

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
(240) 777-6600

www.montgomerycountymd.gov/content/council/boa/board.asp

Case No. S-2598

PETITION OF ELIEZER TRYBUCH

OPINION OF THE BOARD

(Resolution Adopted April 21, 2004)
(Effective Date of Opinion: May 7, 2004)

Case No. S-2598 is an application for a special exception pursuant to Section 59-G-2.38 (Non-Residential Medical Practitioner) of the Zoning Ordinance to permit the use of Suite 1B for podiatry services at the Promenade.

Pursuant to the authority contained in Section 59-A-4.125 of the Zoning Ordinance, the Board of Appeals referred the case to the Hearing Examiner to conduct a public hearing on the application. A hearing was convened on March 26, 2004, the record closed on the same date, and on March 31, 2004, the Hearing Examiner issued a report and recommendation for approval of the special exception.

The subject property is located at 5225 Pooks Hill Road, Bethesda, Maryland, 20814, in the R-30 Zone.

Decision of the Board: Special exception **granted** subject
to conditions enumerated below.

The Board of Appeals considered the Hearing Examiner's report and recommendation at its Worksession on April 21, 2004. After careful consideration, and a review of the record, the Board adopts the report and recommendation, with one exception: the Board does not find that an existing office is an inherent characteristic of a special exception for a medical practitioner. The Board grants the special exception subject to the following conditions:

Case No. S-2598

Page 2.

1. Petitioner shall be bound by his testimony, representations and exhibits of record, to the extent that such evidence and representations are identified in the Hearing Examiner's Report and Recommendation and in the opinion of the Board.
2. The Petitioner's office space is limited to a maximum of 1300 square feet.

3. The Petitioner's office hours are limited to 9 a.m. to 5 p.m. Monday through Friday, and 9 a.m. to 12 noon on Saturday, the Saturday hours occurring once a month.

4. The Petitioner may not have more than one medical professional practicing from his office space at any given time, which permits him to have an associate to utilize the office space when he is not there.

5. The Petitioner may employ no more than two full-time professional support staff at the subject office.

On a motion by Allison Ishihara Fultz, seconded by Donna L. Barron, with Louise L. Mayer, Angelo M. Caputo and Donald H. Spence, Jr., Chairman, in agreement, the Board adopted the following resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the resolution required by law as its decision on the above entitled case.

Donald H. Spence, Jr.
Chairman, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 7th day of May, 2004.

Katherine Freeman
Executive Secretary to the Board

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure.

See Section 59-A-4.53 of the Zoning Ordinance regarding the twenty-four months' period within which the special exception granted by the Board must be exercised.

**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: *
Eliezer M. Trybuch *
Petitioner *
*
Eliezer M. Trybuch *
For the Petition *

Board of Appeals Case No. S-2598
(OZAH Referral No. 04-29)

Before: Martin L. Grossman, Hearing Examiner

HEARING EXAMINER’S REPORT AND RECOMMENDATION

TABLE OF CONTENTS	PAGE
I. STATEMENT OF THE CASE	5
II. BACKGROUND	6
A. The Subject Property	6
B. The Neighborhood and its Character	8
C. The Master Plan.....	9
D. Proposed Use	11
E. Public Facilities	13
F. The Environment	14
E. Community Response.....	14
III. SUMMARY OF THE HEARING	14
IV. FINDINGS AND CONCLUSIONS.....	15
A. Standard for Evaluation.....	16
B. General Conditions	17
C. Specific Standards	23
D. Additional Applicable Standards.....	24
V. RECOMMENDATION	25

I. STATEMENT OF THE CASE

Petition No. S-2598, filed on November 28, 2003, seeks a special exception, pursuant to §59-G-2.36 of the Zoning Ordinance, to permit “a medical practitioners’ office for use of other than a resident of the building,” at 5225 Pooks Hill Road, Suite 1B, Bethesda, Maryland (the Promenade), which is zoned R-H (Multiple Family, High-Rise Planned Residential). The office will be located on the ground floor of a large, high-rise residential complex. The subject property is designated Parcel J in the Pooks Hill Subdivision of Bethesda (Tax Account No. 00284493)¹. The special exception is sought so that Petitioner can continue his podiatric practice in Suite 1-B of the Promenade, as he has been for the past two years.

On January 7, 2004, the Board of Appeals adopted a resolution (Exhibit 14) referring this case to the Hearing Examiner for Montgomery County to conduct a public hearing and issue a written report and recommendation to the Board of Appeals for final action. On January 15, 2004, the Board of Appeals issued a notice (Exhibit 12) that a hearing in this matter would be held by the Hearing Examiner for Montgomery County on March 26, 2004, at 9:30 a.m., in the Second Floor Hearing Room of the Stella B. Werner Council Office Building.

