

**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:** \*  
**VCA VETERINARY REFERRAL** \*  
**ASSOCIATES ANIMAL HOSPITAL, INC.** \*  
 Petitioner \*

Cheryl Smith \*  
 John Sekerak \*  
 Edward Papazian \*  
 For the Petitioner \*

Stuart Barr, Esquire \*  
 \*  
 Attorney for the Petitioner \*

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 Martin Klauber, Esquire, People’s Counsel \*  
 In Support of the Petition \*  
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Board of Appeals Nos. S-597-A  
 (OZAH Referral No. 06-11)

Before: Martin L. Grossman, Hearing Examiner

**HEARING EXAMINER'S REPORT AND RECOMMENDATION**

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## I. STATEMENT OF THE CASE

Petition No. S-597-A seeks to modify an existing Special Exception, S-597, under which VCA Referral Associates Animal Hospital, Inc. (VCA),<sup>1</sup> the Petitioner, has operated a veterinary hospital since 1996 as a lessee, pursuant to Zoning Ordinance §59-G-2.32. The property is located at 15021 Dufief Mill Road, Gaithersburg, Maryland, in the R-200 Zone.<sup>2</sup> It is currently owned by Dr. H. Steven Steinberg, V.M.D, who authorized Petitioner to pursue the subject modification application. Exhibit 9(b). The Tax Account Number is 02360907.

The Board of Appeals granted the original Special Exception approval to operate a veterinary hospital on the subject property (which then consisted of 7.7 acres) to Dr. Danny Denham in 1978. In 1981, the Special Exception was transferred to H. Steven Steinberg, V.M.D. and Kenneth R. Cowell, D.V.M, (the current holders), and the property was reduced to 2 acres, while the number of veterinarians was increased from four to ten. Since that time, the Board has granted numerous administrative changes, increasing the staff to 22 veterinarians and 10 support staff, and finally, in 1996, approving an enlargement of the animal hospital main building.

On May 30, 2003, Dr. Steinberg was cited by the Department of Permitting Services (DPS) for numerous violations of the special exception conditions, including support staff exceeding the specified limit of 10, office hours beginning before the specified time of 8:00 a.m., additional unapproved exterior lighting, an unapproved fence around the x-ray building, reduction in the size of the property and operation by an entity (VCA) not identified to the Board of Appeals.<sup>3</sup> On September 4, 2003, Petitioner sought to remedy these violations by seeking an administrative modification of the special

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<sup>1</sup> Petitioner's parent company, VCA Antech, Inc., is a national company which provides pet health care services at over 300 animal hospitals nationwide.

<sup>2</sup> Its address was originally listed as 10810 Darnestown Road (MD Route 28), but when the state widened Darnestown Road, that entrance to the subject property was removed, and the only current entrance is from Dufief Mill Road.

<sup>3</sup> The Notice of Violation was not submitted as evidence at the hearing on this case; however, a copy of it was included in the Board of Appeals file regarding the underlying Special Exception, S-597. The Hearing Examiner takes official notice of the contents of that file.

exception. By Resolution effective February 12, 2004, the Board determined that the requested modifications were too significant to be granted administratively, and referred the matter to the Hearing Examiner to hold a public hearing and submit a report and recommendation.<sup>4</sup> Although the Board did not specifically direct the filing of a major modification petition in its February 12, 2004 resolution, when Petitioner's counsel notified the Board that Petitioner would be filing an application for a major modification of the special exception, the Board passed another resolution on June 17, 2005, in which it referred to its earlier resolution as having required "a major modification application."<sup>5</sup>

On August 22, 2005, Petitioner VCA filed the instant Modification Petition, accompanied by the required attachments.<sup>6</sup> The application seeks to increase the number of permitted support staff to 40 (in addition to the 22 veterinarians), lengthen the office hours allowed to permit pet drop-offs as early as 6:30 a.m., validate the current parking, landscaping, and fencing, change the lighting and signage, update the site, landscaping and lighting plans, and remove one of the two current special exception holders (Dr. Kenneth R. Cowell) who is no longer involved in the use. There will be no expansion of the existing buildings, and thus no addition to floor area. All the proposed changes relate to Petitioner's current special exception, and that fundamental use would continue.

On September 8, 2005, the Board issued a notice of a public hearing before the Hearing Examiner on the subject modification petition. Unfortunately, the Board's notice contained a typo, specifying the hearing date as "January 9, 2005," not the intended January 9, 2006. Happily, the Hearing Examiner had also issued a notice on December 27, 2005, regarding Petitioner's motion to

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<sup>4</sup> The February 12, 2004, resolution erroneously indicates its own effective date as "February 12, 2003," when it is actually February 12, 2004.

<sup>5</sup> The June 17, 2005 resolution erroneously refers to the earlier resolution as "the Resolution of February 12, 2003," due to the error noted in the preceding footnote.

<sup>6</sup> Once the Board determined that an administrative modification would not be granted, a full modification petition needed to be filed and accompanied by the information required by the Zoning Ordinance for filing an original special exception petition.

amend the petition,<sup>7</sup> and that notice did refer to the correct hearing date, time and place. Since that notice went to all the people required to get notice of the hearing, the Hearing Examiner and all parties of record felt that notice was adequate, and the hearing could proceed as scheduled.<sup>8</sup>

A report issued by Technical Staff of the Maryland-National Capital Park and Planning Commission (M-NCPPC), dated January 5 and filed January 9, 2006 (Exhibit 20), recommended approval of the Modification Petition, with conditions.<sup>9</sup> The hearing went forward as scheduled on January 9, 2006. There was no opposition, and the record was held open until January 17, 2006, to allow Petitioner to file additional material responsive to questions raised at the hearing. Petitioner did so, filing an affidavit regarding ownership of the special exception (Exhibit 29) and a revised site plan clarifying some entries (Exhibit 30(a)). The record closed on January 17, 2006.

The appropriate scope of the review on a petition for modification of a special exception is spelled out in Zoning Ordinance § 59-G-1.3(c)(4). That subsection provides, in relevant part:

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.

The public notices in this case specified the modifications proposed by Petitioner, as mentioned above. Because Petitioner's plans do not include expansion of the total floor area at all, the scope of this inquiry is limited by statute to "discussion of those aspects of the special exception use that are directly related to [the modification] proposals" and does not include a review of the "underlying

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<sup>7</sup> The amendment to the petition sought permission to change some lighting and to add a leased dog-walk area.

<sup>8</sup> The Hearing Examiner also notes that a reasonable person receiving the original notice should have realized that a notice issued on September 8, 2005 could not be for a hearing to be held in January of 2005. In the four months following the original notice, none of the recipients filed any opposition, nor raised any question about the hearing date. The Hearing Examiner therefore finds that, not only was the follow-up notice adequate, but also the typographical defect in the original notice was waived.

<sup>9</sup> The Technical Staff Report, Exhibit 20, is frequently quoted and paraphrased herein.

special exception.” Nevertheless, the changes proposed by Petitioner do require a review under numerous provisions of the special exception in question, as will be discussed at length below.

## II. FACTUAL BACKGROUND

### A. The Subject Property

The subject Property is located in Gaithersburg, Maryland, southeast of the intersection of Darnestown Road (MD Route 28), a six-lane divided highway on the north, and Dufief Mill Road, a two-lane highway to the west. The 78,957 square foot tract (1.81 acres) is part of Lot 2, Block V, Subdivision 11, identified as record plat No. 14624, titled “Westleigh.” The property can be seen on the following recent aerial photo, a portion of Exhibit 27 presented at the hearing:



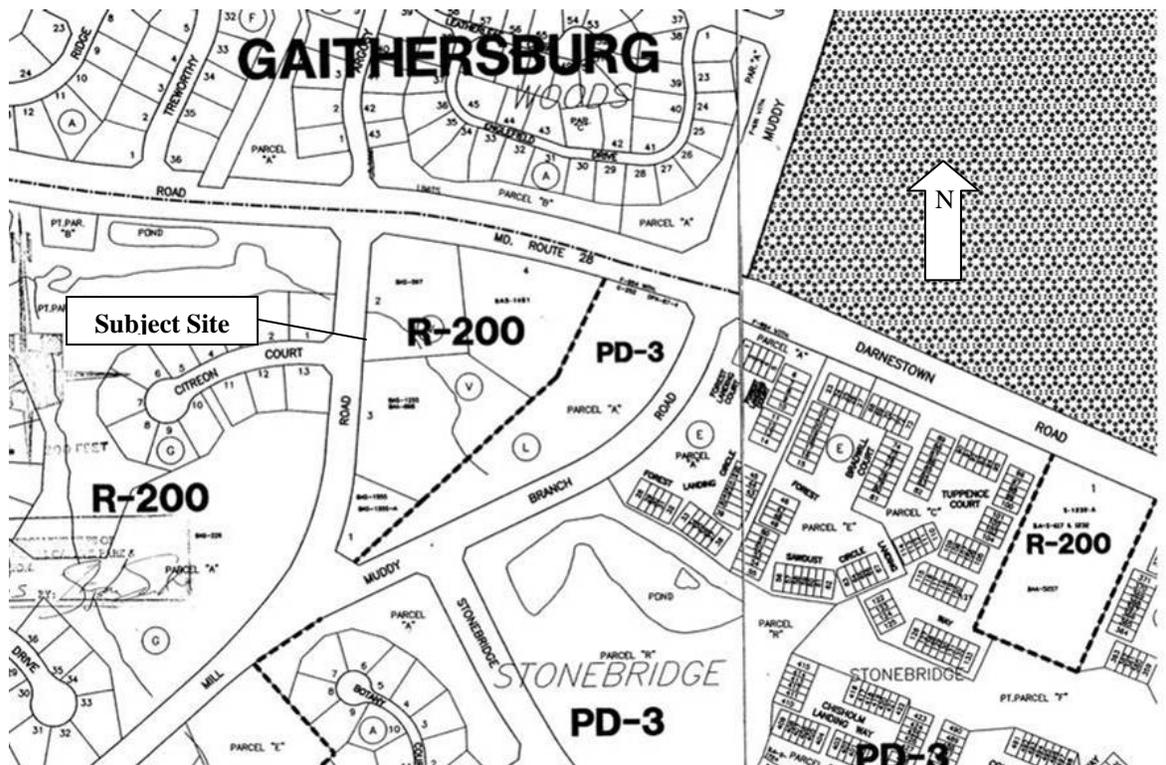
The property entrance is located on Dufief Mill Road, which forms the west side of the site. The main barn building and another barn building on the site are known as the “Maple Spring Barns,” listed in the *Potomac Subregion Master Plan* as historic structures 25/1 and 25/2. Exhibit 3. It is the main barn building which houses most of the subject use. Another building on site contains additional x-ray equipment, and it is surrounded by a security fence. These structures are depicted in an enlargement of the aerial photo from page 3 of the Technical Staff report and in photos from Exhibit 10:



The property lies within the Watts Branch watershed and is traversed through the southwest quadrant by an unnamed tributary of the Watts Branch, which runs Northwest to Southeast through the lower half of the site.

### B. The Surrounding Neighborhood

Technical Staff described the location of the subject site as “a triangle shaped block that is defined by MD 28 Darnestown Road, Dufief Mill Road and Muddy Branch Road.” Exhibit 20, p. 2. This triangular area can be clearly seen in the aerial photo on page 5 of this report. After inspecting the site, Staff concluded that MD 28 and Muddy Branch Road “present significant divide suggesting an edge for defining the neighborhood.” However, Dufief Mill Road does not have this effect, and Staff therefore included properties on the opposite side of this road within its proposed definition of the “general neighborhood.” These include residences on Citreon Court, which is west of Dufief Mill Road. Both Petitioner and the Hearing Examiner agree with Technical Staff’s conclusion that, for the purposes of evaluating the proposed use, the general neighborhood for this special exception is the described triangle area and both sides of Dufief Mill Road that this use accesses, inclusive of Citreon Court. The surrounding zoning is shown below on the zoning map of the area, and the general neighborhood is outlined on Technical Staff’s vicinity map, on the following page:



# S-597A VCA VETERINARY HOSPITAL



Map compiled on January 05, 2006 at 4:41 PM | Site located on base sheet no - 220NW11

The land uses surrounding the Property, as set forth in Exhibit 3, include:

- To the north, across MD Route 28: Single-family detached homes in a residential subdivision called the “Washington Woods,” within the Gaithersburg city limits.
- To the west, across Dufief Mill Road (zoned R-200): A narrow section of the Muddy Branch Park that houses a stormwater pond along MD Route 28 and single-family residences directly south of it, which are accessed by Citreon Court, and located within the Westleigh Subdivision. Directly south of these single-family residences is a privately owned “Westleigh Recreation Club” which houses a community clubhouse, swimming pool and four tennis courts. The private club is a special exception use (Special Exception Number S-226) approved by the Montgomery County Board of Appeals in 1973.
- To the south (zoned R-200): A building that houses a medical clinic for two non-resident practitioners. The medical clinic is a special exception use (Special Exception Number S-1255) approved by the Montgomery County Board of Appeals in 1986. South of this clinic, at the intersection of Dufief Mill Road and Muddy Branch Road, is a second non-resident veterinary hospital located in a private residence. The veterinary hospital is a special exception use (Special Exception Numbers S-1555 and S-1555-A) approved by the Montgomery County Board of Appeals in 2004.
- To the east: A medical clinic called “Maple Springs Medical Center” is also zoned R-200. The medical clinic is a special exception use (Special Exception Number S-1481) approved by the Montgomery County Board of Appeals in 1988. Further to the east is the Stonebridge Planned Unit Development zoned PD-3 (Planned development, 3 dwelling units per acre).

