

IN RE: <b>PETITIONS FOR SPECIAL HEARING</b>	*	BEFORE THE
<b>AND SPECIAL EXCEPTION</b>		
NE Corner of Gun Road and	*	ZONING COMMISSIONER
Keech Road		
<b>(505 Gun Road)</b>	*	OF
13 <sup>th</sup> Election District	*	BALTIMORE COUNTY
1 <sup>st</sup> Council District		
	*	
Lynn R. Hogg, et ux		
Petitioners	*	<b>Case No. 2009-0153-SPHX</b>
* * * * *		

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This matter comes before the Zoning Commissioner for consideration of Petitions for Special Hearing and Special Exception filed by the owners of the property, Elizabeth A. Smith and her husband, Lynn R. Hogg, through their attorney, Lawrence E. Schmidt, Esquire. The Petitioners request a special exception to permit a Class B Group Child Care Center as a principal use on their property, pursuant to Section 424.5A of the Baltimore County Zoning Regulations (B.C.Z.R.), to allow a maximum of 24 children.<sup>1</sup> It is to be noted that special hearing relief was also requested from Section 409.12.B of the B.C.Z.R. to approve a modified parking plan. The subject property and requested relief are more particularly described on the site plan submitted which was accepted into evidence and marked as Petitioners' Exhibit 1.

Appearing at the requisite public hearing in support of the request were Elizabeth Smith and Lynn Hogg, property owners, and their attorney, Lawrence E. Schmidt, Esquire with Gildea & Schmidt, LLC. Testimony was also offered in support of the Petitions by Larry Link, a

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<sup>1</sup> On April 17, 2008, a Class A Group Child Care Center Use Permit was issued for this location by Timothy M. Kotroco, Director of the Department of Permits and Development Management. This permit, identified at the hearing as Petitioners' Exhibit 2, allows for a maximum of 12 children as an accessory use within the Petitioners single-family dwelling. The instant petition was therefore filed to expand the existing child day care facility.

licensed architect with L.J. Link, Jr., Inc., the consultant who prepared the site plan for this property.

The issues presented in this case generated significant public interest and a number of individuals from the surrounding Gun Road community appeared and testified in opposition to this group child care center operating in their neighborhood, namely Paul G. Donoghue, individually, and as President of the Gun Road Historical and Protective Association; his wife, Elizabeth A. Donoghue; William Moore, a resident and member of the Baltimore County Planning Board; Lucy W. and Paul F. McKean; Nancy J. and Frank A. Lindberg; Janet G. Bruns; William Watson, III; Jackie Hedeman; John Joseph Bennett; Frank Allen Earp; Naomi Baldwin; Mary Jane and Charles G. Macgill, and Jeremy S. Walsh. Also appearing at the hearing in opposition to the proposed day care expansion was Dennis E. Wertz, Community Planner for Baltimore County's Office of Planning.

### **INTRODUCTION**

The Petitioners have operated Cuddles Early Learning Center since June 2008. They wish to increase the number of pre-school children from 12 to 24. Their home at 505 Gun Road is located at the mid-point between South Rolling Road and the Patapsco Valley State Park. This one-mile long road predates the American Revolutionary War and was used primarily to carry freight to the Patapsco River. Several of the 40 single-family homes that form this part of the Relay neighborhood date back to the early 1800's with many families having lived on Gun Road for generations. Most oppose a Class B Child Care Center. A significant amount of testimony and evidence was offered by both sides. Due to limitations of time and space, it is impossible to repeat all of the testimony offered herein. Additionally, there were numerous documents,

photographs, plats, licenses, certificates, written memoranda, and other exhibits entered into the record of this case. I shall summarize only the relevant evidence presented.