Technical Staff at the Maryland-National Capital Parks and Planning Commission (M-NCPPC), in a memorandum dated March 18, 2004, recommended approval of the petition, with conditions (Exhibit 15).²

A public hearing was convened as scheduled on March 26, 2004, and testimony was presented by Petitioner, acting *pro se*. There were no other witnesses. The record closed on the same date, subject to receipt of the transcript. There is no opposition in this case.

¹ Listed above is the tax account number shown on the Notice of Hearing issued by the Board of Appeals; the tax account number for the Promenade, as shown in the Montgomery County tax records, is 00418610; the Petitioner listed his tax account number as 160701680617 on the Petition.

² The Technical Staff Report is frequently quoted and paraphrased herein.

II. BACKGROUND

A. The Subject Property

As noted above, the subject property is located at 5225 Pooks Hill Road, Suite 1B, Bethesda, Maryland, and is designated Parcel J in the Pooks Hill Subdivision of Bethesda, which is zoned R-H. The site is an irregularly shaped lot encompassing 24.77 acres, on which is located a high-rise residential complex known as the Promenade Towers. It consists of two 18 story buildings, which are linked together and located about 200 to 400 feet south of the Capital Beltway on the north side of Pooks Hill Road. Each building has two wings, and there is underground parking, as well as over 200 surface parking spaces. Vehicular access is from Pooks Hill Road about 400 feet from the intersection with Linden Avenue.

The requested use is located in the east wing of the arcade level (ground floor) of the south building. Several other medical office suites are also located in this wing. There is a 40-space surface parking lot for the medical suites, with a separate outdoor entrance. Besides the underground parking area, the large surface parking lot, and the parking area serving the medical suites area, another small surface parking lot between the north and south buildings also serves the retail and service arcade. Technical Staff notes that a buffer of tall evergreen and deciduous trees surrounds the complex on all sides. Elsewhere, the property is well landscaped with various types of trees, flowers and shrubs.

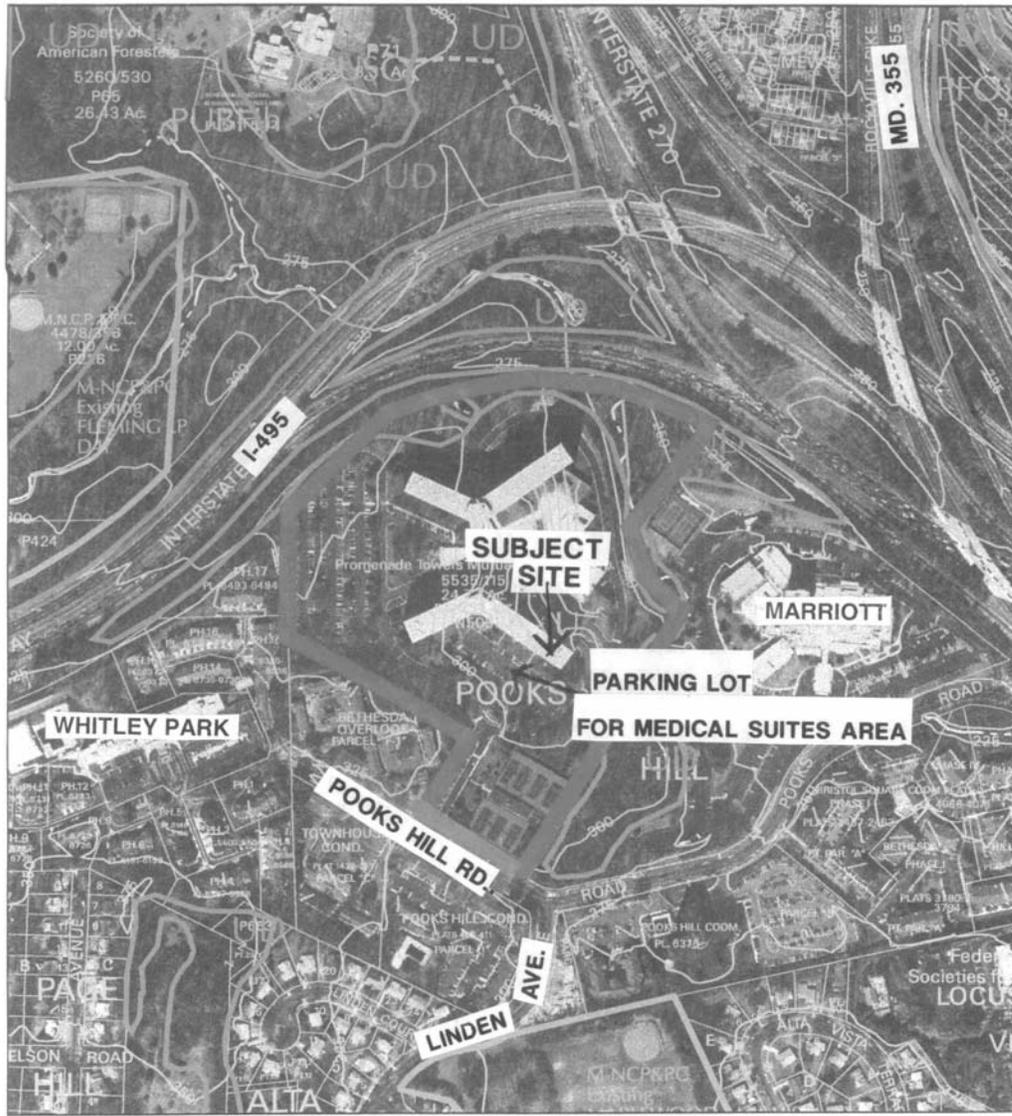
Technical Staff indicates that there are several other special exception uses, in addition to the subject use, located within the Promenade. Five of these additional special exceptions (S-325, S-326, S-333, S-334 and S-384) are for other non-resident medical practitioners. Of the remaining special exception uses, one entire group was included under special exception S-322. It included a small grocery store, dry cleaning establishment, variety store, beauty salon, apparel shop, and delicatessen. A florist shop was approved in S-407. Recently, a mortgage and real estate center was