### **C. The Master Plan**

The subject property lies within the area analyzed by the *Potomac Subregion Master Plan*, approved and adopted in April 2002. As mentioned above, two of the structures on the site are listed by the Master Plan as the historic “Maple Spring Barns.” Appendix C, pp. C-2, C-4 and C-55.

The larger of these structures has been adapted to the veterinary hospital use approved by the Board of Appeals over 25 years ago. The Historic Preservation Commission (HPC) approved the proposed changes, with conditions (Exhibit 26), and Technical Staff found that “the existing use, as proposed for modification, will continue to be an appropriate adaptive use of an historic structure.” Exhibit 20, p. 5.

The Master Plan also contains a “Special Exception Policy,” under which it discourages special exceptions incompatible with their neighborhood or located in highly visible sites or concentrated along major transportation corridors. See Master Plan, pp. 35-36. None of the changes sought in this is modification petition are likely to conflict with these goals, since no new special exception use is being added, and the general appearance of this historic site is not being changed.

It should also be noted that the Master Plan recommended continuation of R-200 zoning, and the subject use is permissible by special exception in that zone. The Hearing Examiner agrees with the Technical Staff’s conclusion that the application is in conformance with the *Potomac Subregion Master Plan*.

#### **D. The Use and Proposed Modifications**

The Petitioner currently operates the animal hospital located on the Property. The Hospital provides a full range of general medical and surgical services as well as specialized treatments. All animals are seen by emergency or appointment only. All animal hospital operations are contained within the main barn building and the one-story block outbuilding on the Property, which are shown on the following pages in photos from Exhibit 10.



**Exhibit 10(a), Photo 1: South Elevation of Primary Veterinary Hospital Building (Main Barn)**

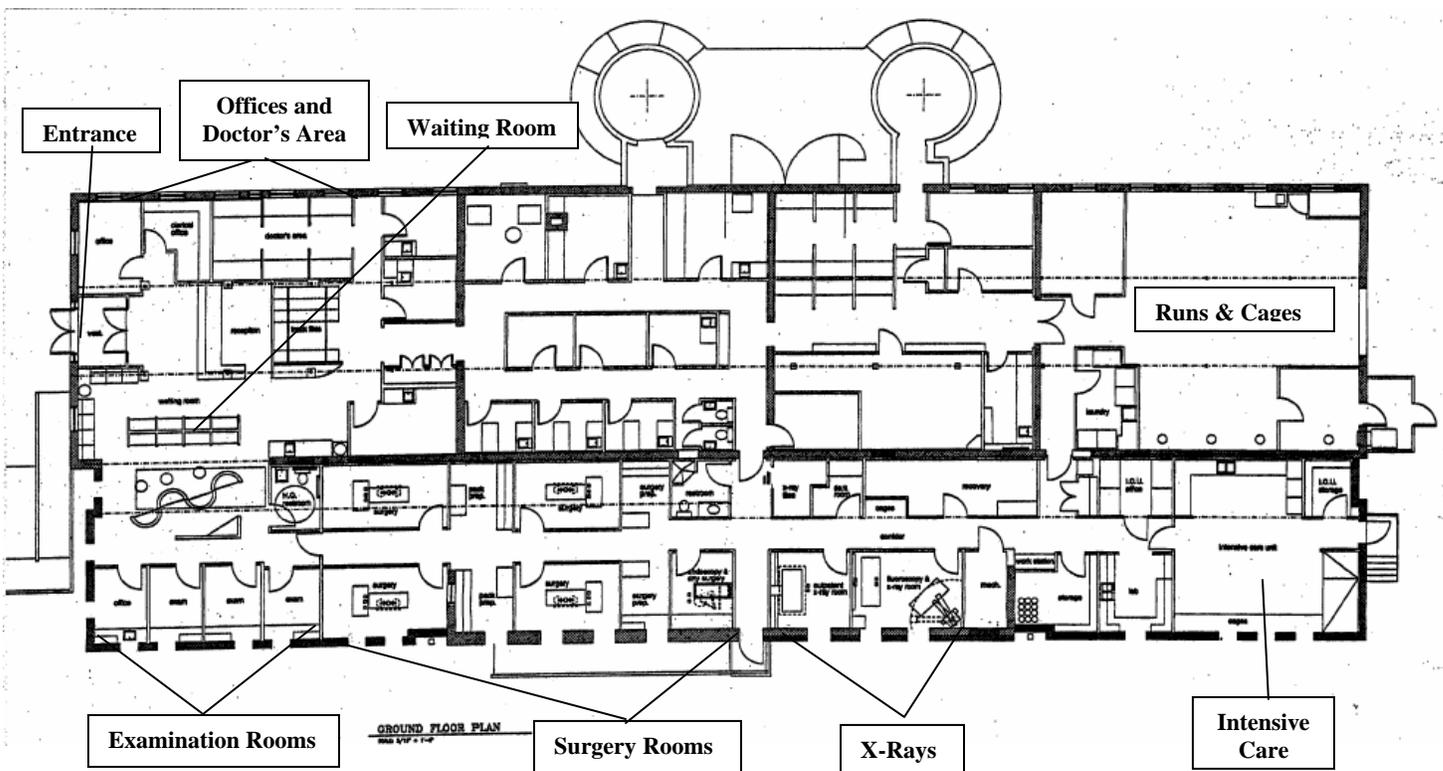


**Exhibit 10(b), Photo 3: West Elevation of (and Entrance to) Primary Veterinary Hospital Building**



**Exhibit 10(c), Photo 5: North Elevation of Veterinary Hospital X-Ray Building**

The Petitioner does not propose any additional building construction at this time, and the current Floor Plan of the Primary Veterinary Hospital Building is shown below (Exhibit 5):



According to Petitioner (Exhibit 3), the Hospital is recognized as one of the most progressive veterinary referral centers in the country. It provides specialized treatment to animals, including, but not limited to, heart, hip, and elbow certifications for pet breeds with genetic defects and acupuncture for the treatment of pets suffering from chronic pain. It also treats animals referred by the Montgomery County Humane Society, Society for the Prevention of Cruelty to Animals (SPCA), Partnership for Animal Welfare (PAW), Golden Retriever Rescue (GRREAT), Capital Animal Care, Friends of Montgomery County Animals, Kit Kat and Critter Rescue, Lost Dog and Cat Rescue, Beagle Rescue, and Bassett Rescue. The Hospital attends to police dogs serving with the U.S. Capitol Police, Maryland State Troopers, and Montgomery, Prince George's, and Howard Counties law enforcement officers. Clients of the Hospital travel from all parts of the East Coast, spanning from Florida to New York.

The modification petition, as amended, seeks approval of the following changes:

- 1) An increase in the number of permitted staff to a maximum of sixty-two (62) employees (including all veterinarians and support staff employees) on site at any one time, provided that the number of veterinarians on site at any one time does not exceed twenty-two (22);
- 2) Hours of operation: Office hours of 6:30 a.m. to 8:00 p.m. (*i.e.* allowing animals to be dropped off an hour and a half earlier than the current limit of 8:00 a.m.) Monday through Saturday. A certain number of employees always remains at the hospital twenty-four hours a day, seven days a week to accommodate emergency care for animals which must remain overnight for medical purposes;
- 3) Reduction in the specified size of the property to 1.81 acres (78,957 square feet) to reflect the current property size, which was reduced by the MD Route 28 road widening;
- 4) An updated site plan which reflects the current on-site conditions including:
  - a) 71 parking spaces on site (inclusive of three handicap spaces);<sup>10</sup>
  - b) a six foot board-on-board wooden fence on the southeastern portion of the property, as security for the x-ray building;
  - c) two entrance signs (currently there is one ground sign at the Dufief Mill Road entrance; a second sign would be reinstalled, measuring six feet high and five feet wide.); and
  - d) the area south of the property to be leased for the occasional walking of animals, as proposed in Item # 6 , below.

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<sup>10</sup> Both the Statement in Support of the Petition (Exhibit 3) and the Technical Staff report refer to 74 spaces; however 3 of those spaces shown on the site plan are actually located just south of the site's property line.

- 5) An updated landscape and lighting plan showing four lights on 12 foot poles instead of two lights on 25 foot poles, in accordance with the wishes of the Historic Preservation Commission, and accompanied by cut sheets for the newly proposed lights and a photometric study of the lighting;
- 6) An area south of the property to be leased for the occasional walking of animals; and
- 7) Removal of Kenneth R. Cowell, D.V.M, as one of the two co-holders of the special exception, the other being H. Steven Steinberg, V.M.D, because Dr. Cowell has not been associated with the use for more than 20 years.<sup>11</sup>

### **1. Staffing Increases and Their Impact on Traffic and Parking:**

Petitioner seeks to increase the number of permitted staff to a maximum of sixty-two (62) employees (including all veterinarians and support staff employees) on site at any one time, provided that the number of veterinarians on site at any one time does not exceed twenty-two (22). Support staff includes veterinary technicians, intensive care unit technicians, ward technicians, ward assistants, and administrative office staff. Currently, 22 veterinarians and 10 support staff members are permitted under the terms of the special exception, but the nature of the specialty care calls for more support staff, and Petitioner is actually operating with the 40 support staff for which it now seeks permission. That is one reason Dr. Steinberg was cited by DPS on May 30, 2003 for violating the terms of his special exception. Petitioner characterizes the current ratio of permitted support staff to veterinarians as “a very disproportionate number for the animal hospital industry,” and the plan is to raise the number of permitted support staff to 40, with a total employee count of 62, which reflects the actual staff level now. Because the actual level of staff would not change, Petitioner is able to accommodate this number of employees within the existing buildings on the site, and without any new construction or parking.

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<sup>11</sup> Petitioner’s request was made in terms of a “transfer” of the special exception from Drs. Steinberg and Cowell, jointly, to just Dr. Steinberg. Unfortunately, Petitioner has been unable to locate Dr. Cowell to get his consent.

The biggest concern with increased support staff is, of course, the traffic impact. Petitioner observes that many of the support staff employees have and will continue to have staggered work hours. These various work shifts will spread out the traffic flow into and out of the subject property. A traffic impact study (Exhibit 12) was prepared by Petitioner's transportation planning expert, Edward Papazian, and reviewed by Transportation Planning Staff. Two intersections were identified by Technical Staff as critical, MD 28 and Dufief Mill Road and MD 28 and Muddy Branch Road. According to Technical Staff, the congestion standard for the North Potomac Policy Area is 1,475 Critical Lane Volume (CLV).

Mr. Papazian's study accounted for existing development, which includes the current actual staffing levels at the veterinary hospital as well as other existing developments, and background traffic which includes projects which have been approved but not yet built. He concluded that the VCA Hospital creates 37 trips during the a.m. peak hours and 43 trips during the p.m. peak hours, with its full compliment of 40 support staff. Tr. 121. Though this represents a doubling of the number of trips with a support staff limited to 10, it actually has "a very negligible effect" on the surrounding roadway system. Tr. 122. The critical lane volumes did not exceed the congestion standard at either critical intersection studied, the highest reading being 1,376 at MD 28 and Muddy Branch Road during the morning peak hour. Exhibit 12, p. 14. Thus, both Petitioner's transportation planning expert and Transportation Planning Staff agreed that a staffing level of 62 employees would not have an adverse traffic impact on the neighborhood. Tr. 124-125 and Transportation Planning Staff Report attached to Exhibit 20. Transportation Staff also concluded that "existing access to the site and the internal traffic/pedestrian circulation system shown on the site plan are safe and adequate." The Hearing Examiner accepts these unrebutted findings.

