

IN RE: PETITION FOR SPECIAL EXCEPTION	*	BEFORE THE
(1301 Cheverly Road)		
9 th Election District	*	OFFICE OF
3 rd Councilman District		
The Belvedere Baptist Church of Baltimore	*	ADMINISTRATIVE HEARINGS
<i>Legal Owner</i>		
Davenport Preschool LLC	*	FOR BALTIMORE COUNTY
<i>Lessee</i>		
Petitioners	*	Case No. 2013-0166-X

* * * * *

OPINION AND ORDER

This matter comes before the Office of Administrative Hearings (OAH) for Baltimore County as a Petition for Special Exception filed for property located at 1301 Cheverly Road. The Petition was filed by Scott E. Massengill, Esquire, on behalf of the legal owner of the subject property, The Belvedere Baptist Church of Baltimore, and the lessee, Davenport Preschool LLC., (“Petitioners”). The Special Exception Petition seeks relief pursuant to §424.5.A of the Baltimore County Zoning Regulations (B.C.Z.R.), to permit a class B Group Child Care Center for more than 40 children in an existing church in a DR zone. The subject property and requested relief are more fully described on the site plan which was marked and accepted into evidence as Petitioners’ Exhibit 1.

Appearing at the hearing was Elizabeth Harlan, the operator of the proposed facility. Scott E. Massengill, Esquire attended and represented the Petitioners. Several members of the community (whose names are listed in the case file) attended the hearing and expressed concerns regarding the proposal. The file reveals that the Petition was properly advertised and the site was properly posted as required by the B.C.Z.R.

The Zoning Advisory Committee (ZAC) comments were received and are made part of the record of this case. The only substantive comment was from the Department of Planning (DOP), which expressed support for the petition.

Testimony and evidence offered at the hearing revealed that the subject property is 12.711 acres and is zoned DR 1. There was a great deal of confusion at the hearing concerning the exact nature of the program proposed. The Hampton Gardens Community Association has not had an opportunity to meet and formally vote on the proposal, which is unfortunate given that many disputes are often able to be resolved if there is sufficient dialogue before the actual zoning hearing. In any event, that did not occur here.

Under the DR-1 zoning classification, the Petitioner would be permitted to operate a class B child care facility, with up to 40 children, as of right, without the necessity of a hearing or further approvals from the County. BCZR § 1B01.1.A.12. The Petitioner proposes to enroll in excess of 40 children, and in that event the Regulations require a special exception to do so, pursuant to BCZR § 424.5. The Regulations also require that the facility be licensed by State authorities, contain a fenced play area, and not be located adjacent to an existing group child care center. BCZR § 424.1. The Petitioner has (or will) satisfy these requirements. In addition, the Regulations specify certain lot size, building height and setback requirements for child care centers, and as noted on the site plan (Petitioner's Exhibit 1) these are satisfied.

A final preliminary issue concerns whether or not the Residential Transition Area (RTA) regulations are applicable. BCZR §1B01.1.B.1.g.(11). Those regulations are designed to ensure that similar housing types are built adjacent to one another or, if that is not the case, that adequate buffers be provided. BCZR § 1B01.1.B.1. Those concerns are not implicated here, especially since the Petitioner is proposing an adaptive reuse of an existing church that was constructed over 30

years ago. Regardless, even assuming the RTA regulations were applicable, the existing church building (as shown on the plan) is set back over 400' from the front and side property boundaries, and 225' from the rear boundary. Exhibit 1, note 8. As such, more than adequate buffers are provided by this large site.

SPECIAL EXCEPTION LAW

As noted above, Petitioners seek special exception relief under §424.5.A of the Baltimore County Zoning Regulations (B.C.Z.R.), to permit a class B Group Child Care Center for more than 40 children in an existing church in a DR zone. 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 People's Counsel v. Loyola College, 406 Md. 54 (2008), where the court emphasized that 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.

This is a unique case in many respects. The Petitioner proposes to operate a class B child care facility in a residential zone, pursuant to a special exception. While that, in and of itself, isn't particularly unusual, the site and infrastructure are. Specifically, the Petitioner proposes to lease (and eventually purchase) the existing Belvedere Baptist Church in the neighborhood, which is situated on a nearly 13 acre parcel. As discussed at the hearing, under the BCZR the Petitioner could theoretically have over 1,000 children at the center, using the ratio set forth at BCZR § 424.7. Of course, the Petitioner is not proposing such a number, and State law and regulations would provide an independent limit on the number of children at the center. I simply point this out

to show that, in a case like this with a large parcel, the application of the BCZR can produce anomalous (and probably unintended) results.

