businesses and individuals, and seeks the proposed special exception to continue operating her business from her home. She reiterated that employees and clients reach the office part of her home by following the sidewalk on the side of the house to the rear, basement entrance. They enter an open work area and waiting room where one employee works. Ms. Prettyman’s work space is in a separate room with a door, and there is a back section with two desks as additional work space. Other than cars arriving and people walking to the rear entrance, the business takes place entirely inside the dwelling. Ms. Prettyman noted that she has three employees, one full-time and two who job-share, who would not be on the property at the same time. When the Hearing Examiner explained that Technical Staff had recommended the two job-sharing employees not be permitted on the premises within the same day, to limit the number of employee trips to the site per day, Ms. Prettyman agreed to a condition of approval that would allow no more than two non-resident employees on site per day.

With regard to client visits to the site, Ms. Prettyman requested approval for up to ten client visits per day and 50 per week during the tax season (January through April), and up to three client visits per day and 10 per week the rest of the year. Her hours of operation are proposed to be 9:00 a.m. to 7:00 p.m. Monday through Saturday during tax season, and 9:00 a.m. to 4:00 p.m.

Monday through Thursday the rest of the year, except that on Fridays outside tax season employees may work on site, but no client visits would be scheduled.

Ms. Prettyman described the equipment used in connection with her special exception, which is limited to general office equipment – computers, printers, scanners, copiers, telephones, calculators, desks. She stated that none of this equipment has any noise or other impacts outside the home. Her business does not involve the display or storage of goods, nor are there any commercial vehicles associated with the use. Ms. Prettyman stated that deliveries are generally from FedEx or UPS, or an occasional client dropping off information. She agreed to a condition of approval that would limit deliveries to her home in connection with the special exception to delivery services that commonly deliver to private homes. Finally, Ms. Prettyman agreed to abide by any conditions imposed by the Board of Appeals and to renew the special exception every two years, as required.

3. Martin Klauber, People's Counsel for Montgomery County

Mr. Klauber participated in the early part of the hearing, but was unable to stay for the full proceeding due to a prior commitment. He observed that Petitioner's counsel had indicated there are no plans for a sign at this location, and stressed to the Petitioner the importance of maintaining a visitor log for the Department of Permitting Services to review during inspections.

IV. CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met. The Zoning Ordinance establishes both general and specific standards for special exceptions, and the petitioner has the burden of proof to show that the proposed use satisfies all applicable general and specific standards. The special exception is evaluated in a site-specific context because there may be locations where it is not appropriate. Weighing all the testimony and evidence of record under a "preponderance of the evidence" standard (see Code §59-G-1.21(a)), the Hearing Examiner concludes that with the recommended conditions of approval, the proposed special exception would satisfy the specific and general requirements for the use.

A. Standard for Evaluation

The standard for evaluation prescribed in Code § 59-G-1.21 requires consideration of the inherent and non-inherent adverse effects of the proposed use, at the proposed location, on nearby properties and the general neighborhood. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.21. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a major home occupation. Characteristics of the proposed special exception that are consistent with the characteristics thus identified will be considered inherent adverse effects. Physical and operational characteristics of the proposed special exception that are not consistent with the characteristics thus identified, or adverse effects created by unusual site conditions, will be considered non-inherent adverse effects. The inherent and non-inherent effects thus identified must be analyzed to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

The following may be considered physical and operational characteristics necessarily associated with a major home occupation: a residential structure, sufficient parking for the residential and business uses, exterior lighting sufficient for safety and consistent with the residential setting, and a limited number of vehicular trips to and from the site by employees and clients.

Technical Staff identified no unusual physical or operational characteristics of the use or the site, and the Hearing Examiner agrees. The proposed major home occupation is located in the basement of the dwelling, with an entrance that looks like a rear door into the house. No external

features of the building suggest anything other than a typical residential use. Parking is provided in the driveway and in the street, in a fashion that is typical of large-lot residential uses. Exterior lighting is typical of the area and residential in nature. The limit of two employees on site in any one day ensures a very small number of trips associated with employees. The limits on the number of client visits per day, per week and at one time ensure that client visits would be limited in number, particularly from May to December, and would be spread out during the day. No unusual site characteristics have been identified. Accordingly, the Hearing Examiner concludes that no inherent or non-inherent adverse effects exist sufficient to warrant denial.

