

IN RE: PETITIONS FOR SPECIAL HEARING	*	BEFORE THE
AND VARIANCE		
(8650 Winding Way)	*	OFFICE OF
11 th Election District		
5 th Council District	*	ADMINISTRATIVE HEARINGS
Richard O & Elizabeth Huffman	*	FOR BALTIMORE COUNTY
<i>Legal Owners</i>		
White Marsh Child Care, Inc.	*	Case No. 2017-0301-SPHA
<i>Lessee</i>		
Petitioners	*	

* * * * *

OPINION AND ORDER

This matter comes before the Office of Administrative Hearings (OAH) for consideration of Petitions for Special Hearing and Variance filed on behalf of Richard O. and Elizabeth Huffman, legal owners and White Marsh Child Care, Inc., lessee (“Petitioners”). The Special Hearing was filed pursuant to § 500.7 of the Baltimore County Zoning Regulations (“B.C.Z.R”): (1) to approve an expansion of a special exception for a child care center in a DR 1 zone (DR 5.5 in 1982 under which the original approval was obtained) by adding a 1 story prefab modular 1,924 SF 2 classroom building, 24 ft. +/- x 75 ft. +/-; designed to accommodate additional children by modifying the special exception granted in Case No. 82-289-X utilizing the zoning regulations applicable in 1982 at the time of its original approval to establish a nursery school/day care facility; and as amended in Case No. 87-329-SPH to expand the nursery school/day care facility and Case No. 95-291-SPH to expand the nursery school/day care facility; and (2) for a determination the child care center is a principal use on the aforesaid subject property; or in the alternative, to determine the child care center is exempt from 1982 RTA requirements.

In addition, a Petition for Variance seeks: (1) To allow a rear yard setback for the proposed expansion building of 42 ft. in lieu of the required 50 ft.; and (2) To allow a side yard setback

for the proposed expansion building of 11 ft. in lieu of the required 40 ft. A site plan was marked and accepted into evidence as Petitioners' Exhibit 1.

Elizabeth Huffman and professional engineer Rick Richardson appeared in support of the requests. Michael P. Tanczyn, Esq. represented Petitioners. A neighbor attended the hearing and opposed the requests. The Petition was advertised and posted as required by the Baltimore County Zoning Regulations. No substantive Zoning Advisory Committee (ZAC) comments were received from any of the reviewing county agencies.

The subject property is approximately five (5) acres in size and split-zoned DR 1 & DR 3.5. A group child care facility is operated at the site, pursuant to a special exception originally granted in 1982. Thereafter, the child care center expanded on the site as permitted in four subsequent zoning cases (in 1987, 1989, 1995 and 1997). Petitioners propose at this time to construct an additional building at the site, which would contain two classrooms that could accommodate an additional sixty (60) children.

SPECIAL HEARING

Having reviewed the petition for special hearing in detail, I am unsure exactly what relief is requested (or needed). The County zoning office maintains a microfiche copy of the entire zoning file from the 1982 case. Therein, a site plan marked as Ex. 1 indicates the parcel in question had an area of 4.74 +/- acres, which is the same as shown on the current site plan. There is no indication on the 1982 plan and/or order the special exception granted therein did not encompass the entirety of the tract. As such, the special exception granted in 1982 does not need to be expanded, as suggested in the petition for special hearing.

By special exception in the DR zone, Petitioners are entitled to operate a Class B group child care center with "more than 40 children." B.C.Z.R. §424.5.A. The Regulations do not provide a

cap or limit on the number of children enrolled in such a facility, although presumably the State (Maryland Department of Education) does. The Regulation requires a minimum one acre lot size for the “first 40 children plus 500 sq. ft. per child for every child beyond 40 children.” B.C.Z.R. § 424.7.A. At present Petitioners are licensed for 159 children (*see* Petitioners’ Ex. 6A), and the new building would accommodate 60 additional children. Per the above regulation approximately three acres are required for a center with 220 children, while this site is approximately five acres in size. Thus, it would appear Petitioners are in compliance with applicable density or bulk standards for group centers in DR zones.

The special hearing petition also seeks a determination the child care center is a principal use on the subject property. The Regulations define a Class A group child care center as one where no more than 12 children are enrolled, while a Class B group child care center is one where more than 12 children are enrolled. B.C.Z.R. §101.1. A Class A center is permitted as an accessory use within a single-family dwelling in all residential zones. B.C.Z.R. §424.4. A special exception is required to operate a Class B center in a DR zone, and Petitioners satisfied that requirement in 1982. Under the Regulations a Class B center is by definition a “principal use,” and the center in this case will have in excess of 200 children enrolled, and is clearly the principal use on this property.

