

IN THE MATTER OF	*	BEFORE THE
	*	HOWARD COUNTY
DANA McGREGOR	*	BOARD OF APPEALS
Petitioner	*	BA Case No. 12-009C

DECISION AND ORDER

The Howard County Board of Appeals (the "Board") convened on December 6, 2012, to hear the amended Petition of Dana McGregor (Petitioner) for a child day care center with up to 30 children in an R-20 (Residential: Single) Zoning District. The Petition was filed pursuant to Section 131.N.13. of the Howard County Zoning Regulations (the "Zoning Regulations").

The Petitioner provided certification that notice of the hearing was advertised and certified that the property was posted as required by the Howard County Code. The Board members indicated that they had viewed the property as required by the Zoning Regulations.

Board members James Walsh, John Lederer, Maurice Simpkins, Henry Eagles and James Howard were present for and participated in the hearing. Board member Walsh presided over the hearing. Barry M. Sanders, Assistant County Solicitor, served as legal advisor to the Board.

This case was conducted in accordance with Section 2.209 of the Board's Rules of Procedure. The Howard County Code, the Howard County Charter, the Howard County Zoning Regulations, the various technical staff reports and agency comments, the Department of Planning and Zoning Technical Staff Report recommendations dated June 26, 2012 and November 27, 2012, the General Plan for Howard County, the General Plan of Highways, and the amended petition and plat submitted by the Petitioner were incorporated into the record by

reference.

The Petitioner was represented by Dylan Springmann, Esquire. Several individuals appeared in opposition to the Petition.

The following persons testified on behalf of the Petitioner: Brian Cleary, Dana McGregor, Elinia Johnson, Dawn Freburger, Maurica Price and Brandy Swan. Maureen Shirliff, Nellie Arrington, Helen Waldron, Kathy Fitzpatrick, Nick DeLuca and Jim Watkins testified in opposition to the petition.

FINDINGS OF FACT

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

1. The subject property is located in the 2nd Election District on the north side of Old Frederick Road about 370 feet west of Mt. Hebron Drive. It is referenced as Tax Map 29, Grid 10, Parcel 280, Lot 8, and is also known as 9210 Old Frederick Road (MD 99) (the "Property").

2. The 21,954-square foot, generally rectangular Property is improved with a one-story brick single-family detached dwelling and basement constructed in the late 1950s. The house is set back farther from MD 99 than the current 50-foot minimum and the rear of the house is about 36 feet from the rear lot line. The driveway entrance from MD 99 is located in the southeast corner. Play equipment and a shed are located to the west and northwest of the house. Evergreen tree buffers run along the Property's rear and front lot lines and deciduous trees dot the yard. Hedges run along portions of the west lot line. The Property is highest in the northeast corner and from here, the elevation drops about seven feet to the southwest corner.

3. All adjacent properties are similarly zoned R-20. To the north, Lot 21 of the Mt. Hebron Section 3 subdivision is improved with a single-family detached dwelling fronting on Furrow Avenue. To the east is Lot 9 of the Mt. Hebron Section 1 subdivision, and to the west is Lot 7 in the same subdivision and these are each improved with a single-family detached dwelling fronting on the with access to MD 99. The closest home appears to be on Lot 7 and is estimated to be approximately 65 feet from the proposed outdoor play area.

4. MD 99 in this location has one eastbound travel lane, one westbound travel lane, a center left-hand turn lane and about 43 feet of paving within a variable width right-of-way (ROW). The posted speed limit is 40 MPH. The estimated sight distance from the existing driveway entrance is more than 500 feet to the east and west. According to State Highway Administration (SHA) data, the traffic volume on MD 99 west of US 29 was 15,201 average daily trips as of 2010.

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

6. The Policies Map 2000-2020 of the 2000 General Plan designates the Property as a "Residential Area" land use. The Transportation Map 2000-2020 of the 2000 General Plan depicts MD 99 as a Minor Arterial.

7. The Petitioner currently has home care for up to seven children and now proposes to establish and operate a full child day care center and pre-school on the Property (the Day Care Use). Up to 30 children will attend the Day Care Use. The proposed hours of operation are from 6:00 a.m. to 6:30 p.m. Monday through Friday. The building is a residence and will continue to be occupied by four resident occupants. There would be four employees for the Day Care Use.

The Petitioner intends to use the existing house without any new addition; however,

there will be several outdoor improvements on the Property. The amended plan depicts a revised 25 foot wide entrance and driveway into the Property near the southeast corner in the same general area as the existing driveway. This driveway leads to a revised parking lot in front of the building with five parking spaces. Two residential spaces are not shown on the plan but are provided within the existing paved area of the driveway. There is a relatively wide vehicle circulation area in front of the parking spaces. A new concrete sidewalk is proposed in front of the building and along the west side of the building and through the rear yard. A new 8 feet by 15 feet shed is proposed near the southwest corner of the building and a trash storage area would be behind this shed. A new 6-foot privacy fence would run approximately from the southwest corner of the building to the northeast corner enclosing the west side yard and the rear yard. This fence would be 20 feet from the lot lines and comply with the use setback. The timber edge and wood chip playground area in the west side yard would remain and the existing playground equipment would be relocated to comply with the required setbacks. An existing shed and a walkway in the rear yard would be removed. The existing evergreen tree buffers along the front and rear of the Property will be retained and the existing large trees throughout the yard will also be retained. New landscaping buffers are proposed along the east, west and north lot lines.

8. Brian Cleary, an engineer, testified and described the revisions that have been proposed in the Amended Plan dated September 26, 2012.

9. Dana McGregor, the Petitioner, testified and stated that she currently provides home care in her residence and is licensed by the State of Maryland. Ms. McGregor's plan is to operate a full child day care center and pre-school for up to 30 children on her Property. Ms. McGregor stated that the children would be taken outside for play in groups of 10 to 12

children at most. Ms. McGregor stated that the dwelling is 1,500 sq. ft. and includes a basement which would not be part of the Day Care Use.

10. Elinia Johnson, Dawn Freburger, Maurica Price and Brandy Swan testified that Dana McGregor is their current day provider and that they wholeheartedly support her conditional use proposal.

11. Maureen Shirliff testified in opposition to the petition and stated that she is the next door neighbor to the east. Ms. Shirliff stated that MD 99 is very busy and that she has trouble leaving her property in the evening between the hours of 5:30 and 6:30 p.m.

12. Nellie Arrington testified in opposition to the petition and stated that the driveway access is not adequate for rush hour traffic.

13. Helen Waldron testified in opposition to the petition and stated that she resides 2 houses west of the Petitioner. Ms. Waldron stated that she can hear laughter and screaming quite vividly from the current 7 children that Ms. McGregor provides home care for currently. Ms. Waldron stated that the noise of 30 children will be heard.

14. Kathy Fitzpatric, a nearby resident, testified in opposition to the petition and stated that the proposal is too intense for the size of the lot.

15. Nick DeLuca testified that he has lived in the area for 23 years and expressed his concern over the traffic patterns on an already dangerous road especially when someone dropping off or picking up a child from the day care center.

16. Jim Watkins testified in opposition to the petition and stated that he lives across the street from the subject Property. Mr. Watkins expressed his concern regarding the safety of the children entering and exiting the subject Property from MD 99.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Board concludes as follows:

I. General Criteria for Special Exceptions (131.B).

A. **Harmony with the General Plan:** Section 131.B.1 of the Zoning Regulations requires that a conditional use plan will be in harmony with the land uses and policies indicated in the Howard County General Plan for the “Residential Areas” land use designation. In evaluating a plan under this standard, the Board must 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.

Although the proposed use meets the minimum lot size and square footage requirement of the conditional use category, this Board finds that a 30-child Day Care Use is a much more intense use than the adjoining solely residential uses. The Day Care Use will certainly generate noise from the use of the outdoor play areas and on the basis of the proximity of the adjoining residential uses, this noise may be inordinate at times. While the location of the site on MD 99 has a positive aspect because the traffic to and from the Day Care Use would be using this higher category road rather than a local road within the neighborhood; however there is also a negative aspect because of the need for entrance improvements and the increase of turning movements into and from the Property on a relatively busy road.

Petitioner proposes to combine the use with the residential use of the Property. The

Board concludes that the overall intensity and scale of uses is inappropriate given the adequacy of proposed buffers and setbacks. The petition does not comply with Section 131.B.1.

B. **Adverse Effect**: Section 131.B.2 of the Zoning Regulations states in pertinent part that the Hearing Authority shall have the power to permit a conditional use, provided the proposed use at the proposed location will not have adverse effects on vicinal properties above and beyond those ordinarily associated with such uses. In evaluating the Plan under this standard, the Hearing Authority shall consider the following 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 recognizes the potential for adverse impact from virtually every human activity. 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 the board is not whether the proposed use would have adverse effects in an R-20 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 not 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 Day Care Use in the R-20 district.

C. 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 generate inordinate noise from the use of the outdoor play area, which in the Board's view, is much larger relative to the entire site than the area generally approved for day care center conditional uses combined with a residential use.

D. Structures. 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.

The outdoor play areas of the Day Care Use would be visually screened from the surrounding properties by a six foot privacy fence and also by the existing and proposed vegetation. However as noted above, these features would not mitigate the noise of many children in the outdoor play area to any great extent.

E. Parking and Drives. 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.

Based on the evidence, the Board concludes that the Petitioners have met their burden of demonstrating that the proposed use complies with Section 131.B.2.c. The plan depicts a total of seven parking spaces. The amended conditional use plan proposes a maximum of

1,500 square feet for the child day care center. At the required parking rate of 3.0 parking spaces for each 1,000 square feet of floor area, the parking requirement would be 5 spaces. The parking areas will be of adequate size for the particular use. The parking area, the driveway and trash storage area appear to be screened from public roads and residential uses.

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

The Petitioner failed to persuade the Board that the site ingress/egress would provide safe access with adequate sight distance. Petitioner failed to provide the Board with a precise sight distance measurements for the Board to make this determination.

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 proposed parking area and the vehicle circulation appears to comply with Section 131.N.13.a.lot will provide safe vehicular and pedestrian circulation patterns.

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 is not applicable as the Property is not located in an industrial or commercial district.

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

No more than 30 children will attend the Day Care Use, resulting in a minimum lot size of 15,000 square feet. The Property is 21,954 square feet, in accordance 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 outdoor play areas will be fenced, located to the side and rear of the building and are buffered from the adjoining residential properties by landscaping, but are still not buffered by adequate distance. A minimum use setback of 20 feet will not mitigate the level of noise that is anticipated to be generated in the outdoor play area given the proximity of the neighboring houses.

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

The proposed parking areas for the Day Care use appears to be adequately located and landscaped to minimize their visibility from roads and adjacent residential properties.

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.

No additions or new structures are proposed. Section 131.N.13.f. does not apply.

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.

(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, that presents an attractive and effective buffer for neighboring residential properties.

(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.

Section 131.N.13.g. does not apply.


ORDER

Based upon the foregoing, it is this 3rd day of September 2013, by the Howard County Board of Appeals, ORDERED:

That the amended Petition of Dana McGregor, for a child day care center for up to 30 children in an R-20 (Residential-Single) Zoning District is hereby **DENIED**.


ATTEST:

HOWARD COUNTY BOARD OF APPEALS


Alison Mathieson, Secretary


John Lederer, Chairperson

PREPARED BY:
HOWARD COUNTY OFFICE OF LAW
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