

IN THE MATTER OF	:	BEFORE THE
MARYLAND INTERNATIONAL	:	HOWARD COUNTY
SCHOOL, LLC	:	BOARD OF APPEALS
Petitioner	:	HEARING EXAMINER
	:	BA Case No. 22-023C&V

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**MOTION FOR RECONSIDERATION**

On March 8, 2023, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, held the evidentiary hearing for the Petition of Maryland International School, LLC (Petitioner) for a Private School (Academic) Conditional Use and a Child Day Care Center and Nursery School Conditional Use, in the R-12 (Residential: Single) Zoning District, filed pursuant to Section 131.0.N.48 and Section 130.0.N.13 of the Howard County Zoning Regulations (HCZR). Petitioner has also requested a variance to increase the maximum height for an addition to an existing school from 40.15 to 51.24 feet pursuant to Section 131.0.N.48.c. of the HCZR.

The 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 Coale, Esq.

represented the Petitioner. Robert Vogel (civil engineer), Rose Chow (architect), and Rebecca Ghosh (head of school) testified in support of the Petition. David Marc, Janice

McVey, Frederick Marc, Ashley Walton, Margie Dunklee, Steve Kelehan, Kimberly Marc, Deborah Marc, Carol Kelehan, Larry Weatherholt, Micheal Marc, Mary Marc, Michael Walton, Rachelle Nedd-Jones, and Lodewijk Jones testified in opposition to the Petition.

Petitioner introduced into evidence the following Exhibits:

1. Colorized Site Plan
2. Building Addition and Renovation History
- 3.(a) & (b) Addition Elevations
4. Auditorium and Parking Garage Elevation
5. Athletic and Montessori Building Elevation
6. Site Sections

Opposition introduced into evidence the following Exhibits:

1. Sept 6, 2022 letter to Amy Gowan with attachments
2. Existing Site Density
3. Proposed Site Density
4. Site Entrance (Autoturn)
5. Aerial
6. Annotated Rendered Site Plan
7. Site Sections with additional Existing Section

After the conclusion of the evidentiary hearing and the closure of the record, on March 16, 2023, a Decision and Order was issued granting the Petition for the Conditional Uses and variance. By Motion for Reconsideration dated March 31, 2023, Mr. Frederick Marc, a party of record, requested that the Decision and Order be reconsidered, that a hearing on the Motion for Reconsideration be held, and that the March 16, 2023, Decision and Order be suspended pending a decision on the Motion for Reconsideration. On April 6, 2023, Petitioner filed its Answer to the Motion for Reconsideration opposing the reconsideration request.

On April 13, 2023, an Order was entered staying the Decision and Order dated March 16, 2023 approving the Petition of Maryland International School, LLC for (1) the expansion of an existing Conditional Use for a Private School (Academic), (2) the expansion of an existing Conditional Use for a Child Day Care Center and a Nursery School, and (3) a variance from the maximum height restriction of 34 feet to 51.24 feet, in a R-12 (Residential: Single) Zoning District, identified as 6135 Old Washington Road, ElkrIDGE, Maryland, and granting the request for a hearing on the Motion for Reconsideration. The hearing on the Motion for Reconsideration was held on June 21, 2023. Mr. Thomas Coale, Esq. argued on behalf of the Petitioner and Mr. Grant Giel, Esq. argued on behalf of opponents David Marc, Deborah Marc, Kimberly Marc, Michael Marc, Jan McVey, Larry Weatherholt, Cheryl Marc, Frederick Marc, Carol Kelehan and Steve Kelehan.

At the Motion hearing, Mr. Giel, Esq. argued 4 points which shall each be addressed as follows.

I. VARIANCES

Opposition argues that there is no jurisdiction to grant the requested height variance. The crux of its argument is the interpretation of HCZR § 131.0.D, which states, in pertinent part,

**D. Compliance with Specific Requirements for a Conditional Use**

**1. A Conditional Use shall comply with the requirements for the specific use given in Section 131.0.N. Variances may not be granted to the requirements of Section 131.0.N except for modifications or expansions of existing Conditional Uses in accordance with Section 131.0.D.4 below.**

\* \* \* \* \*

**4. The Hearing Authority may approve variances to the bulk regulations in Section 131.0.N, in accordance with the variance provisions of Section 130.0.B, for modifications and expansions of:**

- a. Existing Conditional Uses that were approved prior to July 12, 2001; and**
- b. Conditional Uses filed on or before March 5, 2001, and approved after July 12, 2001.**

Opposition argues that the Subject Property does not have "existing Conditional Uses that were approved prior to July 12, 2001". The Subject Property has been developed and utilized as a school, public or private, since 1923. BA-00-015E, approved on September 7, 2000 for the Subject Property, granted a Special Exception for a Private School (Academic) for 480 students and a Child Day Care Center and Nursery School. BA-15-013C, approved on August 21, 2015 for the Subject Property, granted a Conditional Use for a Private School (Academic) for 500 students and a

Child Day Care Center and Nursery School. There is no evidence that BA-00-016E has been revoked. There is also insufficient evidence in the record to support a finding that BA-00-016E was legally abandoned.