B. Specific Standards

The Staff Report and Petitioner's testimony and written submissions provide sufficient evidence that with the recommended conditions of approval, the specific standards set forth in Section 59-G-2.29 are satisfied in this case, as described below.

Sec. 59-G-2.29. Home occupation, major.

The use of a dwelling for a major home occupation, including a professional or home health practitioner's office that is not in accordance with Sections 59-A-3.4 and 59-A-6.1, may be allowed, subject to the following provisions:

- (a) The use must be clearly subordinate to the use of the dwelling for residential purposes. The amount of floor area used for the major home occupation must not exceed 33 percent or 1,500 square feet, whichever is less, of the total floor area of the dwelling unit and any existing accessory building on the same lot or parcel. Any enlargement of the total floor area resulting from construction completed on or after the date of application for the special exception or within 18 months immediately preceding the application must be excluded from the total floor area on which this calculation is based.

Conclusion: The office use is clearly subordinate to the residential use of the dwelling. The total floor area of the building is approximately 5,120 square feet and the office for the special exception occupies approximately 1,052 square feet, 21 percent of the total square footage. Ms. Prettyman testified that the basement existed in its current configuration when she bought her home, and she made only interior alterations. County land records indicate that Ms. Prettyman acquired the subject property in February 2005, 19 months before the original submission date of her application.

- (b) The use must be conducted within the dwelling unit or any existing accessory building and not in any open yard area of the lot or parcel on which the dwelling is located. Exterior storage of goods or equipment is not permitted. No separate detached building may be constructed on the lot or parcel for the express purpose of specifically operating the home occupation. No more than one existing accessory building may be used for this purpose. The use may, however, involve off-site activities such as sales, client contact and other matters related to the home occupation.

Conclusion: The use would be conducted within the basement of the residence. No exterior storage of goods or equipment is proposed, and there are no buildings on the site other than the residence.

- (c) The Board may grant a special exception for a major home occupation on the same property as a registered home occupation, if it finds that both together can be operated in accordance with the provisions of this section and Section 59-G-1.,2, title "Conditions for Granting." The Board must not grant a special exception for more than one major home occupation on the same property or approve such a use if the property is also approved for a different special exception in accordance with this Division 59-G-2.

Conclusion: No registered home occupation or additional major home occupation is proposed for the subject site.

- (d) The home occupation office must be conducted only by members of the family, as defined in Section 59-A-2.1, residing in the dwelling and a maximum of 2 nonresident employees or associates to be determined by the Board, taking into account the impact on neighboring residences of the resultant parking and traffic. The Board may allow more than 2 nonresident employees for a health practitioner's practice; however, no nonresident health practitioner is allowed. In any case where customers, clients or patients visit the dwelling, there must be no more than 2 resident operators of the home occupation or 2 resident health practitioners or other professionals practicing in the dwelling; abused of this exemption may lead to revocation of the Certificate of Registration.

Conclusion: Petitioner proposes to staff her office with herself and two full-time equivalent positions for nonresidents. One of the nonresident positions is held by a full-time employee and the other is held by two employees who job-share. Technical Staff recommended that Petitioner be permitted to continue this employment arrangement, provided that the two job-share employees are not on site on the same day. The recommended condition of approval limiting the use to two nonresident employees on site in any one day ensures that only two nonresident employees would

generate trips in any one day, and maintains a level of activity corresponding to only two nonresident employees. Under these circumstances, the Hearing Examiner considers this employment arrangement to be appropriate and within the Board's discretion to approve.