approved by S-2559.

Both the subject property and the surrounding neighborhood can be seen on the aerial photo attached to the Technical Staff report (Exhibit 15).

VICINITY MAP for S.E. S-2598

FIGURE 1



Map compiled on March 17, 2004 at 5:48 PM | Site located on base sheet no - 212NW05 | Data of Orthophotos - March 2002 | Orthophoto Images Licensed from VARGIS LLC

NOTICE
 The planimetric, property, and topographic information shown on this map is based on copyrighted Map Products from the Montgomery County Department of Park and Planning of the Maryland-National Capital Park and Planning Commission, and may not be copied or reproduced without written permission from M-NCPPC.
 Property lines are compiled by adjusting the property lines to topography created from aerial photography and should not be interpreted as actual field surveys. Planimetric features were compiled from 1:14,400 scale aerial photography using stereo photogrammetric methods.
 This map is created from a variety of data sources, and may not reflect the most current conditions in any one location and may not be completely accurate or up to date. All map features are approximately within five feet of their true location. This map may not be the same as a map of the same area plotted at an earlier time as the data is continuously updated. Use of this map, other than for general planning purposes is not recommended. - Copyright 1998



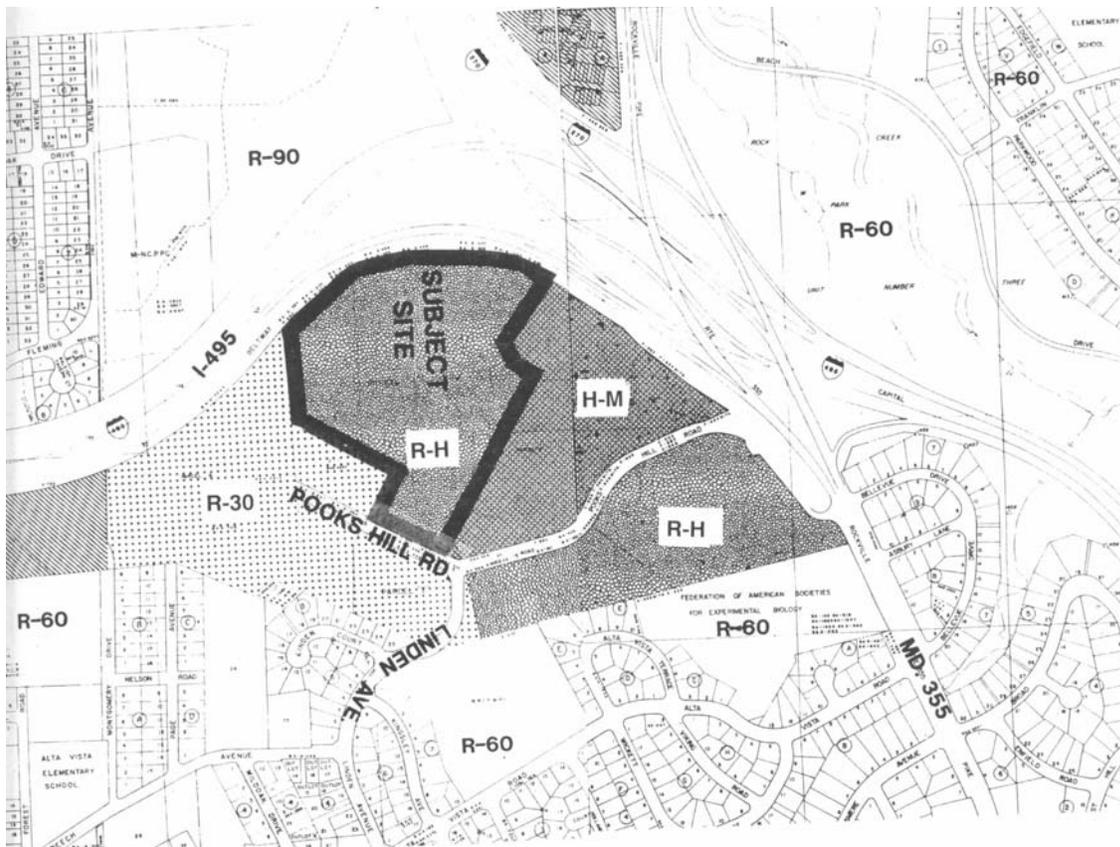
B. The Neighborhood and its Character

Technical Staff described the neighborhood as “bounded on the north by the Capital Beltway (I-495), on the east by Rockville Pike (MD 355), on the south by Linden Avenue, and on the west by properties located along the west side of Linden Avenue and Pooks Hill Road.” Land-use in the subject neighborhood includes “a hotel, low-rise and high-rise apartments, single-family housing and an association headquarters.” Zones in the surrounding neighborhood include the H-M, R-30, R-H and R-60 Zones.

The Pooks Hill Marriott Hotel is just east of the subject site in the H-M Zone. The Bethesda Hill Apartments and the Pooks Hill Towers are south and southeast, respectively of the Marriott, on the other side of Pooks Hill Road in the R-H Zone. Just southwest of the Promenade is R-30-zoned land (low-density multi-family), containing the Bethesda Overlook Townhouses, Pooks Hill Square Condominiums, and the Whitley Park Condominiums. Farther southwest of these latter developments is single-family detached housing in the Maplewood Estates subdivision, zoned R-60.