Opposition also argues that the Petitioner failed to meet its burden of uniqueness required to support a variance. At issue is § 130.0.B.2.a.(1):

- (1) That there are unique physical conditions, including irregularity, narrowness or shallowness of the lot or shape, exceptional topography, or other existing features peculiar to the particular lot; and that as a result of such unique physical condition, practical difficulties or unnecessary hardships arise in complying strictly with the bulk provisions of these regulations.**

There was extensive evidence adduced at the evidentiary hearing, including the testimony of Mr. Robert Vogel, regarding the severe drop in topography from the street frontage to the rear and side of the Subject Property. Even the Historic Preservation Commission and the Opposition recognized and acknowledged the severe topography of the Subject Property. The variance request was an accommodation to the Historic Preservation Commission to create an integrated street façade commensurate with the existing school structure. But for the exceptional topography, and the desire to accommodate the Historic Preservation Commission, a variance would not have been requested. The severe topography directly creates a practical difficulty or unnecessary hardship in constructing the new school expansion.

## II. SETBACKS

Opposition argues that the three-story school addition, the single-story Montessori school/day care, the three-story athletic building, and the three-story

auditorium/parking garage are all principal uses. Petitioner asserts that these uses are accessory uses. Even if the three-story school addition, the single-story Montessori school/day care, and the three-story athletic building are considered principal uses, their proposed locations are in compliance with principal use setbacks. It is only the three-story auditorium/parking garage that does not meet the setback for a principal use; however, it does meet the setback for an accessory use. Opposition also argues that the athletic field is a principal use requiring approval of a Conditional Use.

The Subject Property is in the R-12(Residential: Single) Zoning District and HCZR §109.0.D.4. provides:

**Minimum setback requirements**

**a. From arterial or collector public street right-of-way**

**(1) All structures**

**(a) Front or side .....30 feet**

**(b) Rear**

**(i) Principal structure .....50 feet**

**(ii) Accessory Structure .....10 feet**

Athletic fields and parking are customarily incidental to a school; they do not change the basic nature of the principal use, the school, and are attendant, concomitant, customary, incidental and supportive of the principal use and do not change the principal use as a school. County Comm'rs of Carroll County v. Zent, 86 Md. App. 745, 587 A. 2d 1205 (1991), Eastern Serv. Ctrs., Inc. v. Cloverland Farms Dairy, Inc., 130 Md. App. 1, 744 A.2d 63 (2000) Additionally, HCZR

§131.0.N.48.4 specifically recognizes athletic fields as a part of a school and not as a principal use when utilized in concert with a school. Similarly, HCZR §131.0.B.3.c specifically requires parking spaces but does not treat parking lots differently from structured parking. Both the auditorium/parking garage and athletic field are accessory uses that meet the bulk regulation setbacks.

### III. TRAFFIC

Opposition argues that reliance on the traffic findings in BA-15-013C is misplaced. HCZR §131.0.B.3.d requires that **"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 existing ingress/egress drive was reviewed and approved in BA-15-013C, a Conditional Use approval for a nursery school, child care center, and a private academic school for 500 students, a slightly larger enrollment than the instant proposed Conditional Use. The access drive meets Old Washington Road at a 90-degree angle and there is no curvature of Old Washington Road at this Intersection. Both parties argued the relevant merits of CAD AutoTurn analysis of this access drive. The Site Plan shows the required turning radius. Neither side prepared a complete traffic analysis; this is required at a later stage in the development plan. None of the State or County departments or agencies who reviewed the Petition found the access drive to be inadequate or not meeting access standards. Opposition failed to provide any traffic reports or empirical traffic data. Opposition simply did not provide evidence sufficient to rebut the approval of BA-15-013C, the

Technical Staff Report, the departments and agencies reviews, and the evidence adduced in the record.

#### IV. SEWER

Opponents' final argument is that it is error to have not delved further and required an in-depth analysis of the construction of water and sewer access to the Subject Property. The Subject Property is within the Planned Service Area for water and sewer and the Property is served by public water and sewer. An adequate water and sewer system will be designed by State and County agencies and departments. It is not required that a Petition for a Conditional Use include what will be required of them by the State or County at a later step in the development process. At a minimum, if a Conditional Use is approved, the water and sewer system plans will be approved by the County Department of Public Works and the County Department of Licenses, Inspections, and Permits at a later stage of the development process.

Based on the foregoing, there are no mistakes of fact or law sufficient to reconsider the Decision and Order in this matter issued March 16, 2023. To do so would constitute an impermissible change of mind.

### **FINAL DECISION AND ORDER**

#### **FINDINGS OF FACT**

Based upon the evidence of record, the Hearing Examiner finds the following facts:



1. Property Identification. The Subject Property is located on the east side of Old Washington Road, north of its intersection with Hanover Road, and south of its intersection with Lebanon Lane. It is in Council District 1, the 1st Election District, identified as Tax Map 38, Grid 9, Parcels 820 and 830, and is also known as 6135 Old Washington Road, ElkrIDGE, Maryland (the Property).

