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| IN THE MATTER OF | : | BEFORE THE |
| NVH PROPERTY HOLDINGS, LLC | : | HOWARD COUNTY |
| Petitioner | : | BOARD OF APPEALS |
| | : | HEARING EXAMINER |
| | : | BA Case No. 09-031C |

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DECISION AND ORDER

On January 11, 2010, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, heard the petition of NVH Property Holdings, LLC, for a child day care center and nursery school conditional use in an R-12 (Residential-Single) Zoning District, pursuant to Section 131.N.13 of the Howard County Zoning Regulations (the "Zoning Regulations").

The Petitioner certified to compliance with the advertising and posting requirements of the Howard County Code. I viewed the subject property as required by the Hearing Examiner Rules of Procedure.

Sang Oh, Esquire, represented the Petitioner. Zac Fisch and Chinnababy Gudapah testified on behalf of the Petitioner. No one appeared in opposition to the petition.

FINDINGS OF FACT

Based upon the preponderance of evidence presented at the hearing, I find the following facts:

1. The subject property is located in the 6th Election District on the west side of MD 108 (Waterloo Road), about 500 feet north of Golden Bell Way (the "Property"). The Property is referenced on Tax Map 37, Block 8, as Parcel 240 and is also known as 6054 Waterloo Road.

2. The .419-acre, irregularly shaped Property has about 100 frontage feet on MD 108. It ranges in depth from about 250 feet on the south side to about 273 feet on the north side. It is improved by a one-story, 780-square foot residential structure built around 1960. The residence lies about 50 feet from MD 108. A stand of mature trees runs along the rear lot line. A driveway in the Property's southeast corner provides access.

3. Vicinal Properties. The R-12 zoned Parcel 239 to the north is improved with a single-family detached dwelling sited about 80 feet from the proposed structure. Lots 48 and 49 of the R-12 zoned Golden Bell subdivision lie to the south. The dwelling on Lot 48 would lie about 40 feet from the proposed structure, the Lot 49 dwelling, about 70 feet. The dwelling on Lot 10 to the Property's rear lies about 45 feet from the rear lot line.

4. Roads. MD 108 has two travel lanes with a shoulder along the Property frontage within a 100-foot right-of-way.

5. Water and Sewer Service. The Property is served by public water and sewer facilities

6. The General Plan. Policies Map 2000-2020 of the 2000 General Plan designates the Property as a "Residential Area" land use. Transportation Map 2000-2020 of the 2000 General Plan depicts MD 108 as a Minor Arterial.

7. The Proposal. The Petitioner proposes to operate a Child Day Care Center and Nursery School (the "center") with a maximum enrollment of 36 children and a four-member staff. The center would operate from 7:00 a.m. to 6:00 p.m. Monday-Friday. The Petitioner would raze the existing dwelling and erect a 2,000-square foot building sited about 95 feet from the front property line, 105 feet from the rear lot line, and 20 feet from the side line lines. A new 25-foot wide driveway would be constructed about 30 feet from the northeast property corner. A fenced playground would be located behind the day care center. A six-foot high privacy fence and Type C landscape buffer would run along the rear and side property lines. At the hearing, the Petitioner agreed to set the requisite fence slightly back from the property lines and place the landscape buffer on the fence's outside to soften the view of the fence from adjoining properties, and to install a Type E landscape buffer along the parking area road frontage,

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, I conclude as follows:

I. General Criteria for Conditional Uses (Section 131.B)

A. **Harmony with the General Plan.** Section 131.B.1 requires me to evaluate whether the proposed conditional use plan will be in harmony with the land uses and

policies indicated in the Howard County General Plan for the district based on in which it is located. In making this evaluation, I am required to consider:

a. The nature and intensity of the use, the size of the site in relation to the use, and the location of the site with respect to streets giving access to the site; and

b. If a conditional use is combined with other conditional uses or permitted uses on a site, whether the overall intensity and scale of uses on the site is appropriate given the adequacy of proposed buffers and setbacks.