According to the Technical Staff, there is a nearby special exception, S-862, issued in December 2001 to the Federation of American Societies for Experimental Biology (FASEB), which is located on Rockville Pike next to the Bethesda Hills Apartments. It is used primarily for educational and administration purposes.

The zoning in the surrounding area is shown below, as it was depicted in the Zoning Map, attached as “Figure 2” to the Technical Staff report.



C. The Master Plan

The property is located within the area covered by the *Bethesda-Chevy Chase Master Plan*, approved and adopted in 1990. The subject site is part of the Pooks Hill Plan area. The Master Plan recommends the “reconfirmation and containment of the existing zoning on Pooks Hill,” and notes that, although there is a mix of land uses and zoning on Pooks Hill, “this high density residential community has the appearance of internal compatibility.” (p. 63) The proposed use will not change the nature or character of the premises.

The Plan provides guidelines for review of special exceptions in residential areas (p. 31).

In summary, these guidelines recommend:

1. Avoiding excessive concentration of special exception and other nonresidential land uses along major highway corridors;
2. Avoiding over-concentration of commercial service or office-type special exception uses in residential communities;

3. Protecting major highway corridors and residential communities from incompatible design of special exception uses;
4. Supporting special exception uses that contribute to the housing objectives of the Master Plan; and
5. Supporting special exception uses that contribute to the service and health objectives of the Master Plan.

The second recommendation is of some concern because it does include “medical or professional offices” in its discussion of uses, the over-concentration of which should be avoided. There are certainly other medical office special exceptions located within the Pooks Hill area, and in fact there are numerous ones located in the same building and floor that Petitioner is using. Nevertheless, the Technical Staff felt that the addition of the subject special exception would not result in the kind of over-concentration criticized in the Master Plan, and the Hearing Examiner agrees.