Current Parking on site has been reconfigured, but not enlarged, since the last modification to Special Exception Number S-597. The widening of MD Route 28 impacted the amount of space available for parking on the site, so the layout of the parking has been redesigned and re-striped to allow a more efficient use of the space. These changes were retroactively approved by the HPC (Exhibit 26). The existing parking layout currently supports seventy-one (71) parking spaces on site.<sup>12</sup> Three (3) of these parking spaces are designated for handicapped parking, and they are located in close proximity to a handicapped accessible entrance of the Hospital. The revised Site Plan (Exhibit 30(a)) shows the as-built parking configuration that currently exists on the Property.

Technical Staff notes that the proposed modification would not require a change in the number of parking spaces on site, if the requirements in Zoning Ordinance §59-E-3.7 for a medical clinic are used as a guide (which is what Staff recommends in the absence of a specific regulation for parking at veterinary hospitals). That provision requires five parking spaces for each 1,000 square feet of the gross floor area of the medical clinic's building. Applying that standard to the subject use, Technical Staff calculated that approximately 58 spaces are required.

Technical Staff did not mention the total floor area of the use, but based on the site plan, the Hearing Examiner estimates that the floor area used in the Main Barn is about 9,600 square feet and the floor area used in the x-ray building is about 1925 square feet, yielding a total floor area of 11,525 square feet. If 5 spaces per 1,000 square feet are required, then 57.625 spaces would be needed, almost exactly the 58 spaces Technical Staff said were necessary. As noted above, 71 spaces have been provided, so the site contains sufficient parking. Technical Staff also determined that no additional landscaping or screening would be required under Zoning Ordinance §59-E-2.83, because

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<sup>12</sup> As mentioned earlier, both the Statement in Support of the Petition (Exhibit 3) and the Technical Staff report refer to 74 spaces; however 3 of those spaces shown on the site plan are actually located just south of the site's property line.

“[a]n existing surface parking facility included as part of a special exception granted before May 6, 2002, is a conforming use,” pursuant to §59-E-2.83(e), and the subject use fits that description.

Petitioner argues, and the Hearing Examiner agrees that, given the highly specialized services the Hospital provides, the Petitioner needs an appropriate complement of support staff to support the number of currently approved veterinarians, in order to ensure the highest quality medical care for its patients. Since the increase in permitted staff will have no adverse effect on traffic or parking, the Hearing Examiner sees no basis for denying this modification. Petitioner also requests that the condition limiting the number of employees not specifically limit the number of support staff, but rather provide an overall limit of 62 employees, in addition to the existing limit of 22 veterinarians. This would give the Petitioner the option of having more than 40 support staff on hand if the number of veterinarians present dips below 22. Neither Technical Staff nor the Hearing Examiner sees any problem with allowing Petitioner this flexibility, and a corresponding condition has been proposed in Part V of this report.

## **2. Hours of operation:**

Currently, the special exception permits office hours from 8:00 a.m. to 8:00 p.m., Monday through Saturday, “plus additional hours as required to accommodate emergency cases.” *BOA Resolution adopted April 16, 1981*. In fact, some employees always remain at the hospital, twenty-four hours a day, seven days a week to accommodate such emergency care needs. In the current petition, VCA seeks to open its regular office hours an hour and a half earlier than presently allowed (*i.e.*, at 6:30 a.m.) in order to allow animals to be dropped off more conveniently. Thus, if granted, regular office hours would be of 6:30 a.m. to 8:00 p.m., Monday through Saturday.

Petitioner observes that the extension of the hours of operation will not increase the traffic to and from the subject site because the Hospital has no walk-in clientele, other than emergency cases,

and the Hospital schedules all veterinarian visits by appointment only. The Hearing Examiner also finds that these added hours should spread out any morning traffic impacts, as confirmed by Transportation Planner, Edward Papazian. Tr. 123. Scheduled appointment hours will continue to commence at 8:00 a.m. However, with the additional one and a half hours of operation allowed prior to the commencement of scheduled appointments, pet owners are provided an added convenience to deliver a pet to the Hospital for an appointment prior to the height of rush hour traffic in the area. Technical Staff supported the extended hours, as does the Hearing Examiner.

### **3. Size of the Property:**

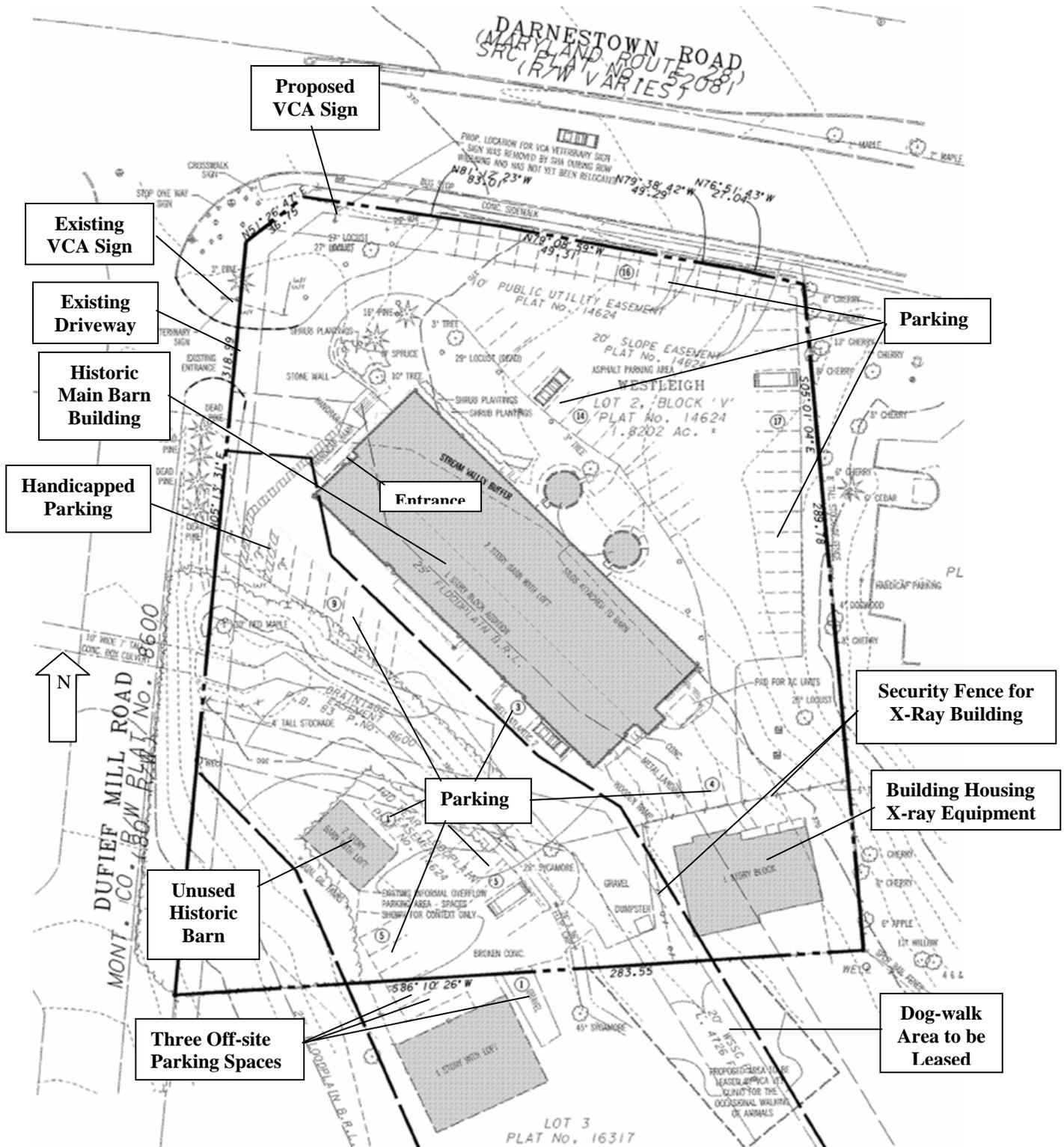
Petitioner asks that the special exception be modified to recognize the reduction in the size of the site from 2 acres to 1.81 acres (78,957 square feet), brought about by the State's taking of a northern slice of the site to permit the widening of MD Route 28. Petitioner recalls that when the subject site went through the subdivision process in the 1982-1984 timeframe, the total area for the property included 2.0033 acres, of which approximately 0.1567 acres (6,825 square feet) along MD Route 28 was required to be dedicated to public use by Plat Number 14624, ostensibly for a future road widening. Exhibit 3, p.8. The current tax records with the Maryland Department of Assessments and Taxation indicate that the subject property contains 78,957 square feet (approximately 1.81 acres). This current Property size is due to the previous dedication by plat and to the more recent condemnation by the State Highway Administration of an additional portion of the Property to accommodate the road widening.

Technical Staff indicates that the Zoning Ordinance no longer requires a 2 acre site for this use, and the current size of the site (1.81 acres) is "acceptable." Exhibit 20, p.4. Since Petitioner is asking only that the special exception language be conformed to the facts on the ground, the Hearing Examiner agrees that the allowable size of the Property should be reduced from 87,120 square feet to

the existing 78,957 square feet.

#### 4. The Updated Site Plan (Exhibit 30(a))

The diagrammatic portion of the revised Site Plan (Exhibit 30(a)) is shown below:



Petitioner's revised Site Plan (Exhibit 30(a)), reflects both the current on-site conditions (items (a) and (b), below) and two proposed additions (items (c) and (d), below):

a) Parking spaces on site (71, inclusive of three handicap spaces):

The revised Site Plan reflects the current parking space locations. As discussed above in connection with the increased staff, the parking is safe and adequate, per Technical Staff.

b) Six foot board-on-board wooden security fence surrounding the x-ray building:

A six foot board-on-board wooden fence was erected by the Hospital as security for the x-ray building located in the southeastern portion of the Property. Exhibit 3. The installation of this fence complies with County height controls, in accordance with Zoning Ordinance §59-B-2.1. This existing fence was not included on the previous site plan for Special Exception Number S-597, but is shown on the Revised Site Plan, displayed above. The HPC approved the existing fence in its conditional work permit #404172 (Exhibit 26), and Petitioner requests that the Board of Appeals do so as well. The Hearing Examiner so recommends.

c) Two entrance signs:

Currently, the subject property contains only one sign at the Dufief Mill Road entrance to the site. A second sign previously was erected along MD Route 28. The road construction crew removed this second sign during the road-widening project. Petitioner requests that the Board allow Petitioner to reinstall the second sign and requests that Special Exception Number S-597 be modified to allow two ground signs for the identification of the Hospital. Petitioner indicates that it had permits for both signs and that each sign measured six feet in height and five feet in width. Exhibit 3, page 9. The revised Site Plan, shown on the previous page of this report, depicts the location of the existing sign for the Hospital in the northwest corner of the property, as well as the proposed location of the reinstalled sign along MD Route 28.

Petitioner observes that the second sign would facilitate the identification of the Hospital for vehicular traffic traveling on MD Route 28 and that the design of the signs is not obtrusive and does not detract from the character of the neighborhood. Below is a photo of the existing sign, from Exhibit 28:



Zoning Ordinance §59-F-4.2(a) generally limits signs in residential zones to two square feet; however an exception is made in §59-F-4.2(a)(3)(B) for “public facilities or places of assembly, such as places of worship, schools, libraries, museums, and **hospitals.**” [Emphasis added.] In those cases, the signs must be ground or wall signs located at an entrance to the building or driveway to identify the location of the building for users of the facility. Two signs are permitted, and the signs must not exceed 40 square feet in area and 26 feet in height. The signs must be set back at least 5 feet from the property line, or, if the driveway entrance to the subdivision is located in the right-of-way, a revocable permit issued jointly by the Sign Review Board and the appropriate transportation jurisdiction in accordance with Section 59-F-7.1(g) must be obtained to erect the sign. The sign may

be illuminated in accordance with the requirements of Section 59-F-4.1(e).