2. Property Description. The Property consists of approximately 8.955 acres and is developed and utilized with a Private School (Academic) with 185 students and a Child Day Care Center and Nursery School within a 51,000 sq ft three-story brick building originally constructed circa 1923 as a public-school building that is listed on the Howard County Historic Sites Inventory as #HO-803. The environmentally sensitive areas consist of steep slopes, wetlands, specimen trees and a stream in the eastern and southern sections. The site descends from an elevation of 184 feet in the northwest corner to 105 feet in the southeast corner.

3. Vicinal Properties.

Direction	Zoning	Land Use
North	R-12	Single-Family Residences / Multi-Family Residence/Old Washington Road
South	R-12	Single-Family Residences
East	R-12	Single-Family Residences
West	R-12	Single-Family Residences

4. Roads. Old Washington Road has two travel lanes within a 50-foot right-of-way. The speed limit for Old Washington Road is 30 miles per hour. Traffic count data is not available for this portion of Old Washington Road.

5. Water and Sewer Service. The Property is within the Planned Service Area for Water and Sewer. The Property is served by public water and sewer.

6. The General Plan. PlanHOWARD 2030 designates the Property as Established Community on the Designated Place Types Map. The Plan's Functional Road Classification Map depicts Old Washington Road as a Minor Collector.

7. Zoning History.

Case No. BA-00-015E

Request: Special Exception for a nursery school and child day care center and a private academic school for 480 students.

Granted: September 7, 2000

Case No. BA-15-013C

Request: Conditional Use for a Private School (Academic) and a Child Day Care Center and Nursery School for 500 students

Granted: August 21, 2015

8. Reported Agency Comments. The Division of Land Development has reviewed the Conditional Use and Variance Petition for a Private School (Academic) and offers the following analysis:

1. An Environmental Concept Plan for the site must be approved prior to the site development plan in order to identify any impacts to streams, wetlands and their buffers, floodplain, steep slopes and specimen trees on site which are protected from disturbance per the Land Development Regulations.
  - a. The natural environmental conditions of the subject site must be thoroughly assessed by an environmental professional

and findings must be provided with the forthcoming Site Development Plan.

- b. Specimen Trees must be shown with their Critical Root Zones in order to evaluate the level of disturbance.
  - c. Storm water management and suitable drainage requirements will be reviewed at both the ECP and SDP stage.
2. A Site Development Plan (SDP) will be required subsequent to the approval of this Conditional Use. Proposed site improvement and features shall be evaluated by DPZ staff and county agencies/offices as part of the SDP submission requirements.
- a. Parking for the use is subject to site development regulations and engineering design standards for access, spacing, and drainage purposes. In addition, the number of parking spaces required and provided will be reviewed upon the submission of the SDP.
  - b. Perimeter and internal landscaping will be required for this development with the SDP, in accordance with the Landscape Manual.
    - i. The perimeter landscape buffers as shown on the Conditional Use exhibit appear to comply with the Landscape Manual requirements, except Perimeter #3 requires a Type 'C' buffer.
3. This development will be subject to and must comply with the Forest Conservation Act, per Subtitle 12 of the County Code, prior to site plan approval.
- a. Nonresidential developments shall establish Forest Conservation Easements with retained or planted forest in all on-site sensitive areas, including floodplains, wetlands, wetland buffers, steep slopes and stream buffers. To ensure protection of riparian areas, the Forest Conservation Easements shall be a minimum 75-foot width from the banks of any perennial and intermittent stream.

- b. Approval of an alternative compliance application is required for the removal of any specimen tree. If approval is granted, the required mitigation will be determined as part of the alternative compliance application.
4. The athletic field and retaining wall are proposed to be constructed within a steep slope area that exceeds 20,000 square feet. In accordance with Section 16.116(b) of the Subdivision and Land Development Regulations, grading, removal of vegetative cover and trees, and paving shall not be permitted on land with existing steep slopes, except when: 1) The on-site and off-site contiguous area of steep slopes is less than 20,000 square feet; and 2) There is sufficient area, a minimum ten feet, outside of stream and wetland buffers for required sediment and erosion control measures. Approval of an alternative compliance application is required for disturbance to the steep slopes in accordance with Section 16.104(a) and 16.116(d) of the Subdivision and Land Development Regulations.
5. Please be informed that approval of a Conditional Use plan and specific site design does not serve as unwarranted hardship justification for any potential alternative compliance requests to the Subdivision and Land Development Regulations. Future review of the Site Development Plan for compliance with the development regulations may cause changes to the plan layout. If such changes do not constitute "minor modifications" as defined in Section 131.0.1.2.c, these changes may require a new hearing by the Hearing Authority, unless otherwise specified in the Decision and Order.

There are no Agency or Department comments in objection to the Petition.

9. Historic Preservation Commission. The Property is not located in a local Historic District but is listed as a contributing resource in the Old Washington Road Survey District, HO-803. According to the Historic Sites Inventory, the building dates circa 1923 and was originally constructed as a school. Since the Property is not located in a local Historic District there are no specific applicable design guidelines.