In any event, the residents who spoke at the hearing identified one overriding concern with the proposal: traffic. As was correctly noted, if the Petitioner enrolled 150 children (full time) at the center, that would equate to 600 vehicle “trips” on a daily (Monday-Friday) basis. Ms. Harlan testified that in her experience (she characterized it as her “best guess” based on her 6 years of experience in this field) this number would be closer to 400, given that some parents will enroll more than one child, and there may be some carpooling. Even so, that is undoubtedly a lot of traffic, especially in a rural residential neighborhood (zoned DR-1) consisting of 160 homes. I can certainly understand (and if I lived there would share) the sentiments expressed by residents, that the use would in many respects disturb the peace and quiet of this neighborhood.

But, though it may sound illogical, this is exactly the type of inherent adverse effect that 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). For sure, any large child care center with 100+ children will generate a large volume of traffic, and thus that impact is “inherent” in the use. In other words, a child care center with 100+ children would generate the exact same volume of traffic at any location in a DR zone as it would at the present site. Several residents noted that the neighborhood has no street lights and/or sidewalks, but this too is also true for many residential neighborhoods in the County, especially in the more sparsely populated DR-1 and DR-2 zones. Thus, I think those concerns are also “inherent” adverse effects arising from the operation of a large child care center in a residential zone.

To warrant the denial of a special exception, the opponents must show that the use, at the particular location proposed, would have “non-inherent adverse effects.” Id. at 282. In this case, I do not believe the Protestants made such a showing. Thus, I believe that I am obliged by the BCZR and case law to grant the Petition, though I will also impose conditions on the relief that may help to mitigate the impacts upon the community.

The most significant condition concerns the number of children at the center. As discussed at the hearing, some of the younger children (2 and 3 year olds mainly) will attend on a part-time schedule, either M-W-F or Tue & Thurs. Ms. Harlan indicated that two such children in essence count as one “full time” enrollment, since they “share” the calendar week. Further complicating matters is that even though all children are dropped off in the morning, some small number (Ms. Harlan estimated between 10-15) of children will be picked-up by their parents at mid-day, rather than at the end of the day. Some citizens urged that an “enrollment cap” be applied, but on further reflection it doesn’t seem like this would be subject to verification by County authorities, since this is a private enterprise, and the childrens’ enrollment records would not be open to inspection. Instead, I think the only meaningful, and enforceable, restriction concerns the maximum number of children that can be at the facility on any given day.

In that regard, I believe that 120 children is an appropriate figure, based upon Ms. Harlan’s testimony. Ms. Harlan described the number of classes she would like to have, which would be situated in nine classrooms. She indicated that according to her calculations, State child care regulations would allow no more than approximately 135 children at any one time within the facility as planned. She also described the child care center at which she previously was employed (that was also located in a church), and indicated it had 120 full time students, which correlated to about 95 families, given that some parents had multiple children enrolled. Finally, she stated that

her goal with this center is to enroll 150 children, which after deducting approximately 30 children who would be part-time and “sharing” one full time slot (as described in the preceding paragraph), would mean that approximately 120 children would be attending the center on any given day. With respect to the number of vehicle “trips” generated on a daily basis, one would imagine that the number of families would be between 95-100, based on Ms. Harlan’s previous experience. As such, based on the evidence and testimony in the case, I believe it is reasonable to assume that somewhere in the neighborhood of 400 vehicle trips on a daily (M-F) basis will be generated when this proposed facility is at capacity, which Ms. Harlan anticipated would take at least a year.

Pursuant to the advertisement, posting of the property, and public hearing on this petition, and after considering the testimony and evidence offered, I find that Petitioners’ Special Exception request should be granted, subject to the conditions noted below.

THEREFORE, IT IS ORDERED by the Administrative Law Judge for Baltimore County, this 28th day of March, 2013, that the Petition for Special Exception relief under §424.5.A of the Baltimore County Zoning Regulations (“B.C.Z.R.”), to permit a class B Group Child Care Center for more than 40 children in an existing church in a DR zone, be and is hereby GRANTED.

The relief granted herein shall be subject to the following:

1. Petitioners may apply for appropriate permits and be granted same upon receipt of this Order; however, Petitioners are hereby made aware that proceeding at this time is at their own risk until such time as the 30-day appellate process from this Order has expired. If, for whatever reason, this Order is reversed, Petitioners would be required to return, and be responsible for returning, said property to its original condition.
2. The Petitioner shall have no more than 120 children in the facility at any one time, unless state regulations or fire and life safety regulations provide a lower number which would prevail.
3. The morning drop off hours are limited to 7:30 a.m. – 9:00 a.m., and the afternoon pickup shall be between the hours of 3:00 p.m. - 5:45 p.m. Though a small percentage of children (approximately 10%) will attend the program for half-day and be picked up at mid-day, there shall be no drop off of children outside of the 7:30 a.m.- 9:00 a.m. period.

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