

IN THE MATTER OF	:	BEFORE THE
<b>CALVARY EVANGELICAL</b>	:	HOWARD COUNTY
<b>LUTHERAN CHURCH</b>	:	BOARD OF APPEALS
Petitioner	:	HEARING EXAMINER
	:	BA Case No. 14-036C

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**DECISION AND ORDER**

On February 9, 2015, 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 Calvary Evangelical Lutheran Church to modify Condition of Approval No. 1 of Board of Appeals Case No. 01-019E&V to allow elementary, middle and high school age students at a private academic school in an RC-DEO (Rural Conservation: Density Exchange Option) Zoning District, filed pursuant to Section 131.0.H.4 of the Howard County Zoning Regulations (HCZR).

Petitioner certified to compliance with the 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.

Thomas Meachum, Esquire, represented the Petitioner. No one appeared in opposition to the petition.

At the outset of the hearing, Petitioner concurred with the Technical Staff Report (TSR) and presented no additional testimony or evidence in support of the petition.

**A Preliminary Matter**

During the proceeding, the Hearing Examiner queried counsel about a note on the Conditional Use Plan (CUP) submitted with the Modification of Conditions of Approval Petition

and calling out a "future portable classroom." As the Hearing Examiner explained, the technical staff report (TSR) did not evaluate any such classroom, and the structure did not come to her attention until she received post-TSR comments from the Department of Fire and Rescue Service (the Fire Department) concerning the need to sprinkle the "building." Counsel explained the petition referenced the building in Section 7.h of the petition, wherein the petitioner is asked to explain the impact of the proposed modification on the subject property. In that section, Petitioner stated as follows. "There will be no physical changes to the building to expand the ages to high school for the private school academy. A location for a portable trailer is shown. The trailer will be placed behind the building and not visible to the road or adjacent property owners."

Because the petition was for a modification of conditions of an approved Conditional Use (BOA Case No. 01-019C&V), the Hearing Examiner, pursuant to Hearing Examiner Rules of Procedure 10.4, requested DPZ to update the TSR to address whether a new Conditional Use petition is required for the modular classroom labeled as a "Future Portable Class Room" on the CUP. DPZ's March 4, 2015 response commented that in Section 7.a of the petition, wherein the petitioner is asked to describe the requested modification, the Petitioner stated the request is to "[m]odify the ages of a private academy school from preschool ages. Private academy school ages would be expanded to include elementary, middle school and high school ages. The maximum of 80 students would remain at 80 students." DPZ further explained that the addition of a modular classroom to an existing Conditional Use always requires the filing of a Conditional

Use petition, because any new building, building addition or additional floor area must be evaluated using the General Standards, which are not included in a Petition to Modify Conditions of Approval.<sup>1</sup>

Petitioner, through counsel Thomas Meachum, commented on DPZ's response on March 12, 2015, as is permitted under Rule 10.4, stating "[i]t doesn't seem necessary for the Church to go back and start the process over for one portable trailer" and considering that the trailer was discussed during the pre-submission community meeting, where the minutes of the meeting show the community had no objections to the portable classroom because it would be located behind the Church building in relation to the street. Petitioner suggested DPZ could draft a revised TSR to comment on the proposal under the conditional use standards, and if the Hearing Examiner wanted, Petitioner could come back for another hearing to discuss the portable under the standards.

On balance, having reviewed both DPZ's response and Petitioner's comments, the Hearing Examiner has determined that it is inappropriate and bad precedent 1) to reopen a hearing that was officially concluded and 2) to allow Petitioner to transform a Petition to Modify Conditions of Approval into a Conditional Use Petition. Additionally, while pre-submission meeting attendees had actual notice of any future modular classroom, there was no advertised or posted public notice of any such addition. Moreover, as DPZ highlighted in its

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<sup>1</sup> DPZ noted in its March 4, 2015 response that the TSR for BOA Case No. 01-19C&V commented that a building permit for portable classrooms approved in BOA Case No. 93-43E was never obtained and the units were not present on the site when the 2001 petition was submitted.

response to the 10.4 request, the petition lacks the requisite information to allow DPZ to evaluate the addition. Also to be considered is the fact that the CUP submitted with the petition appears on its face to be a 2005 revised site development plan, showing a smaller religious facility, there being no discernable revision date on the plan indicating Petitioner modified/updated the 2005 plan to include a new future portable classroom and no plan information as required under Zoning Regulations § 131.0.F.2.

For these reasons, the Hearing Examiner is compelled to deny any proposed portable education trailer/portable classroom. If Petitioner desires to locate any such structure on its Property, it must submit a new Conditional Use petition in accordance with Zoning Regulations § 131.0.J.

#### FINDINGS OF FACT

Based upon the petition and technical staff report (TSR) the Hearing Examiner finds the following facts:

1. Property Identification. The 4.12-acre parcel is located in the 4<sup>th</sup> Election District on the south side of Old Frederick Road, about 1,600 feet west of MD 94 and southeast of the intersection with Patapsco Overlook Court. It is referenced as Tax Map 7, Grid 5, Parcel 92, Lot 1 and known as 16151 Old Frederick Road (the Property).