- (e) Clients, customers, patients or other visitors in connection with the home occupation must visit by appointment only. The Board may specify the hours during which they may visit and may limit the number of clients, customers, patients, or other visitors during those periods. An indoor waiting room must be provided. In the case of a home health practitioner, as defined in Section 59-A-2.1, emergency patients may visit outside the specific hours or without appointment; abuse of this exemption may lead to revocation of the special exception.

Conclusion: Petitioner proposes to have clients visit the site only by appointment, and has agreed to reasonable limitations on the hours of operation for her business and the number of clients who may visit the site per day and per week. The recommended conditions of approval specify that no more than two clients may be on site at one time, consistent with the Staff Report at page 11. An indoor waiting area is available in the basement office area.

- (f) No equipment or process that creates noise, vibration, glare, fumes, odors or electrical or electronic interference detectable at or beyond the lot line is allowed as part of the special exception activity, nor is it allowed to involve use, storage or disposal of:
 - (1) A quantity of a petroleum product sufficient to require a special license or permit from the fire marshal; or
 - (2) Any materials defined as hazardous or required to have a special handling license by the Montgomery County Code, as amended, or the Annotated Code of Maryland, as amended, except that disposal of medical waste must be regulated as provided in Maryland State Laws and Regulations.

Conclusion: The proposed major home occupation would not involve any equipment or process with any effects detectable beyond the lot line, nor would it involve the use, storage or disposal of any petroleum product or materials defined as hazardous or requiring a special handling license.

- (g) The only allowable equipment or facilities are those needed for:
 - (1) Domestic or household purposes;

- (2) General office purposes, such as but not limited to a personal computer, calculator, word processor, or typewriter; or
- (3) Art or handicraft equipment, such as but not limited to a hand loom, spinning wheel, kiln, or woodworking tools.
- (4) In the case of a home health practitioner, as defined in Section 59-A-2.1, medical equipment may also be used, subject to the provisions of Paragraph (f), above.

Conclusion: The only equipment used in connection with Petitioner's business is general office equipment.

- (h) The sale of goods on the premises is prohibited, except for:
 - (1) The products of dressmaking, hand-weaving, block-printing, the making of jewelry, pottery or musical instruments by hand, or similar arts or handicrafts performed by a resident of the dwelling; or
 - (2) No more than 5 sales per month of items customarily ordered for delivery to customers at off-site locations.

Conclusion: No sale of goods of any kind is proposed in this case.

- (i) Display or storage of goods is prohibited except for:
 - (1) Such handmade items as are enumerated in paragraph (h)(1) above; or
 - (2) Samples of merchandise that may be ordered by customers to whom it will be delivered at off-site locations, or merchandise awaiting such delivery.

Conclusion: No display or storage of goods of any kind is proposed in this case.

- (j) Except as provided in Paragraph (2), off-street parking must be provided on-site in accordance with the relevant provisions of Article 59-E, as follows:
 - (1) For a home health practitioner, the Board may require the number of spaces specified in Section 59-E-3.7 for "office, medical practitioner." Alternatively, and for any other use encompassed by this Section 59-G-2.29, there must be one parking space for each nonresident employee or associate plus one parking space for every client or customer allowed by the conditions of the special exception to visit in any one-hour period. These spaces must be in addition to the number of spaces required for the residential use of the property.
 - (2) In determining the necessary amount of on-site parking, the Board may take into account the availability of on-street parking spaces, but on-street parking must not be allowed in connection with the home occupation or professional

office if it will have an adverse impact on neighboring residences.

- (3) Screening must be provided in accordance with Section 59-E-2.83. The required spaces must be located in the side or rear yard, except that the Board may approve the parking in a driveway traversing the front yard if it finds that there is inadequate space for the parking or necessary screening in the side or rear yard, and the front-yard driveway can be screened in accordance with Section 59-E-2.83. If an applicant can establish, to the satisfaction of the Board, that a front-yard parking area was constructed prior to February 5, 1990, in order to satisfy the parking requirements for a residential professional office as a permitted use, the Board may waive the requirement for side or rear yard parking if it finds that such action will not have adverse impact on neighboring residences.