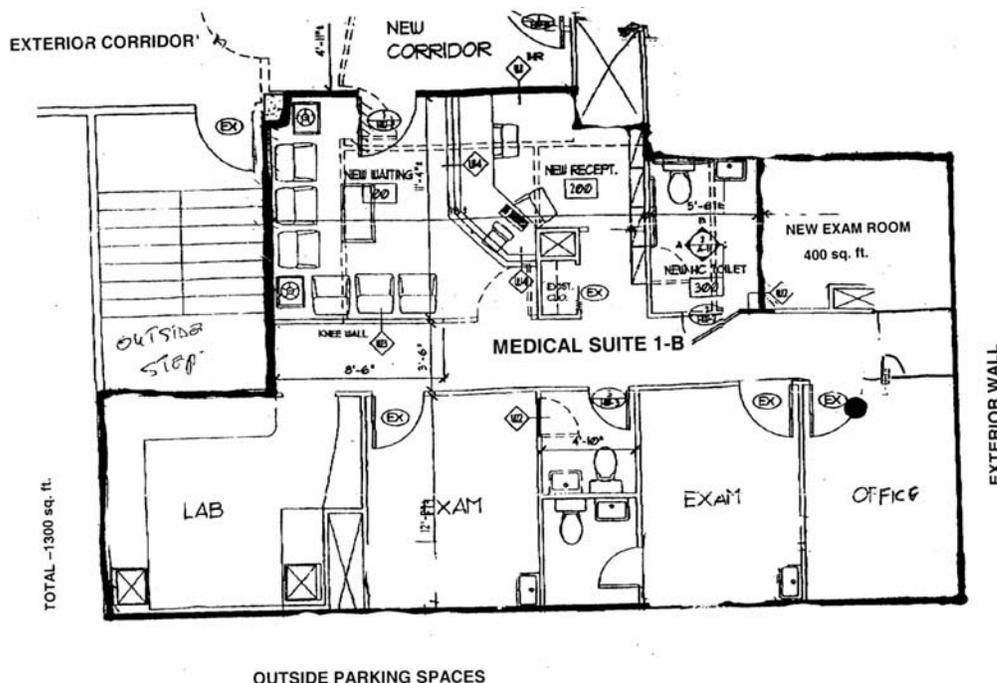
First of all, the proposed special exception would merely replace a similar use that had been functioning in the same office space. Secondly, all the special uses in question are located in the same arcade area of the Promenade which was, according to the Technical Staff, physically designed to be separate from the residential areas and to serve the residents. In fact, 70% of the patients served by the subject special exception will be residents of the Promenade (Exhibit 13), so those residents will be getting the convenience of close-by service while causing no disturbance to nearby residents and no traffic in the local community. The Hearing Examiner concludes, as apparently did the Technical Staff, that the Master Plan was not intending to address this type of setting when it recommended avoiding an over-concentration of office-type uses in residential areas.

The subject use is in an area with the R-H zoning classification for high-rise zoning. A medical practitioner’s office for use of other than a resident of the building is allowed by special exception in that zone. Under all the circumstances, it is fair to say that the planned use is not inconsistent with the applicable Master Plan.

D. The Proposed Use

Technical Staff states that the subject site was previously part of the office space approved on March 13, 1975 as Special Exception #S-384. That Special Exception occupied the 3,800 square foot Medical Suite 1 on the arcade level (*i.e.*, ground floor) of the Promenade and was approved for the practices of three physicians and eight employees. The suite of the current Petitioner (Suite 1B) has been separated from the original suite (now Suite 1A) for about two years. Suite 1A is still operating under the original special exception, but with only two doctors. According to Technical Staff, construction to separate Medical Suite 1B from Suite 1A included the partial construction of a new public corridor between Suite 1A and Suite 1B, plus the physical separation of the two suites, and interior reconstruction and remodeling of Suite 1B.

Petitioner seeks a special exception so that he can continue the podiatric practice he has been conducting in Suite 1-B of the Promenade for the past two years. Suite 1-B occupies approximately 1300 square feet of the 3800 square feet of office space which had originally been covered by Special Exception S-384. Suite 1-B is depicted below (Figure 3 of Exhibit 15).



Petitioner expects to see a maximum of 20 patients daily, of which an estimated 70 per cent live in the Promenade complex, and 30 per cent (or about six) in the surrounding neighborhood. The approximately six patients daily who come from the neighborhood, as well as the Petitioner and his two employees, park in the 40 spaces provided for the medical suites section of the arcade in front of the east wing of the south building. Suite 1-B is approximately 50 feet from the exterior arcade door to the front parking lot serving the medical suites.

Petitioner employs two administrative staff, who work 40 hours weekly. Technical Staff stated in their report that the subject practice will continue to operate Monday through Friday between 9 a.m. and 5 p.m.; however, Petitioner testified at the hearing that in addition to the hours of operation specified in the Technical Staff report and in Petitioner's letter of January 30, 2004 (Exhibit 13), Petitioner has Saturday hours once a month from 9 a.m. to 12 noon. The Saturday hours are held on the first Saturday of each month, unless it is a holiday, and then they are held on the following Saturday. These additional hours are Petitioner's current practice, and there is no evidence that permitting the once-a-month Saturday hours will additionally burden the neighborhood; nor have they evoked any community opposition. Therefore, the Hearing Examiner will treat this change as a revision received at the Hearing Examiner's request at the hearing, as permitted under Zoning Code §59-A-4.24.

Also at the hearing, Petitioner stated that he wanted to be able to bring in another podiatrist to work in his office, even though his petition did not mention a second professional using the office. Technical Staff, unaware of Petitioner's desires in this regard, had recommended a condition restricting the office to use by Petitioner and his two assistants. At first, the Hearing Examiner indicated to Petitioner that he would have to apply for an amendment (possibly administrative) if he wanted to proceed on the current Petition and add another podiatrist later; however, Petitioner then testified that the second podiatrist would never be using the office space at the same time as

Petitioner. Rather, the associate would use the space when Petitioner was at his other office or otherwise occupied. Given this limitation, the Hearing Examiner can see no adverse impact or burden on the community from allowing Petitioner this flexibility and concludes that it serves no purpose to make Petitioner seek an amendment to any special exception granted on the current petition. Therefore, this change will also be considered as a revision received at the Hearing Examiner's request at the hearing, pursuant to Zoning Code §59-A-4.24.

