

Item 10 - Correspondence

From: [Erika Bowen](#)
To: [MCP-Chair](#)
Subject: Arbor Place
Date: Wednesday, June 21, 2023 11:54:43 AM

[EXTERNAL EMAIL] Exercise caution when opening attachments, clicking links, or responding.

Dear Sir or Madam,

It has come to my attention that there are plans to approve a Portuguese Community Center next to a memory care facility.

I had a loved one in Arbor Place. I know first hand what kind of care Arbor Place provides for their residents. Someone who has never had a loved one dealing with memory care issues has no idea what kind of impact the slightest change in environment has on a resident in such a facility.

Residents in a memory care facility are at the end stage of life. Routine is very important in their care. The slightest change can be traumatic. The staff may be dealing with a resident who may not understand what is happening in their surroundings and anything out of the ordinary may cause distress.

Arbor Place has a beautiful back yard where residents can enjoy for fresh air and sunshine. This place of peace and quiet would be negatively impacted by noise from events that could last until 10:00 pm, odors and smoke from grilling. Increased traffic will impact parking and illumination will also affect residents in the evening when they are trying to sleep.

Residents at Arbor Place should be able to enjoy the peace and quiet that they deserve at this stage of their life.

Please vote no to Conditional Use No. CU202313.

Thank you,

Erika Bowen
3200 N. Leisure World Boulevard, #504
Silver Spring, Maryland 20906
301-202-5911

From: [Susy Murphy](#)
To: [MCP-Chair](#)
Cc: [Walter Fanburg](#); [Debbie Fanburg](#)
Subject: Conditional Use No. CU202313: Associacao Cultural de Lingua Portuguesa, Inc. (Portuguese Community Center).
Date: Wednesday, June 21, 2023 11:47:24 AM

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To the Montgomery County Planning Board Chair,

I have had the great good fortune to know about Arbor Place and its founder, Walter Fanburg, since its opening 25 years ago. As a care manager working primarily in Montgomery County, it was my great pleasure to move one of the first residents into Arbor Place when it opened. Over the last 25 years, I think we have always had at least one of our clients receiving care there. Arbor Place is not just an outstanding memory care facility, they truly provide care to both their residents AND their families. They helped to provide support to the wife of one of our clients who resided there for the last 5 years of his life and also supported his wife through breast cancer treatment and recovery. Another client resident was able to see her granddaughter take her first steps there! Clients who have been unable to be cared for at home or at another, larger facility, have thrived in the quiet supportive environment of Arbor Place. It has been no small feat to maintain such a high quality care environment over so many years, and Walter and his daughter Debbie should be applauded for their efforts.

I unequivocally oppose the granting of a special exception to the organization which seeks to open a "private club" on the adjacent property. The noise, lighting and traffic which will be generated will all negatively impact the residents and family members who visit Arbor Place on a daily basis. I am confident that there are other locations in Montgomery County where the private club could be built to serve its members, without impinging on the care and well-being of our county's most vulnerable citizens, those living with Alzheimer's and other dementias.

Many thanks in advance for the opportunity to register my very strong opposition to granting a special exception in this case.

Warmly,

Susy Elder Murphy

--



AGING WELL
eldercare
35th ANNIVERSARY

Susy Elder Murphy, CMC

Owner

Pronouns: she/her/hers



AGING LIFE CARE ASSOCIATION

MEMBER

Member Board of Directors, Aging Life Care Association

12501 Prosperity Drive, Suite 450
Silver Spring, MD 20904
301-593-5285

Cell 301-257-8351 | Fax 301-593-9624

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From: [Melissa Bailey Kutner](#)
To: [MCP-Chair](#)
Subject: Re: Conditional Use No. CU202313: Associacao Cultural de Lingua Portuguesa, Inc. (Portuguese Community Center)
Date: Wednesday, June 21, 2023 11:08:59 AM

[EXTERNAL EMAIL] Exercise caution when opening attachments, clicking links, or responding.

My mailing address is:

Melissa Kutner
4201 Flower Valley Drive
Rockville, MD 20853.

Thank you!

On Wed, Jun 21, 2023 at 11:06 AM Melissa Bailey Kutner <melissabailey9@gmail.com> wrote:

Dear Montgomery County Planning Board,

I am writing regarding Conditional Use No. CU202313. My mother is a resident at Arbor Place, a memory care facility next door to the proposed community center. My mother has advanced Alzheimer's disease, and her condition has also severely deteriorated due to Covid-19. In particular, she is agitated and distressed by loud noise. She is not able to speak or walk anymore, and one of the few things she is able to enjoy is sitting in the garden at Arbor Place, listening to the birds and feeling the breeze, smelling the flowers. This is also one of the few things that connects her to her time before Alzheimer's, as she always loved to garden and sit outside. The community center, with noise, music, and smoke from any outdoor cooking, would frequently rob her of any enjoyment in the garden. The noise is also likely to bother her even in her room, since her room is on the side of Arbor Place next to this proposed center.

In addition, parking is often crowded at Arbor Place, and if people from outside park on the street or (as has already happened) take spaces in the Arbor Place lot, it becomes increasingly difficult to visit our families.

It has been very hard over the last few years to watch my mother lose the ability to enjoy almost everything that used to make her happy. I hope that you can take action so that she will not lose this garden (and peace in her own room) as well.

Sincerely,
Melissa Bailey Kutner

From: [B Brittenham](#)
To: [MCP-Chair](#)
Cc: [Bea Brittenham](#)
Subject: Conditional Use No. CU202313 Associacao Cultural de Lingua Portuguesa, Inc. (Portuguese Community Center), 4407 Muncaster Mill Rd.
Date: Wednesday, June 21, 2023 11:02:08 AM

[EXTERNAL EMAIL] Exercise caution when opening attachments, clicking links, or responding.

The above conditional proposed use will cause undue harm to Arbor Place and the surrounding neighborhood and will adversely affect the quality of life (what little remains) and peaceful enjoyment of my full assistance, advanced dementia loved one who lives and considers “home” as Arbor Place. My loved one is extremely fragile and confused and has even been on/off hospice care. It is extremely critical that my family member and the Arbor Place community can enjoy a quiet visit outdoors in the backyard and quiet sleep in the afternoon and at bedtime to include the option of an open window for fresh air without suffering from the below issues.

I also hope the committee members have not or ever will be a caregiver for a long term/end-of-life family member suffering from dementia or other life threatening disease!

Substantial increased key issues are:

TRAFFIC,
NOISE,
ODORS/DUST, and
ILLUMINATION

TRAFFIC on Muncaster Mill is already heavy and will increase. Overflow parking off the property of 4407 Muncaster Mill onto Muncaster Mill has already and will continue to occur, which will increase pedestrian danger for traffic as well as visitor blocked sight of vision exiting into traffic in the surrounding neighborhood.

NOISE from public address, loud conversations/yelling, drinking, DJ’s/music, and dancing during daytime and nighttime hours will be very disruptive and agitating to the routines of Arbor Place dementia residents as well as employees trying to care for their residents.

ODORS/DUST - Grilling odors/smoke from cooking food in the backyard will carry over to the Arbor Place patio and residence as well as the surrounding neighborhood.

ILLUMINATION-most likely there will be additional flood lights installed in the front parking area and backyard, which will negatively affect the Arbor Place residents. It is critical evening darkness and quiet be present for a restful sleep for the dementia residents. Dementia affects patients day/evening rest cycles and behaviors.

I implore the committee to consider heavily my above input and vote “no” for the above referenced conditional use application.

If you would like to contact me for further input or questions, please do not hesitate to do so.

Sincerely,

Beatrice Brittenham
8611 Augusta Farm Lane
Gaithersburg, MD 20882
Sent from my iPhone

From: [David Wasserman](#)
To: [MCP-Chair](#)
Subject: OPPOSITION to Conditional Use No. CU202313: Associacao Cultural de Lingua Portuguesa
Date: Wednesday, June 21, 2023 10:32:53 AM

[EXTERNAL EMAIL] Exercise caution when opening attachments, clicking links, or responding.

David Wasserman

4324 Woodberry Street

University Park, MD 20782

OPPOSITION to Conditional Use No. CU202313: Associacao Cultural de Lingua Portuguesa

Dear Montgomery County Planning Board,

As the son of a 93-year-old Arbor Place resident with advanced dementia, I strongly oppose the application to use the adjacent property at 4407 Muncaster Mill Road as a private event and service organization. Arbor Place has provided a tranquil environment in which my mother and the other residents can spend their last years as happily and restfully as their conditions permit. I believe that the kind of activity the exception would permit would cause stress and discomfort to many of the residents, including my mother.

According to its own website, the applicant envisions BBQ's, music, dancing, microphones, and strobe lights at the organization's events. This would be a striking departure from the other group activities in the neighborhood, such as the largely indoor worship services along Muncaster Mill Road. Unrestricted use of a backyard event space until 10-11 pm in any primarily residential neighborhood would be likely to result in frequent noise complaints to the police; it would have a far more adverse effect next-door to a dementia residence.