### **THE PROPERTY AND PROPOSAL**

Testimony and evidence offered revealed that the subject property is an irregular rectangular shaped parcel located on the east side of Gun Road, 2,600 feet south of Rolling Road and adjacent to Keech Road in Relay/Halethorpe. The property contains a lot area of 2.442 acres, zoned R.C.5, and is improved with a two-story brick single-family dwelling and features an in-ground pool and deck in the rear yard. The Petitioners purchased the property in May 2008 and have arranged the home to provide for both their living quarters and a child day care facility. Separate entrances and exits are provided for each use. Other improvements on site include a large playground area in the front yard, which is enclosed with a 5-foot high chain link fence and a long macadam driveway that leads into the property from Gun Road that splits into a circular drive. The property is served by public water but has a private septic system. Mr. Hogg stated that the septic system and driveway circulation have worked well during the past year and without incident. Elizabeth Smith stated that she is a Maryland State licensed and certified child care provider having received a degree from Howard Community College and a Child Development Program License from the Maryland State Department of Education (*See* Petitioners' Exhibit 9). She filed the instant petition to expand the operation so as to be able to provide day care services for 24 children. In this regard, letters of support from area residents familiar with the pre-school were received as Petitioners' Exhibit 4.

Mr. Hogg indicated that his wife runs an efficient center, which benefits both the children and their parents, and that they offer educational programs for the children. He indicated that the use serves many families in the adjacent community. Many of these individuals drop off their

children at this neighborhood site and then travel to their places of employment. Mr. Hogg indicated that the use is needed in this community and that there is a waiting list for people to enroll their children. He testified that they would not be expanding in any way the physical building structure of their home nor do they wish to make any detrimental changes to the exterior, landscape, or natural beauty of the property or the neighborhood. He stated they wanted to remain compatible with the character and general welfare of the surrounding residential properties with no adverse impact to their own property or that of their neighbors.

### **APPLICABLE LAW**

Governmental regulation of land use is largely a local function. The Baltimore County Council adopts zoning maps every four (4) years and every property, pursuant to the Comprehensive Zoning Map Process (CZMP), is assigned one of the nearly 40 zoning classifications listed in the B.C.Z.R. ranging from “R.C.” - Resource Conservation to the “M.H.” - Manufacturing–Heavy zones. Each zone contains its own specific regulations governing the property’s use and it is to be noted that these zones provide three (3) classifications of land use:

- 1<sup>st</sup> - Classification of uses permitted by right and allowed automatically as long as the owner meets the appropriate building, height and area regulations.
- 2<sup>nd</sup> - At the other end of the spectrum are uses prohibited under any circumstance. That is to say, any use other than those permitted in a particular zoning classification (as of right or by special exception) are prohibited. *Kowalski v. Lamar* 25 Md. App. 493 (1975).
- 3<sup>rd</sup> - Middle ground – identified as “special exception” uses. That term is a misnomer, as the uses listed are neither special nor exceptional. Other jurisdictions label special exception uses as “conditional” uses. This is a better description as these uses *may* be permitted in the zoning classification – if prior to establishing the use, the property owner or applicant petitions the Zoning Commissioner for approval of the proposed use.

Special exception (conditional) uses are regulated in the B.C.Z.R. under Section 502.1:

“Before any special exception may be granted, it must appear that the use for which

the special exception is requested will not:

- A) be detrimental to the health, safety or general welfare *of the locality involved*;
- B) tend to create congestion in roads, streets or alleys therein;
- C) create a potential hazard from fire, panic or other danger;
- D) tend to overcrowd land and cause undue concentration of population;
- E) interfere with adequate provisions for schools, parks, water, sewerage, transportation or other public requirements, conveniences or improvements;
- F) interfere with adequate light and air (Bill No. 45-1982);
- G) be inconsistent with the purposes of the property's zoning classification nor in any other way inconsistent with the spirit and intent of these zoning regulations (Bill No. 45-1982);
- H) be inconsistent with the impermeable surface and vegetative retention provisions of these zoning regulations; nor (Bill No. 45-1982)
- I) be detrimental to the environmental and natural resources of the site and vicinity including forests, streams, wetlands, aquifers and floodplains in an R.C.2, R.C.4, R.C.5 or R.C.7 zone (Bill No. 74-2000)."