In order to insure that no extra burden will be created by the use, the Hearing Examiner has recommended a condition that would permit a second podiatrist, as long as both podiatrists were not using the office space at the same time.

E. Public Facilities

Transportation planning staff found that there would not be any adverse impact on local roadways as a result of the subject use, given that the operational characteristics of the medical office are basically the same as the medical office formerly occupying the premises. Since a medical office was previously located at the subject site, and Petitioner is not hiring any more employees, additional vehicular trip generation is not expected by Technical Staff. Petitioner, therefore, does not need to conduct a Local Area Transportation Review. The site is located within the Bethesda-Chevy Chase policy area, which has a remaining capacity of 390 jobs and 4988 housing units as of February 29, 2004. Thus, even if Petitioner were hiring an additional employee, which he is not, the capacity exists and he passes the Policy Area Transportation Review.

Technical Staff also noted that site access and traffic patterns on adjacent roadways are not expected to change as a result of the proposed use; nor will the subject use adversely affect pedestrian access or safety. The Hearing Examiner agrees with these conclusions.

F. The Environment

According to the Technical Staff, the property on which the Promenade is located is not subject to a Tree Save Plan and is not located within a Special Protection Area. Technical Staff also found, and the Hearing Examiner agrees, that the subject use will not have any adverse environmental impact. The subject use does not involve any exterior change to the property surrounding the building in which the office in question is located; nor does the use involve changes to any exterior conditions, such as parking lots, spaces, and trees. Thus, an exemption from Forest Conservation Plan requirements was issued in October 2002 (Exhibit 7).

E. Community Response

There has been no community reaction to the subject Petition. This fact is not surprising since granting the special exception will put no burden on the community that was not already present.

III. SUMMARY OF THE HEARING

The only witness to testify at the hearing was the Petitioner. He testified that he adopted the findings in the Technical Staff report (Exhibit 15), except for two items. The first is that, in addition to the hours of operation (Monday through Friday, 9 a.m. to 5 p.m.) specified in the Technical Staff report and in Petitioner's letter of January 30, 2004 (Exhibit 13), Petitioner has Saturday hours once a month from 9 a.m. to 12 noon. The Saturday hours are held on the first Saturday of each month, unless it is a holiday, and then they are held on the following Saturday.

The second item Petitioner objected to in the Technical Staff report was the condition that Petitioner be the sole medical professional in the practice. Petitioner would like the option of having another practitioner substitute for him when he is not present. Petitioner testified that there would never be two medical professionals practicing in his office at the same time.

Petitioner then testified that he is compliant with each of the Specific and General conditions required for this special exception; that the exterior of the building presents an appearance consistent with the character of the neighborhood; that the proposed use will not adversely affect surrounding residential uses because of noise, lighting, traffic or physical activity; that the office is located on the ground level and close to the exterior entrance; that appropriate off-street parking is provided in spaces designated for the use of the patients of the medical practitioners; that the medical practitioner's office use is permitted as a special exception in the R-H Zone; that this use is also consistent with the *1990 Bethesda-Chevy Chase Master Plan*; that the use will be in harmony with the general character of neighborhood; that the use would not be detrimental to the use, peaceful enjoyment, value or development of the surrounding properties; that there would be no objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity; that the use would not alter the residential nature of the area, nor would it adversely affect the health, safety, security, morals or general welfare of the residents; and finally, it would be served by adequate public facilities and would not reduce the safety of vehicular or pedestrian traffic.

Petitioner described his office space, using the office diagram attached to the Technical Staff report. He indicated where his two employees are located and the locations of his office and examining rooms. After Petitioner submitted an executed affidavit of posting (Exhibit 16) and all exhibits were admitted into evidence, the hearing was terminated and the record closed, subject to receipt of the transcript.

IV. FINDINGS AND CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not

in others. The zoning statute establishes both general and specific standards for special exceptions, and the Petitioner has the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Based on the testimony and evidence of record, the Hearing Examiner concludes that the instant petition meets the general and specific requirements for the proposed use, as long as Petitioner complies with the conditions set forth in Part V, below.

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 on nearby properties and the general neighborhood from the proposed use at the proposed location. 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 medical practitioner’s office for use of other than a resident of the building. Characteristics of the proposed medical practitioner’s office use that are consistent with the “necessarily associated” characteristics of medical practitioner’s office uses will be considered inherent adverse effects, while those characteristics of the proposed use that are not necessarily associated with medical practitioner’s office uses, or that are created by unusual site conditions, will be considered non-inherent effects. The inherent

and non-inherent effects thus identified must then be analyzed, in the context of the subject property and the general neighborhood, to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff determined that the physical and operational characteristics necessarily associated with a medical practitioner's office use include "an existing office equipped with medical equipment, parking and its accompanying signage and lighting, employees, and visiting patients."

