

IN THE MATTER OF : BEFORE THE
OLENKA STASYSHYN : HOWARD COUNTY
Petitioner : BOARD OF APPEALS
: Case No. BA 17-041C

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DECISION AND ORDER

The Howard County Board of Appeals (the “Board”) met on February 7, 2019 to hear and deliberate the petition of Olenka Stasyshyn (Petitioner), for a conditional use for a Music School in an R-20 (Residential: Single Family) zoning district. The petition is filed pursuant to Section 131.0.O.3 of the Howard County Zoning Regulations (the “Zoning Regulations”).

Board members James Howard, Neveen Kurtum, John Lederer, Steven Hunt and William Santos participated in the hearing. Board member James Howard presided over the hearing and deliberation of the case. Barry M. Sanders, Assistant County Solicitor, served as legal advisor to the Board.

The Petitioner certified to compliance with the notice, posting and advertising requirements of the Howard County Code. The Board members indicated that they had viewed the property as required by the Zoning Regulations.

The hearing was conducted in accordance with Section 2.209 of the Board’s Rules of Procedure. The Howard County Charter, the Howard County Code, the Howard County Zoning Regulations, the various technical staff reports and agency comments, the Department of Planning and Zoning’s Technical Staff Report recommendation of conditional use approval dated June 6, 2018, the General Plan for Howard County, the General Plan of Highways, and the conditional use petition and plan were incorporated into the record by reference.

The Petitioner was represented by counsel, Thomas G. Coale.

Olenka Stasyshyn testified in favor of the petition. No persons appeared or testified in opposition to the petition.

The Petitioner offered, and the Board accepted, the following documents into evidence:

Petitioner's Exhibits

1. Copy of MDOT Olenka Stasyshyn Driver License/Soundex No.; and
2. Series of interior and exterior photographs of 10207 Baltimore National Pike.

FINDINGS OF FACT

Based upon the testimony and evidence presented at the hearing, the Board makes the following Findings of Fact:

1. The subject property is on the south side of a residential service drive accessed from eastbound Baltimore National Pike (US 40). The 2nd Election District subject property is identified as Tax Map 24, Grid 1, Parcel 544, Lot 107, and known as 10207 Baltimore National Pike (the "Property"). The Property is the last lot on the service road. Frederick Road terminates immediately east of the Property.

2. The 36,527 square-foot Property is improved with a one-story, single-family dwelling located about 19 feet from the west property line and 51 feet from the front property line. To the east and south of the residence is a detached garage. To the rear of this garage is a shed and in-ground pool.

3. All properties to the east, west and south are zoned R-20. Lot 106 to the west is improved with a single-family detached dwelling approved for a Home Occupation conditional use in BA 16-024C&V. To the east is a strip of land identified as Orchard Lane. Properties to the south are each improved with a single-family detached dwelling. Across Frederick Road to the northeast, are B-2

(Business: General) zoned properties. The closest, Parcel 420, is the site of a gasoline service station. Properties across US 40 are zoned B-1 (Business: Local) and are improved with commercial buildings.

4. The service road portion of US 40 near the Property has two travel lanes and a variable paving width within a variable width right-of-way (ROW). US 40 on the north side of the median has two eastbound and two westbound travel lanes as well as various acceleration and deceleration lanes. The posted speed limit is 45 miles per hour.

5. The Property is served by public water and sewer.

6. PlanHoward 2030 General Plan depicts the Property as Established community on the Designated Place Types Map. US 40 is depicted as an Intermediate Arterial on PlanHoward 2030 Functional Road Classification Map.

7. This Petitioner proposes a music school within the existing 3,889 square foot single-family detached dwelling. The school will comprise 3,615 square feet of the building and the remaining 274 square feet will be used as a residence by the Petitioner.

The instructional school will operate across two shifts, one in the morning and one in the evening. The morning shift will be from 9:00 a.m. to 12:15 p.m. and the evening shift will be from 2:00 p.m. to 8:45 p.m. All activity related to the instructional school will cease by 9:00 p.m. During each shift, Petitioner will offer three one-hour classes with a maximum of twelve students in each class. The school will have two full-time employees, including the Petitioner, but will also hire up to 20 contract-instructors who will teach students based on their instrument specialty. Petitioner will have no more than three employees and/or contract-instructors on site at any given time.

Activity related to the instructional school will be primarily indoors, with exception of up to two outdoor activities. Petitioner intends to hold a Summer Ice Cream Social & School Recital as well as a Thanksgiving Day Parade. All outdoor activities will be held entirely on-site and will occur during regular business hours and be approximately 3-4 hours in duration.