Conclusion: As discussed on Part II.E. above, Petitioner proposes to provide the two required residential parking spaces in the garage, two spaces for the special exception in the driveway, and two spaces for the special exception on the street. The evidence demonstrates that ample on-street parking space is available, given the 80 feet of frontage available in front of the subject site (not counting the driveway) and the large lots in the neighborhood with two-car garages and large driveways. The evidence further establishes that placing the parking in the side or rear yard would be difficult due to space constraints and topography, and would be out of keeping with the character of the neighborhood. The Hearing Examiner is further persuaded by the expert opinion of Mr. Leakan and Technical Staff that requiring screening or shading of the driveway in connection with the proposed special exception would be incompatible with the neighborhood, as it would detract from the open character created by the large lots and deep setbacks. For all of these reasons, the Hearing Examiner recommends that the Board waive the screening and shading requirements of Section 59-E-2.83, pursuant to its authority under Section 59-E-4.5.

- (k) In the Residential One-Family Zones regulated by Section 59-C-1.3 and in recorded residential subdivisions in Agricultural Zones regulated by Division 59-C-9, any commercial vehicle that is parked or garaged on-site in connection with the home occupation must comply with the regulations for commercial vehicles in Section 59-C-1.31, title "Land Uses." In the Townhouse and Multiple-Family Zones regulation by Sections 59-C-1.7 and 59-C-2.3, respectively, one commercial vehicle may be parked on-site in connection with the home occupation if parked in a garage.

Conclusion: No commercial vehicles would be parked on site in connection with the proposed special exception.

- (l) The Board may restrict deliveries by truck in volume and frequency and may limit them to deliveries by public or private services that also deliver to private homes.

Conclusion: Petitioner has agreed to a condition limiting deliveries to services that also deliver to private homes. The evidence suggests no need to restrict the number or frequency of deliveries by truck.

- (m) Reserved.

- (n) A special exception for a major home occupation is granted for a two-year period and the special exception may be renewed if it is operated in compliance with the findings and conditions of the Board in the initial grant and satisfies the compliance procedures specified by Section 59-G-1.3. The public hearing on the renewal may be waived by the Hearing Examiner if the inspection of the premises indicates that the special exception is in compliance with the conditions established by the Board of Appeals and the parties entitled to notice are given an opportunity to request a hearing and fail to do so.

Conclusion: Petitioner has acknowledged the renewal requirement.

- (o) In those zones where a professional office for a resident of a dwelling was permitted by right prior to February 5, 1990, and if a use-and-occupancy permit for the professional office was issued prior to February 5, 1990, the office may be continued as a nonconforming use, as provided in Division 59-G-4. (See Section 59-C-1.31, 59-C-2.3 or 59-C-9.3).

Conclusion: Not applicable.

C. General Conditions

The general conditions for a special exception are found in Section 59-G-1.21(a). The Technical Staff report and Petitioner's testimony and written submissions support a conclusion that the general standards would be satisfied in this case.

Sec. 59-G-1.21. General conditions.

- (a) A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:

- (1) Is a permissible special exception in the zone.

Conclusion: A major home occupation is a permissible special exception in the RE-2C Zone.

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

Conclusion: The proposed special exception would fully comply with the standards and requirements set forth for the use in Code §59-G-2.29, as detailed in Part IV.B. above.

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

Conclusion: As discussed in Part II.C. above, the proposed accessory apartment would be consistent with the Master Plan, which confirmed RE-2C zoning for the subject property.

- (4) Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.

Conclusion: The proposed special exception would be in harmony with the general character of the neighborhood considering the cited factors. Compared to a solely residential use of the site, it would have a modest impact on daytime population density; it would not result in any changes to the exterior of the house; it would result in a moderate increase in intensity of use of the property and in vehicular traffic from January to April and a modest increase from May to December; adequate parking is available on-site and on the street; and no similar uses have been identified in the general neighborhood. This conclusion is supported by a number of letters from neighbors indicating

that Ms. Prettyman's home-based business has operated, to date, without adverse effects on the neighborhood.