Technical Staff found that there are no special circumstances that would create adverse effects at the subject site. There will be no exterior building changes; nor any changes to the lighting and signage. The Hearing Examiner agrees that the physical and operational characteristics of the proposed medical office are no different from what is typically encountered with any medical office. Therefore, based on the evidence in this case, and considering size, scale, scope, light, noise, traffic and environment, the Hearing Examiner concludes that there are no non-inherent adverse effects arising from the subject use. Actually, this particular office use will create less traffic than similar medical offices at different sites because most of the Petitioner's patients live in the same building complex.

B. General Conditions

The general standards for a special exception are found in Section 59-G-1.21(a). The Technical Staff report, the other exhibits and the testimony of the Petitioner provide ample evidence that the general standards would be satisfied in this case.

Sec. 59-G-1.21. General conditions.

§5-G-1.21(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 “medical practitioners’ office for use of other than a resident of the building” is a permissible special exception in the R-H Zone, pursuant to Code § 59-C-2.3.

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

Conclusion: The proposed use complies with the specific standards set forth in § 59-G-2.36 for a medical practitioner’s office by a nonresident as outlined in Part C, below.

(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 a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board’s technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.

Conclusion: The property is located within the area covered by the *Bethesda-Chevy Chase Master Plan*, approved and adopted in 1990. The subject site is part of the Pooks Hill Plan area. The Master Plan recommends the “reconfirmation and containment of the existing zoning on Pooks Hill.” The proposed use will not change the nature or character of the area.

The Master Plan also provides guidelines for review of special exceptions in residential areas (p. 31). One of those guidelines recommends avoiding “over-concentration of commercial or office-type uses in residential communities.” The Plan notes that his reference includes “medical or professional offices.” There are certainly other medical office special exceptions located within the Pooks Hill

area, and in fact there are numerous ones located in the same building and floor that Petitioner is using. Nevertheless, the Technical Staff felt that the addition of the subject special exception would not result in the kind of over-concentration criticized in the Master Plan, and the Hearing Examiner agrees.

The proposed special exception would merely replace a similar use that had been functioning in the same office space. Moreover, all the special uses in question are located in the same arcade area of the Promenade which was, according to the Technical Staff, physically designed to be separate from the residential areas and to serve the residents. In fact, 70% of the patients served by the subject special exception will be residents of the Promenade (Exhibit 13), so those residents will be getting the convenience of close-by service while causing no disturbance to nearby residents and no traffic in the local community. The Hearing Examiner concludes, as apparently did the Technical Staff, that the Master Plan was not intending to address this type of setting when it recommended avoiding an over-concentration of office-type uses in residential areas.

Under all the circumstances, it is fair to say that the planned use is not inconsistent with the applicable Master Plan.

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

Conclusion: The proposed use will be in harmony with the general character of the neighborhood because it is located in a space that was specifically designed for such uses, and in fact houses numerous similar offices. There is a separate

entrance for the medical suites, and separate parking is available. The proposed use also will not generate any significant change in traffic conditions. Thus, the subject use will be in harmony with its surroundings.

- (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 Hearing Examiner concludes that the proposed use will not be detrimental to the peaceful enjoyment, economic value or development of surrounding properties at the site. As noted by the Technical Staff, a similar medical use was located at the subject site for 25 years without any apparent adverse effect.

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

Conclusion: Based on the nature of the proposed use (*i.e.*, a medical office), the special exception would cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site. In fact, the subject site is specifically located away from the residential areas to avoid any potential adverse effects.

- (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: Technical Staff set forth the special exception uses in the Promenade as follows:

- S-322---retail sales and consumer services, including barber shop, grocery store, delicatessen, apparel shop, dry-cleaner pick- up station, gift shop, and variety store, 1974
- S-325---psychiatrist's office for Dr. Ben Williamowsky, June, 1974
- S-326---dentist office, Dr. Stephen Fred, June, 1974
- S-333---medical practitioner's office, Dr. Weiss and Dr. Gross, psychiatrists, October, 1974
- S-334---medical practitioner's office, Dr. Irwin and Dr. Hanson, psychiatrists, October, 1974
- S-384---medical practitioner's office for internal medicine, March, 1975
- S-407---modification for florist shop (S-322) July, 1975
- S-438---modification to S-325 to add staff February, 1976
- S-449---modification to S-322 concerning relocation of gift shop
- S-623---approval for jewelry shop, June, 1978
- S-2559--retail establishment, May, 2003

While these special exceptions are numerous, they are all located in the Arcade which was specifically designed for such purposes. Given all of the circumstances, the Hearing examiner concludes that the proposed special exception will not increase the number, scope, or intensity of special exception uses sufficiently to 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 use would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site.

