

IN THE MATTER OF	:	BEFORE THE
SANG GUG DO & HEA OCK DO	:	HOWARD COUNTY
Petitioner	:	BOARD OF APPEALS
	:	HEARING EXAMINER
	:	BA Case No. 14-006C

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DECISION AND ORDER

On May 15, 2014, 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 Sang Gug Do and Hea Ock Do (Petitioners) for approval of a two-family dwelling conditional use in an RC-DEO (Rural Residential: Density Exchange Option) Zoning District, filed pursuant to Section 131.0.N.54 of the Howard County Zoning Regulations (the "Zoning Regulations").

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

Petitioners were not represented by counsel. Stephen Forney appeared for Petitioners and testified. No one appeared in opposition to the petition.

Petitioner introduced into evidence the exhibits as follows.

1. Information about proposed use, including handwritten note stating the two-family dwelling would be connected by the existing 21'x22' common living space accessible by both structures and a two-car garage below, accessible only by the addition. The older building will be refaced to match the new addition. Handwritten notes on a copy of the Section 131.0.54 standards for Two-family dwellings state, "Zoning Regulations changed 6 months ago. Now you can tutor up to 6 students" and "up to 4 boarders."

FINDINGS OF FACT

Based upon the preponderance of evidence presented at the hearing, the Hearing Examiner finds as follows:

1. Property Identification. The subject property is located in the 5th Election District on the northern side of Clarksville Pike about 800 feet east of Linden Chapel Road. It is referenced as Tax Map 29, Grid 14, Parcel 330, Chapel Woods, Lot 1, and has a street address of 11746 Clarksville Pike (the Property).
2. Site Description. The 3.009-acre is improved with what the Technical Staff Report (TSR) identifies as two single-family detached structures connected by a covered walkway located in the Property's northwesterly area. A large paved parking area lies to the structure's south and east. Two detached garages and a shed are situated to the structures' south. A paved driveway located in the southwesterly corner of the Property provides access.
3. Vicinal Properties. Adjoining properties are also zoned RC-DEO and each is improved with a single-family detached dwelling.
4. Roads. Jones Road has two travel lanes within a 40- right of way.
5. Water and Sewer. The Property lies outside the Metropolitan District. At some juncture, the Health Department ordered the property owner to connect the Property to the public water system pursuant to Howard County Code Section 12.105, as amended by Council Bill 32-2002. The county also issued a permit to allow the Property to connect to public sewer in 2008, but the Health Department did not issue an order directing the Property to connect to

public sewer. The Howard County Real Estate Services Division is investigating the resolution of these issues.

6. General Plan. PlanHOWARD2030 designates the Property as "Rural Conservation" on the Designated Place Types Map. The Functional Road Classification Map depicts Clarksville Pike as a Minor Arterial.

7. Zoning History. In 2011, Hea Ock Do held a pre-submission community meeting for a proposed boarding house conditional use, but did not proceed with the proposal. In 2010, a zoning complaint was filed with the Department of Planning and Zoning (DPZ) about the Property being used for an illegal business (commercial school) in a residential zoning district (Code Enforcement Case No. CE 10-100). After inspection, the school ceased operation. The case was closed on November 8, 2010. DPZ has since approved a one-on-one tutoring, home occupation application.

8. Permit History. In 2008, the county issued Petitioners a permit for the construction of a 2 ½ story, four-car garage and guest room attached to the main house by a breezeway. At the 2010 final inspection, a county inspector determined Petitioners had instead constructed a four-bedroom, 4 ½-bathroom structure and so required Petitioners to amend the permit scope of work description to reflect what had actually been built.

9. The Proposed Conditional Use. Petitioner seeks approval for an owner-occupied two-family dwelling. The existing covered walkway would be eliminated. The two-family dwelling would be connected by a 21'x22' common living space accessible by both buildings and a two car garage below, which would be accessible only by the building to the southwest. The

older building will be refaced to match the new addition, according to Exhibit 1. There will be two kitchen areas, one on each side of the dwelling.