The historic structure will remain on-site. A one-story addition will be demolished and a new three-story addition will be constructed in the location of the former one-story addition. The historic resources will be integrated in the site plan in the same manner with the new construction as they currently are, the spatial relationship to the addition will remain the same. The other new construction and site alterations will take place behind the historic structure.

The Howard County Historic Preservation Commission reviewed the request for advisory comments and advice regarding the design of the development at its December 1, 2022, meeting and identified issues regarding the façade of the proposed addition, the massing and heights of the new structures, and the sloping of the Property. Petitioner, in response to the Historic Preservation Commissions comments, redesigned the façade of the proposed addition and realigned the floors to be commensurate with the floors of the existing structure.

10. Opposition. The persons testifying in opposition were united in their concerns and therefore will be summarized here collectively. The primary concerns are (1) traffic congestion on Old Washington Road, (2) internal traffic circulation, (3) belief that the proposed structures will realistically need to be taller than shown on the Site Plan to achieve the proposed uses, (4) the sloping and rear retaining wall, and (5) an

overdevelopment of the site due to the environmentally sensitive areas resulting in a massing of the structures on the interior of the Property.

### **BURDEN OF PROOF**

The Court of Appeals of Maryland has frequently expressed the applicable standards for judicial review of the grant or denial of a Conditional Use. The Conditional Use is a part of the comprehensive zoning plan sharing the presumption that, as such, it is in the interest of the general welfare, and therefore, valid. The Conditional Use is a valid zoning mechanism that delegates to an administrative body a limited authority to allow enumerated uses which the legislature has determined to be permissible absent any fact or circumstance negating this presumption. The legislative body has statutorily determined that a Conditional Use is compatible in a particular zoning district absent specific facts adduced to the contrary at a particular location. The duties given the hearing body are to judge whether the neighboring properties in the general neighborhood would be adversely affected and whether the use in the particular case is in harmony with the general purpose and intent of the Zoning Plan.

The Applicant has the burden of adducing testimony which will show that his use meets the prescribed standards and requirements, he does not have the burden of establishing affirmatively that his proposed use would be a benefit to the community. These prescribed standards and requirements are conditions precedent to the approval of a conditional use. If he shows to the satisfaction of the zoning body that the conditions

precedent have been met and that the proposed use would be conducted without real detriment to the neighborhood and would not actually adversely affect the public interest to a greater extent than if the proposed use were located elsewhere, he has met his burden.

The extent of any harm or disturbance to the neighboring area and uses is, of course, material. If the evidence makes the question of harm or disturbance or the question of the disruption of the harmony of the comprehensive plan of zoning fairly debatable, the matter is one for the zoning body to decide. But if there is no probative evidence of harm or disturbance in light of the nature of the zone involved or of factors causing disharmony to the operation of the comprehensive plan, a denial of an application for a Conditional Use is arbitrary, capricious, and illegal. Turner v. Hammond, 270 Md. 41, 54-55, 310 A.2d 543, 550-51 (1973); Rockville Fuel & Feed Co. v. Board of Appeals of Gaithersburg, 257 Md. 183, 187-88, 262 A.2d 499, 502 (1970); Montgomery County v. Merlands Club, Inc., 202 Md. 279, 287, 96 A.2d 261, 264 (1953); Anderson v. Sawyer, 23 Md. App. 612, 617, 329 A.2d 716, 720 (1974).

These standards dictate that if a requested Conditional Use is properly determined to have an adverse effect upon neighboring properties in the general area, it must be denied. Schultz v. Pritts, 291 Md. 1, 432 A.2d 1319, 1325 (1981). See also Mossberg v. Montgomery County, 107 Md. App. 1, 666 A.2d 1253 (1995).

The appropriate standard to be used in determining whether a requested Conditional Use would have an adverse effect and, therefore, should be denied is whether

there are facts and circumstances that show that the particular use proposed and the particular location proposed would have any adverse effects above and beyond those inherently associated with such a Conditional Use Irrespective of its location within the zone. Turner v. Hammond, 270 Md. 41, 54-55, 310 A.2d 543, 550-51 (1973); Deen v. Baltimore Gas & Electric Co., 240 Md. 317, 330-31; 214 A.2d 146, 153 (1965); Anderson v. Sawyer, 23 Md. App. 612, 617-18, 329 A.2d 716, 720, 724 (1974). Schultz v. Pritts, 291 Md. 1, 432 A.2d 1319, 1331 (1981). See also Mossberg v. Montgomery County, 107 Md. App. 1, 666 A.2d 1253 (1995).

### CONCLUSIONS OF LAW

#### 1. General Criteria for Conditional Uses (Section 131.0.B)

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

##### A. **Harmony and Intensity of Use**

**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.**



While Howard County General Plan policies are not directly related to Conditional Use requests for Private School (Academic) and Child Day Care Centers and Nursery Schools, properly sited facilities are considered compatible with residential uses.

