

**IN RE: PETITIONS FOR SPECIAL
EXCEPTION AND VARIANCE
(8301 Oakleigh Road)
9th Election District
5th Council District
8301 Oakleigh Road, LLC
*Legal Owner***

* BEFORE THE
* OFFICE OF
* ADMINISTRATIVE HEARINGS
* FOR BALTIMORE COUNTY
* **Case No. 2019-0105-XA**

Petitioner

* * * * *

OPINION AND ORDER

This matter comes before the Office of Administrative Hearings (OAH) as Petitions for Special Exception and Variance filed for property located at 8301 Oakleigh Road. The Petitions were filed on behalf of 8301 Oakleigh Road, LLC, legal owner of the subject property (“Petitioner”). The Special Exception petition seeks to approve a Class B child care center for as many as 20 children. The Petition for Variance seeks: **(1)** A minimum lot size of 0.197 acre in lieu of the required 1 acre; **(2)** A side yard setback of 5.5'+/- and 9'+/-, in lieu of the required 50' and a 5' and 0' side yard vegetation buffer in lieu of the required 20'; **(3)** A 5' rear vegetation buffer in lieu of the required 20'; **(4)** A maximum impervious surface of 40% in lieu of the required 25%; **(5)** A 5' RTA buffer in lieu of the required 50'; **(6)** A 5' setback for a parking lot in lieu of the required 75' and 5' buffer in lieu of the required 50'; and **(7)** For a 5' tall solid wood stockade or panel fence 5' from the property line on the North side, 10' from the property line on the West side and 0' from the property line on the south side, in lieu of the required 20'. A site plan prepared by surveyor Brian Dietz was marked as Petitioner’s Exhibit 1.

Appearing in support of the petitions were Elizabeth and Robert Rosiak. Michael Pierce attended the hearing to obtain additional information about the project. The Petition was advertised and posted as required by the BCZR. Substantive Zoning Advisory Committee

(“ZAC”) comments were received from the Department of Planning (“DOP”) and the Bureau of Development Plans Review (“DPR”). The DOP objected to the request and opined that the site was too small to accommodate the proposed use.

The subject property is approximately 8602 square feet in size and zoned DR 5.5. The property is improved with a single-family dwelling constructed in 1943. Petitioner proposes to undertake significant interior renovations and proposes to operate (as a principal use) a Class B child care center with up to 20 children. Such a center is permitted by special exception in the DR zones.

SPECIAL EXCEPTION

Under Maryland law, a special exception use enjoys a presumption that it is in the interest of the general welfare, and therefore, valid. *Schultz v. Pritts*, 291 Md. 1 (1981). The *Schultz* standard was revisited in *Attar v. DMS Tollgate, LLC*, 451 Md. 272 (2017), where the court of appeals discussed the nature of the evidentiary presumption in special exception cases. The court again emphasized a special exception is properly denied only when there are facts and circumstances showing that the adverse impacts of the use at the particular location in question would be above and beyond those inherently associated with the special exception use. Ms. Rosiak explained in detail how the center will operate, and no evidence was presented which would indicate the use would be injurious to the community. As such the petition for special exception will be granted.

VARIANCE

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 is narrow and deep (approx. 50' x 200') and is therefore unique. If the BCZR were strictly interpreted Petitioner would suffer a practical difficulty since it would be unable to operate the group child care center. Finally, I find that the variances can be granted in harmony with the spirit and intent of the BCZR, and in such manner as to grant relief without injury to the public health, safety, and general welfare. This is demonstrated by the support of adjacent neighbors, the community and prospective clients, many of whom signed a petition expressing support for the requests.

In its ZAC comment the DOP noted (correctly) the subject property is approximately 0.2 acres in size, while the BCZR imposes a one acre minimum lot size for a child care center. BCZR §424.7.A. Of note, the one acre requirement applies to all “group child-care centers located in D.R. Zones,” not just Class B centers with more than 12 children. *Id.* The BCZR defines “Group Child Care Center” in pertinent part as “a building...wherein care, protection and supervision is provided...to at least nine children.” BCZR §101.1.

As such, the one acre minimum lot size would be applicable in cases seeking approval for both Class A & B group child care centers, although it is clear County review staff have not uniformly enforced that requirement. Indeed, other than perhaps a few rare exceptions, I cannot recall a group child care center case in the last several years where the lot was larger than one acre or where a variance was sought to address that deficiency. In addition, the regulation permits up to 40 children on a one acre lot, and the Petitioner here seeks only half that number. In these circumstances I do not believe the subject property is too small for the proposed use. In addition,

Ms. Rosiak has operated a group child care center in her home since 2014, and with this successful track record I believe the use can be conducted without a detrimental impact upon the community.

Finally, Ms. Rosiak also noted that group child care centers are subject to rigorous inspection and licensing requirements of the State Board of Education. Applicable state regulations require 35 square feet of indoor space for each child (COMAR 13A.16.05.03), and 75 square feet of outdoor area for each child (COMAR 13A.16.05.12), and Petitioner satisfies both of these requirements.

THEREFORE, IT IS ORDERED by the Administrative Law Judge for Baltimore County, this 12th day of **December, 2018**, that the Petition for Special Exception to approve a Class B child care center for as many as 20 children, be and is hereby GRANTED; and

IT IS FURTHER ORDERED that the Petition for Variance to approve: **(1)** A minimum lot size of 0.197 acre in lieu of the required 1 acre; **(2)** A side yard setback of 5.5'+/- and 9'+/-, in lieu of the required 50' and a 5' and 0' side yard vegetation buffer in lieu of the required 20'; **(3)** A 5' rear vegetation buffer in lieu of the required 20'; **(4)** A maximum impervious surface of 40% in lieu of the required 25%; **(5)** A 5' RTA buffer in lieu of the required 50'; **(6)** A 5' setback for a parking lot in lieu of the required 75' and 5' buffer in lieu of the required 50'; and **(7)** For a 5' tall solid wood stockade or panel fence 5' from the property line on the North side, 10' from the property line on the West side and 0' from the property line on the south side, in lieu of the required 20', be and is hereby GRANTED.

The relief granted herein shall be subject to and conditioned upon the following:

1. Petitioner may apply for necessary permits and/or licenses upon receipt of this Order. However, Petitioner is hereby made aware that proceeding at this time is at its 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, Petitioner would be required to return the subject property to its original condition.

2. A maximum of 20 children may be enrolled at the center.
3. Prior to issuance of permits Petitioner must submit for approval by Baltimore County a landscape plan for the site.
4. The child care center may operate only Monday-Friday from 7:00 AM-5:30 PM.

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

Signed
JOHN E. BEVERUNGEN
Administrative Law Judge
for Baltimore County

JEB/sln