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

Conclusion: Petitioner testified that there were adequate public facilities serving the office in question. Technical Staff also found, and the Hearing Examiner agrees, that the subject property is adequately served by the specified public services and facilities.

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

Conclusion: The special exception sought in this case would not require approval of a preliminary plan of subdivision. Therefore, the public facilities review must include analysis of both the Local Area Transportation Review (“LATR”) and the Policy Area Transportation Review (“PATR”). The Technical Staff did do such a review, and it concluded that there would be no increase in traffic from the proposed use. Since the proposed medical practitioner’s office use would generate fewer than 50 total trips in the weekday morning and evening peak hours, the requirements of the LATR are satisfied without a traffic study. See the July 2002 LATR Guidelines, of which the Hearing Examiner takes official notice.

Turning to the PATR, the Technical Staff found that the Bethesda Policy Area has additional job staging ceiling capacity available, but this use passes the PATR regardless because it will generate fewer than 5 trips during the peak weekday hours. Therefore, the Transportation Staff concludes, as does the Hearing Examiner, that the instant petition meets the PATR test, as well as the LATR test.

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

Conclusion: The Transportation Staff concluded that the proposed special exception “will not reduce the safety of vehicular or pedestrian traffic.” (Exhibit 15). Petitioner also testified his proposed use will not reduce safety. Thus, the evidence of record supports the finding that the proposed use would have no detrimental effect on the safety of vehicular or pedestrian traffic.

C. Specific Standards

The testimony and the exhibits of record [including the Technical Staff Report (Ex. 15)] provide sufficient evidence that the specific standards required by Section 59-G-2.36 are satisfied in this case, as described below.

Sec. 59-G-2.36. Medical practitioners' office for use of other than a resident of the building.

(a) [Not applicable]

(b) *In the R-H, R-10, R-20 and R-30 zones, one or more offices for one or more medical practitioners may be permitted provided, that:*

(1)The exterior of the building presents an appearance consistent with the character of the neighborhood;

Conclusion: The Transportation Staff noted that “the subject neighborhood contains buildings of mixed uses and heights, and developments of various densities” and concluded that “the exterior of the building containing the subject use is consistent and compatible with this established neighborhood character.” The Hearing Examiner agrees but also believes that this statutory section was attempting to address free-standing medical office buildings, not a huge residential complex containing some medical offices, such as the subject site.

(2)The proposed use will not adversely affect surrounding residential uses because of noise, lighting, traffic or physical activity;

Conclusion: See response to §§5-G-1.21(a)(6) and (9), in Part IV.B, above.

(3)No office shall be located on a floor above the highest ground level entrance and the interior office entrance shall be located so as to minimize distance from the exterior entrance;

Conclusion: The use is located on the ground floor within about 50 feet from the exterior door to the parking lot for the medical suites.

(4)Reserved;

Conclusion: Not applicable.

(5)Off-street parking spaces shall be provided as required in article 59-E of this chapter which shall be in addition to those spaces required for the residential portion of the building and shall be specifically designated for the use of the patients of the medical practitioners.

Conclusion: Article 59-E requires a medical practitioner's office to provide not less than four parking spaces for each practitioner occupying or using such office. A 40-space parking lot is provided for the several medical suites (including the subject suite) located in the east end of the arcade of the South Building. Technical Staff believes this parking is sufficient for the Petitioner's requirements and complies with the Zoning Code. The Hearing Examiner agrees.

D. Additional Applicable Standards

This special exception involves only the use of internal office space in a large residential complex owned by others. There will be no changes to the building structure, the landscaping the lighting or anything else external to the building. Therefore, neither the Technical Staff nor the Hearing Examiner found it necessary to discuss Development Standards, lighting and the like.

Based on the testimony and evidence of record, I conclude that the medical practitioner's office use proposed by Petitioner, as conditioned below, meets the specific and general requirements for the special exception, and that the Petition should be granted, subject to the conditions set forth in Part V of this report.

V. RECOMMENDATION

Based on the foregoing analysis, I recommend that Petition No. S-2598, seeking a special exception for a medical practitioner's office use located at 5225 Pooks Hill Road, Suite 1B, Bethesda, Maryland, be GRANTED, with the following conditions:

1. The Petitioner is bound by his testimony, representations and exhibits of record;
2. The Petitioner's office space is limited to a maximum of 1300 square feet;
3. The Petitioner's office hours are limited to 9 a.m. to 5 p.m., Monday through Friday, and 9 a.m. to 12 noon on Saturday, the Saturday hours occurring once a month;
4. The Petitioner may not have more than one medical professional practicing from his office space at any given time, which permits him to have an associate utilize the office space when he is not there; and
5. The Petitioner may employ no more than two full-time professional support staff at the subject office.

Dated: March 31, 2004

Respectfully submitted,

Martin L. Grossman
Hearing Examiner