Although Petitioner says the signs are each six feet tall and five feet wide, the existing sign appears from the above photo to be only about four feet tall and variable in width. Moreover, because the sides are irregular in shape, it is quite possible that each sign has an area of 20 square feet or less, which would allow their combined area to comply with the 40 square foot maximum set out in the statute. Petitioner should accurately measure the existing sign and request sign permits from DPS.

The HPC approved reinstallation of the second sign on the property, and Technical Staff also raised no objection. The Hearing Examiner finds no basis for denial, assuming DPS grants the required permit. A condition to that effect has been proposed in Part V of this report.

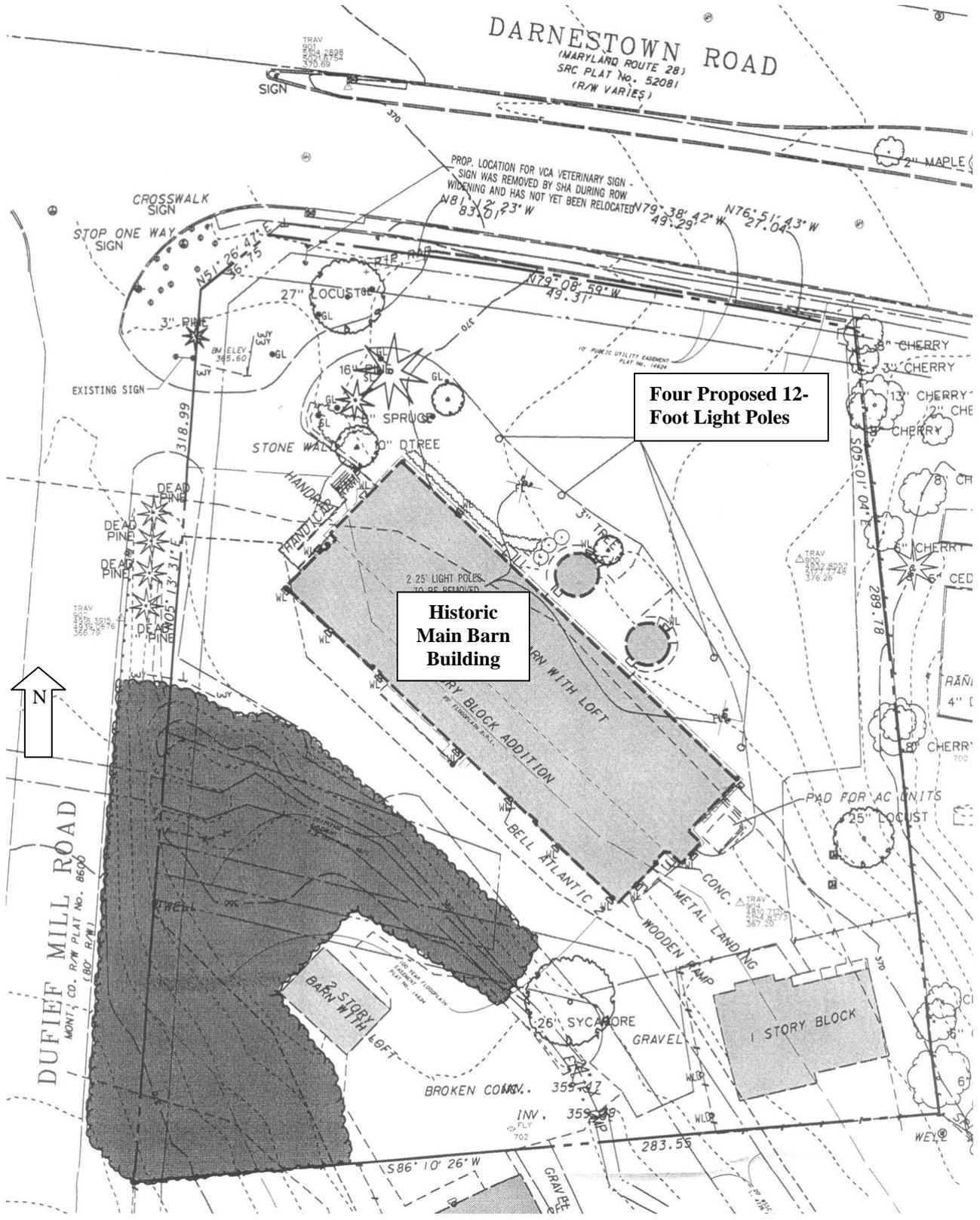
d) The proposed dog-walk area:

Petitioner proposes to lease an area just south of the property, for the occasional walking of animals, as set forth in Item # 6, below. This area is visible on the revised Site Plan, shown on page 19 of this report. For the reasons discussed in Item 6, below, the Hearing Examiner finds that this proposed revision should not be permitted.

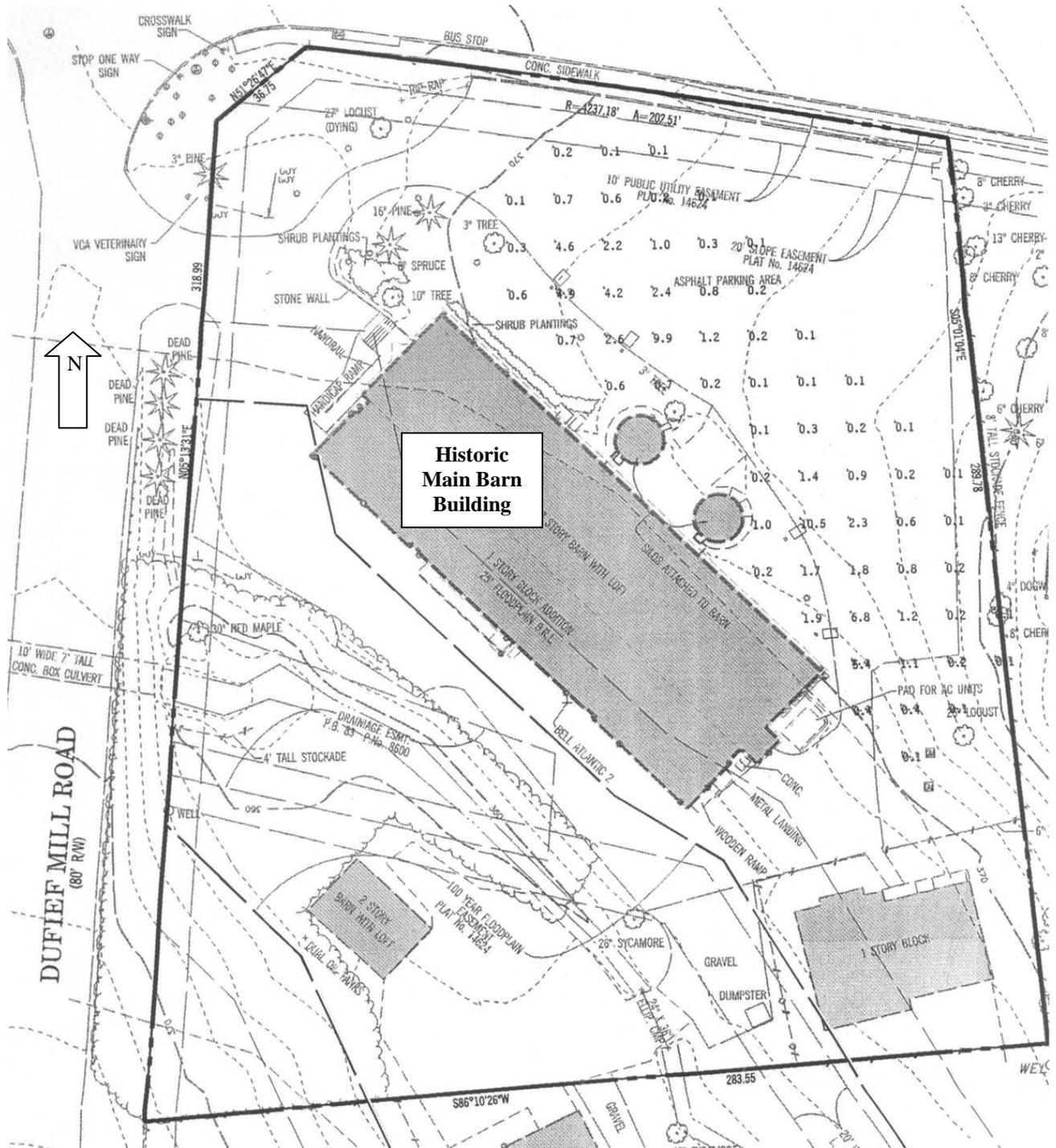
**5. The Updated Landscape and Lighting Plan (Exhibit 18(a)):**

One of the proposed changes to the site is reflected in an updated landscape and lighting plan (Exhibit 18(a)), which shows four lights on 12 foot poles, instead of two lights on 25 foot poles, in accordance with the wishes of the Historic Preservation Commission. The HPC made that change a condition of its Historic Area Work Permit, as shown in Exhibit 26. It also required that existing light fixtures on the silos and barn be removed and replaced or painted to match the silos and barn in color; that replaced or painted fixtures be reviewed and approved at the staff level; and that Petitioner survey and stabilize the other historic barn on its property. Since it is not clear from the record that Petitioner has taken these other steps, the Hearing Examiner has recommended them in Part V of this report as

conditions of the special exception. As mentioned, the four new 12 foot pole lamps are shown on the revised Landscape and Lighting Plan, displayed below:



Cut sheets for the newly proposed lights were filed as Exhibit 18(b), and a supplementary photometric study of the lighting was filed as (Exhibit 18(d)). It is shown below, demonstrating that the new lighting will not produce lighting in excess of 0.1 foot-candles at the property line.



In addition to the new 12 foot pole lights, five decorative single lamps are mounted at a height of eight (8) feet, and they illuminate the entrance to the Property off of Dufief Mill Road. Twelve single lamplights are mounted on the western, eastern, and southern sides of the main structure at a height of twelve (12) feet. One light is mounted on each of the two silos at a height of about twenty (20) feet.

The existing lighting on the Property provides for the safety of vehicular and pedestrian traffic on the property and increases the visibility of the vehicular entrance from Dufief Mill Road. In accordance with section Zoning Ordinance §59-E-2.6, all lighting was installed and is maintained in a manner not to cause glare or reflection into abutting or facing properties. The lighting also does not interfere with the safe operation of vehicles moving on or near the site. All lighting will be directed away from adjacent homes, and no light will spill on to residential properties. Technical Staff notes that the proposed new fixtures are “shoebox” design, which are acceptable in terms of light glare and spill control. The photometric studies, Exhibits 11 and 18(c), demonstrate there are no adverse light impacts upon neighboring properties. Technical Staff concluded that no new landscaping is required for the proposal.

## **6. Proposed Area for Dog-Walk:**

One of the amendments to the modification petition added an area south of the site to be leased for the occasional walking of animals. The owner of that adjacent property, Ronald E. Greger, MD, signed a letter (Exhibit 25) confirming that he had “granted VCA permission to walk dogs on the north side of the existing stream.” Though the revised Site Plan, shown on page 19 of this report specifies the area to be leased for this purpose, the letter signed by Dr. Greger does not clearly indicate the area. Therefore, Petitioner offered to submit a document with greater clarity if the special exception is approved, Tr. 70, or a copy of the lease for the dog-walk area. Tr. 130.

Unfortunately, it appears to the Hearing Examiner that the proposed lease area for walking the animals does not meet the statutory requirement that it be “set back from any property line 200 feet . . .” *Zoning Ordinance §59-G-2.32(b)(2)*. The Technical Staff report misinterprets this provision as calling only for a setback of 200 feet “from adjacent residences, the nearest of which are located on Citroen Court . . .” That is not what the *Zoning Ordinance* provides. The Hearing Examiner finds that Petitioner’s land use expert, John Sekerak, made a similar error in testifying that, in his opinion, the proposed lease area complied with the 200 foot setback. Tr. 114.