Arbor Place designed its indoor and outdoor spaces to minimize agitation and keep its residents feeling as safe and secure as possible. Noisy social gatherings and outdoor lighting in the adjunct building will significantly reduce the comfort and sense of security of my mother and her fellow residents.

Parking is another serious concern. The surrounding churches were designed with large

parking lots, safe exits to the busy road, and indoor space for services and events. The applicant's property is a single-family home that was not intended or designed to handle event parking.

I urge you to vote against the applicant's request.

David Wasserman

Son of Helen Wasserman,

Resident of Arbor Place Dementia Care

From: [Sheila Vicenzi](#)
To: [MCP-Chair](#)
Subject: 4407 Muncaster Mill Road-Special exception
Date: Wednesday, June 21, 2023 10:12:38 AM

[EXTERNAL EMAIL] Exercise caution when opening attachments, clicking links, or responding.

Montgomery County Planning Board,

I am writing to in regard to 4407 Muncaster Mill Road, the property next door to Arbor Place that has made an application to obtain a conditional use special exception to use the property as a "private club and service organization".

As the Director of Nursing at Arbor Place I believe that an exception would negatively impact the quality of life of our residents. After 37 of working in healthcare I walked into Arbor Place and was stunned to find something I had never seen before. What I saw was the fully accomplished mission of treating residents/patients with the utmost respect, kindness, love, care and dignity that I have ever witnessed. Dr. and Mrs. Fanburg created an oasis in the healthcare field. Not only does Arbor Place provide wonderful care, it provides a serene setting with a beautiful gardens and back yard space.

Residents with dementia are very sensitive to noise, smells and disturbances. In addition to providing the very best quality of life for residents with dementia, Arbor Place residents also often transition to Hospice services in our facility which allows end of life care in the resident's home setting. To allow an exception for a private club and service organization next door would be a disservice to the mission that Arbor Place has provided for 25 years.

As a former long-time emergency nurse, I also have a safety concern as I have witnessed adults and children crossing Muncaster Mill Rd. to attend yard sales. The traffic generally travels by at a high rate of speed and there have already been too many deadly and critical accidents in this area.

As the president of a 595 home Home Owners Association I understand the importance of community and community behavior. While I support service and community activities, I feel that 4407 Muncaster Mill Rd is not the appropriate location for this type of organization and therefore I am opposed to this special exception.

Sincerely,

Sheila S. Vicenzi
19710 Boxberry Dr.
Gaithersburg, MD 20879

From: [Susan Ginsberg](#)
To: [MCP-Chair](#)
Subject: OPPOSITION to Conditional Use No. CU202313: Associacao Cultural de Lingua Portuguesa
Date: Wednesday, June 21, 2023 9:33:04 AM

[EXTERNAL EMAIL] Exercise caution when opening attachments, clicking links, or responding.

Susan Ginsberg
4324 Woodberry Street
University Park, MD 20782

OPPOSITION to Conditional Use No. CU202313: Associacao Cultural de Lingua Portuguesa

Dear Planning Board,

I am writing to express my opposition to the application to use the property at 4407 Muncaster Mill Road as a private event and service organization. My specific interest is that my mother-in-law resides next door at Arbor Place

A look at the applicant's website shows BBQ's, music, dancing, strobe lights and the use of microphones at the organization's events. Most residential neighborhoods would be fine with an occasional party next door. Unlimited use of the backyard as an event space until 10-11 at night in any neighborhood would generate calls to the police and is at odds with Montgomery County's noise ordinance. A noise disturbance, as defined by the Montgomery County Noise Law, is any sound that is detrimental to the health, comfort, or the reasonable enjoyment of property because of loudness. Arbor Place Dementia Care's indoor décor and outside space was designed to prevent agitation and to keep every resident safe and secure. Noisy social gatherings and outdoor lighting from next door will adversely impact the health, comfort, and sense of security of my family member and other residents at Arbor Place.

Another concern is parking. The surrounding churches were designed with large parking lots, safe exits to the busy main road and indoor space for services and events. The applicant's property is a single-family home and is not set up to handle event parking.

I urge you to vote against the applicant's request. -

Thank you for your continued service to the community.

From: [Joe Kruger](#)
To: [MCP-Chair](#)
Subject: Re: Conditional Use No. CU202313: Associacao Cultural de Lingua Portuguesa, Inc.
Date: Wednesday, June 21, 2023 8:55:55 AM

[EXTERNAL EMAIL] Exercise caution when opening attachments, clicking links, or responding.

To: Chair, Montgomery County Planning Board

I am writing to oppose the conditional use special exception for the property at 4407 Muncaster Mill Road. (This is conditional use No. CU202313: Associacao Cultural de Lingua Portuguesa.)

The property subject to the application is adjacent to Arbor Place Dementia Care where my wife resides. My wife has early-onset dementia and is subject to severe agitation if she hears loud noises. We chose Arbor Place because it is a place of serenity and comfort for the patients who reside there. I am very concerned the proposed use will lead to noisy social events, increased traffic, and other activities that would harm my wife and the other dementia patients at Arbor Place.

I ask that you consider the health and well-being of the severely disabled residents who live in Arbor Place and deny the proposed use for 4407 Muncaster Mill Road.

Thank you for your consideration of this matter.

Best regards,

Joseph Kruger
1614 Brisbane St, Silver Spring, MD 20902

From: [Michele Rosenfeld](#)
To: [MCP-Chair](#)
Cc: [Beall, Mark](#); [Butler, Patrick](#)
Subject: Conditional Use- No. CU202313: Associacao Cultural de Lingua Portuguesa, Inc. (Portuguese Community Center)
Date: Wednesday, June 21, 2023 8:49:00 AM
Attachments: [Outlook-tmatmisz.png](#)

[EXTERNAL EMAIL] Exercise caution when opening attachments, clicking links, or responding.

Dear Chairman Harris:

Please enter the attached three photographs into the record of this case.

Mr. Beall and Mr. Butler:

Please let me know if you are able to display these during Dr. Fanburg's testimony, and if you need more coordination in advance please just let me know.

Best regards,

Michele Rosenfeld
The Law Office of Michele Rosenfeld LLC
1 Research Court, Suite 450
Rockville MD 20850
michele@marylandpropertylaw.com
301-204-0913







From: [Walter Fanburg](#)
To: [MCP-Chair](#)
Cc: [Michele Rosenfeld](#); [Deborah Fanburg](#)
Subject: photos for presentation- CU 202313
Date: Wednesday, June 21, 2023 11:12:49 AM

[EXTERNAL EMAIL] Exercise caution when opening attachments, clicking links, or responding.

Chair: I am presenting tomorrow, June 22, item 10 - CU202313 at the planning board hearing for the above matter.

I would like to use the attached photos during my presentation. I know they need to be to you by 12 noon today.

They are attached below.

Please acknowledge receipt.

Thank you.

Walter

--

Walter H. Fanburg, MD
240-832-8409







From: [Edie Brower](#)
To: [MCP-Chair](#)
Subject: Fwd: Conditional Use No. CU202313: Associacao Cultural de Lingua Portuguesa Inc.
Date: Tuesday, June 20, 2023 10:08:42 PM

[EXTERNAL EMAIL] Exercise caution when opening attachments, clicking links, or responding.

Sent from my iPhone

Begin forwarded message:

From: Edie Brower <esbnanny@gmail.com>
Date: June 20, 2023 at 9:19:34 PM EDT
To: mcp-chair@mncppc-mc.org
Subject: Conditional Use No. CU202313: Associacao Cultural de Lingua Portuguesa Inc.

(Portuguese Community Center)

This email constitutes the objection of a nearly 102 year old resident (DOB 9/30/1921) of Arbor Place, 4413 Muncaster Mill Rd. Gaithersburg Md., immediately adjacent to the applicant's property.

The objection to the conditional use variance is based on the facts that Arbor Place residents are fragile, medically diagnosed, compromised individuals who will be negatively affected by the increase in noise, traffic, light pollution, dust & odors created by the proposal. The initial construction stage is sure to include all these negative aspects. Further, while the specific events to be held are unknown at this time, any latenight activity is sure to disturb the residents of Arbor Place who retire early, well before the proposed 10 an 11 pm closing times.

Permitting this use will cause undue harm to the residents of Arbor Place.

Thank you for your consideration.

ES Brower

3709 Martins Dairy Circle
Olney, MD
20832

Sent from my iPhone

From: [Jim&Paula](#)
To: [MCP-Chair](#)
Subject: Conditional Use No. CU202313: Associacao Cultural de Lingua Portuguesa, Inc. (Portuguese Community Center).
Date: Tuesday, June 20, 2023 9:44:28 PM

[EXTERNAL EMAIL] Exercise caution when opening attachments, clicking links, or responding.

To: Montgomery County Planning Board Chair

I am writing to express my opposition to the conditional use special exception to use the property as a “private club and service organization” intended for 4407 Muncaster Mill Road next door to Arbor Place.