**Section 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 8.95-acre property exceeds the minimum required lot size by 7.95 acres. The 480 proposed students is below the 895 allowed on an 8.95-acre property. All structures are over 50 feet from all residential properties and over 60% of the property is open space. The number of proposed parking spaces exceeds the minimum requirement.

The Functional Road Classification Map of PlanHoward 2030 depicts Old Washington Road as a Minor Collector, which is appropriate for the number and types of vehicles associated with a school.

The nature and intensity of the use, the size of the Property in relation to the use, and the location of the site, with respect to streets that provide access, are such that the overall intensity and scale of the use are appropriate.

**B. Adverse Impacts (Section 131.0.B.3)**

Unlike HCZR Section 131.0.B.1, which concerns the proposed use's harmony or compatibility with the General Plan, or Section 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 Section 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) impact on the character and significant 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 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 R-12 Zoning 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, 107 Md. App. 1, 666 A.2d 1253 (1995).

For the reasons stated below, Petitioner has met its burden of presenting sufficient evidence under HCZR Section 131.0.B.3 to establish the proposed use will not have adverse effects on vicinal properties beyond those ordinarily associated with a Private School (Academic) and a Child Day Care Center and Nursery School, in the R-12 Zoning District.

**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 use will occur primarily indoors except for activities in the playground and athletic field, which are customary for a pre-k through 12<sup>th</sup> grade private school. No lighting is proposed on the athletic field; therefore, activities will likely occur during the daytime throughout most of the school year. There is no evidence of adverse effects such as noise, dust, fumes, odors, vibrations, increased lighting, hazards or other physical conditions associated with the proposed expansion of a private school that would be greater at the subject site than generally elsewhere in the R-12 Zoning District.

**Section 131.0.B.3.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 maximum height of 34 feet is allowed in the R-12 Zoning District. However, Section 131.0.N.48.c states that "a private school structure 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. "

Additionally, Section 131.0.D.4 states "The Hearing Authority may approve variances to the bulk regulations in Section 131.0.N, in accordance with the variance provisions of Section 130.0.B. for

**modifications and expansions of**

- a. Existing Conditional Uses that were approved prior to July 12,2001."

The proposed buildings consist of:

Building 1

A three-story addition to the existing school building with a height of 51.24 feet. The maximum height allowed, based on §131.0.N.48.c., is 40.15 feet. A variance is requested to exceed this allowed height.

Building 2

A one-story Montessori school/day care building with a height of 22.33 feet that is located over 200 feet from the closest residential property.

Building 3

A three-story athletic building with a height of 48.5 feet. This structure exceeds the height limit by 14.5 feet; therefore, according to Section 131.0.N.48.c., the building shall be a minimum of 89 feet from all property line and the building is 247.4 feet from the closest property line.

Building 4

A three-story building consisting of parking and an auditorium with a height of 36.92 feet. This building exceeds the height limit by 2.92 feet; therefore, according to Section 131.0.N.48.c, the building shall be a minimum of 56 feet from all property lines, and the building is 64.1 feet from the closest property line.

The athletic field retaining wall varies in height from 21' to 38' feet at the rear of the Property. The retaining wall exceeds the 15-foot accessory structure height limit by 23 feet; therefore, according to Sec.

131.0.N.48.c, the retaining wall shall be a minimum of 56 feet from all property lines. The base of the wall is 50.9; however, the wall's distance from the property line increases as the height increases. The retaining wall exceeds the required minimum of 56 feet from all property lines.

A type "C" buffer is proposed along the driveway adjacent to residential properties to the west. The Petitioner is seeking credit for retention of existing vegetation equivalent to a Type "C" buffer adjacent to the other residential properties.

Provided the variance is granted, the location, nature and height of structures, walls or fences, and the nature and extent of the existing and/or proposed landscaping are unlikely to hinder or discourage the development and/or use of adjacent land and structures more at the subject site than generally elsewhere in the R-12 zoning district.

**Section 131.0.B.3.c. The number of parking spaces will be appropriate to serve the particular use. Parking areas, loading areas, driveways and refuse areas will be approximately located and buffered or screened from public roads and residential uses to minimize adverse impacts on adjacent properties.**

The Zoning Regulations require the following:

Private School: 53 parking spaces

Elementary & Middle: (1 space per 6 student 320 students/6=53 spaces)

Private School: 53 parking spaces

Secondary: (1 space per 3 students 160 students/3=53 spaces)

Preschool/Daycare: 30 parking spaces

(3 spaces per 1,000 sq ft: 9,870 sq ft/1,000 x 3=30 spaces)

The total number of required parking spaces is 136 including, including five (5)

handicapped spaces. The total number of proposed parking spaces is 137; two (2) on-site spaces to remain, nine (9) spaces on-street to remain, 93 new spaces in the proposed parking garage and 33 spaces on the proposed parking lot.

The parking spaces will be screened from the public roads and adjacent properties by a Type C landscaping buffer and the proposed buildings. A dumpster enclosure will be located at the terminus of the entrance drive to screen refuse containers from adjacent properties and the public right-of-way.