2. Property Description. The trapezoid-shaped Property is improved with a brick church building located in the front portion of the Property, to the west of which is a two-story school/fellowship hall addition approved in BA 01-19C&V. The religious facility main assembly

area has 188 seats. A two-lane paved driveway with short acceleration and deceleration lanes on Old Frederick Road provides access to a paved parking lot on the east, southeast and south sides of the facility. Beyond this paved area are a shed, fenced play area and picnic area with several tables. The Property slopes to the south from a high point at the driveway entrance. In the Property's back section is a stormwater management facility. The site is open lawn predominately with a line of evergreen trees running along the easterly lot line and small stands of trees.

3. Vicinal Properties. All adjoining properties are zoned RC-DEO. To the northeast and east, across Old Frederick Road, is Section 1 of the Patapsco Overlook subdivision, the lots being each improved with single-family detached dwellings fronting on Patapsco Overlook Court. To the east is the West Howard Swim Club, approved under BA 82-37E and BA 87-50E. This property is improved with a fenced swimming pool, a parking lot, a one-story masonry building and two fenced tennis courts. Parcel 84 to the south is a 41-acre farm and Environmental Preservation Parcel. To the southwest is a four-lot subdivision improved by single-family detached dwellings. On Parcel 86 to the west is a large foundation of a former building and several small buildings.

4. Roads. Old Frederick Road has two travel lanes, a wide paved north shoulder and about 31 paving feet within an 80-foot ROW. The TSR reasons sight distance is not an issue in this modification request. The posted speed limit is 30 MPH. Visibility does not appear to be an

issue. According to Public Works data, traffic volume on Old Frederick Road east of the Carroll County line was 2,428 average daily trips as of 2009.

5. Water and Sewer Service. The Property is served by private well and septic.

6. The General Plan. The Property is designated "Rural Resources" on the PlanHOWARD2030 Designated Place Types Map and is designated Institutional on the Land use Map. Old Frederick Road is classified as a Major Collector on the PlanHOWARD2030 Transportation Map.

7. Zoning History. The TSR discusses the substantial zoning history relating to this Property, which is here incorporated by reference. The private academic school use granted in BA 01-19E&V (November 15, 2001) was limited to pre-school age children only, three to five years of age, with a maximum of 80 students.

8. The Requested Modification of Approval Condition. Condition No. 1, as approved under BA 01-19E&V, provided that "[t]he conditional use shall apply only to the proposed enlarged religious facility and new private school as described in the petition and as depicted on the conditional use plan submitted on March 30, 2001, and not to any other activities, uses, or structures on the Property." Petitioner is seeking to modify this condition by changing the use to include elementary, middle and high school age students, with the maximum number of students remaining at 80.

#### **CONCLUSIONS OF LAW**

Based upon the petition and the TSR, the Hearing Examiner concludes as follows.

**I. General Criteria for Conditional Uses (§ 131.0.B)**

Zoning Regulations §§ 131.0.B.1-3 requires the Hearing Authority to evaluate a proposed Conditional Use through the application of three standards, harmony with the General Plan, overall intensity and scale of use, and adverse impacts.

**A. Harmony and Intensity of Use (§§ 131.0.B.1 & .2)**

**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.**

As the TSR explains, the only General Plan Policy that can be related to the proposed use is Policy 4.5, the purpose of which is to "[r]efine the Rural Conservation (RC) and the Rural Residential (RR) zoning regulations to provide greater flexibility for the agricultural community as well as appropriate protections for rural residents." Policy 4.5 has two implementing actions: 1) examine and amend where appropriate the list of accessory and conditional uses in the RC and RR districts and refine uses and standards for approval, and 2) review use designations (permitted by right, by permit, and conditional) in each Rural West zoning district, and determine whether amendments are needed to make some uses less or more restrictive. According to the TSR, these Implementing Actions were realized as part of the 2013 Comprehensive Zoning Plan, when the county reevaluated the entire Conditional Use section of the Zoning Regulations but made no significant revisions having the effect of reducing the general acceptability of private academic schools in the Rural West. The Hearing Examiner

concludes the petition complies with § 131.0.B.1 because the proposed uses are not disharmonious with any specific policy or land use.

**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 modification to allow elementary, middle and high school age students is only a minor intensification of use if the presence of older students is considered a more intense use. There will be no modification in the functionality of the private academic school, as the use will continue to operate within the existing building. The almost 5-acre Property is sufficiently sized and the Property has good access to a low traffic volume collector highway.

**B. Adverse Impacts (§ 131.0.B.3)**

Unlike § 131.0.B.1, which concerns the proposed use's harmony or compatibility with the General Plan, or § 131.0.B.2, which concerns the on-site effects of the proposed use, compatibility of the proposed use with the neighborhood is measured under § 131.0.B.3's six off-site, "adverse effect" criteria: (a) physical conditions; (b) structures and landscaping; (c) parking areas and loading; (d) access; (e) environmentally sensitive areas; and (f) historic sites. 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, the Petitioner has met its burden of presenting sufficient evidence under §131.0.B.3 of the Zoning Regulations to establish the proposed use will not have adverse effects on vicinal properties beyond those ordinarily associated with a private academic school in the RC-DEO zoning district.