Examination of the revised Site Plan, Exhibit 30(a), reveals that the proposed dog-walk area is approximately 45 feet from the property line separating Lot 3 from Lot 4, 160 feet from the property line separating Lot 3 from “Parcel “A” (to the southeast of Lot 3) and approximately 170 feet (at its closest point) from the property line separating Lot 3 from the Dufief Mill Road right-of-way.<sup>13</sup>

Mr. Sekerak attempted to draw a distinction between an animal exercise area and a dog-walk area in which animals would be leashed. While that distinction would apply to the requirement for fencing contained in the second sentence of subsection (b)(2), it does not apply to the first sentence which unambiguously requires a 200 foot setback “from any property line” for “[e]xterior areas used to exercise, **walk**, or keep animals . . .” [Emphasis added.] The Hearing Examiner does agree with Mr. Sekerak’s observation that walking one dog at a time in the proposed lease area “should have no impact on surrounding residential areas.” Tr. 101-102. However, the Hearing Examiner is not free to ignore the plain language of the statute which prohibits the dog-walk in this area just because it would have no actual adverse impact on the neighbors in this case. In sum, the Hearing Examiner cannot

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<sup>13</sup> The Hearing Examiner does not consider the property line between Lot 3 and Lot 2 (the subject site) because leasing the adjacent property would probably result in a zoning merger of the two lots at that point. See *David H. Remes v. Montgomery County*, 387 Md. 52, 874 A.2d 470 (2005). For the same reason, leasing the adjacent dog-walk area would satisfy the subsection (b)(7), which prohibits dog walking or exercise in outdoor areas “off-site,” because the proposed lease area would become “on-site.” However, this result does not satisfy the setback provision quoted above.

recommend approval of the proposed lease area for walking animals.<sup>14</sup>

### **7. Change in Special Exception Ownership:**

The final change requested by Petitioner is the removal of Kenneth R. Cowell, D.V.M, as one of the two co-holders of the special exception, the other being H. Steven Steinberg, V.M.D, because Dr. Cowell has not been associated with the use for more than 20 years. The request was couched in terms of “transferring” the special exception solely to Dr. Steinberg (Exhibit 9(b)) because there is nothing in the Zoning Ordinance or in Board of Appeals Rules which expressly permits one of two co-holders to be dropped. BOA Rule 12.2 does permit transfers of special exceptions as a modification, but only “if the original holder of the special exception requests a transfer or agrees to the transfer in writing.”<sup>15</sup> Although Dr. Steinberg has agreed in writing, Dr. Cowell has not.

Petitioner submitted an affidavit from Dr. Steinberg (attached to Exhibit 29) indicating that Dr. Cowell has not been affiliated with the special exception since 1985, and that to his knowledge, Dr. Cowell gave up his veterinary practice and moved out of state. According to Dr. Steinberg’s sworn statement, “attempts to reach him have been unsuccessful.” Petitioner argues in a letter from its counsel (Exhibit 29) that the Board has the power to grant the request, and that it has tacitly recognized Dr. Steinberg as the only holder of the special exception by processing numerous modification petitions over the last 20 years signed only by Dr. Steinberg.

The Board of Appeal’s general power to grant special exceptions stems from Montgomery County Code §2-112(b). Zoning Ordinance §59-A-4.123(a) requires that the Board act by written resolution, and §59- A-4.123(c) specifies that an “affirmative vote of at least 4 members [with some

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<sup>14</sup> It should be noted that Petitioner may still be able to walk and even exercise animals on site because the initial grant of a special exception in S-597 expressly recognized that “large animals would have an exercise paddock located to the southwest of the larger of the two frame barns.” *BOA Opinion and Resolution in S-597, effective March 15, 1978, p 2*. The Hearing Examiner is not aware of that authority ever being revoked by the Board, and therefore has proposed a condition which denies the current request but makes clear that any on-site, outdoor, animal-walking authority previously granted remains intact. The proposed condition also sets certain parameters for such animal walking.

<sup>15</sup> An exception is made for accessory apartments, but that is not material to this case.

exceptions] is required to adopt a resolution granting, revoking, suspending, modifying, amending, or extending the time in which to implement a special exception.” Montgomery County Code §2-113(d) authorizes the Board of Appeals to promulgate Rules of Procedure to govern its proceedings, subject to Council approval. The Board’s Rules of Procedure were approved by the Council on October 27, 1992 (Resolution 12-865).

Both the Zoning Ordinance and the Board’s Rules of Procedure appear to be silent regarding co-holders of a special exception. Zoning Ordinance §§59-A-4.2 *et seq.* and § 59-G-1.3(c) govern the required contents of petitions for special exceptions and modifications thereof. None of these sections specifies that a special exception modification petition must be signed by all co-holders of the special exception. Actually, under § 59-G-1.3(c), “[t]he 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).” In other words, a special exception may be modified even if neither co-holder so requests, as long as DPS requests the modification or there is a show cause hearing. Administrative agencies generally have only those powers as are conferred by statute; however, some powers may be considered incidental to the grant of authority – *e.g.*, the grant of authority to approve implies the power to disapprove. *Baltimore County v. Missouri Realty, Inc.*, 219 Md. 155, 157-158, 148 A.2d 424, 426 (1959). Given the Board’s authority to modify the special exception absent the application of either co-holder, it is reasonable to conclude that the Board has the incidental authority to modify the special exception upon the application of one of the two co-holders.

In addition, Zoning Ordinance §59-G-1.3(c) allows the Board to administratively modify a special exception (*i.e.*, without a public hearing), “[i]f 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. . . .”

That is the case here as to the unopposed request to remove Dr. Cowell, an absentee co-holder whose removal will in no way affect the nature of the use or its impact on the neighborhood..

It should also be noted that Rule 5.0 of the Board’s Rules of Procedure specifies, *inter alia*, that the Board may “on motion by any party, or by the Board, dispose of procedural requests, including but not limited to . . . motions . . . to amend . . . petitions”; “waive minor procedural defects or errors that do not affect substantive rights of the parties in order to proceed on the merits;” and “take any other action necessary to carry out the intent of the Zoning Ordinance . . . .”

The Hearing Examiner thus concludes that the Board has authority to remove Dr. Cowell as a co-holder of the special exception, incidental to the grants of power to the Board discussed above.<sup>16</sup> Nevertheless, in the absence of a Board Rule specifically authorizing an inactive co-holder to be dropped, the Hearing Examiner recommends that a resolution granting the removal in this case be made expressly subject to reconsideration if and when Kenneth R. Cowell, D.V.M. appears and requests such reconsideration in writing. A condition to that effect is proposed in Part V of this report.

Such a resolution will have the practical benefit of allowing the current use to be legally modified, while protecting the “substantive rights” of the absent co-holder, should he ever return to this jurisdiction and request reinstatement. Failing to allow the modification because Dr. Cowell has failed to sign the petition would have the unfortunate effect of “tying the Board’s hands” and allowing an important use to be held hostage to the extended and unexplained absence of one of two co-holders. Such an outcome, at least in this case, would be against the public interest because it is undisputed that the veterinary hospital is an asset to the community.

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<sup>16</sup> It appears that the administrative practice of the Board’s staff has been consistent with this approach. People’s Counsel, Martin Klauber, personally checked with the Board’s administrative staff during the hearing and reported back that, when there are multiple special exception holders, “[i]t is the administrative practice with the Board of Appeals, after ascertaining good faith attempts to contact the missing Special Exception holder, to grant the request and eliminate that Special Exception holder.” Tr. 30.

### **E. Community Response**

As mentioned in Part I of this report, there has been no opposition to the special exception modification request, and indeed no community response of any kind, except for the participation of the People's Counsel, Martin Klauber, Esquire, in the Hearing. Mr. Klauber strongly supported the modification petition, stating (Tr. 34):

But as was indicated in my preliminary issues, I am personally aware of the kind of services that this Special Exception has rendered to citizens and residents of Montgomery County. And there is, speaking on behalf of the public interest, this is a no brainer. It, it's personally and officially delightful to me to understand that this expansion will allow this service to be even better than it was; and it was pretty good. And a lot of people benefit from what goes on here, a lot more people will benefit. And so the granting of this Special Exception Modification is so in the public interest of the citizen's of Montgomery County that it almost goes without saying, I fully support this modification.

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

At the beginning of the hearing, the Hearing Examiner raised the notice question that was discussed on pages 3 - 4 (and in footnote 7) of this report. The Hearing Examiner concluded that the fact that the Board's notice contained a typo, specifying the hearing date as "January 9, 2005," not the intended January 9, 2006, should not derail the hearing because a reasonable person receiving the original notice should have realized that a notice issued on September 8, 2005 could not be for a hearing to be held in January of 2005. Moreover, the Hearing Examiner had also issued a notice on December 27, 2005, regarding Petitioner's motion to amend the petition, and that notice referred to the correct hearing date, time and place. Since that notice went to all the people required to get notice of the hearing, the Hearing Examiner and all parties of record felt that notice was adequate, and the hearing could proceed as scheduled. Also, the motion to amend the petition,

noticed on December 27, 2005, was granted, subject to reconsideration should a meritorious objection be made by the end of the notice period that day (None was.).

In response to a question raised by Hearing Examiner, Petitioner's counsel, Stuart Barr, represented that "no expansion [in floor space] is proposed at this time." Tr. 8. Another question raised by the Hearing Examiner was the impact of not having Dr. Cowell, a co-holder of the special exception, as a signatory to a modification petition seeking, in part, transfer of special exception ownership. Tr. 9. Mr. Barr responded that the special exception was not being transferred to a new owner, but to one of the current co-holders, Dr. Steinberg, and Dr. Cowell has not been affiliated with the operation for many years. He offered to submit something in writing from Dr. Steinberg, describing the efforts he made to locate Dr. Cowell. Tr. 10-11, and *see* Exhibit 29.

The People's Counsel, Martin Klauber, also raised two items as preliminary matters, an objection to the untimely Technical Staff report and a disclosure that he had once had a pet treated at Petitioner's hospital. The Hearing Examiner found no prejudice in this unopposed case caused by the untimely Technical Staff report, and with Petitioner's consent, elected to proceed with the hearing. Tr. 14-19. Since Petitioner did not object to Mr. Klauber's continued participation, he was allowed to remain on the case.

Mr. Barr indicated that the special exception site has historic buildings on it, and that the Historic Area Work Permit was approved with conditions. Tr. 25. One of the conditions was the replacement of two lights, and that is what triggered the amendment to the petition, filed in December. He also noted that the Technical Staff report (Exhibit 20) had a few minor errors. Contrary to its language on page 2, Petitioner does not seek to transfer the special exception to "a new owner," but rather to one of the two current co-holders, and 24 hour operation of the hospital for emergency purposes had been previously approved. Tr. 26-29. Moreover, Petitioner disagreed with

Technical Staff's conclusion on page 7 of their report that any future development on the site would require subdivision.<sup>17</sup> Tr. 29-30.

Petitioner called three witnesses at the hearing, Cheryl Smith, Administrator of the VCA Hospital, John Sekerak an expert in land planning, and Edward Papazian, an expert in traffic engineering and transportation planning. There were no other witnesses at the hearing.

### **A. Petitioner's Case**

#### **1. Cheryl Smith:**

Cheryl Smith testified that she is the Hospital Administrator for "VCA VRA." She has been there for ten years and manages day-to-day functions. VCA stands for Veterinary Centers of America. VCA's parent company is "VCA ANTEC," but the Applicant in this case is "VCA Referral Associates Animal Hospital, Inc.," (a/k/a, "VCA VRA"), the named lessee of the property. None of those entities is the holder of the Special Exception; nor do they seek to be. Dr. Steinberg owns the property and serves as Petitioner's neurologist. He authorized the petition. VCA has operated the hospital since 1996. Tr. 35-37.

Ms. Smith testified the zoning notice signs were posted and identified photos of them. She described the hospital's practice as including ophthalmology, neurology, surgery, chemotherapy, radiation/oncology, cardiology, predominantly on small animals, dogs and cats. Most services are provided in the main barn building, but additional services are given in the radiation/oncology building, marked "1-story block" on the Site Plan [and specified as "Building Housing X-ray Equipment" on page 19 of this report]. Tr. 38-41.

Ms. Smith identified all of the photographs in Exhibit 10. Tr. 42-46. She indicated that the staff included many technicians and assistants, in addition to the veterinarians. All animals are seen by appointment only, except in emergency situations. No animals are allowed outdoors between 6

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<sup>17</sup> This issue is not relevant to the pending petition because it applies to future development.

p.m. in the evening to 8 a.m., the next day, unless they are going to and from the facility. VCA keeps a written log of appointments and drop-in emergency activities. VCA does not sell pet food or supplies (except for the care of hospitalized pets), nor display them for retail purposes. Tr. 47-48.