Child care centers are defined in Section 101 of the B.C.Z.R. Therein, a Group Child Care Center is defined as: "A building or structure wherein care, protection and supervision is provided for part or all of a day on a regular schedule at least twice a week to at least 9 children, including children of the adult provider." A group Child Care Center, Class A, is defined as: "A Group Child Care Center wherein child care is provided for no more than 12 children at one time". A Group Child Care Center, Class B, is defined as: "A Group Child Care Center wherein child care is provided for more than 12 children."

The B.C.Z.R. also contains specific regulations that govern particular land uses. Applicable in this case is Section 424 of the B.C.Z.R. That section establishes specific rules and

regulations for group child care centers. Section 424.5 thereof establishes specific criteria for child care centers as *principal* uses. This is to be distinguished from child care centers which are *accessory* to another use, for example - to a church or school. Clearly, the Cuddles Early Learning Center operation proposed here for 24 children is, according to the B.C.Z.R., a *principal* use, not an *accessory* use.<sup>2</sup> Although the proposal meets all of the “bulk” standards, i.e., size, height, distance, etc., the issues generated in this case are driven by the actual use. As noted above, this is a special exception use and is not permitted by right. The highest courts of this State have reviewed the treatment of proposed special exception and conditional uses by various local zoning boards and commissions. The seminal case regarding special exceptions is *Schultz v. Pritts*, 291 Md. 1 432 A2d 1319 (1981). In that case, the Court noted that a special exception use is part of the comprehensive zoning plan and thus, shares the legal presumption that it is in the interest of the general welfare and therefore valid. The Court noted that a special exception use is a valid zoning mechanism that delegates to the Zoning Commissioner a limited authority to allow certain enumerated uses which the Baltimore County Council has determined to be permissible, absent any facts or circumstances which negate that presumption.

The Court further noted that the applicant for a proposed special exception use does not have the burden of establishing affirmatively that the proposal would be of benefit to the community. Moreover, the test is not whether another use is more preferable or whether the property could be used for a higher or better purpose. Rather, the test to be considered by the Zoning Commissioner and/or the County’s Board of Appeals is 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 purposes and intent of the underlying zoning

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<sup>2</sup> B.C.Z.R. Section 424.4 classifies a “Class A” child care center as an accessory use while Section 424.5 designates all other “Class B” child care facilities as a principal use.

scheme.

The Court of Appeals of Maryland further explained the special exception test in its recent decision of *People's Counsel for Baltimore County v. Loyola* 406 Md. 54, 956 A.2d 166 (2008). In that case after 27 years, the Court re-evaluated *Schultz* and its progenies clarifying only that:

“Applications for Special Exceptions do not require an Applicant to present, and the zoning body to consider, a comparison of the potential and adverse effects of the proposed use at the proposed location to the potential adverse effects of the proposed use at other, like-zoned locations throughout the County.”

Therefore, in considering the present application, it is not enough to simply conclude the proposed Cuddles Day Care request to expand its existing day care facility will produce impacts, such as traffic that could adversely affect the neighborhood. It most certainly will, and such an effect is inherent in any day care operation. The real test is whether the traffic produced by the proposed operation will cause an adverse impact at this location different in kind or degree than those inherently associated with such a use regardless of its location within the R.C.5 zone.

#### **TRAFFIC IMPACTS (Section 502.1.B of the B.C.Z.R.)**

The primary objection voiced by all of the witnesses who testified in opposition to the request relates to traffic impacts and the likelihood that traffic flows going into and out of the Petitioners narrow driveway entrance would backup and interfere with the traffic flows on Gun Road. This conclusion is supported by the County's Traffic Engineering Division Chief, Stephen E. Weber. At the request of People's Counsel for Baltimore County, he went to the site and took physical measurements of the site line from the subject driveway looking south and found it deficient. Essentially, he opined that with a posted speed limit of 30 miles per hour,