**Section 131.0.B.3.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/egress drive was approved in BA-15-013C, and no changes or additional driveways are proposed. The driveway is not shared with other properties.

**Section 131.0.B.3.e The proposed use will not have a greater potential for adversely impacting environmentally sensitive areas in the vicinity than elsewhere.**

The environmentally sensitive areas on the Property consist of over 50,000 sq. ft. of steep slopes, nine (9) specimen trees, and intermittent/perennial streams. The proposed buildings/uses do not encroach into the stream buffers. The Petition indicates that two of the specimen trees may need to be removed to allow for Building C, the athletic field, and the retaining wall. Additionally, the athletic field and retaining wall are within a protected steep slope area along the rear of the Property. The proposed use, excluding the athletic field, will not have a greater potential for adversely impacting environmentally sensitive

areas in the vicinity than elsewhere.

Alternative compliance to the Subdivision and Land Development Regulations is required for the disturbance to the steep slopes, associated with the athletic field, in accordance with Sections 16.104(a) and 16.116(d) and will be evaluated during review of the Site Development Plan.

**Section 131.0.B.3.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 Petitioner requested Advisory Comments from the Historic Preservation Commission (HPC) during its regular meeting on Thursday, December 1, 2022. The Property is listed as a contributing resource in the Old Washington Road Survey District, HO-803. The existing three-story building that fronts on Old Washington Road is a contributing structure. The Survey District for this portion of Old Washington Road includes multiple historic properties that are contained under one inventory form and notes that there are other historic properties in the immediate vicinity.

Petitioner amended the proposed façade for the addition along Old Washington Road in accordance with the HPCs desire to more closely imitate the façade of the existing school. The Property rapidly slopes from Old Washington Road to the rear of the Property, which in addition to the large 3-story existing school located along most of the street frontage, severely limits the viewshed from Old Washington Road of the proposed Montessori School, Athletic Building and Parking Garage. Therefore, the new structures will not adversely affect the environmental setting of the existing school structure or diminish the character and

significance of historic sites in the vicinity than elsewhere in the R-12 Zoning District.

**2. Specific Criteria for Schools, Colleges, Universities-Private (Academic)**

**(Section 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, which may include child day care centers and nursery schools as an accessory use, provided that:

1. 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.

Petitioner proposes to maintain the previously approved pupil density of 55.87pupils per acre ( $500 \text{ pupils} / 8.95 \text{ acres} = 55.87 \text{ pupils per acre}$ ), which is less than the maximum density permitted on a lot that is three acres or greater (100 pupils per acre) or a maximum of 895 pupils.

1. 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.

The proposed private school does not have residence accommodations; therefore, this criterion does not apply.

2. 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.

See evaluation in Section 131.0.B.3.b, *supra*.



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

Two school buses will be used and a designated drop off/pick up area that can accommodate these buses will be provided.

4. **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.**

The playground will be in the center of the site over 200 feet from the closest residential property. The athletic field is over 50 feet from the closest residential property and no lighting is proposed. A type "C" buffer is proposed along the driveway adjacent to residential properties to the west. The Petitioner is seeking credit for retention of existing vegetation equivalent to a Type "C" buffer adjacent to the other residential properties. Therefore, the outdoor uses are located and designed to shield residential property from noise and nuisance.

5. **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.**

The proposed buildings, parking spaces and outdoor activity areas are a minimum 50 feet from adjoining residentially zoned properties.

6. **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.**

The Conditional Use Plan depicts a building envelope that is 347,749 square feet and the green area provided is 227,017 sq. ft., which equals 65.3%.

7. **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.

This proposal is an expansion of a Conditional Use that was approved prior to July 12, 2001; therefore, this criterion does not apply.

8. **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 criterion.**

The proposal is an expansion an existing private academic facility; therefore, this criterion does not apply.

**3. Specific Criteria for Child Day Care Centers and Nursery Schools (Section 131.0.N.13)**

1. **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.**

A designated "drop-off/pick-up zone" is provided at the entrance of the Child Day Care Center.

2. **The minimum lot size in the RC and RR Districts shall be three acres and the minimum lot size in the R-ED, R-20, R-12, R-SC, R-SA-8, R-A-15, R-APT, R-VH, HO or HC Districts shall be one acre, except that uses approved prior to October 6, 2013 shall not be subject to this criteria.**

The Nursery School and Child Day Care Center were approved prior to October 6, 2013; therefore, this criterion does not apply.

3. **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 proposed fenced in playground will be located to the side of the Nursery School/Child Day Care building, will be over 200 feet from the closest

residential property and will be buffered from adjoining residential areas by existing vegetation.

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

The visibility of the parking areas from roads and adjacent residential properties will be minimized by existing/proposed buildings, a Type "C" or equivalent landscape buffer, and fencing.

- 5. 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 proposed Nursery School/Child Day Care Center is one-story and 9,793 square feet. The building is over 200 feet from the closest residential property and is buffered from residential properties by existing dense vegetation. The architectural elevations are compatible in scale and character with the residential properties in the vicinity of the Property.