Ms. Smith described the hospital's floor plan and testified that animals are kept overnight at the hospital for medical purposes only. Tr. 49-51. She indicated that VCA has a good relationship with the neighborhood, and had not had any complaints. VCA notified the neighbors in writing of the modification petition (Exhibit 24). Ms. Smith further testified that VCA is not proposing any building construction or any additional expansion at this point. VCA is committed in the future to ensuring that any additional changes go through the appropriate processes, either with the Board of Appeals or with the Historic Preservation Commission as appropriate, to make sure everything is approved ahead of time. Tr. 49-54.

According to Ms. Smith, VCA is not proposing any additional veterinarians at this time. In her experience working in the vet hospital industry, the general standard for the proportion of staff members to veterinarians is two to one. Support staff have staggered work shifts, and generally speaking, the number of veterinarians is what typically affects most directly, the number of appointments that VCA has. VCA agrees to a condition stating that petitioner shall be permitted to have a maximum of 62 employees, including all veterinarians and support staff employees on site at any one time, provided that the number of veterinarians on site at any one time does not exceed 22. Tr. 55.

Ms Smith testified that VCA is proposing to begin drop-offs at 6:30 a.m., as opposed to the current 8 o'clock hour, to help alleviate parking problems and to allow the owners or the pet handlers to drop off their animals before the peak hour traffic, and so that they can get into work. VCA, for the past several years has received emergency pet situations 24 hours a day, but otherwise,

everything is by appointment only. A minimal number of staff remain overnight to care for the animals. According to Ms. Smith, VCA has never had a parking problem requiring VCA employees or customers to park off the property. Ms. Smith described the location of parking and other features on the Site Plan, including a 6 foot tall fence installed around the small x-ray building for security; the VCA Veterinary entrance sign; the location proposed for installing another sign that had been removed as a result of road widening; the 8 foot tall stockade fence on the eastern boarder of the property, which has been there “forever;” and the proposed dog-walk area to be leased south of the site. VCA is willing to walk animals only between the hours of 8 a.m. to 6 p.m., and only one at a time. Tr. 56-65.

[Mr. Barr indicated, regarding the area south of the site to be leased for the occasional walking of animals, that the owner of that adjacent property, Ronald E. Greger, MD, had signed a letter (Exhibit 25) confirming that he had “granted VCA permission to walk dogs on the north side of the existing stream.” Though the revised Site Plan, shown on page 19 of this report specifies the area to be leased for this purpose, the letter signed by Dr. Greger does not clearly indicate the area. Therefore, Mr. Barr offered to submit a document with greater clarity if the special exception is approved. Tr. 70.]

Ms. Smith identified the two lights on 25 foot poles which Petitioner planned to replace with four 12 foot pole lights, in accordance with the wishes of the HPC. She indicated that VCA consents to the removal of Dr. Cowell as a co-holder of the special exception, leaving the special exception in the name of Dr. Steinberg only. Tr. 73. In later questioning, she testified that VCA is complying with all applicable Federal, State and local regulations regarding safety of the x-ray equipment on the site. Tr. 95. Also, she stated that none of the animals treated at the facility are walked offsite, and none of the animal waste is, in any way, allowed offsite. Tr. 117.

2. John Sekerak:

John Sekerak testified as an expert in landscape architecture and land use planning. He described the site and noted its historic designation. He also described the surrounding roadways, and introduced a recent aerial photo of the area (Exhibit 27), showing the expanded Route 28. Tr. 75-85. Mr. Sekerak then described the surrounding area and indicated his agreement with Technical Staff's definition of the general neighborhood. Tr. 85-87.

Mr. Sekerak further testified that there has been no expansion of the buildings and structures, so increasing the number of staff has no substantive impact on the surrounding neighborhood. In his opinion, the parking area is sufficient now. As to hours of operation, having the convenience of the customers being able to drop some patients off on their way to work, and spreading out the times that they arrive, in order to drop off their pets, should be helpful. In Mr. Sekerak's opinion, the reduction in lot size will not adversely impact the functioning of the Special Exception. It actually is a contribution to improvements of the surrounding transportation network. Changes brought about by the governmental taking to widen the road leave the parking facility a conforming use, and since the parking facility existed before May 6, 2002, it does not have to conform to the requirements of Zoning Ordinance §59-E-2.83 regarding landscaping around a parking facility Tr. 88-93.

[Mr. Barr indicated that Petitioner would apply to DPS for a sign permit (and a variance, if needed) to erect a second sign to replace the one removed during the road widening, and he produced a photo (Exhibit 28) of the existing sign. Tr. 97-101.]

As to the proposed dog-walk lease area, Mr. Sekerak testified that it is approximately 50 x 80 feet, with plenty of room on the north side of the stream. "It would be difficult to even see it from the roadway if you were so inclined. So, certainly, in terms of walking one dog at a time, should have no impact on surrounding residential areas." Tr. 101-102.

In Mr. Sekerak's opinion, as confirmed by the lighting consultant who had prepared the photometric analysis, the four lights on 12 foot poles will create less light at the perimeter than would the two existing 25 foot pole lights. Therefore, regarding lighting, Petitioner is expecting less impact on surrounding properties than exists today. Tr. 102-106.

Mr. Sekerak agrees with Technical Staff's conclusions regarding both the general and specific conditions of the special exception, and with regard to inherent and non-inherent characteristics. Regarding the non-inherent characteristics, he noted this is a specialty veterinary use here ("not your run of the mill veterinary hospital"), but the traveling public and the surrounding areas "shouldn't really perceive any difference there." Regarding the size of the use, Mr. Sekerak noted that the facility is an adaptive reuse of a large, historically designated barn. "So in that sense, it's not a adverse non-inherent [use], in fact, it's actually an attribute to the community." Tr. 107.

In Mr. Sekerak's opinion, the use is consistent with the Master Plan. The site is specifically discussed as to the historic designation on the property, and with the HPC approval, this is an appropriate and inventive adapted reuse. Regarding the impacts to the surrounding area, Mr. Sekerak noted that there are no physical changes being proposed here, no additional structures, no expansions or changes to the structures, and no land disturbance activities at all. Moreover, the property is zoned R200, and a veterinary hospital is permitted by a special exception in that zone. He testified that there is a concentration of special exceptions, but considering the enclave nature of this triangle surrounded by the road network and community open space, it's very appropriate. The special exception to the east is a building for medical offices, but it is directly related to the six lane highway. The other two special exceptions are much smaller, one included in what appears to be a former single family home. Tr. 108-110.

Mr. Sekerak observed that while he was on the site, there was no difficulty at all with barking dogs or noise generated by them from inside the building. The site abuts a six lane highway and that's certainly the dominant noise generator in this area. Tr. 110. He also opined that it is appropriate to maintain the agricultural appearance to this building for historical reasons, and so a residential appearance would not be appropriate. Tr. 111-113.

Mr. Sekerak further testified that the proposed lease area was not an animal exercise area but a dog-walk area in which animals would be leashed. According to Mr. Sekerak, the area is located over 200 feet from the property line.<sup>18</sup> Because it is an area leased by Petitioner, adjacent to the property it leases from Dr. Steinberg, it satisfies the provision prohibiting "off-site" dog walks.<sup>19</sup> The 50 foot setback requirements regarding buildings are not applicable because the buildings are all existing structures. Animals will not be outdoors between 6 p.m. and 8 a.m., except for arrival and departure. Mr. Sekerak agrees with Technical Staff's use of the criterion for medical clinics to determine appropriate parking for the subject site. There is no boarding of animals, and the facility is serviced by public sewers. Tr. 114 -117.

3. Edward Papazian (Tr. 118-126):

Edward Papazian testified as an expert in traffic engineering and transportation planning. He performed a traffic impact study in accordance with methodologies outlined in the Local Area Transportation Review Guidelines for Montgomery County, and it was and reviewed by Transportation Planning Staff. Two intersections were identified by Technical Staff as critical, MD Route 28 and Dufief Mill Road, and MD Route 28 and Muddy Branch Road.

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<sup>18</sup> Presumably, Mr. Sekerak is referring to setbacks from actual residences because the proposed dog-walk area is certainly not set back 200 feet from all property lines.

<sup>19</sup> The Hearing Examiner takes this statement to mean that the proposed leased dog-walk area would become part of the special exception site.

Mr. Papazian's study accounted for existing development, which includes the current actual staffing levels at the veterinary hospital as well as other existing developments, and background traffic which includes projects which have been approved but not yet built. He concluded that the VCA Hospital creates 37 trips during the a.m. peak hours and 43 trips during the p.m. peak hours, with its full compliment of 40 support staff. Tr. 121. Though this represents a doubling of the number of trips with a support staff limited to 10, it actually has "a very negligible effect" on the surrounding roadway system. Tr. 122. The critical lane volumes did not exceed the congestion standard at either critical intersection studied. Exhibit 12, p. 14. According to Mr. Papazian, the added morning hours for pet drop-offs should spread out any morning traffic impacts. Tr. 123. Thus, a staffing level of 62 employees would not have an adverse traffic impact on the neighborhood. Mr. Papazian agrees with Technical Staff's use of the criterion for medical clinics to determine appropriate parking for the subject site. He concluded that the proposal will not reduce the safety of vehicular or pedestrian traffic in any way; that the buildings and the proposed use are adequately served by public roads and transportation facilities; that the proposed use is in harmony with the general character of the neighborhood, as to traffic and parking conditions; and that the proposed use does not constitute any type of nuisance because of traffic and parking conditions. Tr. 124-126.

### **B. People's Counsel**

Martin Klauber, the People's Counsel, did not present any witnesses at the hearing, but he did participate, and he strongly recommended approval of the requested special exception modifications. As stated by Mr. Klauber (Tr. 34),

But as was indicated in my preliminary issues, I am personally aware of the kind of services that this Special Exception has rendered to citizens and residents of Montgomery County. And there is, speaking on behalf of the public interest, this is a no brainer. It, it's personally and officially delightful to me to understand

that this expansion will allow this service to be even better than it was; and it was pretty good. And a lot of people benefit from what goes on here, a lot more people will benefit. And so the granting of this Special Exception Modification is so in the public interest of the citizen's of Montgomery County that it almost goes without saying, I fully support this modification.

Mr. Klauber also personally checked with the Board's administrative staff during the hearing and reported back that, when there are multiple special exception holders, "[i]t is the administrative practice with the Board of Appeals, after ascertaining good faith attempts to contact the missing Special Exception holder, to grant the request and eliminate that Special Exception holder." Tr. 30.

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

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met. The special exception is also evaluated in a site-specific context because there may be locations where it is not appropriate. A special exception use is deemed presumptively compatible within the zoning district in which it is authorized, unless specific adverse conditions at the proposed location are shown to overcome the presumption. Pre-set legislative standards are both specific and general.

Petitions to modify the terms or conditions of a special exception are authorized by §59-G-1.3(c)(4) of the Zoning Ordinance. As mentioned in Part I of this report, because Petitioner's plans do not include expansion of the total floor area at all, the scope of this inquiry is limited by statute to "discussion of those aspects of the special exception use that are directly related to [the modification] proposals" and does not include a review of the "underlying special exception[s]." Nevertheless, the changes proposed by Petitioner do require a review under the standards established by the Zoning Ordinance for evaluating special exceptions.

### **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 veterinary hospital use. Characteristics of the proposed modification that are consistent with the characteristics thus identified will be considered inherent adverse effects. Physical and operational characteristics of the proposed modification 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.

Technical Staff suggested the following inherent characteristics of a veterinary hospital use (Exhibit 20, p. 6):

The inherent characteristics associated with the proposed use are daily arrival and departure of veterinary staff and intermittent entry and exit of customers with pets. Deliveries of materials may come by mail or in small parcels.

Specialty medical equipment will need servicing but mostly by technicians in regular vehicles. Most activities are internalized within the building however animals must be walked or carried from the parking lot into the building. Animals recuperating from anesthesia are also taken outdoors.

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

Technical Staff listed the following possible non-inherent effects (Exhibit 20, pp. 6-7):

Non-inherent characteristics of this use may include a use that is particularly large and intense or intensity that comes from a combination of uses. No combination of uses is proposed in this instance but this analysis has given consideration to the intensity of this operation. This is a specialized regional animal hospital and its fairly large when compared to similar special exceptions in the County. Certainly the location and neighborhood context serve to mitigate adverse effects on neighboring properties.