there should be a minimum 200-foot site line distance but found only 150 feet available due to the stone fence abutment on the Petitioners property. He further opined that the driveway width should be widened to 20 feet to provide for two-way traffic at an absolute minimum of the first 100 feet of driveway off of Gun Road. On behalf of the Petitioners, the testimony of Lynn Hogg was produced. He took his own photographs (collectively Petitioners' Exhibit 6) and explained that the present conditions have worked well and without incident or complaint. Furthermore, Gun Road and Keech Road are dead-end streets producing at best minimal traffic from the average daily trips (ADT) generated by the 20 to 22 homes that are to the south of his driveway. He pointed out that some day care students actually arrive in one (1) vehicle and that "drop off" and "pick up" times are staggered – from 7:30 a.m. to 10:00 a.m. in the morning and from 3:30 p.m. to 5:30 p.m. in the evenings. He stated that while not in favor of moving the entranceway monuments and expanding the driveway width, he and his wife would be amenable to do so as a condition of approval. They wish to maintain the natural beauty of their property and that of the surrounding neighborhood. He adds that there have never been any complaints concerning traffic, safety issues nor about children making noise outside. In brief, he believes from a traffic standpoint that Gun Road is clearly capable of handling the traffic demands generated by the proposed one (1) additional employee and 12 new pre-school infants that will be age targeted between 18 months to 26 months. He and his wife believe that there will be no adverse traffic impacts caused by this request. The driveway configuration ensures that children will be dropped off and picked up at a significant distance from traffic going by the site on Gun Road.

As noted above, numerous individuals wrote letters and appeared in opposition to the request. Let it also be noted that in addition to the Division of Traffic Engineering, the Office of Planning also recommended a denial of both the requested Special Exception and

Special Hearing on the basis that this particular location is not appropriate for a Class B Group Child Care Center. Community leaders and many lay witnesses who have resided in the neighborhood for decades offered their own survey summary and analysis of this proposal's conflict concerning the excess and unwanted traffic (*See* Protestants Exhibits 1 and 2). The road is narrow (18 feet wide without shoulders) and winding. There are large trees very close to the sides of the road. Many people drive over the double yellow line to avoid the edge of the road. Two (2) cars traveling toward each other will move back into their own lane only long enough to pass each other. School buses that serve the Relay Elementary, Arbutus Middle and Catonsville Senior High Schools drive down the center of the road and use Keech Road to make their U-turn to travel back to Rolling Road. The adjacent neighbor, Paul Donoghue, and Messrs. McKean (403 Gun Road) and Macgill (319 Gun Road) discussed the dangerous portion of the road at the subject property and testified to seeing young mothers coming out of the driveway with cell phones, causing difficulty for them getting out of their own driveways and instances of being run off the road while traveling southbound by cars leaving the Petitioners driveway to proceed northbound. Other residents along Gun Road point out that a day care facility already exist at the Oblate Sisters Convent<sup>3</sup> and see no reason to allow an enlargement of the Petitioners facility. Additionally, Ms. Baldwin and others express safety concerns for the many people that use Gun Road as a means to walk, jog and bike into the State park and are always up and down the road.

As noted in the discussion above regarding the law of special exceptions, the undersigned is required to focus upon the impacts of the proposed use and how they particularly affect the locality involved. The undersigned has reviewed the proposal in that light and I find

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<sup>3</sup> The Oblate Sisters Day Care Center located at 701 Gun Road has operated for 35 years at this location. It provides day care services for children ranging in ages from 6 weeks to 5 years with a current enrollment of 65 and a capacity of 80.

that the special exception request has failed to meet the test set out in Section 502.1.B of the B.C.Z.R. There are two (2) primary factors that justify this conclusion. I explain.

First, it is acknowledged that this Commission, in considering other petitions for day care centers, has remarked that a special exception day care use is most appropriately located on the fringes of a residential community as opposed to its interior. That is, traditional wisdom would support the conclusion that the location of the day care center near the fringe of a residential community is more appropriate than a location embedded in the interior of a residential community. For example, one would conclude that the Oblate Sisters facility located at the intersection of Gun Road and South Rolling Road in the D.R.1 zoning classification is better situated than the subject location (505 Gun Road) in the middle of a surrounding R.C.5 zone. I find that the traffic to be generated by the proposed day care center will indeed tend to cause congestion on Gun Road due to the property's interior location shared with pedestrians and residents of this "National Landmark Eligible" community. Although Mr. Hogg opined that modifications could be made to his driveway, it is likewise apparent that this would have an adverse affect (outward appearance) upon adjoining properties and a detriment to this neighborhood.