The Howard County General Plan designates the area in which the Property is located as a "Residential Area" land use. The .419-acre Property would adequately support the intensity of the use and the location of the Property on a Major Arterial road will ensure harmoniousness with the land uses and policies indicated in the General Plan for the district in which it is located. The new driveway will facilitate traffic safety. Most activities would occur indoors, and any outdoor play noise would be buffered by a fence and landscaping. The size of the structure is reasonable, and both it and the use (including 36 children and 4 staffers) are relatively small for the type for the use proposed.

B. Adverse Impacts. Unlike Section 131.B.1, which concerns the proposed use's harmony or compatibility with the General Plan, compatibility with the neighborhood is measured under Section 131.B.2's four "adverse effect" criteria": (a) physical conditions; (b) structures and landscaping; (c) parking areas and loading, and; (4) access.

The assessment of a proposed conditional use under these criteria begins with the realization that virtually every human activity has the potential for adverse impact. Zoning recognizes this fact and, when concerned with conditional uses, accepts some

level of such impact in light of the beneficial purposes the zoning body has determined to be inherent in the use. Thus, the question in the matter before me is not whether the proposed use would have adverse effects in an R-12 district. The proper question is whether those inherent adverse effects are greater at the proposed site than they would be generally elsewhere within the R-20 district. *Schultz v. Pritts*, 291 Md. 1, 432 A.2d 1319 (1981); *Mossburg v. Montgomery County*, 107 Md. App. 1, 666 A.2d 1253 (1995).

For the reasons stated below, the Petitioner has met its burden of presenting sufficient evidence under Section 131.B.2 of the Zoning Regulations to establish this proposed use will not have adverse effects on vicinal properties beyond those ordinarily associated with a child day care center and nursery school, conditional use an R-12 zoning district.

a. Physical Conditions. The impact of adverse effects such as noise, dust, fumes, odors, lighting, vibrations, hazards or other physical conditions will be greater at the subject site than it would generally be elsewhere in the zone or applicable other zones.

The testimony and evidence indicate the proposed facility will not generate inordinate noise, significant outdoor lighting, or other physical effects detectable within the neighborhood. The use will be conducted predominately indoors, and the proposed structure will comply with the reduced setback permitted under Section 131.N.13.g(2). The proposed playground will be fenced and the nearest dwelling is 40 feet from the use. No new outdoor lighting is proposed. Consequently, I conclude the Petitioner has adequately shown that any noise, lighting, or other physical conditions generated by the proposed use

will not be greater than that ordinarily associated with a day care center and nursery school.

b. Structures and Landscaping. The location, nature and height of structures, walls and fences, and the nature and extent of the landscaping on the site are such that the use will not hinder or discourage the development and use of adjacent land and structures more at the subject site than it would generally in the zone or applicable other zones.

Based on the evidence, I conclude the Petitioner has met its burden of demonstrating the proposed use complies with Section 131.B.2.b. The location and height of the proposed center will comply with all bulk regulations (subject to the reduction in setback discussed below). The nearest residence is 40 feet from the structure. The landscaping and fencing, as conditioned, will mitigate any impact on adjoining properties.

c. Parking and Loading. Parking areas will be of adequate size for the particular use. Parking areas, loading areas, driveways and refuse areas will be properly located and screened from public roads and residential uses to minimize adverse impacts on adjacent properties.

The proposed parking spaces are adequate for the proposed use and subject to the condition that it be screened from the road with a Type E buffer, will be properly located and screened. The proposed use complies with Section 131.B.2.c.

d. Access. The ingress and egress drives will provide safe access with adequate sight distance, based on actual conditions, and with adequate acceleration and deceleration lanes where appropriate.

The new driveway will likely provide safe access, subject to compliance with State Highway Administration comments. I conclude the Petitioner has met its burden of demonstrating the proposed use complies with Section 131.B.2.d.

II. Specific Criteria for Child Day Care Centers and Nursery Schools, Day Treatment and Care Facilities (Section 131.N.13)

a. On-site circulation and parking areas shall be designed to minimize vehicular/pedestrian conflicts and to provide safe areas for dropping off and picking up passengers.

The new driveway will parking lot will provide safe vehicular and pedestrian circulation patterns, in accordance with Section 131.N.13.a.

b. For child day care centers or nursery schools in industrial or commercial districts, outdoor play areas shall be fenced, screened and located to minimize exposure to noise and other emissions from roads, parking areas, and industrial activities.