My opposition is rooted in the concern for the health and wellbeing of the elderly Arbor Place residents. The people residing at Arbor Place are elderly, fragile, and often experience anxiety and agitation. My mother will be 102 this September and while she enjoyed dancing and music in her younger days, those days are long past.

Establishing a social club with events of up to 50 people will undoubtedly disturb the residents’ activities in their secure and calm facility. There will be a profound change to the neighborhood during events with increased traffic and noise.

I do not believe that the social club will moderate on-going noise from social gatherings next door. I do believe that the potential to negatively impact the quality of life of the Arbor Place residents is extremely high.

Thank you for considering my viewpoints and opposition in your decision process.

James Saviola, 3709 Martins Dairy Circle, Olney MD 20832

From: [Mitchell, Sandra \(NIH/NCI\) \[E\]](#)
To: [MCP-Chair](#)
Subject: RE: Thank you for your message
Date: Wednesday, June 21, 2023 2:39:39 PM
Attachments: [Arbor Place Letter Sandra Mitchell.docx](#)

[EXTERNAL EMAIL] Exercise caution when opening attachments, clicking links, or responding.

Attached please find my revised letter which now includes my mailing address, in accordance with your request below

Thank you—

Sandra Mitchell, PhD, CRNP, FAAN
Senior Scientist and Program Director
Outcomes Research Branch; Healthcare Delivery Research Program
National Cancer Institute

From: MCP-Chair <mcp-chair@mncppc-mc.org>
Sent: Wednesday, June 21, 2023 2:28 PM
To: Mitchell, Sandra (NIH/NCI) [E] <sandra.mitchell@nih.gov>
Subject: [EXTERNAL] Thank you for your message

Thank you for this message. If you have submitted written testimony for a Planning Board item, please be sure to include your mailing address to satisfy proper noticing requirements. You may provide this to MCP-Chair@mncppc-mc.org

For all other e-mails, Chair's Office staff will respond as soon as possible. If you need immediate assistance, please call our office at (301) 495-4605.

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and are confident the content is safe.

Montgomery Counting Planning Board

June 21, 2023

Subject: Opposition to application to obtain a conditional use special exception for 4407 Muncaster Mill Road as a "private club and service organization."

Dear Montgomery County Planning Board Chair,

I am writing to express my strong opposition to an application for a conditional use special exception for 4407 Muncaster Mill Road. This property is located next to Arbor Place which for the past 25 years has served Montgomery County families in providing care to a very fragile community of individuals with Alzheimer's Disease and other dementias. **I am providing my opposition to this both as the daughter of someone who was care for at Arbor Place for more than three years, and as a senior scientist and board-certified acute care nurse practitioner with more than 40 years of experience studying care delivery and providing care to seriously ill older adults including those at the end of life.**

I think that we can all agree that dementia is devastating diagnosis that severely impacts quality of life and participation/functioning, and that these individuals need to be cared for in an environment that is calm, therapeutic, ensures their safety, health and well-being and which helps to enhance their quality of life. This includes having access to a secure and calm backyard setting, free from noise, distracting conversations, or other sensory experiences that can be misinterpreted and cause fear or frustration. The environment at Arbor Place was carefully site selected and built to be enriching and therapeutic. Anxiety and agitation are common symptoms for residents. The reassurance by our trained staff and the specialized environment are essential to the well-being of each of our residents.

Having access to a safe, secure and calm outdoor space is critically important to the wellbeing and quality of life of someone with dementia. Moreover, noise and confusion are very distressing to anyone with dementia, and to some patients much more than others depending upon the area of the brain that is most affected. In my clinical experience, noises, and even just regular amounts of talking can be upsetting of those with dementia due in part to the prominent sensory changes that occur with dementia, including vision and hearing loss, together with illusions and misperceptions/misinterpretations of both sight and sound. As such, the noise that would result from approval of this community center would be extremely aversive.

Arbor Place is home to these residents and the setting is currently a peaceful and healing one. They currently do not experience loud on-going noises from group gatherings, barbeque cooking odors, worrisome smoke, and intermittent or bright artificial lighting at night. Some of the residents go to sleep early and many also nap during the day. The impact to each resident from creating a private club and service organization, with all of its attendant traffic, additional noise [including music and the noise of large gatherings both indoor and outdoor], will greatly impact the peace and tranquility necessary for the residents, and will result in serious negative consequences on their health and well-being. As such, **I am strongly opposed to approving the application to use 4407 Muncaster Mill Road as a "private club and service organization."**

If I can provide any additional information, or address questions, please do not hesitate to contact me at (301) 461-7609 or email sandra.mitchell@nih.gov

Sincerely,

Sandra A. Mitchell

Sandra A. Mitchell, PhD, CRNP, FAAN
Senior Scientist, Board-Certified Nurse Practitioner, and Daughter of a Former Arbor Place Resident
Home Address: 504 Saddle Ridge Lane Rockville, MD, 20850

From: [Kevin Kennedy](#)
To: [MCP-Chair](#)
Subject: comments on June 22 agenda item 10: Conditional Use- No. CU202313: Associacao Cultural de Lingua Portuguesa, Inc. (Portuguese Community Center)
Date: Tuesday, June 20, 2023 5:22:43 PM
Attachments: [Kennedy comments on CUP No. CU202313 Associacao Cultural de Lingua Portuguesa, Inc. \(Portuguese Community Center\).pdf](#)

[EXTERNAL EMAIL] Exercise caution when opening attachments, clicking links, or responding.

Dear Planning Board members,

I am submitting the attached comment letter (also copied below) relating to agenda item 10 - Conditional Use- No. CU202313: Associacao Cultural de Lingua Portuguesa, Inc. (Portuguese Community Center) - at this Thursday's meeting. As I note in my comments, my wife has Alzheimer's disease and lives in the Arbor Place Dementia Care home adjacent to the subject property. I believe that approving this conditional use permit could adversely affect the care and well-being of my wife and her fellow residents.

Kevin Kennedy

38 Maryland Ave, #617
Rockville MD 20850

I am writing to express my concern over the proposed conditional use permit for the Portuguese Community Center at 4407 Muncaster Mill Road. This proposed use has the potential to seriously affect the well-being of the residents of the Arbor Place Dementia Care home at 4413 Muncaster Mill Road, immediately next door to the proposed community center. The County should not allow an event center next to a dementia care home. My wife, who has advanced Alzheimer's disease, has lived at Arbor Place for almost five years. Penny and her fellow residents at Arbor Place are well served by the home's setting in a quiet residential neighborhood, and they enjoy (weather permitting) being able to make use of their backyard. If the community center were permitted and held events with loud music, that could greatly interfere with the care my wife and the other residents receive since those with dementia can be easily disturbed by loud noises. My wife and other residents also generally go to bed quite early, so events continuing even to 10pm or 11pm would likely interfere with their sleep.

Part of my concern comes from a lack of clarity on what activities would occur if the community center were permitted. The project description (on page 6 of the staff report) notes that the applicant "is proposing minimal weekday visits to help prepare for weekend meetings and events" without a description of the types of meetings and events planned, though "the vast majority of visits will occur on weekends and holidays." While the description says "most visits will involve less than 10 people" though certain events "would be expected to include between 11-49 persons," these do not appear to be firm limits on the number of people and do not give any indication on their frequency or whether they would include amplified music. I have seen large yard sales held at the site in the last year that have led to lots of cars parked

along the side of Muncaster Mill Road, including along the Arbor Place frontage, making it difficult and dangerous to go in and out of the Arbor Place driveway. That experience and the lack of detail in the project description leaves me very concerned that the site would have regular large gatherings that could go into the night if this conditional use permit is approved.

I do note the staff's recommended conditions on page 3 of the report, which would alleviate some (but not all) of my concerns. I am not clear, though, whether those conditions would place hard limits on the number of people on site and the number and type of events, and even if that is the intent of staff, whether those conditions have been accepted by the applicant and could easily be enforced.

As the Board considers this application, I urge you to pay attention to the needs of the residents of Arbor Place, which has been providing quality dementia care at that location for 25 years. Finding Arbor Place was a godsend for me since I know they take excellent care of my wife. It would be a shame to approve a new use in this quiet residential neighborhood that undermines the quality of care that Arbor Place provides. The county and the country need more places that provide quality dementia care – please do not undermine one of the best around.

Thank you,

Kevin Kennedy

June 20, 2023

Montgomery County Planning Board
2425 Reddie Drive
Wheaton, MD 20902

RE: Conditional Use- No. CU202313: Associacao Cultural de Lingua Portuguesa, Inc. (Portuguese Community Center)

Dear Board members,

I am writing to express my concern over the proposed conditional use permit for the Portuguese Community Center at 4407 Muncaster Mill Road. This proposed use has the potential to seriously affect the well-being of the residents of the Arbor Place Dementia Care home at 4413 Muncaster Mill Road, immediately next door to the proposed community center. The County should not allow an event center next to a dementia care home.