Outdoor lighting shall consist of the lighting currently on the dwelling and potentially ground level lighting in the parking area to ensure the safety of visitors. Exterior lighting shall comply with all Howard County requirements and will be shielded and directed as necessary to ensure that adjoining properties will not be adversely impacted.

- § 131.0.B – General Standards Required for Approval; and
- § 131.0.O.3 – Specific Conditional Use Criteria for School Instructions.

Maryland’s Common Law - *Schultz v. Pritts and its Progeny*

Maryland law requires the Board to apply the *Schultz* test when evaluating the Petition – a two-part test (or standard) that “lurks” within each individual factor the Board must consider under the Regulations. *People’s Counsel for Baltimore Cty. v. Loyola Coll. in Md.*, 406 Md. 54, 68-69 (2008) (citations omitted) (explaining *Schultz v. Pritts*, 291 Md. 1 (1981)). First, a conditional use is presumed to be “in the interest of the general welfare, and therefore, valid.” *Loyola Coll.*, 406 Md. at 84 (citations and internal quotation marks omitted). Second, the favorable presumption incorporates the inherent adverse effects of the use. *Id.* at 79 (citations omitted).¹ *Schultz* “essentially adds language to statutory factors to be considered in evaluating proposed [conditional uses.]” *Id.* at 69 (citations omitted).

¹ The *Schultz* test is consistent with the Regulations, which presume a conditional use is “generally appropriate and compatible in the specified zoning districts” and require a finding that a conditional use does not have any “adverse effects above and beyond those ordinarily associated with such uses.” Regulations, §§ 131.0.A, 131.0.B.3.

Once a conditional use complies with the applicable zoning regulations, notwithstanding even “severe” inherent adverse effects, it cannot be denied without evidence of adverse effects that are “above and beyond those inherently associated with [the use] . . .” *Mossberg v. Montgomery Co.*, 107 Md. App. 1, 9 (1995); *see also Schultz*, 291 Md. at 22-23; *Loyola Coll.*, 406 Md. at 90, 99. The *Schultz* presumption can only be overcome with “strong and substantial” evidence of “detrimental effects above and beyond the inherent ones ordinarily associated with such uses.” *Loyola Coll.*, 406 Md. at 85 (emphasis added) (citing *Anderson v. Sawyer*, 23 Md. App. 612, 625 (1974)).

CONCLUSIONS OF LAW

Based upon the evidence presented to the Board in this case, and upon the Board’s review of the evidence, the Board makes the following Conclusions of Law:

A. General Criteria for Conditional Uses (Section 131.0.B.)

- 1. The proposed Conditional Use plan will be in harmony with the land uses and policies in the Howard County General Plan which can be related to the proposed use. Section 131.0.B.1**

The proposed conditional use for a Music School is in harmony with the following Howard County General Plan policies:

Policy 8.11 – Ensure County residents and visitors have access to a wide variety of arts and cultural programs, cultivate artists and develop a creative workforce.

Policy 8.11 – Implementing Action E. Support for Artists. Increase opportunities for artists to live, work, learn and present work in Howard County.

Furthermore, the design and scale of the proposed use is compatible with the surrounding residential area since it is proposed within an existing owner-occupied residence.

2. **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 are such that the overall intensity and scale of the use(s) are appropriate for the site. Section 131.0.B.2**

The music school is proposed within an existing owner-occupied, single-family dwelling and complies with all bulk regulations, conditional use criteria and parking requirements. Sufficient area is provided for landscaped buffers between the building/parking areas and adjacent properties. The use comprises 3,615 square-feet of floor area on a 36,527 square-foot parcel, thus the size and intensity is appropriate for the site. Access is from a service road adjacent to US 40, which is an Intermediate Arterial and appropriate for the type and number of vehicles associated with the proposed use.

3. **The proposed use at the proposed location will not have adverse effects on vicinal properties above and beyond those ordinarily associated with such uses. Section 131.0.B.3.**

- a. **The impact of adverse effects such as, but not limited to, noise, dust, fumes, odors, intensity of lighting, vibrations, hazards or other physical conditions will be greater at the proposed site than it would generally be elsewhere in the same zoning district or other similar zoning districts.**

The instructional school will not generate physical conditions such as dust, fumes, odors or vibrations. Noise from business operations will be contained within the structure and will not be perceptible from abutting or vicinal properties. Petitioner will not be using amplifiers for musical instruments. Exterior lighting shall consist of the dwelling's existing lighting. The proposed use will not create any adverse impacts greater at the Property than elsewhere in the zone.