- 6. For facilities with a capacity of more than 30 children or adult clients at one time, the following standards apply:**
  - a. 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 Old Washington Road, which is as a Minor Collector.

- b. 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 closest adjoining residentially zoned property is approximately 200 feet from the proposed building/playground. The parking spaces are a minimum 50 feet from all residentially zoned properties.

- c. At least 20% 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.

The Conditional Use Plan depicts a building envelope that is 347,749 sq. ft., and the green area provided is 227,017 sq. ft., which equals 65.3%.

4. **General Criteria for Variances (Section 130.0.B.2.a.)**

The standards for variances are contained in HCZR § 130.0.B.2.a. Pursuant to this Section, the Hearing Examiner may grant a variance only if the Petitioner demonstrates compliance with all four variance criteria. Based upon the foregoing Findings of Fact, and for the reasons stated below, the Hearing Examiner finds the requested variance complies with § 130.0.B.2.a.(1) through (4), and therefore may be granted.

**(1) That there are unique physical conditions, including irregularity, narrowness or shallowness of the lot or shape, exceptional topography, or other existing features peculiar to the particular lot; and that as a result of such unique physical condition, practical difficulties or unnecessary hardships arise in complying strictly with the bulk provisions of these regulations.**

Compliance with the first criterion is a two-part test. First, there must be a finding that the property is unusual or different from the nature of the surrounding properties. Secondly, this unique condition must disproportionately impact the property such that a practical difficulty arises in complying with the bulk regulations. See *Cromwell v. Ward*, 102 Md. App. 691, 651 A.2d 424 (1995). A "practical difficulty" is shown when the strict letter of the zoning regulation would "unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome." *Anderson v. Board of Appeals, Town of Chesapeake Beach*, 22 Md. App. 28, 322 A.2d 220 (1974).

As shown on the Variance Exhibit, the Property is severely constrained by extreme topography along the Property's northern boundary and the Property severely slopes from the street frontage (184 feet) to the southeastern boundary (105 feet) which limits the developable area of the Property by pushing the building envelope to the central portion of the Property. There is an approximately 80-foot grade differential from the northwest corner to the southeast corner of the Property. The Property also contains environmentally sensitive areas of steep slopes, specimen trees, wetlands and a stream, primarily located along the eastern and southern boundaries of the Property. Adjacent on the east, south and west are single family dwellings also in the R-12 Zoning District.

The existing 3-story school has been operating on the Property since 1923. The HPC has adopted advisory comments in which they want the façade, height, and floor alignment of the addition to be similar to the existing school. This necessitates an increase in the maximum height of 34 feet in the R-12 Zoning District due to the

location of the sloping topography adjacent to the existing school.

Additionally, Sec. 131.0.D.4 states "The Hearing Authority may approve variances to the bulk regulations in Section 131.0.N, in accordance with the variance provisions of Section 130.0.B. for modifications and expansions of

a. Existing Conditional Uses that were approved prior to July 12, 2001."

The existing school was approved for a Special Exception by BA-00-015E on September 7, 2000. A school is permitted by approved Special Exception/Conditional Use on the Property. These steep slopes, wetlands, stream and specimen trees are constraining environmental features which cause the Petitioner practical difficulty in complying with the current bulk area requirements for the maximum height of 34 feet in the R-12 Zoning District. Additionally, HPCs advisory comment that the addition should retain a similar façade, height, and continuity of floors with the existing building is impossible due to the steep slopes adjacent to the existing school without a variance in the maximum height requirements, in accordance with § 130.0.B.2.a.(1).

**(2) That the variance, if granted, will not alter the essential character of the neighborhood or district in which the lot is located; will not substantially impair the appropriate use or development of adjacent property; and will not be detrimental to the public welfare.**

The existing school building has been developed and utilized as a school since 1923. A School has been legislatively deemed compatible with uses in the R-12 Zoning District provided a Special Exception/Conditional Use has been approved. BA-00-015E, approved on September 7, 2000, on the Property granted a Special Exception for a Private School (Academic) for 480 students and a Child Day Care Center and Nursery

School. BA-15-013C, approved on August 21, 2015, granted a Conditional Use for a Private School (Academic) for 500 students and a Child Day Care Center and Nursery School. The proposal to construct an addition to the school building with a similar façade, height, and floor levels will not alter the character of the neighborhood nor will the additional buildings proposed to be added to the campus, the Montessori school, the athletic building and the parking garage. The requested variance to increase the height of the proposed addition to be commensurate with the height of the school building that has existed on the Property since 1923 will not alter the essential character of the neighborhood and will not impact the appropriate use and development of adjacent properties. The proposal to add a 3-story addition to the existing school will not be detrimental to the public welfare as it will not produce excessive noise, odors, dust, fumes, vibrations, or other adverse effects that would negatively impact vicinal properties.

The variance, if granted, will therefore not alter the essential character of the neighborhood in which the lot is located nor substantially impair the appropriate use or development of adjacent property, nor be detrimental to the public welfare, in accordance with § 130.0.B.2.a.(2).