My wife, who has advanced Alzheimer's disease, has lived at Arbor Place for almost five years. Penny and her fellow residents at Arbor Place are well served by the home's setting in a quiet residential neighborhood, and they enjoy (weather permitting) being able to make use of their backyard. If the community center were permitted and held events with loud music, that could greatly interfere with the care my wife and the other residents receive since those with dementia can be easily disturbed by loud noises. My wife and other residents also generally go to bed quite early, so events continuing even to 10pm or 11pm would likely interfere with their sleep.

Part of my concern comes from a lack of clarity on what activities would occur if the community center were permitted. The project description (on page 6 of the staff report) notes that the applicant "is proposing minimal weekday visits to help prepare for weekend meetings and events" without a description of the types of meetings and events planned, though "the vast majority of visits will occur on weekends and holidays." While the description says "most visits will involve less than 10 people" though certain events "would be expected to include between 11-49 persons," these do not appear to be firm limits on the number of people and do not give any indication on their frequency or whether they would include amplified music. I have seen large yard sales held at the site in the last year that have led to lots of cars parked along the side of Muncaster Mill Road, including along the Arbor Place frontage, making it difficult and dangerous to go in and out of the Arbor Place driveway. That experience and the lack of detail in the project description leaves me very concerned that the site would have regular large gatherings that could go into the night if this conditional use permit is approved.

I do note the staff's recommended conditions on page 3 of the report, which would alleviate some (but not all) of my concerns. I am not clear, though, whether those conditions would place hard limits on the number of people on site and the number and type of events, and even if that is the intent of staff, whether those conditions have been accepted by the applicant and could easily be enforced.

As the Board considers this application, I urge you to pay attention to the needs of the residents of Arbor Place, which has been providing quality dementia care at that location for 25 years. Finding Arbor Place was a godsend for me since I know they take excellent care of my wife. It would be a shame to approve a new use in this quiet residential neighborhood that undermines the quality of care that Arbor Place provides. The county and the country need more places that provide quality dementia care – please do not undermine one of the best around.

Thank you,



Kevin M Kennedy

38 Maryland Ave, #617
Rockville, MD 20850

From: [Joyce Feinstein](#)
To: [MCP-Chair](#)
Subject: Planning Board hearing
Date: Tuesday, June 20, 2023 5:05:14 PM

[EXTERNAL EMAIL] Exercise caution when opening attachments, clicking links, or responding.

To: The Planning Board Chair

My husband has been a resident of Arbor Place for almost 2 years. I visit him everyday and love the peaceful environment he enjoys. Now that the weather is nice, we both benefit from walking around the beautiful and serene outdoors.

The atmosphere inside Arbor Place is peaceful as well with residents doing quiet activities and gentle music. Any disruption to the atmosphere inside Arbor Place could have damaging affects on the residents.

The proposed changes to 4407 Muncaster Mill Road will cause undue harm to our residents. The environment they are now enjoying will change to create excess noise and traffic and unwelcome odors.

I would hope you will consider the residents well being and not agree to a potential disruptive change in my husband's life as well as the lives of the other residents.

Thank you for your consideration to do the right thing.

Joyce Feinstein
529 Redland Blvd.
Rockville, Md 20850

Sent from my iPad

From: [Deborah Layn](#)
To: [MCP-Chair](#)
Subject: Written Testimony - June 22, 2023 Meeting
Date: Tuesday, June 20, 2023 4:14:11 PM

[EXTERNAL EMAIL] Exercise caution when opening attachments, clicking links, or responding.

Attn: Mr. Artie Harris, Chair, Montgomery County Planning Board

The following written testimony is submitted to the Montgomery County Planning Board for agenda Item 10, **Conditional Use No. CU202313: Associacao Cultural de Lingua Portuguesa, Inc. (Portuguese Community Center) - Public Hearing.**

My name is Deborah A. Layn, a Montgomery County resident living at 110 Fountain Green Lane, Gaithersburg, MD 20878. My interest in this matter is due to my mother, Martha J. Layn, being a resident of Arbor Place Residential Dementia Care ("Arbor Place"), 4413 Muncaster Mill Road, Rockville, MD 20853.

I oppose the Applicant's request for Conditional Use Approval to operate a Private Club/Service Organization at 4407 Muncaster Mill Road, Rockville, MD 20853 due to the following proposed conditions that will have an adverse effect on the residents of Arbor Place.
Condition 3. Special events each year on April 25th, June 10th, and October 5th are limited to 49 people.
Condition 5. Meetings and Events will end by 10 pm on weekdays and 11 pm on weekends.

Arbor Place is directly to the west of the Subject Property. The single family detached dwelling unit with an existing carport and patio is located on the west side of the Subject Property lot. The proposed social and meeting activities, illumination, parking and construction will occur on the west side of the Subject Property lot and adjacent to the property line with Arbor Place.

Screening on the west side of the property proposes evergreen trees. How effective will this type of landscape screening be at dampening noise? As the evergreen trees mature, how will this growth impact the abutting property?

Special events are expected to include up to 49 persons with only 12 parking spots onsite. How does the Applicant plan to accommodate parking for special events? Will special events take place in the dwelling or in the yard surrounding the dwelling? Will temporary event structures such as tents be allowed and what permits are required? How will attendance for special events be monitored to ensure compliance with the headcount condition? Will alcoholic beverages be served and does the applicant need a liquor license as a social club? How will underage drinking be monitored?

Meetings and events will end by 10 pm on weekdays and 11 pm on weekends. Is this harmonious with the abutting properties which are predominantly residential in nature? Events will end by these times but when will clean-up and other activity cease?

The east side of the property is planned as a conservation easement. Did the planning board consider this site characteristic of the Subject Property lot when determining compliance with the specific standard for Minimum Lot Area?

These questions are not answered by the Applicant or the Planning Staff in its review. Any further action on this matter should be delayed until answers are provided as part of the public record.

The Proposed Conditional Use No. CU202313 as written will result in unacceptable continuous noise and illumination lasting too late in the evening. Arbor Place's residents will no longer have peaceful enjoyment of their home - inside and outside. Yes, Arbor Place is their home, just like your home! Would you want a private club having meetings and social events until 10 pm or 11 pm as your neighbor?

From: [Kathy Schoshinski](#)
To: [MCP-Chair](#)
Cc: [Owens, James](#)
Subject: Conditional Use No. CU202313
Date: Tuesday, June 20, 2023 4:09:15 PM

[EXTERNAL EMAIL] Exercise caution when opening attachments, clicking links, or responding.

Montgomery County Planning Board Chair

This is relation to Conditional Use No. CU202313: Associacao Cultural de Lingua Portuguesa, Inc.

My mother suffers from Alzheimer's disease and has been a resident at Arbor Place Dementia Care in Rockville MD since June, 2022. Since coming to that facility, she has enjoyed peace and serenity and is so much calmer that she was before arriving. Our family is concerned that the proposed change to the adjoining property to Arbor Place will affect the peaceful atmosphere that is key to her living situation. We want to be respectful to all people, but loud noise, crowds and changes to her daily surroundings can be upsetting and distressing to her. We are hoping that Arbor Place is allowed to continue to provide a calm and supportive home for their family of residents.

Sincerely,

Kathleen Owens Schoshinski
6414 Battle Rock Dr
Clifton, VA 20124
703 915-0795

From: [Jeffrey Rosenbaum](#)
To: [MCP-Chair](#)
Subject: Conditional Use No. CU202313: Associacao Cultural de Lingua Portuguesa, Inc. (Portuguese Community Center)
Date: Tuesday, June 20, 2023 3:11:22 PM

[EXTERNAL EMAIL] Exercise caution when opening attachments, clicking links, or responding.

From: Jeffrey Rosenbaum
11 Island Ave Apt 1911
Miami Beach, FL 33139

Subject: Contitional Use No. CU202313 Associacao Cultural de Lingua Portuguesa, Inc
(Portuguese Community Center)

To: Montgomery County Planning Board,

Tranquility, dignity, quality of life and the love of nature are some of the many things my 96 year old mother cherishes as a resident of Arbor Place. The balanced therapeutic environment of it's indoor space is matched by it's secure and calm outdoor space. My mother regularly enjoys the peacefulness of the outdoors, whether in solitude, with other residents, or taking a restful nap. It's a calming influence that enhances her overall health. At 96 years, my mother looks forward to each day and the comfort and balance it brings her at Arbor Place.

I believe this proposed use will cause irreparable harm to my mother's well-being and adversely impact her quality of life. Take a moment and imagine yourself at 96 years old where every day is precious. The increase in traffic, loud ongoing noise from social gatherings and music, as well as artificial light, will have an adverse effect on my mother's remaining days.

I am firmly opposed to the conditional use of 4407 Conitional use at Muncaster Mill Road.

Sincerely,

Jeffrey Rosenbaum
Son and POA for my Mother who resides at Arbor Place

From: [Ernie Marcus](#)
To: [MCP-Chair](#)
Cc: [Madalyn Marcus](#)
Subject: Chair, Montgomery County Planning Board Chair re: Conditional Use No. CU202313
Date: Tuesday, June 20, 2023 11:40:49 AM
Attachments: [MNCPPC-MC Comments CU202313.pdf](#)

[EXTERNAL EMAIL] Exercise caution when opening attachments, clicking links, or responding.