**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.**

There is no evidence of record regarding atypical adverse effects on vicinal properties from dust, fumes, odors, intensity of lighting or hazards.

**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 Property adjoins an outdoor recreation use to the east and a wooded portion of a Preservation Parcel to the south. Existing residential uses to the southwest and north, across Old Frederick Road, are buffered by distance and vegetation. There is no evidence of any

change to the location, nature and height of existing structures, walls or fences that would hinder or discourage the development and/or use of adjacent land and structures more at the subject site than elsewhere in the same zoning district.

**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.**

No new parking spaces are required. No other changes are proposed.

**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 long-existing use has utilized the same access, with no apparent safety concerns.

Sight distance appears to be adequate. There is no shared driveway access.

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

The closest environmentally sensitive area appears to be a stream and floodplain on Parcel 84 to the Property's south. This area is more than 1,000 feet from the Property, well beyond the large stormwater management facility on the Property. There is no evidence of atypical adverse impact on vicinal environmentally sensitive areas.

**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 closest historic site is the St. Paul Episcopal Church (HO101), which lies about 3,700 feet to the Property's west. Importantly, no new construction is proposed. There is no evidence of atypical adverse impact on environmentally sensitive areas.

**II. Specific Criteria for Private Academic Schools (§ 131.0.N.48)**

A Conditional Use may be granted in the RC and RR Districts, on properties that are not ALPP purchased or dedicated easement properties, and in the R-20, R-ED, R-12, R-SC, R-SA-8, R-H-ED, R-A-15, R-APT, R-MH, or R-VH Districts for private academic schools, colleges and universities, (not including nursery schools) provided that:

- a. The maximum density permitted is 60 pupils per acre for lots less than three acres, and 100 pupils per acre for lots three acres or greater.**

The requested modification is for a student density of about 16 students per acre, in accordance with § 131.0.N.48.a

- b. In addition to meeting the minimum area requirements above, schools with residence accommodations shall provide an additional 500 square feet of lot area per site resident. Residents shall include students, staff members, caretakers and their families who reside on the site.**

No residence is proposed. This section is inapplicable.

- c. A private school may be erected to a greater height than permitted in the respective district, provided that no structure is more than three stories in height and the front, side and rear setbacks shall be increased two feet for each foot by which such structure exceeds the height limitation.**

No new construction is proposed. This section is inapplicable.

- d. Sufficient off-street school bus loading areas shall be provided if bus service is provided for students.**

No new off-street school bus loading area is proposed. This section is inapplicable.

**e. Outdoor uses will be located and designed to shield residential property from noise or nuisance. Play areas, athletic fields and similar uses shall be buffered from residential properties by fencing, landscaping, adequate distance or other appropriate means.**

No new outdoor uses are proposed. This section is inapplicable.

**f. Buildings, parking areas and outdoor activity areas will be at least 50 feet from adjoining residentially-zoned properties other than a public road right-of-way.**

No new building, parking area or outdoor activity area is proposed. This section is inapplicable.

**g. At least 20% of the area within the building envelope will 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.**

There is no exact data on the amount of green space. The TSR estimates it to be about 50 percent (within the building envelope).

**h. 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 July 12, 2001 are permitted.**

The Property has frontage on and direct access to a collector highway, in accordance with § 131.0.N.48.h.

**i. The minimum lot size in the RC and RR Districts for a new private academic facility is three acres. The minimum lot size in the R-20, R-ED, R-12, R-SC, R-SA-8, R-H-ED, R-A-15, R-APT, R-MH, or R-VH Districts for a new private academic facility is one acre. An existing private academic facility is not required to comply with this criteria.**

The Property is 4.999 acres, in accordance with § 131.0.N.48.1.

**ORDER**

Based upon the foregoing, it is this **26<sup>th</sup> day of March 2015**, by the Howard County Board of Appeals Hearing Examiner, **ORDERED:**

That the Petition to Modify Condition No. 1 of Board of Appeals Case No. 01-019E&V to allow elementary, middle and high school age students at a private academic school in an RC-DEO (Rural Conservation: Density Exchange Option) Zoning District, is hereby **GRANTED**;

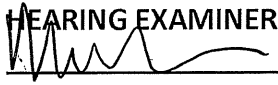
**Provided, however, that:**

1. The Use shall be conducted in conformance with and shall apply only to Petitioner's request to allow elementary, middle and high school age students at the private academic school on the Property in the same location and structures approved in BOA Case No. 01-019E&V.
2. Petitioner shall comply with all applicable federal, state, and county laws and regulations.

It is **FURTHER ORDERED** that the "future portable classroom" depicted on the plan accompanying the Petition and described as a "portable trailer" in the Petition is **DENIED**. A new Conditional Use Petition is required for this use/structure.

**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.