- (5) Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: The evidence demonstrates that due to the modest impacts of the proposed special exception, whose activities would take place almost entirely indoors, the special exception would not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, provided that it is operated in compliance with the recommended conditions of approval

- (6) Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: Based on the nature of the use and the typical residential exterior lighting, with the recommended conditions of approval the proposed special exception would cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity.

- (7) Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.

Conclusion: No existing special exceptions have been identified in the general neighborhood. The Hearing Examiner agrees with Technical Staff's conclusion that the proposed major home occupation would not increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely.

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

Conclusion: The evidence supports the conclusion that the proposed use would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site.

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

Conclusion: The Hearing Examiner accepts Technical Staff's conclusion that the subject site, currently used as a residence, would continue to be adequately served by the specified public services and facilities.

- (i) If the special exception use requires approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of the special exception. If the special exception does not require approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Board of Appeals when the special exception is considered. The adequacy of public facilities review must include the Local Area Transportation Review and the Policy Area Transportation Review, as required in the applicable Annual Growth Policy.

Conclusion: No subdivision approval would be required. Technical Staff reports that the proposed accessory apartment would generate two to three additional vehicle trips during the peak hours, far below the 30-trip threshold that triggers Local Area Transportation Review. The Hearing Examiner accepts Technical Staff's conclusion that this minimal amount of traffic can be accommodated by the existing road network in the neighborhood. Policy Area Transportation Review no longer applies.

- (ii) With regard to findings relating to public roads, the Board, the Hearing Examiner, or the District Council, as the case may be, must further determine that the proposal will have no detrimental effect on the safety of vehicular or pedestrian traffic.

Conclusion: The Hearing Examiner accepts Technical Staff's finding that the proposed use would have no detrimental effect on the safety of vehicular or pedestrian traffic.

V. RECOMMENDATION

Based on the foregoing analysis, I recommend that Petition No. S-2688, for a special exception to permit a major home occupation in a single-family residential structure located at 10948 Bellehaven Boulevard, Damascus, Maryland be GRANTED with the following conditions:

1. Petitioner is bound by her testimony and exhibits of record, including the final Site Plan, Exhibit 22(b), and by the testimony of her witness and representations of counsel identified in the Hearing Examiner's report.

2. The major home occupation shall be limited to 1,052 square feet in the basement of the dwelling, as show on the approved Site Plan, Exhibit 22(b).

3. Non-resident employment at the major home occupation shall be limited to two full-time equivalent positions. These may be filled by a combination of one full-time employee and two part-time employees who job share, but no more than two employees may be on site in any one day.

4. Hours of operation shall be limited to 9:00 a.m. to 7:00 p.m. Monday through Saturday during tax season (January through April), and 9:00 a.m. to 4:00 p.m. Monday through Thursday the rest of the year (May through December). In addition, no client appointments may be made on Fridays outside of tax season, but employees shall be permitted to work on site during the normal off-season hours (9:00 a.m. to 4:00 p.m.). Failure to strictly conform to this condition may be grounds for revocation of the special exception.

5. Client visits shall be by appointment only, and shall be limited to a total of 10 per day and 50 per week during tax season (January through April), and three per day and ten per week the rest of the year (May through December).

6. Ms. Prettyman must maintain a written log of all arrivals and departures associated with the use, including employees, clients, visitors, deliveries and pick-ups. The log must show names, appointment times, arrival times and departure times. It must be kept up to date at all times, and must be available for inspection by County officials at any time.

7. Deliveries to the special exception shall be made only by delivery services that commonly deliver to single-family residences.

8. Petitioner must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits or a use-and-occupancy permit, necessary to implement the special exception as granted herein. Petitioners shall at all times ensure that the special exception use and facility comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: June 25, 2007

Respectfully submitted,

Françoise M. Carrier
Hearing Examiner