**(3) That such practical difficulties or hardships have not been created by the owner provided, however, that where all other required findings are made, the purchase of a lot subject to the restrictions sought to be varied shall not itself constitute a self-created hardship.**

The practical difficulty and hardship in complying strictly with the bulk regulations requiring a 34-foot height maximum arises from the steep slopes along the northeastern

and southeastern Property boundaries which push the building envelope to the center of the Property. These steep slopes render much of the Property unusable. This topographic situation was not created by the Petitioner, nor is the height of the existing school which the HPC would like to mimic and which was constructed in 1923 (Petitioner purchased the Property in 2021), in accordance with §130.0.B.2.a.(3).

**(4) That within the intent and purpose of these regulations, the variance, if granted, is the minimum necessary to afford relief.**

The variance sought, an increase in the building height maximum from 34 feet to 51.24 feet, is the minimum increase necessary to permit the reasonable redevelopment of the Property with a 3-story addition to the existing 3-story school. The requested variance will allow for development of the proposed addition in an area that will not affect the existing environmental features while permitting internal circulation and parking of vehicles on the Property. Within the intent and purpose of the regulations, this variance is the minimum necessary to afford relief, in accordance with § 130.0.B.2.a.(4).



## ORDER

Based upon the foregoing, it is this 23rd day of June, 2023, by the Howard County Board of Appeals Hearing Examiner, **ORDERED**:

That the Petition of Maryland International School, LLC. for (1) the expansion of an existing Conditional Use for a Private School (Academic), (2) the expansion of an existing Conditional Use for a Child Day Care Center and a Nursery School, and (3) a variance from the maximum height restriction of 34 feet to 51.24 feet, in a R-12 (Residential: Single) Zoning District, Council District 1, Tax Map 38, Grid 9, Parcels 820 and 830, Election District 2, identified as 6135 Old Washington Road, Elkridge, Maryland, be and are hereby **APPROVED**, subject to the following **Conditions**:

1. An Environmental Concept Plan for the Property must be approved prior to the Site Development Plan in order to identify any impacts to streams, wetlands and their buffers, floodplain, steep slopes and specimen trees on site which are protected from disturbance per the Land Development Regulations.
  - a. The natural environmental conditions of the subject site must be thoroughly assessed by an environmental professional and findings must be provided with the Site Development Plan.
  - b. Specimen Trees must be shown with their Critical Root Zones in order to evaluate the level of disturbance.
  - c. Storm water management and suitable drainage requirements will be reviewed at both the ECP and SDP stage.
2. A Site Development Plan is required subsequent to the approval of this Conditional Use. Proposed site improvement and features shall

be evaluated by DPZ staff and County agencies/offices as part of the SDP submission requirements.

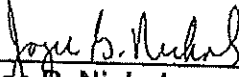
- a. All environmentally sensitive areas must comply with Sections 16.115 - 16.117 of the Subdivision and Land Development Regulations.
  - b. Parking for the use is subject to site development regulations and engineering design standards for access, spacing, and drainage purposes. In addition, the number of parking spaces required and provided will be reviewed upon the submission of the SDP.
  - c. Perimeter and internal landscaping will be required for this development with the SDP, in accordance with the Landscape Manual.
3. This development is subject to and must comply with the Forest Conservation Act, per Subtitle 12 of the County Code, prior to Site Development Plan approval.
- a. Nonresidential developments shall establish Forest Conservation Easements with retained or planted forest in all on-site sensitive areas, including floodplains, wetlands, wetland buffers, steep slopes and stream buffers. To ensure protection of riparian areas, the Forest Conservation Easements shall be a minimum 75-foot width from the banks of any perennial and intermittent stream.
  - b. Approval of Alternative Compliance is required for the removal of any specimen tree. If approval is granted, the required mitigation will be determined as part of Alternative Compliance.
4. The athletic field and retaining wall are proposed to be constructed within a steep slope area that exceeds 20,000 square feet. In accordance with Section 16.116(b) of the Subdivision and Land Development Regulations, grading, removal of vegetative cover and trees, and paving shall not be permitted on land with existing steep slopes, except when: 1) The on-site and off-site contiguous area of steep slopes is less than 20,000 square feet; and 2) There is sufficient area, a minimum ten feet, outside of stream and wetland buffers for

required sediment and erosion control measures. Approval of Alternative Compliance is required for disturbance to the steep slopes in accordance with Sections 16.104(a) and 16.116(d) of the Subdivision and Land Development Regulations.

5. An approved Conditional Use plan and specific site design does not serve as unwarranted hardship justification for any potential alternative compliance requests to the Subdivision and Land Development Regulations. Future review of the Site Development Plan for compliance with the development regulations may cause changes to the plan layout. If such changes do not constitute "minor modifications" as defined in Section 131.0.1.2.c, these changes may require a new hearing by the Hearing Authority.

#### HOWARD COUNTY BOARD OF APPEALS

#### HEARING EXAMINER

  
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Joyce B. Nichols

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.