- b. **The location, nature and height of structures, walls or fences, and the nature and extent of the existing and/or proposed landscaping on the site are such that the use will not hinder or discourage the development and/or use of adjacent land and structures more at the subject site than it would generally elsewhere in the same zoning district or other similar zoning districts.**

The music school is proposed within the existing single-family detached dwelling and no walls/fences are proposed. The proposed plan maintains open areas and landscape buffers. The structures will not hinder or discourage the development and/or use of adjacent land and structures more at the subject site than it would generally elsewhere in the same zoning district or other similar zoning districts.

- c. **The number of parking spaces will be appropriate to serve the particular use. Parking areas, loading areas, driveways and refuse areas will be appropriately located and buffered or screened from public roads and residential uses to minimize adverse impact on adjacent properties.**

Zoning Regulations require 21 parking spaces for the 3,615 square-foot music school and dwelling unit. The Petitioner has proposed 32 parking spaces, which will be more than adequate to serve the instructional school use and needs of the resident of the dwelling. No loading areas or large commercial trash receptacle areas are proposed. The driveway location will remain unchanged and the driveway will be screened from adjacent residential properties and the public road by proposed landscaping.

- d. **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. For proposed Conditional Use sites which have driveway access that is shared with other residential properties, the proposed Conditional Use will not adversely impact the convenience or safety of shared use of the driveway.**

The existing ingress and egress driveways will continue to provide safe access with adequate sight distance. The proposed driveway access does not have driveway access that is shared with other residential properties.

- e. **The proposed use will not have a greater potential for adversely impacting environmentally sensitive areas in the vicinity than elsewhere.**

There are no known environmentally sensitive areas in the nearby vicinity. Therefore, the

proposed use will not have a greater potential for adversely impacting environmentally sensitive areas in the vicinity than elsewhere.

- f. The proposed use will not have a greater potential for diminishing the character and significance of historic sites in the vicinity than elsewhere.**

The TSR indicates that the closest historic site to the Property is known as Brosenne's Stone House (HO-137) which is located on the south side of Baltimore National Pike approximately 600 feet to the west. This historic building from the mid-19th century was incorporated into a retail building at 10281 Baltimore National Pike. Therefore, the proposed use will not have a greater potential for diminishing the character and significance of historic sites in the vicinity than elsewhere.

B. Conditional Use Criteria for School Instruction (Section 131.0.O.3.)

- (1) The parcel is within 500 feet of the center point of the intersection of two arterial roads.**

The Property is located approximately 167 feet from the intersection of two arterials, Frederick Road and Baltimore National Pike.

- (2) The structure for which the Conditional Use is proposed shall not exceed 4,000 square feet. This Conditional Use may only be granted for a dwelling existing at the time of the application for the Conditional Use.**

The structure for which the conditional use is proposed is 3,889 square feet and is existing at the time of application.

- (3) Parking areas shall be located and landscaped to minimize their visibility from adjacent residential properties. All parking for the instructional school must be provided on-site.**

Parking areas are located and landscaped in a manner that will minimize their visibility from adjacent residential properties. All parking is provided on-site.

- (4) **Reasonable standards for hours of operation shall be proposed by the petitioner and established by the Hearing Authority for each use. All activity related to the instructional school must cease by 9:00 p.m.**

Proposed hours of operation are from 9:00 a.m. to 8:45 p.m. All activity related to the instructional school will cease by 9:00 p.m.

- (5) **The design 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.**

No new structures or additions are proposed.

- (6) **At least one person involved in the instructional school operation shall reside in the structure.**

The Petitioner intends to live on-site.

C. CONCLUSION

Weighing all the testimony and evidence of record under a “preponderance of the evidence” standard, the Board concludes that the instant petition complies with Sections 131.0.B (General Standards), and 131.0.O.3 (Specific Criteria) of the Zoning Regulations.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is this 18th day of April, 2019, by the Howard County Board of Appeals, ORDERED:

That the Petition of Olenka Stasyshyn for a Conditonal Use for a Music School in an R-20 (Residential: Single) Zoning District is **GRANTED**, subject to the following conditions:

1. The hours of operation for the music school are from 9:00 a.m. to 9:00 p.m.
2. The Petitioner shall comply with all applicable Federal, State and County laws and regulations.

ATTEST:

HOWARD COUNTY BOARD OF APPEALS



Robin Regner, Secretary




James Howard, Chairperson



Neveen Kurtum, Vice-Chairperson

PREPARED BY:
HOWARD COUNTY OFFICE OF LAW
GARY W. KUC
COUNTY SOLICITOR



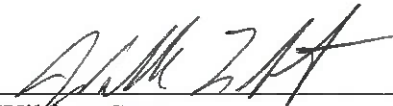
John Lederer



Barry M. Sanders
Assistant County Solicitor

Absent AT TIME OF SIGNING

Steven Hunt



William Santos