Second, the proposed traffic patterns that will be generated by the increased use are problematic. Every potential client of the proposed day care center would turn right onto Gun Road when leaving the site after dropping off their children in the morning and afternoon. A right turn on Gun Road from this site would subject the traveler leaving the driveway to an impaired site line distance to the detriment of approaching traffic both north and southbound on Gun Road. It was indicated, and a site visit confirmed, that the road is winding, narrow with a hillcrest slightly to the north at the Donoghue driveway (508 Gun Road). Indeed, I find this to be

the most troubling aspect of this proposal from a traffic standpoint.

In sum, I find that the proposed use does not meet the applicable criteria set forth in Section 502.1.B of the B.C.Z.R., pursuant to *Schultz and Loyola*, infra. Specifically, an increase to a 24-child day care center will generate traffic volumes and certain congestion no matter where located in the R.C.5 zone. However, the impacts are particularly severe here due to the topography and width of the narrow public roadway. These factors warrant a denial of the plan, even with the contemplated driveway improvements.

**SECTION 502.1G – Inconsistent with the Zoning Classification**

Although the proposal must be denied based on the traffic issue, the undersigned feels compelled to at least address the criteria set out in Section 502.1.G of the B.C.Z.R. given the attention paid to this test at the hearing. Testimony was offered by both sides regarding this issue. The Petitioners offered the testimony of both Mr. Link and Mr. Hogg in support of their assertion that the proposed use is indeed compatible with the R.C.5 zone. The Protestants offered lay testimony on this subject and also offered the Zoning Advisory Committee (ZAC) comment prepared by Dennis Wertz from the Office of Planning.

The not-so-simple answer to this issue is that a day care center would be appropriate for this property; however, not of the size proposed by Cuddles Early Learning. The parties disagree over the nature of the use. The Protestants contend that it is a commercial intrusion while the applicants argue that it remains an accessory use to their residence. Additionally, the parties differ over the “compatibility” of the proposed use. That being said, however, the number of children proposed in this case in the middle of a very low density single-family neighborhood is persuasive and does, in my judgment, tilt the character of the operation from an accessory type use to a principal type business use.

I decline to establish a specific number of children that would be permitted at this location. The question presented under the petition for special exception was on the proposal as offered. Whether a day care center of 16 or 20 children is appropriate is not before me. In answer to the specific question presented, I find that the proposal as submitted is inconsistent with the property's zoning classification.

### CONCLUSION

Based upon due consideration of all the testimony and evidence presented, I am persuaded to deny the requests. In my judgment, the proposal does not meet the criteria set out in Sections 502.1.B and 502.1.G of the B.C.Z.R. and thus, the petition for special exception must be denied.

Pursuant to the advertisement, posting of the property, and public hearing on these Petitions held, and for the reasons set forth above, the relief requested shall be denied.

THEREFORE, IT IS ORDERED by the Zoning Commissioner of Baltimore County, this 12<sup>th</sup> day of May, 2009, that the Petition for Special Exception, to permit a Class B Group Child Care Center as a principal use on the subject site, pursuant to Section 424.5.A of the Baltimore County Zoning Regulations (B.C.Z.R.), for a maximum of 24 children, in accordance with Petitioners' Exhibit 1, be and is hereby DENIED; and

IT IS FURTHER ORDERED that the Petition for Special Hearing seeking relief from Section 409.12.B of the B.C.Z.R. to approve a modified parking plan, be and is hereby DISMISSED AS MOOT.

Any appeal of this decision shall be entered within thirty (30) days of the date hereof in accordance with Baltimore County Code Section 32-3-401.

WJW:dlw

\_\_\_\_SIGNED\_\_\_\_\_  
WILLIAM J. WISEMAN, III  
Zoning Commissioner  
of Baltimore County