This section does not apply.

c. The minimum lot size for child day care centers shall be 500 gross square feet of lot area per child.

Because the Property is .419 acres in size (just over 18,000 square feet) and no more than 36 children will attend the combined uses ($36 \times 500 = 18,000$), the proposed use complies with Section 131.N. 13.c.

d. Outdoor play areas or activity areas shall be fenced, located to the side or rear of the principal structure, and buffered from adjoining residential properties by landscaping or adequate distance or both.

The playground will be adjoin the rear of the day facility, in accordance with Section 131.N. 13.d.

e. Parking areas shall be located and landscaped to minimize their visibility from roads and adjacent residential properties.

Based on the 2,000-square foot day care center and three parking spaces per 1,000 sq. feet, six parking spaces are required and seven are proposed. The parking area will be

screened with a Type E landscape buffer. The proposed use accords with Section 131.N.13.e.

f. The design and massing of proposed structures or additions to existing structures shall be generally compatible in scale and character with residential properties in the vicinity of the site, as demonstrated by architectural elevations or renderings submitted with the petition. Additional setbacks from property lines and landscape buffering shall be required if necessary to make the appearance of the site compatible with surrounding residential properties.

The schematic structure elevation and plan depicted on the Conditional Use Plan indicates the structure will be about 2,000-square feet in size and about 26 feet in height. Because the structure's design and massing are similar to the existing dwelling, it will be compatible in scale and character in accordance with Section 131.N.13.f. All uses will be well buffered.

g. For facilities in residential districts with a capacity of more than 30 children or adult clients at one time, the following standards apply:
(1) The site has frontage on and direct access to a collector or arterial road designated in the General Plan, except that expansions of a conditional use that was approved prior to the effective date of Council Bill No. 11-2001 are permitted.

The proposed use fronts on and has access to MD 108, A Minor Arterial, in accordance with Section 131.N.13.g.

(2) Buildings, parking areas and outdoor activity areas will be at least 50 feet from adjoining residentially-zoned properties other than public road right-of-ways.

The Hearing Authority may reduce this setback to no less than 20 feet or the minimum setback required by the zoning district, whichever is greater, if:

(a) The adjoining land is committed to a long term institutional or

open space use that provides an equivalent or better buffer for vicinal residential development; or (b) The petition includes detailed plans for screening, consisting of a combination of a solid fence or wall and landscaping, or an equivalent combination, that presents an attractive and effective buffer for neighboring residential properties.

The Applicant proposes to locate the structure, parking area and outdoor activity areas 20 feet from the side and rear property lines. The Conditional Use Plan depicts a proposed privacy fence and a Type C landscape buffer. The Petitioner has agreed to set the fence back at a slightly greater distance from property lines in order to place the landscape buffer on the fence's outside. Subject to these conditions, the petition complies with Section 131.N.13.g(2).

(3) At least 20 percent of the area within the building envelope shall be green space, not used for buildings, parking area or driveways. The building envelope is formed by the required structure setbacks from property lines and public street rights-of-way.

About 53 percent of the .419-acre Site is used as green space, in accordance with Section 131.N.13.g(3).


ORDER

Based upon the foregoing, it is this 20th day of January 2010, by the Howard County Board of Appeals Hearing Examiner, **ORDERED:** That the request of NVH Property Holdings, LLC, for a child day care center and nursery school, conditional use an R-12 (Residential-Single) Zoning is hereby **GRANTED;**

Provided, however, that:

1. The conditional use shall be conducted in conformance with and shall apply only to the uses and structures described in the petition and depicted on the Conditional Use Plan, and not to any other activities, uses, or structures on the Property.
2. The Petitioner shall install a Type E landscape buffer adjacent to the parking area road frontage. The privacy fence shall be set back at a slightly greater distance than depicted on the Conditional Use Plan and the required landscape buffer shall be planted on the outside of the fence.
4. The Petitioner shall comply with all agency comments and all applicable federal, state, and county laws and regulations.

**HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER**


Michele L. LeFaivre

Date Mailed: 1/21/10

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The appeal will be heard *de novo* by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing.