

**IN RE: PETITIONS FOR SPECIAL HEARING,
SPECIAL EXCEPTION & VARIANCE**

S side of Liberty Road; 15 feet W of the
c/l of Forest Hill Avenue
2nd Election District
4th Councilmanic District
(6411 Liberty Road)

* BEFORE THE
* DEPUTY ZONING
* COMMISSIONER
* FOR BALTIMORE COUNTY

Dennis and Elizabeth Agboh
Legal Owner

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Kim Walters dba Enigma Learning
Lessee

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Case No. 2010-0314-SPHXA

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter comes before this Deputy Zoning Commissioner for consideration of Petitions for Special Exception, Special Hearing, and Variance, filed by the legal owner of the subject property, Dennis and Elizabeth Agboh, and the lessee of the property, Kim Walters d/b/a Enigma Learning.

Special Exception relief is requested pursuant to Section 1B01.1.C.6 of the Baltimore County Zoning Regulation (“B.C.Z.R.”) to approve a Class B, Group Child Care Center for up to thirty-eight (38) children.

Special Hearing relief is requested pursuant to Section 500.7 of the B.C.Z.R. to:

- Find that Section 1B01.1.B.1.g(11) of the B.C.Z.R. is applicable and has been complied with; and
- Find that in the event a Special Exception is not granted for a “Principal use Group Child Care Center, Class B” then an “Accessory use Group Child Care for more than 12 children but less than 40” is permitted in this existing facility in keeping with the

continuation of the current use and without designating the name of a specific individual(s), and further, that a “lessee” is permitted to be the occupant.

Variance relief is also requested as follows:

- From Section 1B01.1.B.1.e(3) and (5) of the B.C.Z.R. to permit existing parking, structures, and fenced play yard to remain within an RTA buffer in their existing locations and at their current heights in lieu of providing a 50 foot buffer area, a 75 foot setback, and a height not to exceed 35 feet within the required 100 foot Residential Transition Area required for a Class “B” Group Child Care Facility for up to 40 children in a D.R.5.5 Zone; and
- From Section 400.1 of the B.C.Z.R. to permit the existing garage to remain in the current location in lieu of being located in the third of the lot farthest removed from any street as required; and
- From Section 409.8.A.1 and A.4 to permit the existing paved parking area to remain as is in lieu of design, screening and landscaping in accordance with the landscape manual and all other manuals adopted pursuant to Section 32-4-404 of the Baltimore County Code (“B.C.C.”), and a 0 foot setback in lieu of the required setback of 10 feet to the right-of-way line to a public street; and
- From Section 424.7.A to permit a Class “B” Group Child Care Center on a 0.35 gross acre lot in lieu of the required minimum lot size of one acre for the first 40 children; and
- From Section 424.7.B of the B.C.Z.R. to permit an 18 foot front setback of the existing structure (full width front porch) in lieu of the required 25 foot setback from the street right-of-way line or the average setback of the adjacent residential dwellings whichever is less; and to permit an 11 foot side yard setback and a 20 foot side yard setback in lieu of the required 50 feet from a property line; and to permit the rear and side yards to have a 5 foot high wooden stockade fence (existing) in lieu of the required 20 foot perimeter vegetative buffer; and
- From Section 424.7.C of the B.C.Z.R. to permit parking, drop-off and delivery area to be located in the front yard in lieu of the required side yards; and
- From Section 424.7.E of the B.C.Z.R. to permit a maximum impervious surface area of 34% in lieu of the maximum impervious surface area of 25% of the gross area; and
- From Section 427.1.B.2 to permit a wooden stockade solid fence of 60 inches in lieu of the required maximum height of 42 inches in residential zones; and
- Such other variance(s) which may be identified at the time of the hearing.

Details of the subject property and the requested relief are depicted on the site plan that was marked and accepted into evidence as Petitioner's Exhibit 1.

Appearing at the requisite public hearing in support of the requested Special Hearing, Special Exception, and Variance petitions was Petitioner Kim Walters, tenant/lessee and proprietor of Enigma Learning, and J. Carroll Holzer, Esquire, counsel for Petitioner. There were no Protestants or other interested citizens in attendance at the hearing.

Testimony and evidence offered revealed that the subject property is a rectangular shaped property consisting of approximately 10,510 square feet or 0.241 acre, more or less, zoned D.R.5.5 and situated in a residential transition area. The property is located at the southwest corner of Liberty Road and Forest Hill Road, approximately 1½ to 2 miles east of the Interstate 695 Beltway in the Lochearn Area of Baltimore County. Ingress/egress for the property is via Liberty Road (MD Route 26).

Before a review of the facts of this case and consideration of the Petitioner's requests may be discussed, it is necessary to state the prior zoning history for the subject property. In Case No. 86-493-SPH, a Class A Group Childcare Center was granted to the then resident operator, Francis E. Feagin. Eight years later in Case No. CACC-94-2, the current legal owners, Dennis and Elizabeth Agboh, were granted a Use Permit to operate a Class A Child-Care Center on the subject property by the then-Zoning Commissioner Lawrence E. Schmidt. Thereafter, in Case No. 95-248-XA, the current legal owners, Mr. and Mrs. Agboh, were granted a Special Exception, again by then-Zoning Commissioner Lawrence E. Schmidt, in order to expand their existing child-care operation to allow a Class B Group Child Care Center for up to 39 children and several variances. However, following an appeal of that decision by the Office of People's Counsel, an Order of Dismissal was issued on January 21, 1997 by the Baltimore County Board

of Appeals, pursuant to a letter of withdrawal filed by Petitioners requesting that the zoning relief granted in Case No. 95-248-XA be withdrawn and dismissed. Moving forward to this past year, the current legal owners, Mr. and Mrs. Agboh, again filed for relief in Case No. 2010-0004-SPH requesting the removal of the restriction in the original 86-493-SPH case, which stated that operation of a Class A Group Childcare Center on the site was personal to Francis E. Feagin. Petitioners at that time indicated they were unaware of the prior 1986 zoning case. They also indicated that relief had been granted by Mr. Schmidt in the prior 95-248-XA case, but did not inform the undersigned that an appeal had been filed and that Petitioners had expressly withdrawn the request for relief. Nonetheless, the undersigned heard that case and granted the requested relief in an Order issued September 22, 2009. On a Motion for Reconsideration filed by Peter Max Zimmerman, People's Counsel for Baltimore County, the undersigned issued an Order dated December 16, 2009 affirming the relief granted to Petitioners in Case No. 2010-0004-SPH.¹

In the instant matter and in support of the requested relief, testimony and evidence revealed that the subject property is improved with an existing 2½-story framed dwelling that is used as a daycare center, with a drop off/pick up area and handicapped parking space to the rear of the property, along with a one-story framed garage also to the rear of the property. Ms. Walters testified that she rents the subject property from the legal owners for use as a child-care center, known as Enigma Learning. Ms. Walter stated that she has been running this center since July 2009, and has 12 children -- between the ages of six months and twelve-years old -- under her care and supervision. Ms Walters testified that she has been working in child-care services

¹ On information and belief, that case is currently pending on appeal before the Board of Appeals.

since 1999 and in 2002 received a degree in Early Childhood Education from Rutgers-Camden University.

At this juncture, Petitioner Ms. Walters proposes to expand the existing Class A, Child-Care Center to a Class B, Child-Care Center. This expansion would mean going from 12 children to upwards of 38 children, under her care and supervision. Ms. Walters explained that according to the Maryland State Department of Education, Child Development License issued to Enigma Learning Center, the first floor capacity for purposes of child-care is 18. Further, upon inspection by the Maryland State Department of Education, the second-floor provides additional space for 22 children. These documents were marked and accepted into evidence as Petitioner's Exhibits 3 and 2, respectively. Ms. Walters stated that she initially leased the subject property under the impression that it was already a Class B, Child-Care Center, however, later became aware that the property only had a Use Permit for a Class A center, which allows a maximum of 12 children.

In support of the special exception request, Ms. Walters testified as to the subject property's compliance with the criteria enumerated in Section 502.1 of the B.C.Z.R. Ms. Walters offered her opinion that granting of the special exception would not be detrimental to the health, safety, and general welfare of the community, stating that most of the children at her center are neighborhood residents. Further, that expansion of the center would not create congestion in roads, streets or alleys, explaining that parking at the site has proven adequate considering that pick-up/drop off is in the rear of the property. She also indicated in response to questioning by her attorney, Mr. Holzer, that the proposed use would not be detrimental to the other criteria set forth in Section 502.1 of the B.C.Z.R.

The Zoning Advisory Committee (ZAC) comments were received and are contained within the case file. Comments received from the Office of Planning dated June 22, 2010, state that an inspection of the site, subsequent discussions with the property owners' engineer, and a review of the history of zoning activity at this site revealed that the request to occupy the site with 12 to 40 children as a Class B Child Care Facility would be too intense for a property of this size. Operating a childcare facility with more than 12 children at this location could be intrusive for adjacent residential uses. The Planning Office therefore recommends denial of the requested special exception and special hearing.

In regard to the requested Special Exception to increase the use of the subject property to a Group Child-Care Center, Class B, I am compelled to deny the request relief on procedural grounds and on the merits. Section 101 of the B.C.Z.R. defines a "Group Child Care Center, Class B" as, "[a] group child care center wherein group child care is provided for more than 12 children." In a D.R. Zone, Section 1B01.1.C.6 of the B.C.Z.R. permits by special exception:

Class B group child care centers for more than 40 children subject to the standards set forth in Section 424 (family child care homes, group child care centers and nursery schools) and *principal use Class A and Class B group child care centers providing for up to 40 children, if located in a residential transition area.* (emphasis added).

The chart enumerating treatment of child-care centers as principal uses in Section 424.5 of the B.C.Z.R. reiterates the aforementioned section by requiring a Special Exception for a Group Child-Care Center, Class B in all D.R. zones where there will be 40 or fewer children and where the Residential Transition Area (RTA) is applicable. Here, Petitioner desires thirty-eight children in a property zoned D.R.5.5 and located in a Residential Transition Area. Thus, in addition to the Section 502.1 Special Exception criteria, the subject property must abide by the regulations relating to RTA's; however, Petitioner is unable to comply with the RTA requirements.

Moreover, the testimony and evidence presented do not convince me that a Special Exception is warranted in this location on the merits. Liberty Road is an extremely busy state road that renders an increase in the number of people parking and using the ingress/egress for the property extremely dangerous. The fact that this property is in a RTA seems to warrant a presumption that a commercial enterprise of the magnitude proposed here is not well suited for the subject property. Notwithstanding Ms. Walters' testimony regarding the 502.1 criteria, these considerations persuade me to deny the Special Exception as inconsistent with the spirit and intent of the Zoning Regulations.

However, notwithstanding my ruling on the merits, pursuant to Section 1B01.1.B.1.g(11) of the B.C.Z.R., special exception relief would still be inappropriate procedurally. This section states that the use restrictions related to RTA's do not apply to the following:

Principal use Class A and Class B group child care centers, provided that the Zoning Commissioner determines, during the special exception process that the proposed improvements are planned in such a way that *compliance with the bulk standards of Section 424.7 will be maintained* and that the special exception can otherwise be expected to be compatible with the character and general welfare of the surrounding residential premises. (emphasis added).

Thus, not only must the subject property comply with Section 502.1 of the B.C.Z.R. and the regulations for a Residential Transition Area, but also with the bulk regulations of Section 424.7 requiring specific standards for minimum lot size, setbacks, fencing, parking, height and impervious surface area for group child care centers in D.R. Zones. Again, Section 1B01.1.B.1.g(11) states that the bulk standards will be maintained. Accordingly, since this subject property cannot comply with bulk standards promulgated by the County Council in Section 424.7 of the B.C.Z.R., the undersigned is precluded from approving a Special Exception for the proposed use. As a result of these considerations the requested Special Exception for a Group Child-Care Center, Class B must be denied.

Due to the fact that the special exception request fuels the plethora of variance requests, denial of the Special Exception makes consideration of these variance requests inappropriate at this juncture and thereby should be dismissed as moot.

In regards to the Special Hearing requests as described herein, Section 1B01.1.B.1.g(11) is applicable to this case and the subject property does not comply therewith due to an inability to comply with Section 424.7 of the B.C.Z.R. Hence, that aspect of the relief is denied. In addition, based on the foregoing reasons, Petitioner's Special Hearing request to permit an "Accessory use Group Child Care Center for more than 12 children but less than 40" in the existing facility in keeping with the continuation of the current use and without designating the name of a specific individual(s), and further permitting a "lessee" to be the occupant is not appropriate and shall also be denied.

Pursuant to the advertisement, posting of the property, and public hearing on this petition held, and after considering the testimony and evidence offered by Petitioner, the special exception and special hearing requests shall be denied. The variance requests shall be dismissed as moot.

IT IS THEREFORE ORDERED this 26th day of August, 2010 by the Deputy Zoning Commissioner that Petitioner's request for Special Exception pursuant to Section 1B01.1.C.6 of the Baltimore County Zoning Regulations ("B.C.Z.R.") to approve a Class B, Group Child Care Center (for up to 38 children) be and is hereby **DENIED**; and

IT IS FURTHER ORDERED that Petitioner's aforementioned requests for Variance relief be and are hereby **DISMISSED** as **MOOT**; and

IT IS FURTHER ORDERED that Petitioner's requests for Special Hearing relief pursuant to Section 500.7 of the B.C.Z.R. as follows:

- To find that Section 1B01.1.B.1.g(11) of the B.C.Z.R. has been complied with; and
- To find that an “Accessory use Group Child Care for more than 12 children but less than 40” is permitted in this existing facility in keeping with the continuation of the current use and without designating the name of a specific individual(s), and further, that a “lessee” is permitted as the occupant,

be and are hereby **DENIED**.

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

____SIGNED_____
THOMAS H. BOSTWICK
Deputy Zoning Commissioner
for Baltimore County

THB:pz