10. Building Contractor Stephen Forney testified that a second kitchen would be installed in the addition and located on the right side of the middle floor, toward the back. The second dwelling would be the residence of Petitioner's son and his family. Only family members would reside there. The older residence would be remodeled.

CONCLUSIONS OF LAW

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

I. Background Legal Issues

The Hearing Examiner acknowledges DPZ's concerns about the actual nature of the proposed use. On page 3, the TSR expresses uncertainty as to whether the addition is being used for the proposed use. On page 7, it references a site visit suggesting the two existing buildings might be in use as rooming or boarding house, as at least four different families were entering, exiting or utilizing portions of the Property. At that same site visit, DPZ staff observed six cars parked in the driveway. Based on this information, DPZ recommends in pertinent part that the requested conditional be approved subject to two conditions: 1) petitioner shall provide adequate proof to the Hearing Examiner that the existing structures are not currently being used for the purpose of a rooming or boarding house, guest house, hotel or motel, and 2) upon substantial completion of the new common living space and garage and associated construction, the Petitioner shall notify the Division of Public Service and Zoning Administration (the Division) and shall arrange with the Division for an inspection of the construction and

associated dwelling units. The construction and existing dwelling units shall be inspected for a determination as to whether it complies with the approved conditional use plan and is in compliance with the Zoning Regulations. The Division shall prepare a report of its findings and forward this report to the Hearing Authority.

DPZ is understandably apprehensive about Petitioners' intended use of the two buildings as a two-family dwelling. This apprehension is validated, in the Hearing Examiner's view, perforce of Petitioner Exhibit 1, which includes two handwritten notes on a copy of the Section 131.0.54 standards for Two-family dwellings: "Zoning Regulations changed 6 months ago. Now you can tutor up to 6 students" and "up to 4 boarders." Nonetheless, the Hearing Examiner is without legal authority to impose these conditions, which are, effectively, an enforcement burden imposed on Petitioners and an extra-legislative standard not required by the Zoning Regulations. The Hearing Examiner is especially concerned that the second condition potentially authorizes DPZ to make an internal inspection of the buildings. Proceedings on an application for a conditional use may not be used as an enforcement mechanism under the guise of approval conditions. It is an improper exercise of the Hearing Examiner's function to transform zoning application proceedings into a violation and enforcement process. *Klein v. Colonial Pipeline Co.*, 55 Md. App. 324, 337, 462 A.2d 546, 554, 1983 (internal citations omitted). DPZ has ample means to enforce the Zoning Regulations to ensure the use of the Property as a two-family dwelling conforms to such activities as are allowed or permitted through conditions of approval.

Still, the Hearing Authority itself is not without recourse to ensure the use conforms. Pursuant to Zoning Regulations § 130.0.H.2, it may place a time limit on a Conditional Use or may require renewal of the use after a certain time period as a condition of approval.¹ Based on the evidence of record, the Hearing Examiner is approving the requested two-family dwelling subject to the condition that the Conditional Use be renewed every two years. The two-year period is imposed as a matter of public health, safety and welfare. This two-year renewal period and the Hearing Authority's compliance determinations upon receipt of Petitioners' application for renewal would also afford Petitioners the potential opportunity to request a modification of this condition pursuant to Section 130.0.H.4.²

¹ Section 130.0.H.2. The Hearing Authority may place a time limit on a Conditional Use or may require renewal of the use after a certain time period as a condition of approval. On an application for renewal of a Conditional Use, the Hearing Authority shall determine whether the applicant has complied with the conditions and safeguards required by the Hearing Authority during the prior term. If the Hearing Authority finds that the applicant has been in substantial violation thereof, it shall deny the application for renewal. The Hearing Authority shall use the procedures given in Section 131.0.I.3.c(1) through (3) below in considering requests for renewal.

Section 130.0.I.3.c.(1)-(3) establishes the following procedures.

(1) A request for an extension [renewal] shall be submitted by the property owner prior to the expiration of the Conditional Use approval, explaining in detail the steps that have been taken to establish the use.
(2) The property owner shall certify that a copy of the request for an extension [renewal] has been sent by certified mail to adjoining property owners and to the addresses given in the official record of the Conditional Use case for all persons who testified at the public hearing on the petition.
(3) The Hearing Authority shall provide opportunity for oral argument on the request at a work session if requested by any person receiving notice of the request. If no response is received within 15 days of the date of the written notification, a decision on the request may be made by the Hearing Authority without hearing oral argument.

² Section 130.0.H.4. The property owner or Conditional Use holder may petition the Hearing Authority for modification of conditions imposed in a Decision and Order approving a Conditional Use, in accordance with the following procedures:

a. A petition for modification of conditions shall be submitted in the same format and include the same information as a Conditional Use petition, clearly indicating the approved Conditional Use, the requested modifications, and the reasons for the request.

II. Specific Criteria for Two-Family Dwellings (Section 131.0.N.54)

Section 131.0.N.54 generally permits two-family dwellings in the R-12 zoning district provided as follows.

a. Any new structures or additions will be designed to be compatible in scale and character with the surrounding residential neighborhood. Compatibility of character may be in architectural style, materials or details. Compatibility shall be demonstrated by architectural elevations or renderings submitted with the petition.

As a preliminary matter, the Hearing Examiner notes the TSR's recommendation that the proposed conditional use be approved stems from DPZ's interest in bringing the existing structures into closer compliance with the Zoning Regulations. The TSR nonetheless recognizes that the method of connecting the two dwellings through a breezeway or breezeway-like connection is contrary to the definition of "Two-family dwelling: A building which contains two dwelling units, of which neither is an accessory apartment, and which is arranged, designed or used for occupancy by two families. The dwelling units in a two-family dwelling are not separated by an attached garage or by an open or enclosed breezeway." By this definition, the

b. A petitioner shall certify that a copy of a request for modification of a condition to a Conditional Use Decision and Order has been sent by certified mail to adjoining property owners identified in the records of the Maryland Department of Assessments and Taxation and the parties of record, whose addresses shall be maintained by the secretary to the Hearing Authority.

c. The Hearing Authority shall hold a public hearing in accordance with the procedures for a Conditional Use petition. The public hearing shall be limited to consideration of the modification requested by the petitioner.

d. The Hearing Authority shall issue a written decision either upholding or modifying a condition imposed in the original Decision and Order.

e. After a decision is made, a new petition requesting modification of any of the conditions of approval shall not be accepted for at least 24 months after the date of the decision modifying or upholding the conditions of the original Decision and Order.

Zoning Regulations intend to prevent the construction of two separate dwelling units on a property, which may potentially violate zoning density or lot size requirements.

The Hearing Examiner agrees with DPZ that in this limited circumstance, the granting of a Two-family conditional use is an appropriate solution for bringing the Property into compliance to the maximum extent possible. However, she is denying Petitioner's request to construct an attached garage below the proposed "common living space," as this addition would add yet another noncompliant feature to the Two-family dwelling. According to the TSR, there are two detached garages on the Property; these are certainly adequate for vehicle storage.

Petitioners intend to reface the older building to match the addition.

b. Two-family dwellings: in the RC and RR Districts, on properties that are not ALPP purchased or dedicated easement properties, and in the R-ED, R-20 or R-12 Districts, provided that the two-family dwelling is on an individual lot, with only one two-family dwelling permitted on one lot, and the lot is an existing recorded lot at the time of the Conditional Use application. The minimum lot size shall be at least 16,000 square-feet for two-family dwelling structures in the R-ED and R-12 Districts.

The proposed Two-family dwelling will be sited on an individual lot recorded at the time of application, with only one two-family dwelling on the lot. The Property is 3.009 acres.

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

Zoning Regulations Sections 131.0.B.1-3 requires the Hearing Authority to evaluate whether the proposed Conditional Use will be in harmony with the land uses and policies indicated in the Howard County General Plan for the district in which it is located through the application of three standards: harmony with the General Plan, intensity of use, and atypical adverse impacts.

A. Harmony and Intensity of Use

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.

131.0.B.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.

The proposed two-family dwelling comports with the Housing Policies in Chapter 9 of PlanHOWARD 2030, which encourages a mix of housing uses. The residential use is a low intensity use and a predominately-indoor use. Subject to the condition that no attached garage addition be constructed below the common living space, the nature, scale, location, intensity and size of the site in relation to the use is appropriate.

B. Adverse Impacts

Unlike Section 131.0.B.1, which concerns the proposed use's harmony or compatibility with the General Plan, compatibility with the neighborhood is measured under §131.B.2's four "adverse effect" criteria": (a) physical conditions; (b) structures and landscaping; (c) parking areas and loading, and; (d) access.

Inherent in the assessment of a proposed conditional use under these criteria is the recognition that virtually every human activity has the potential for adverse impact. The assessment therefore 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 Hearing Examiner is not whether the proposed use would have adverse effects in an RC-DEO district. The proper question is whether there are facts and circumstances showing the particular use proposed at the particular location would have any adverse effects above and

beyond those inherently associated with such a special exception (conditional) use irrespective of its location within the zones. *People's Counsel for Baltimore County v. Loyola College in Maryland*, 406 Md. 54, 956 A.2d 166 (2008); *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, and as conditioned, Petitioners have met their burden of presenting sufficient evidence under Section 131.0.B.2 of the Zoning Regulations to establish the proposed use will not have adverse effects on vicinal properties beyond those ordinarily associated with a two-family dwelling in an RC-DEO zoning district.

131.0.B.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. In evaluating the proposed use under this standard, the Hearing Authority shall consider whether or not:

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.

Because the requested two-family dwelling is a predominately-indoor use, there are no atypical adverse impacts at the site. The petition complies with Section 131.0.B.3.a.

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.

No changes to the location, nature and height of structures, walls, fencing or landscaping are proposed. The petition complies with Section 131.0.B.3.b.

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 impacts on adjacent properties.

The driveways and existing garages provide adequate parking spaces for the use, in accordance with Section 131.0.B.3.c.

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.

No change to the existing ingress/egress is proposed. The petition complies with Section 131.0.B.3.d.

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

There is no evidence of a greater potential for adversely impacting environmentally sensitive areas in the vicinity than elsewhere, in compliance with Section 131.0.B.3.e.

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

There are no known historic sites in the vicinity.

ORDER

Based upon the foregoing, it is this **27th day of May 2014**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the petition of Sang Gug Do and Hea Ock Do (Petitioners) for approval of a Two-family dwelling conditional use in an RC-DEO (Rural Residential: Density Exchange Option) Zoning District is **GRANTED**.

Provided, however, that;

1. The Conditional use shall be conducted in conformance with and shall apply only to the Conditional Use for an a Two-Family dwelling as described in the petition and as depicted on the Conditional Use Plan accepted on May 15, 2014 and not to any other uses, activities, or structures on the Property, as qualified by these conditions.
2. No garage addition below the common living space is permitted.
3. Petitioner shall depict the location of the second kitchen on all plans submitted to the Department of Inspections, Licensees and Permits.
4. The Conditional Use shall be renewed every two years. The two-year renewal period shall be calculated based on the May 27, 2014 date of this Decision and Order. Petitioners shall renew the Conditional Use in accordance with Zoning Regulations Sections 130.0.I.3.c.(1)-(3). (See Footnote 1.)
5. Petitioners shall obtain all necessary permits for the use.
7. Petitioners shall comply with all state and local laws and regulations.

**HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER**



Michele L. LeFaivre

Date Mailed: _____

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 calendar 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.