The Hearing Examiner agrees with Staff that the size of the facility and its intensity (resulting in a large staff) are non-inherent characteristics of this use. In addition, the historic nature of the site and resulting reduced setbacks are also non-inherent characteristics. Nevertheless, Technical Staff concluded that there are no non-inherent effects sufficient to require a denial of the petition, and the Hearing Examiner agrees. This conclusion is especially warranted considering that the petition before us is for a modification of a long-existing special exception, not for a new one, and that the modification petition does not call for any new construction (except for non-intrusive modifications of the external lights at the behest of the HPC).

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

## B. General Standards

The general standards for a special exception are found in Section 59-G-1.21(a). The Technical Staff report and the Petitioner's written evidence and testimony provide sufficient evidence that the general standards would be satisfied in this case, as outlined below.

### **Sec. 59-G-1.21. General conditions:**

(a) *A special exception may be granted when the Board, 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 veterinary hospital is a permitted special exception in the R-200 Zone, pursuant to Zoning Ordinance §59-C-1.31(d).

(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: Except as described in Part IV. C., below, the proposed modification would comply with the standards and requirements set forth for the use in Code §59-G-2.32.

(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 noted in Part II.C. of this report, the subject property lies within the area analyzed by the *Potomac Subregion Master Plan*, approved and adopted in April 2002. Two of the structures on the site are listed by the Master Plan as the historic “Maple Spring Barns.” Appendix C, pp. C-2, C-4 and C-55. The larger of these structures has been adapted to the veterinary hospital use approved by the Board of Appeals over 25 years ago. The Historic Preservation Commission (HPC) approved the proposed changes, with conditions (Exhibit 26), and Technical Staff found that “the existing use, as proposed for modification, will continue to be an appropriate adaptive use of an historic structure.” Exhibit 20, p. 5.

The Master Plan also contains a “Special Exception Policy,” under which it discourages special exceptions incompatible with their neighborhood or located in highly visible sites or concentrated along major transportation corridors. See Master Plan, pp. 35-36. None of the changes sought in this is modification petition are likely to conflict with these goals, since no new special exception use is being added, and the general appearance of this historic site is not being changed.

It should also be noted that the Master Plan recommended continuation of R-200 zoning, and the subject use is permissible by special exception in that zone. The Hearing Examiner agrees with the Technical Staff’s conclusion that the application is in conformance with the *Potomac Subregion Master Plan*.

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

Conclusion: Both the traffic generated and the on-site parking are within required limits. The proposed use will continue to be in harmony with the neighborhood because the

design, scale and bulk of the structures remain unchanged. The type of activity, traffic and parking have co-existed harmoniously with the neighborhood for many years, and the proposed modifications will not change that relationship.

- (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 supports the conclusion that the requested modifications would not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site.

- (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: The Property has been improved with this veterinary hospital for 28 years. The use has caused no objectionable noise, vibrations, fumes, odors, dust illumination, glare, or physical activity in the past. The requested modifications will not change those operational characteristics.

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

Conclusion: The Hearing Examiner concludes that the proposed modifications will not increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely. Technical Staff observes that the matter of special exceptions in this

triangle was debated in previous cases. The special exceptions on the adjacent lots that host medical clinics (BAS-1481 to the east and BAS-1255 to the south) were originally opposed by Technical Staff because of the concentration of special exception uses. According to Staff, “[t]he Board of Appeals concluded in BAS-1255 that the triangle was well suited for special exception uses.” By the time the last special exception was added to the triangle (BAS 1555, located in the southern end) Technical Staff had acquiesced to this line of reasoning; however, they state that “future modifications of these special exceptions will be examined carefully for cumulative effect.” Exhibit 20, Attachment 1, pp. 2-3. The Hearing Examiner notes that this is a modification petition, so by its nature, it cannot increase the number of special exception uses. Approval would render lawful an increase in support staff that has already occurred and which is apparently critical to the proper functioning of the 22 veterinarians that the Board previously approved. Based on the evidence in this case, the Hearing Examiner finds that this increase in intensity has not and will not affect the area adversely or alter the predominantly residential nature of the area.

- (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 modification would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site. The continuation of the veterinary hospital that has existed for almost 28 years at this location will continue to provide needed health care for local pets, and will have no adverse effect on any of the listed individuals.

(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.*

(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[LATR] and the Policy Area Transportation Review[PATR],<sup>20</sup> as required in the applicable Annual Growth Policy.*

(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 not reduce the safety of vehicular or pedestrian traffic.*

Conclusion: No subdivision is required, and the Board of Appeals must therefore determine the adequacy of public facilities. The evidence supports the conclusion that the subject property would continue to be served by adequate public facilities. Public water and sewer serve the site. The site will require no school services. A fire station and police station are both in close proximity, according to Technical Staff. None of the proposed changes should impact schools, police and fire protection, water, sanitary sewer, storm drainage and other public facilities, with the possible exception of public roads.

A traffic impact study (Exhibit 12) was prepared by Petitioner's transportation planning expert, Edward Papazian, and reviewed by Transportation Planning Staff. Two intersections were identified by Technical Staff as critical, MD 28 and Dufief Mill Road and MD 28 and Muddy Branch Road. According to Technical Staff, the congestion standard for the North Potomac Policy Area is 1,475 Critical Lane Volume (CLV).

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<sup>20</sup> Policy Area Transportation Review (PATR) standards do not apply to this post-July 1, 2004 Petition.

Mr. Papazian concluded that the VCA Hospital creates 37 trips during the a.m. peak hours and 43 trips during the p.m. peak hours, with its full compliment of 40 support staff. Tr. 121. Though this represents a doubling of the number of trips with a support staff limited to 10, it actually has “a very negligible effect” on the surrounding roadway system. Tr. 122. The critical lane volumes did not exceed the congestion standard at either critical intersection studied, the highest reading being 1,376 at MD 28 and Muddy Branch Road during the morning peak hour. Exhibit 12, p. 14. Thus, both Petitioner’s transportation planning expert and Transportation Planning Staff agreed that a staffing level of 62 employees would not have an adverse traffic impact on the neighborhood. Tr. 124-125 and Transportation Planning Staff Report attached to Exhibit 20. Transportation Staff also concluded that “existing access to the site and the internal traffic/pedestrian circulation system shown on the site plan are safe and adequate.” The Hearing Examiner accepts these unrebutted findings.

### **C. Specific Standards: Veterinary Hospitals.**

The specific standards for a veterinary hospital are found in Zoning Ordinance § 59-G-2.32. The Technical Staff report and the Petitioner’s written evidence and testimony provide sufficient evidence that, except with regard to subsection (b)(2), the proposed modifications would be consistent with these specific standards, as outlined below.

#### **Sec. 59-G-2.32. Veterinary hospital.**

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

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

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

Conclusion: Not applicable; the property is not in a commercial, CBD or transit station zone.

(b) *In any residential or rural zone where permitted by special exception, a veterinary hospital must comply with the following conditions and requirements:*

(1) *In the R-150, R-90, and R-60 zone, the maximum lot size is one-half acre. In the R-60 zone a veterinary hospital must be located along a major highway with an existing right-of-way width of no less than 90 feet, and be adjacent to or confronting a central business district or a property zoned for commercial use.*

Conclusion: Not applicable. The property is not in these zones; it is zoned R-200.

(2) *Exterior areas used to exercise, walk, or keep animals must be set back from any property line 200 feet and screened from adjacent residential properties. All exterior exercise areas and runs must be fenced for the safe confinement of animals.*

Conclusion: This issue is discussed at length in Part II. D. 6. of this report. For the reasons stated therein, the Hearing Examiner disagrees with the conclusion stated in Technical Staff's report and instead finds that the proposed the proposed lease area for walking animals south of the current site would violate the 200 foot setback provision. Thus, the Hearing Examiner cannot recommend approval of the proposed lease area for walking animals. As noted in Part II, Petitioner may still be able to walk and even exercise animals on site because the initial grant of a special exception in S-597 expressly recognized that "large animals would have an exercise paddock located to the southwest of the larger of the two frame barns." *BOA Opinion and Resolution in S-597, effective March 15, 1978, p 2. See footnote 14 of this report.*

(3) *For all buildings in which animals will be present, maximum expected interior sound levels must be reduced to 40 dBA (A-weighted decibels) outside, measured at ten feet from the structure.*

Conclusion: According to an acoustical expert's report prepared by Polysonics Corp., the sound levels outside of Petitioner's facility are fully compliant with Zoning Ordinance §59-G-2.32(b). See Exhibit 14. Polysonics made precision noise measurements at the hospital, and reported no animal-generated noise outside of the buildings; rather, they found that the noise level is dominated by traffic from the major roads on the north and west sides of the building. They noted that the building is constructed of masonry and other material which provide excellent noise attenuation. Polysonics predicted that outdoor noise levels of barking would be inaudible except when dogs are being brought in or out. John Sekerak, Petitioner's land use planner, also testified that while he was on the site, there was no difficulty at all with barking dogs or any noise generated by them from inside the building. He indicated that the adjacent six-lane highway is certainly the dominant noise generator in this area. Tr. 110. Based on this uncontradicted record, the Hearing Examiner finds that Petitioner complies with this provision, and the proposed modifications will not change the current status.

*(4) All buildings and accessory structures must be set back from any property line a minimum of 50 feet.*

Conclusion: As noted by Technical Staff, this provision is not met by any of the three buildings on site. Technical Staff opines that Zoning Ordinance §59-G-2.32(c) grandfathers the current setbacks by providing that "[a]ny veterinary hospital lawfully existing prior to the effective date of this ordinance is a conforming use, and may be extended, enlarged or modified by special exception subject to the provisions set forth in this section." The Hearing Examiner takes official notice of the fact that the reference to "the effective date of this ordinance" is intended to mean the effective date of Ordinance

No. 14-47, the comprehensive re-write of Zoning Ordinance special exceptions which took place on May 6, 2002. The buildings in question all predate the comprehensive re-write of the Zoning Ordinance, and two of them are designated as historical buildings. Moreover, even if they were not grandfathered by subsection (c), their setbacks are not within the scope of the subject modification petition because no changes in these structures are proposed. As mentioned above, the scope of this inquiry is limited by statute to “discussion of those aspects of the special exception use that are directly related to [the modification] proposals” and does not include a review of the “underlying special exception[s].” See Zoning Ordinance §59-G-1.3(c)(4).

*(5) No animal may be outdoors between 6 p.m. and 8 a.m.*

Conclusion: Technical Staff believes that this provision is intended to regulate exercise of animals outdoors, not to govern drop-off and pick up of animals. The Hearing Examiner concludes that that is a reasonable interpretation of the statute, especially since the Board had previously approved hours until 8:00 p.m. Technical Staff does not feel that allowing animals to be dropped off and picked up between 6:30 a.m. and 8:00 p.m. will cause any problems. Animals being brought in or out from care are scheduled, which prevents encounters with other animals, and dogs are less likely to bark or make noise when they are with their owners. Also, the pick-up and drop-off area is remote from residences. Petitioner further observes that the extension of the hours of operation will not increase the traffic to and from the subject site because the Hospital has no walk-in clientele, other than emergency cases, and the Hospital schedules all veterinarian visits by appointment only. The Hearing Examiner also finds that these added hours should spread out any morning traffic impacts, as confirmed by Transportation Planner,

Edward Papazian. Tr. 123. Scheduled appointment hours will continue to commence at 8:00 a.m. However, with the additional one and a half hours of operation allowed prior to the commencement of scheduled appointments, pet owners are provided an added convenience to deliver a pet to the Hospital for an appointment prior to the height of rush hour traffic in the area. In sum, the hours can be extended as requested without violating this provision, and the Hearing Examiner so recommends

- (6) *On weekdays, the sound at the nearest receiving property line must not exceed 60 dBA between the hours of 8 a.m. to 6 p.m. and 50 dBA between the hours of 6 p.m. to 8 a.m. On Saturdays, Sundays, and federal holidays, the sound at the nearest receiving property line must not exceed 60 dBA between the hours of 9 a.m. to 6 p.m. and 50 dBA between 6 p.m. and 9 a.m. Terms are defined in accordance with the Montgomery County Noise Ordinance (Chapter 31B of the Montgomery County Code). In any event, the predicted maximum receiving property line sound levels must not exceed the characteristic ambient sound levels by more than 3 dBA at any time.*

Conclusion: The acoustical report indicates the highest measured noise from the facility is the air conditioning condenser at 47 dBA. Although the sound expert heard some barking while he was inside the waiting room, he reported no barking of dogs audible outside the facility. Polysonics expressly found that the VCA facility met the statutory requirements. There is no contrary evidence, and the Hearing Examiner therefore accepts the expert's conclusion.