Though as discussed above I do not believe special hearing relief is required in this case, the petition was presumably drafted with input from the zoning office and the order below will therefore grant the requests.

VARIANCES

A variance request involves a two-step process, summarized as follows:

- (1) It must be shown the property is unique in a manner which makes it unlike surrounding properties, and that uniqueness or peculiarity must necessitate variance relief; and
- (2) If variance relief is denied, Petitioner will experience a practical difficulty or

hardship.

Cromwell v. Ward, 102 Md. App. 691 (1995).

The property has irregular dimensions and an unusual shape. As such it is unique. If the Regulations were strictly interpreted Petitioners would experience a practical difficulty because they would be unable to construct the proposed building. Finally, I find that the variances can be granted in harmony with the spirit and intent of the B.C.Z.R., and in such manner as to grant relief without injury to the public health, safety and general welfare. The setbacks in question are on the interior of the site along the eastern property boundary. The adjoining property is unimproved (and owned by Petitioners) and the reduced setbacks will therefore have no discernable impact upon the community.

Michael Wilsynski, a neighbor, opposed the requests, and was primarily concerned with the volume and speed of traffic associated with the center. He said parents routinely exceed the speed limit and are always in a hurry when dropping off or picking up their children. He also noted ingress and egress was by way of a narrow, unmarked roadway without sidewalks, which he believed was dangerous. Ms. Huffman testified she is unaware of any motor vehicle and/or pedestrian accidents associated with the center in its 35 years of operation.

Mr. Wilsynski simply believes the child care center has grown too large for the site. His comments were echoed in a July 6, 2017 letter from the Perry Hall Improvement Association (as well as emails from two other neighbors) which is in the case file. While I am sympathetic to the community's concerns, traffic, congestion and similar woes are inherent in most special exception uses, and the County Council permits Class B child care centers in DR zones by special exception. These are exactly the types of inherent adverse effects the legislature was presumed to have anticipated when it allowed the use by special exception. In other words, most uses for which a

special exception is required are regarded as “potentially troublesome because of noise, traffic, congestion....” *Montgomery County v. Butler*, 417 Md. 271, 297 (2010). And, Petitioners do not need a special exception; that was granted in 1982.

Instead, this is a variance case, which focuses upon the physical condition and attributes of the property itself, rather than exogenous issues such as traffic. *See, e.g., North v. St. Mary’s County*, 99 Md. App. 502, 512 (1994) (a variance request requires an examination of the property’s shape, topography, subsurface conditions, environmental factors, historical significance, etc.). And as noted above, the reduced setbacks are interior to the site and will not directly impact the community. Even assuming Petitioners could revise the plan and construct the building somewhere else on the site without needing setback variances, that would still not address in any way the concerns raised by the community, which are germane to a special exception case rather than a variance petition.

THEREFORE, IT IS ORDERED this 17th day of **July, 2017**, by this Administrative Law Judge, that the Petition for Special Hearing filed pursuant to § 500.7 of the Baltimore County Zoning Regulations (“B.C.Z.R): (1) to approve an expansion of a Class B Group Child Care Center, as shown on the site plan marked and admitted as Exhibit 1, by adding a one story classroom building (1,924 sq. ft. in size) designed to accommodate additional children; and (2) for a determination the child care center is a principal use on the subject property, be and is hereby GRANTED.

IT IS FURTHER ORDERED that the petition for variance: (1) To allow a rear yard setback for the proposed expansion building of 42 ft. in lieu of the required 50 ft.; and (2) To allow a side yard setback for the proposed expansion building of 11 ft. in lieu of the required 40 ft., be and is hereby GRANTED.

The relief granted herein shall be subject to the following:

1. Petitioners may apply for necessary permits and/or licenses upon receipt of this Order. However, Petitioners are hereby made aware that proceeding at this time is at their own risk until 30 days from the date hereof, during which time an appeal can be filed by any party. If for whatever reason this Order is reversed, Petitioners would be required to return the subject property to its original condition.
2. Petitioners shall provide an appropriate enclosure for the dumpster(s) at the site, as determined in the sole discretion of the Baltimore County landscape architect.

Any appeal of this decision must be made within thirty (30) days of the date of this Order.

JEB/sln

Signed
JOHN E. BEVERUNGEN
Administrative Law Judge
for Baltimore County