- (7) *Dogs must not be walked or exercised in outdoor areas that are off-site.*

Conclusion: If the Board were to approve Petitioner's request to lease a small piece of property south of the current subject site for the occasional walking of animals, then the lease area would become part of the site, allowing compliance with this provision; however, as mentioned above, the proposed lease area does not comply with the 200 foot setback

requirements of subsection (b)(2), and therefore cannot be recommended. The only other evidence regarding exercise of animals is discussed above in connection with subsection (b)(2). The Hearing Examiner has recommended a condition specifying that if Petitioner walks animals in a space previously approved by the Board, only one animal at a time may be walked outdoors, and such animal walking may take place only between the hours of 8:00 a.m. and 6:00 p.m.

(8) *In addition to the submittal requirements in Sec. 59-A-4.22, the applicant must submit the following information. Applications submitted without this information are incomplete and will not be accepted or assigned a case number:*

- (i) *Acoustical engineering studies that demonstrate that the proposed use meets the standards in Sec. 59-G-2.02(b)(3) and (6) above. The studies must show the worst scenario sound level. The statement of operations must be sufficiently detailed to allow determination of how often the worst scenario sound level occurs.*
- (ii) *Detailed floor plans that show all the interior areas and their use designations,*
- (iii) *Site plans that show the layout of all exterior areas used to exercise, walk, or keep animals.*

Conclusion: An acoustical engineering report prepared by Polysonics Corp. was submitted by Petitioner as Exhibit 14; a detailed floor plan was submitted as Exhibit 5, and a revised site plan was submitted as Exhibit 30(a), showing a proposed area for walking animals.

(9) *The Board must specify a minimum number of off-street parking spaces, taking into consideration the number of employees on the maximum shift, the number of doctors practicing simultaneously, and the number of appointments and deliveries. This number must in no case be less than 5.*

Conclusion: The parking lot provides 71 parking spaces, including three that are accessible to the handicapped.<sup>21</sup> According to Petitioner's Hospital Administrator, Cheryl Smith, VCA has never had a parking problem requiring VCA employees or customers to park off the property. Tr. 58. The Zoning Ordinance does not provide a specific parking ratio for this use, but Technical Staff used a medical clinic as a reasonable comparison. Medical clinics are required to provide 5 spaces for each 1,000 square feet of gross floor area. When this ratio was applied to the floor space in the buildings housing the hospital, Technical Staff estimated that 58 parking spaces are required for this use. The Hearing Examiner finds this to be a reasonable approach, given the apparent absence of a parking problem at the proposed staffing levels (which are actually current levels). A condition is recommended requiring maintenance of the current 71 parking spaces.

*(10) The Board may regulate the number of animals that may be boarded, exercised, walked, or kept in runs or similar areas, and the manner in which animals are boarded, exercised, walked, or kept.*

Conclusion: Technical Staff recommends that no more than one animal be exercised in the proposed lease area at a time. Since the Hearing Examiner finds that the proposed lease area does not comply with the Zoning Ordinance, he instead recommends that any exercising of animals in outdoor areas previously permitted by the Board be done one at a time and between the hours of 8:00 a.m. and 6:00 p.m.

*(11) The Board may regulate the office hours and the number of appointments. Animals may be seen by appointment only. Emergency patients and visits to pick up prescriptions and pet-related items may also occur, within office hours only and without prior scheduling: abuse of this exemption may lead to*

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<sup>21</sup> As noted previously, , both the Statement in Support of the Petition (Exhibit 3) and the Technical Staff report refer to 74 spaces; however 3 of those spaces shown on the site plan are actually located just south of the site's property line.

*revocation of the special exception. A written log of all appointments and drop-in and emergency client activities must be kept, to be available for inspection by County authorities.*

Conclusion: Technical Staff confirmed in a site visit that logs are kept. The Hospital Administrator testified that a log is kept (Tr. 48), and except in emergencies, animals are seen by appointment only. Tr. 47. A condition embodying these terms is proposed in Part V of this report.

*(12) Any accessory operation, such as grooming or the sale of pet food and supplies, must be set forth in the statement of operations and must be limited as an accessory activity to a percentage of sales not to exceed 20%.*

Conclusion: No accessory operation is proposed. The Hospital Administrator testified that there are no retail sales or display of products on site, and Technical Staff did not observe any such products or services on the site visit.

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

Conclusion: The Hospital Administrator testified that all litter and animal waste are contained and controlled on the site. Tr. 49. Technical Staff reportedly saw no litter or animal waste, and the facility did not smell of animal waste. A condition embodying these terms is proposed in Part V of this report.

*(14) Animals may be kept overnight at the hospital only for medical purposes. If animals are kept for non-medical purposes, a separate application for an animal boarding place must be approved.*

Conclusion: The Hospital Administrator testified that animals are kept overnight only for medical purposes (Tr. 49), and the Hearing Examiner so finds. No boarding is proposed; only holding of animals for medical recovery. A condition embodying these terms is proposed in Part V of this report.

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

Conclusion: According to Technical Staff, public water and sewer serve the site.

(c) *Any veterinary hospital lawfully existing prior to the effective date of this ordinance is a conforming use, and may be extended, enlarged or modified by special exception subject to the provisions set forth in this section.*

Conclusion: This facility is a conforming use under this provision, as explained in response to subsection (b)(4), above. No physical enlargement is proposed other than adding the proposed lease area for animal exercise. As noted above, building setbacks required for the use are not currently met. Per this section, the existing encroachments lawfully exist. Technical Staff points out that any new construction would be subject to the provision of the section, including setbacks.

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

In addition to the other general and specific standards set forth above, “*Special exceptions are subject [under Code § 59-G-1.23(a)] to the development standards of the applicable zone where the special exception is located [in this case, R-200] except when the standard is specified in Section G-1.23 or in Section G-2.*” For this special exception, the applicable development standards (setbacks) were specified in Section 59-G-2.32; however, as previously discussed, this provision also renders the subject facility a conforming use. In any event, since this is a modification petition and no structural changes are proposed, the issue of development standards is beyond the scope of this report. These issues have been discussed in Part IV.C, above.

The remainder of Zoning Ordinance §59-G-1.23 concerns consistency with the forest conservation and water quality plans, signs that comply with Code § 59-F, compatibility of new or altered structures with the residential zone and limits on leakage of lighting into the neighborhood.

Neither forest conservation nor water quality are “aspects of the special exception use that are directly related to [the modification] proposals,” and they therefore cannot be considered in this review under the restrictions imposed by Zoning Ordinance § 59-G-1.3(c)(4). This modification petition is also exempt from forest conservation requirements under Code § 22A-5(q) because the existing special exception was approved prior to July 1, 1991. Exhibit 7(b). It is noted by Technical Staff that buildings and impervious surface extend into the stream buffers called for in the MNCPPC Guidelines for Environmental Management of Development. However, the instant proposal does not propose expansion, so the guidelines are not applied to the existing buildings. Environmental Staff therefore recommends approval of this application.

Both signs and lighting have been discussed at length in Part II. D. of this report. Any additional sign will require a permit approved by DPS. Proposed lighting has been approved by the HPC and comports with the limits on light spillage in a residential zone. Compatibility of the structures in a residential zone is not an issue here because no changes to the structures are proposed and because they are historic structures which must be preserved in any event. Tr. 111–113.

The requested modifications do not change the character of the approved special exception use. Instead, this request is required to bring the Site Plan and the use into compliance with actual characteristics of the property. Given that the requested changes do not represent a large-scale or substantive change from current operations and that the changes are required to provide appropriate care for the animals and to comply with conditions set forth by the HPC, the Hearing Examiner concludes that the modification petition should be granted, except for the request to add a leased area south of the site for walking animals, which must be denied for the reasons set forth in Part II. D. 6. of this report.

Based on the testimony and evidence of record, I conclude that, except as noted, the changes proposed by Petitioner meet the specific and general requirements for the use, and that the Modification Petition should be granted, with the conditions recommended in the final section of this report.

## V. RECOMMENDATIONS

Accordingly, based on the foregoing findings and conclusions and a thorough review of the entire record, I recommend that, except for the request to add a leased area south of the site for walking animals, Petition No. S-597-A, which seeks to modify an existing special exception for a veterinary hospital located at 15021 Dufief Mill Road, Gaithersburg, Maryland, be **granted**, and that Kenneth R. Cowell, D.V.M, be removed as co-holder of the subject special exception, leaving H. Steven Steinberg, V.M.D. as the sole holder, subject to the following conditions:

1. The Board recognizes VCA Referral Associates Animal Hospital, Inc., as lessee of the subject property, operator of the veterinary hospital on site and the Petitioner in this case, authorized by the special exception holder, H. Steven Steinberg, V.M.D , to bring the instant modification petition.
2. The Petitioner shall be bound by all of its testimony and exhibits of record, and by the testimony of its witnesses and representations of counsel identified in this report.
3. All terms and conditions of the approved special exception (S-597) shall remain in full force and effect, except as modified by the Board as a result of this and previous Modification Petitions.
4. The hours when the facility is open to the public for drop-off and pick up of animals will be limited to 6:30 a.m. to 8 p.m., Monday through Saturday, except in emergencies. Animals may be seen by appointment only, except in emergency situations. Scheduled

appointment hours will continue to commence at 8:00 a.m., and a written log of all appointments and drop-in and emergency client activities must be kept, and be available for inspection by County authorities. The facility will be staffed after office hours (*i.e.*, 24 hours a day, seven days a week) solely to accommodate emergency situations and to provide care for the animals who must remain overnight for medical purposes.

5. Boarding of animals as a kennel service is prohibited. Only animals receiving medical treatment may reside at the facility.
6. All litter and animal waste must be contained and controlled on the site.
7. Petitioner shall be permitted to have a maximum of sixty-two (62) employees (including all veterinarians and support staff employees) on site at any one time, provided that the number of veterinarians on site at any one time does not exceed twenty-two (22).
8. Petitioner must maintain 71 parking spaces on site, which number includes three spaces designated for the handicapped.
9. Existing 25 foot tall poles and double flood lights must be removed, as shown on the Landscape and Lighting Plan (Exhibit 18(a)), and in accordance with the specification of the Historic Preservation Commission (HPC). Replacement lighting for the removed 25 foot poles lights will consist of four 12 foot pole lights per HPC approval and the revised Landscape and Lighting Plan.
10. Existing light fixtures on the silos and barn must be removed and replaced or painted to match the silos and barn in color, and replaced or painted fixtures must be reviewed and approved at the HPC staff level.
11. Petitioner must survey and stabilize the unused historic barn on the Petitioner's property, per the HPC's requirements.

12. Petitioner may erect a second sign to replace the sign which was removed to allow widening of MD Route 28; however, Petitioner must first obtain a permit for such sign from the Department of Permitting Services (and if necessary, a sign variance), and copies of both that sign permit and the one covering the existing sign must be filed with the Board of Appeals. The new sign should match the existing sign in size and design, unless DPS determines otherwise.
13. Petitioner must comply with all applicable Federal, State and local regulations regarding safe storage and use of the x-ray equipment on the site.
14. Petitioner must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioner shall at all times ensure that the special exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.
15. The resolution granting removal of Kenneth R. Cowell, D.V.M., whose current whereabouts are unknown, as a co-holder of the special exception will be reconsidered if and when Kenneth R. Cowell, D.V.M. appears and requests such reconsideration in writing.
16. Petitioner's request to add a leased area south of the site for walking animals is denied because the proposed lease area does not meet the 200 foot setback requirements contained in Zoning Ordinance §59-G-2.32(b)(2). Within 10 days of this Resolution, Petitioner must submit a corrected site plan removing the proposed lease area for

walking animals and showing any previously approved area for animal exercise, if it still exists. Nothing in this Resolution affects Petitioner's right to walk animals in any other area, on site, previously approved by be the Board for that purpose. If Petitioner does so, only one animal at a time may be walked outdoors, and such animal walking may take place only between the hours of 8:00 a.m. and 6:00 p.m.

Dated: January 31, 2006

Respectfully submitted,

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Martin L. Grossman  
Hearing Examiner