See attached Letter in Opposition from Witness Madalyn A. Marcus re: The Associacao Cultural de Lingua Portuguesa, Inc.

Please confirm receipt of this email. Thank you.

Madalyn Marcus

Written Comments for Conditional Use No. CU202313. Associacao Cultural de Lingua Portuguesa, Inc. (Portuguese Community Center)

From: Madalyn A. Marcus, 5460 39th Street, NW, Washington, DC 20015
To: Montgomery County Planning Board Chair
mcp-chair@mncppc-mc.org

My mother, a Montgomery County resident for many years and a resident of Arbor Place Dementia Care for the past two years, has thrived there. Her physical and emotional health have dramatically improved since living at Arbor Place which I believe is in no small measure because of the unique environment that Dr. Fanburg has created and sustained. The peaceful setting seems to reduce anxiety of both residents and visitors.

While we understand that Arbor Place has neighbors who want to utilize their properties, the adjacent owner who is making this Conditional Use Special Exception application knew when they purchased the property what was allowed by-right and what uses would require zoning relief such as a conditional use special exception approval. The proposed Portuguese Community Center is not an appropriate use adjacent to the long existing Dementia Care facility. We make this statement based on the following major points:

Traffic: Even under the current usage, Arbor Care staff has observed vehicles attending events next door to be parking on both sides of Muncaster Mill Road and even on the property of Arbor Place. The proposed community center will further aggravate a dangerous situation.

Noise: The quietude of the peaceful setting of Arbor Place, both inside and outside, is critical for the community residents' health and welfare. There is a reason that families place their loved ones here residents come from all over the area – this is a critical, unique resource that should be protected. We are greatly concerned about noise disturbances emanating from next door, partly due to past experience with our neighbor's events.

Odors, Dust: It is my understanding that cookouts will be part of the events next door, creating odors which could very well bother and aggravate residents as they try to enjoy their beautiful outdoor space. This is one of the special qualities of Arbor Place that you can rarely find in other, more institutional settings.

Illumination: I am also greatly concerned at the lighting next door will cause disturbances to Arbor Place residents as they try to rest. It's important to understand the fragile nature of the residents who can be so aggravated by sleep disturbances that it constantly impacts their quiet enjoyment of the facility.

I am in OPPOSITION of the proposed conditional use special exception. Thanks for consideration of my comments.

Madalyn A. Marcus



From: [Jeff Wendel](#)
To: [MCP-Chair](#)
Subject: Written Testimony regarding Conditional Use No. CU202313 Associacao Cultural de Lingua Portuguesa Inc. Portuguese Community Center
Date: Tuesday, June 20, 2023 10:53:08 AM
Attachments: [Written Testimony. Conditional Use No. CU202313 Associacao Cultural de Lingua Portuguesa, Inc. Portuguese Community Center. June 20 2023.docx](#)

[EXTERNAL EMAIL] Exercise caution when opening attachments, clicking links, or responding.

Dear Montgomery County Planning Board Chair:

Attached is our written testimony regarding the Conditional Use No. CU202313 application. Thank you for your consideration of our testimony.

Best regards,

Jeffrey and Karen Wendel
16679 Bridle Ridge LN
Olney, Md 20832

Written Testimony

Conditional Use No. CU202313: Associacao Cultural de Lingua Portuguesa, Inc.
(Portuguese Community Center)

I am writing in opposition to the proposed conditional use application which insufficiently protects the welfare of a fragile community of cognitively impaired people that resides in a group home at 4413 Muncaster Mill Rd.

The current application inadequately addresses several items that would adversely impact this sensitive population. Significantly altering the magnitude and frequency of larger gatherings would change the tranquil and therapeutically beneficial environment currently enjoyed by the residents.

Specific areas of concern:

- The application does not indicate the type of events that will involve up to 49 people. Will those events be held outside (close to the Group home) or inside the facility? How does the applicant intend to limit participation to 49 people?
- Will the proposed barriers be sufficient to limit the amount of lighting caused by vehicles and event activity to impact the Group home?
- While the application provides 12 parking spaces, will that be adequate to accommodate 49 attendees, or will they seek additional parking on open areas on the site and/or Muncaster Mill Road?

For the past 25 years, this specially designed therapeutic facility and outdoor backyard garden at Arbor Place has provided a secure and calming environment for this cognitively impaired population. We appreciate your consideration of their unique needs.

Jeffrey and Karen Wendel
16679 Bridle Ridge LN
Olney, MD 20832

Family members of a current Arbor Place resident

Sent by email

From: [DEBORAH REISER](#)
To: [MCP-Chair](#)
Subject: Proposed Conditional Use No. CU202313: Associacao Cultural de Lingua Portuguese, Inc.
Date: Tuesday, June 20, 2023 9:10:10 AM

[EXTERNAL EMAIL] Exercise caution when opening attachments, clicking links, or responding.

Ladies and Gentlemen:

I write to express my concerns about the application for a proposed conditional use exception at 4407 Muncaster Mill Road.

My mother was a resident at the neighboring facility, Arbor Place, during the year before she died. It was important to me to find a placement that specialized in care for people suffering from dementia. That population has particularized and special needs: quiet, calm, peacefulness, absence of noise and outside stimulation, to name but a few.

At the time I was seeking a placement for my mother, if there had been a community center next door to Arbor Place with its attendant noise, traffic, partying and other obvious sensory stimulation, I would never have selected Arbor Place. Arbor Place's grounds, its tranquility, and its serenity were key factors in my choice.

I sincerely hope the Planning Commission will recognize the needs of the vulnerable population already present in this location, and that you deny the special exception.

Thank you for your consideration.

Deborah Reiser
11920 Renwood Lane
Rockville, Md.

From: [Nicholas Schor](#)
To: [MCP-Chair](#)
Subject: Fw: Conditional Use No. CU202313: Associacao Cultural de Lingua Portuguesa, Inc. (Portuguese Community Center)
Date: Monday, June 19, 2023 3:29:14 PM

[EXTERNAL EMAIL] Exercise caution when opening attachments, clicking links, or responding.

Dear Montgomery County Planning Board Chair,

I am writing to you regarding the above matter on behalf of my patients that reside at the Arbor Place Memory Care facility that is next door to the above referenced property.

I am a psychiatrist specializing in the assessment and treatment of people with dementia residing in supervised long term care facilities and my practice treats people in over fifty facilities in Montgomery County.

Speaking in general terms, people with dementia require specialized care in a calm, quiet environment. Excessive noise or other stimuli, especially that which occurs in the evening hours, can disrupt their delicate sleep/wake cycle and lead to distress and decline in this fragile population.

As it has been explained to me, the activities at the property referenced above could fall into this category, which would be detrimental to my patients.

Regards,
Nicholas J. Schor, MD, DFAPA
5004 Continental Drive, Olney, MD 20832
www.olneypsychiatry.com

CONFIDENTIALITY NOTICE

The information in this message (and associated attachments, if any) is confidential and may be legally privileged. It is intended solely for the addressee(s). Access to this message by anyone other than the addressee is unauthorized. If you are not the intended recipient, any disclosure, copying, distribution or other action taken, is prohibited and may be unlawful. If you have received this message in error, please notify the sender immediately and delete all electronic copies of this message (and associated attachments). Destroy any hard copies you may have created.

From: [George Liu](#)
To: [MCP-Chair](#)
Cc: [george liu](#)
Subject: Associcao Cultural de Lingua Portuguesa, Inc. (Portuguese Community Center)
Date: Monday, June 19, 2023 3:12:52 PM
Attachments: [MoCo Planning Board 2023.pdf](#)

[EXTERNAL EMAIL] Exercise caution when opening attachments, clicking links, or responding.

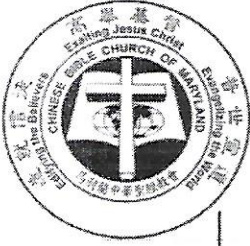
Dear Planning Board Chair,

Attached written comment is being submitted for consideration by the Board in its review of application concerning subject property.

Please note that the photo was taken after the Sunday morning rush. Hence, there wasn't much traffic on the road at the time. This photo was taken from one of two entry/exit of our property. The other entry/exit is located directly across from subject property.

Please let me know if any additional info. is needed by the Board.

Thank you,
George Liu
Overseer of Physical Facilities
Chinese Bible Church of MD



CHINESE BIBLE CHURCH OF MARYLAND

4414 MUNCASTER MILL ROAD, ROCKVILLE, MARYLAND 20853-1433
18757 N. FREDERICK AVENUE, GAITHERSBURG, MARYLAND 20879-3121
ROCKVILLE CAMPUS: 301-924-4855 GAITHERSBURG CAMPUS: 301-216-9598
WWW.CBCM.ORG

June 19, 2023

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Montgomery County Planning Board
2425 Reddie Drive
Wheaton MD 20902

Re: Associcao Cultural de Lingua Portuguesa, Inc.
(Portuguese Community Center)
4407 Muncaster Mill Road, Rockville
Hearing Date: June 22, 2023

Dear MoCo Planning Board,

The Portuguese Community Center (PCC) is located across from our Rockville campus on Muncaster Mill Road which is a busy two-lane roadway. This particular stretch of road is not only busy on weekdays during rush hours, it is also busy on Sunday morning due to several churches and worship places located within close proximity of each other. (see attached list of nearby churches/worship places)

On several occasions, PCC has held yard sale on their front yard on Sunday morning and disrupted normal traffic flow. Some passers-by even parked their cars in the acceleration/deceleration lane of our church and walked across Muncaster Mill Road in order to get to the yard sale. This resulted in dangerous conditions not only for the individuals crossing a busy roadway with traffic coming from both directions, it also posted a challenge for our congregants trying to enter or exit our parking lot.

We respectfully request that the Planning Board's approval of PCC's proposed Forest Conservation Plan and Conditional Use No. CU202313 be conditioned upon PCC not conducting any yard sale on Sundays from 9:30am to 1:00pm to prevent any traffic incidents. If PCC must have yard sale on a Sunday morning, then we respectfully request that it be held away from its front yard and that adequate parking spaces be made available on its own property so as not to cause illegal parking in our church's acceleration/deceleration lane.

Thank you for your consideration of our concerns. Should you have any questions regarding this matter, please do not hesitate to contact me at 301-924-4855 or george.liu@cbcm.org

Sincerely,

George Liu

Overseer of Physical Facilities

Attachment

Below is a list of churches/worship places located on both sides of subject property (4407 Muncaster Mill Road) within ½ mile distance:-

(Left side of subject property)

- 1) Iglesia Senda de Justicia (Korean Presbyterian Church)
4401 Muncaster Mill Road
- 2) Won Buddhist Temple
4253 Muncaster Mill Road
- 3) Hamere Berhan Kidus Yohannes (Ethiopian Orthodox Church)
4115 Muncaster Mill Road
- 4) St. Patrick Church
4101 Muncaster Mill Road
- 5) Mt. Pleasant Church
4021 Muncaster Mill Road

(Right side of subject property)

- 6) Rockville Nazarene Church
4500 Muncaster Mill Road
- 7) Ichthus Mission Church
4601 Muncaster Mill Road

(Below photo was taken 5/7/23 at 1:34pm. The car is parked in the acceleration/deceleration lane serving two entrance/exit of our property)



From: [Tanya Khazan](#)
To: [MCP-Chair](#)
Cc: [Walter Fanburg](#); [David Schwarz](#)
Subject: Conditional Use No. CU202313
Date: Monday, June 19, 2023 12:28:23 PM

[EXTERNAL EMAIL] Exercise caution when opening attachments, clicking links, or responding.

Re: Conditional Use No. CU202313: Associacao Cultural de Lingua Portuguesa, Inc. (Portuguese Community Center).

To Whom it May Concern:

I am writing to express my concern regarding the application for a conditional use special exception to use the property at 4407 Muncaster Mill Road as a “private club and service organization”.

My father is a resident at the neighboring property, Arbor Place. My brother and I were very careful in our choice of facility for our father. Arbor Place is an environment that provides calm and tranquility with a quiet and welcoming outdoor space and a feeling of complete safety. We currently have no worries about ambient noise, lighting or odor that could be very agitating and disorienting to my father, and other residents. We know that aside from the exquisite care provided at Arbor Place, the calm indoor and outdoor environment is crucial for my father’s wellbeing. It approximates the home environment that he came from, which made this a much easier transition in his life.

I sincerely hope that the Planning Board will consider the wellbeing of the residents, many of whom suffered greatly because of their decline before entering Arbor Place where their need for calm and predictability is honored.

Thank you.

Sincerely,

Tanya Khazan
3121 Walnut Ave
Owings Mills, MD. 21117

From: [Ronald Carleton](#)
To: [MCP-Chair](#)
Subject: Conditional Use No. CU202313: Associacao Cultural de Lingua Portuguesa, Inc. (Portuguese Community Center)
Date: Monday, June 19, 2023 9:45:22 AM

[EXTERNAL EMAIL] Exercise caution when opening attachments, clicking links, or responding.

Regarding: Conditional Use No. CU202313: Associacao Cultural de Lingua Portuguesa, Inc. (Portuguese Community Center).

I write in opposition to the conditional use application for 4407 Muncaster Mill Road. My 95 year old mother is a resident at Arbor Place which is next door to that property. She enjoys the quiet neighborhood and spending time in the backyard. I am afraid the conditional use permit would allow excessive noise well into the evening, create odors and dust that would carry onto Arbor Place's property, and cause parking problems in the neighborhood. This would severely negatively impact my mother's quality of life. I urge you to reject this application.

Ron Carleton
45 Pilgrims Progress Road
Rhinebeck, NY 12572
845-876-1704

From: [Michele Rosenfeld](#)
To: [MCP-Chair](#)
Cc: [Beall, Mark](#); [Butler, Patrick](#)
Subject: Conditional Use- No. CU202313: Associacao Cultural de Lingua Portuguesa, Inc. (Portuguese Community Center)
Date: Wednesday, June 21, 2023 8:54:09 AM
Attachments: [Outlook-b4lc1rn.png](#)
[2006.03.10 day care.denial.pdf](#)

[EXTERNAL EMAIL] Exercise caution when opening attachments, clicking links, or responding.

Dear Chairman Harris:

Please enter the attached Hearing Examiner's Opinion and Decision into the hearing record for this case. It relates to property abutting the Arbor Place Dementia Care and I will be referencing it during my testimony tomorrow.

Respectfully submitted,

Michele Rosenfeld
The Law Office of Michele Rosenfeld LLC
1 Research Court, Suite 450
Rockville MD 20850
michele@marylandpropertylaw.com
301-204-0913



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I. STATEMENT OF THE CASE

Petition SE 05-2, filed October 22, 2004, requests a special exception under the RE-1 Zone for a child day care facility, to be operated in an existing structure located at 4419 Muncaster Mill Road in Olney, known as Lot 3, Block A, Parcel A in the Sycamore Acres subdivision, Plat No. 2216.

Technical Staff of the Maryland-National Capital Park & Planning Commission ("M-NCPPC") reviewed the present petition and, in a report dated May 13, 2005, recommended *approval* with conditions. See Ex. 39. Staff submitted a supplemental report, responding to questions posed by the Hearing Examiner, on December 6, 2005. See Ex. 53. The Montgomery County Planning Board ("Planning Board") considered this petition on May 19, 2005 and voted 3 to 1, with one member absent, to recommend *denial* on grounds that Petitioner failed to demonstrate that the proposed facility would not have adverse effects on a geriatric care home abutting to the east, and would satisfy all of the general conditions applicable to special exception uses. See Ex. 40.

On December 2, 2004, the Office of Zoning and Administrative Hearings scheduled a public hearing in this matter before a Hearing Examiner for February 4, 2005. The hearing was later postponed to May 9, 2005 to allow Petitioner to submit additional and revised documentation needed for complete review of the case. The hearing was postponed again, to May 23, 2005, at the request of Counsel for Opposition party Geriatric Care Facility, and was indefinitely postponed on May 18, 2005 at the request of Petitioner, in response to notification from Geriatric Care Facility of its intent to call expert witnesses.

In response to a request made by Opposition counsel, the Hearing Examiner conducted a site visit on December 5, 2005, in the company of Opposition counsel and Petitioner's counsel. This site visit consisted of walking through the neighboring geriatric care facility, Arbor Place, to view its common room and adjoining garden, and touring the outside of the subject property.

On July 27, 2005, the hearing was rescheduled for December 9, 2005. A public hearing was convened after proper notice on December 9, 2005 and continued on December 12 and 16. Testimony and other evidence were received both in support of and in opposition to the proposed special exception.

Testimony, photographs and other documents that were submitted at the hearing demonstrated that the sign provided by the Office of Zoning and Administrative Hearings, which was required to be posted for the entire time period from the filing of the application until after a final decision, was not, in fact, posted properly. See Ex. 71; Tr. Dec. 12 at 60-65. The evidence indicates that the sign was posted in a manner that was not secure, resulting in it falling over repeatedly, and that Petitioner was less than diligent in reinstalling the sign promptly each time it fell.¹ The level of participation by nearby property owners indicates that adjoining and confronting property owners received actual notice of these proceedings. One letter submitted in opposition to the petition, however, stated that the writer had assumed that the hearing was canceled because she no longer saw the sign. See Ex. 54. As a result, she was unable to attend the hearing. To ensure adequate notice to the public, Petitioner was directed to post the sign securely and ensure that it remained continuously posted for a 30-day period. The record was held open during this 30-day period to permit comments by anyone viewing the sign. One letter was received at the very end of that period, necessitating a brief re-opening of the record to allow Petitioner to reply. The record ultimately closed on January 25, 2006. By Order dated February 23, 2006, the Hearing Examiner extended the time for submission of her report for two weeks, to March 10, 2006.

II. BACKGROUND

For the convenience of the reader, background information is grouped by subject matter.

A. The Subject Property and Neighborhood

The subject property consists of approximately one acre of land located at 4419 Muncaster Mill Road (MD 115), on the north side of the street, approximately 2,400 feet west of Norbeck Road and 1,350 feet east of Sycamore Lane. The property is rectangular in shape, with approximately 150 feet of frontage on Muncaster Mill Road, and is classified under the RE-1 Zone. It is

¹ Petitioner stated that the legs on the sign were too short, which was why it fell over frequently. The Hearing Examiner notes that signs are provided by this office without any legs or other support structure. It is up to the Petitioner to ensure that the sign is posted in accordance with the legal requirements, which require that the sign be at least 2 ½ feet off the ground. See Code § 59-A-4.43.

developed with a two-story brick and siding residential structure measuring approximately 2,200 square feet. The property is fairly flat, and is lightly landscaped with a few ornamental trees and shrubs planted very close to the building. The front and rear yards are primarily grass. The property has a 150-foot-long driveway that provides access to an attached two-car garage, and to the rear yard of the house. The driveway, which widens from 16 feet at the front to 38 feet closer to the house, can accommodate eight parked cars. The rear yard contains play equipment, four mature trees and a small shed.

The subject property abuts Muncaster Mill Road to the south, residential properties on large lots in the RE-1 Zone to the west and north, and a group home for Alzheimer's patients, also in the RE-1 Zone, to the east. Confronting across Muncaster Mill Road are the Chinese Bible Church and the Church of the Nazarene, which has a pre-school on site. The adjacent group home, referred to from this point forward as "Arbor Place," participated vigorously in opposition to this petition. The photographs that follow depict the subject property and neighboring land uses.

Front of Existing Residence on Subject Property, Ex. 59(a) top photo



Driveway and Parking Area, excerpted from Staff Report



**Rear Yard of Subject Property Looking East Towards Arbor Place
Ex. 59(f), page 2 of 2, top photo**



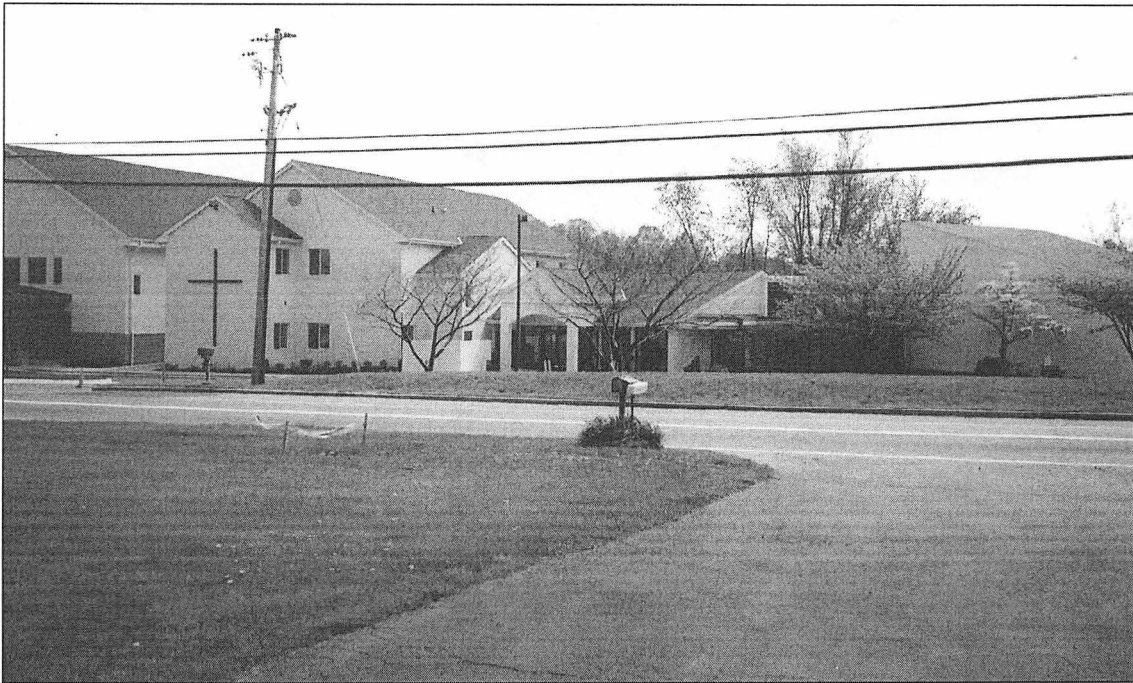
Existing Play Area in Rear Yard of Subject Property, from Staff Report



**View from Rear Yard of Subject Property Looking North
Ex. 59(f), page 1 of 2, bottom photo**



**View from Driveway of Subject Site towards Chinese Bible Church
across the Street, Ex. 59(c)**



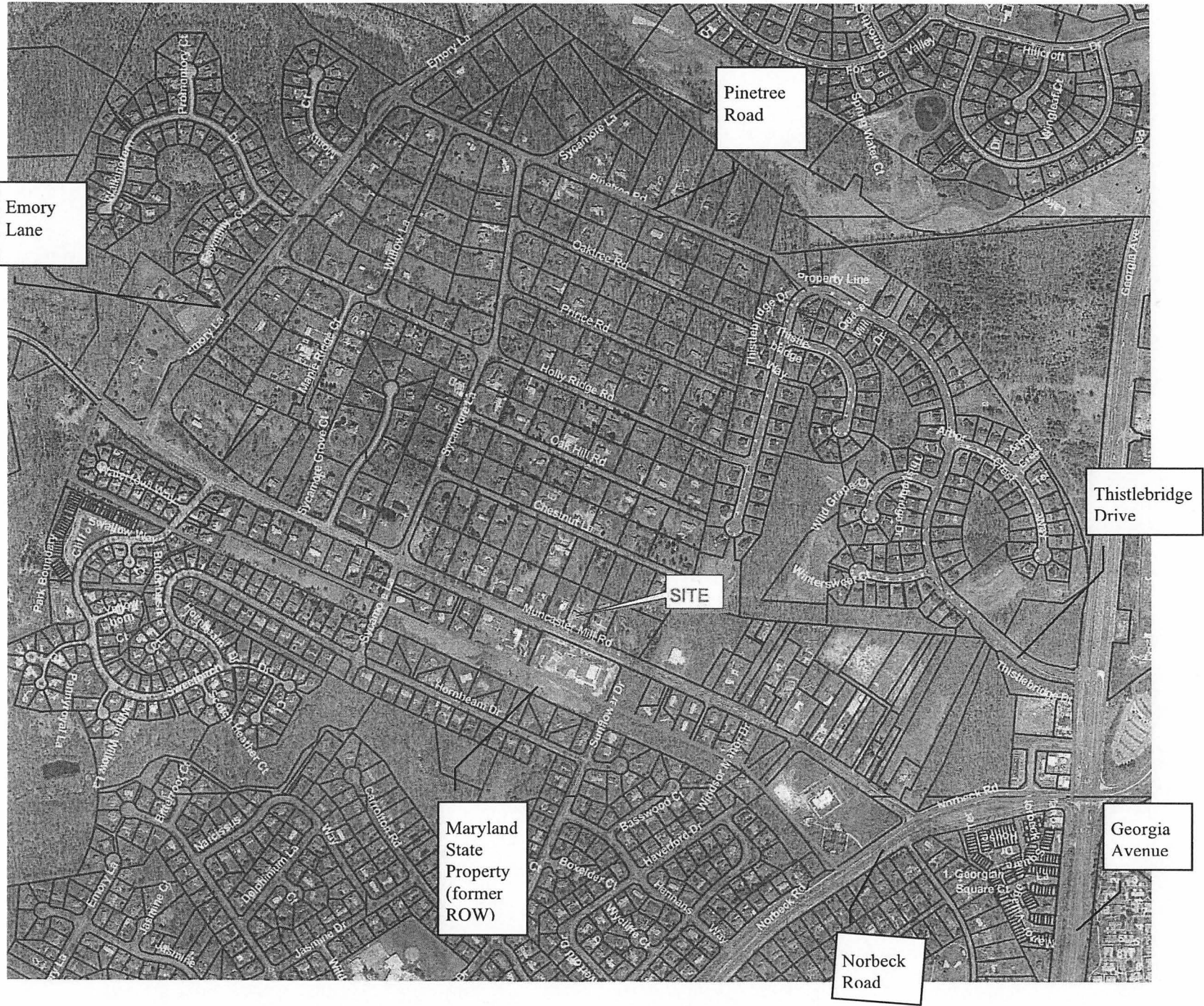
Arbor Place, Ex. 82(a)



Technical Staff described the neighborhood of the subject site broadly, extending generally from Pinetree Road on the north to Emory Lane on the west, property owned by the State of

Maryland to the south, Norbeck Road to the southeast, and Georgia Avenue and Thistle Bridge Drive to the east. Staff Report at 3. This area is identified on the aerial map below.

Aerial Photograph of Technical Staff' s Recommended Neighborhood, from Staff Report



Petitioner's land planner, Al Blumberg, who was designated an expert in land planning, opined that the "neighborhood" as described by Technical Staff was much too large, considering the modest size of the proposed day care center and the limited impacts to be expected. He recommended that the neighborhood be considered to include the area from Chestnut Lane on the north to property owned by the State of Maryland to the south (former road right-of-way), and along Muncaster Mill Road about 1,000 feet to the east (just past Windsor Manor Lane) and west (to Sycamore Lane) of the site. Tr. Dec. 9 at 88-90.

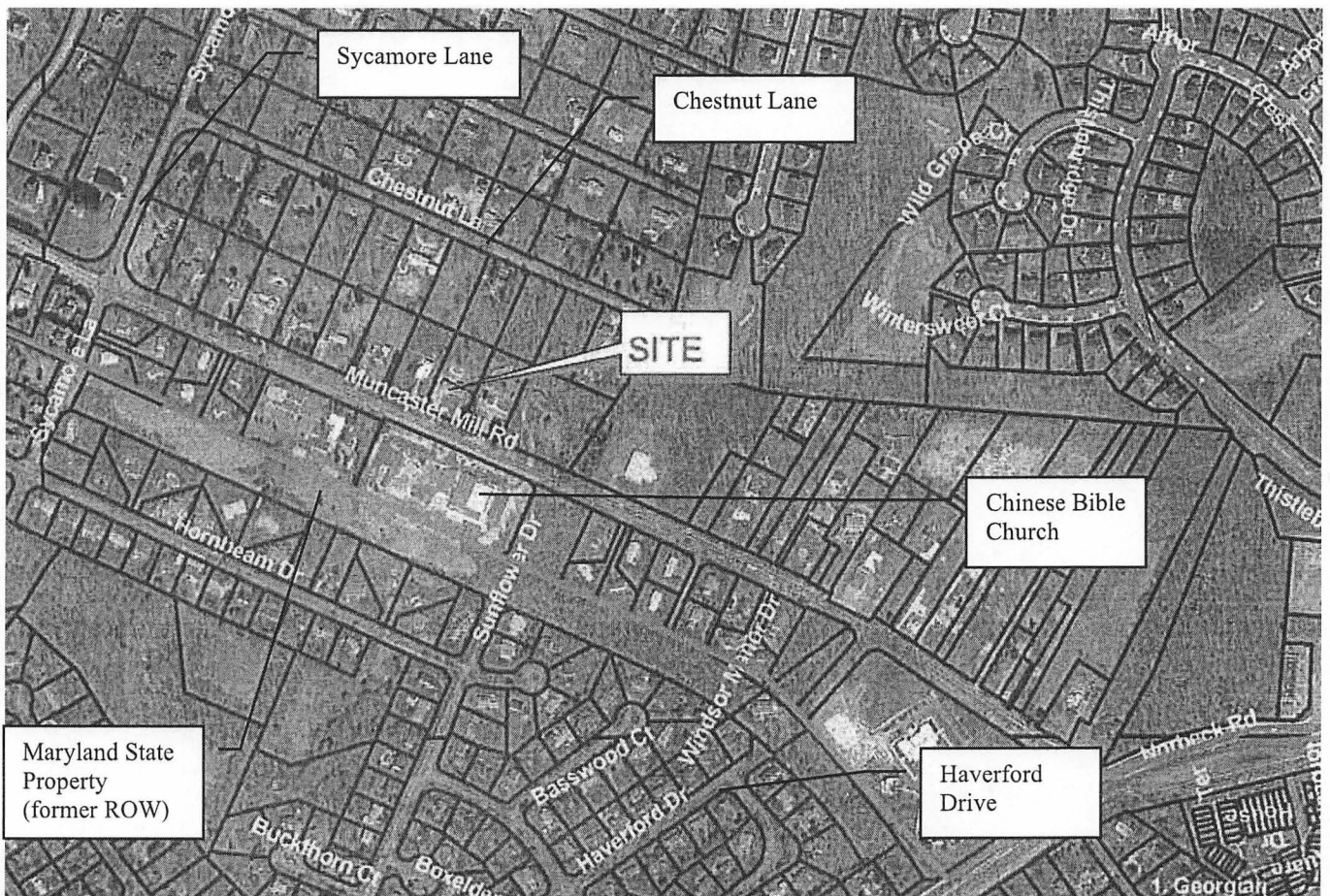
Arbor Place also presented a land planner, Kenneth Doggett, who was designated an expert in land planning. Mr. Doggett agreed with Mr. Blumberg's suggested neighborhood, except that he would extend the neighborhood to Norbeck Road on the east as a logical stopping point. Tr. Dec. 16 at 81.

The Hearing Examiner agrees with Mr. Blumberg and Mr. Doggett that the impacts of the proposed use would likely be unnoticeable in much of the neighborhood identified by Technical Staff, and would be most directly felt in the immediate vicinity of the subject site. Whether the eastern boundary is considered the 1,000-foot mark or Norbeck Road has no real impact on the analysis of the surrounding area. For the sake of simplicity, the Hearing Examiner draws a compromise: Mr. Blumberg's suggested neighborhood, with the eastern boundary at Haverford Drive, between Windsor Manor Lane and Norbeck Road. This area is shown on the aerial map on the next page.

The general neighborhood as thus described contains a mix of single-family homes and institutional uses, including a number of religious institutions. Within the general neighborhood, properties on the north side of Muncaster Mill Road and farther north are classified under the RE-1 Zone, which requires a minimum of one acre per lot. The south side of Muncaster Mill Road in the general neighborhood has a mix of RE-1 and R-200 zoning, with a number of homes developed in groups of four, located off of a common drive under the R-200 cluster option. Institutional uses include the Chinese Bible Church directly across the street, which has two large buildings and extensive parking lots (204 parking spaces); the Church of the Nazarene, diagonally across from the subject

property, which shares its lot with a Montessori School²; the former Norbeck Baptist Church, located at the northwest corner of the intersection of Sycamore Lane and Muncaster Mill Road, which is now known as the Ichthus Mission Church; and a worship center located east of the subject site on the north side of the road whose name is unknown (the signage is in an Asian alphabet, so no one involved in this case could read it). Three additional religious institutions are located on Muncaster Mill Road just east of the general neighborhood, closer to Norbeck Road (MD Route 28).

**Aerial Photograph of General Neighborhood Adopted by Hearing Examiner
Photo Adapted from Staff Report**



² There was much discussion among counsel and witnesses about whether a special exception that the Board of Appeals once issued for this Montessori School is still in effect, how many children attend the school, and exactly what the physical facilities consist of. See Tr. Dec. 12, 13-21. The Hearing Examiner found these discussions inconclusive (because the available records simply do not reflect with any degree of accuracy what the current conditions area) and largely immaterial. The impacts of the proposed child day care center and its compliance with the applicable legal requirements can be fully assessed without a high level of detailed information about this nearby Montessori School.

B. Master Plan

The subject property is in the area covered by the *2005 Olney Master Plan* (the "Master Plan"). Technical Staff reports that the Master Plan does not provide specific guidance regarding child day care centers or the subject site. Staff Report at 6. Staff notes, however, that the Master Plan's general guidance states that special exception projects "should be compatible with the development pattern of the adjoining uses in terms of height, size, scale, traffic and visual impacts of the structures and parking." *Id.* at 6. They note, moreover, that the Master Plan recommends minimizing "the negative impacts of special exception uses such as non-residential character, visibility of parking lots, excessive size, height and scale of buildings and intrusive lighting." *Id.*

Technical Staff observes that the existing home on the subject property is somewhat larger than the adjacent residence to the west, somewhat larger than the adjoining residence to the north, significantly smaller than Arbor Place to the east, and much smaller than the Chinese Bible Church across the street. In view of the sizes of neighboring structures, Staff concludes that the proposed use would be compatible with the existing development patterns of adjoining uses. *Id.* at 16. This implies, at least, that Staff considers the proposed use to be consistent with the Master Plan. Mr. Blumberg similarly opined that the proposed use would be consistent with the Master Plan, based on its general guidance concerning special exceptions. Tr. Dec. 9 at 82.

Opposition counsel, representing Arbor Place, cited additional Master Plan guidance recommending that future special exception uses with the potential to create a commercial appearance along major roads should be discouraged. Mr. Blumberg opined that the only "major road" in the planning area is Georgia Avenue, and that the proposed use would not create a commercial appearance, because the building would continue to be residential in appearance. Tr. Dec. 9 at 82-85.

C. Proposed Use

Petitioner currently provides child care at the subject property as a “group day care home” for not more than 12 children, which is permitted by right in the provider’s home.³ See Code §§ 59-C-1.31(d); 59-A-2.1. This day care center operates under the name “Pathway Child Development Center at Greta’s Place,” and typically has six to eight children in attendance on an average day (several come less than five days a week). Tr. Dec. 12 at 43, 228. Petitioner described her background, which includes bachelor’s and master’s degrees, twenty years of teaching experience, and 11 years of running a child day care center at five different locations in Montgomery County. In addition to the small day care center at the subject site, Ms. General currently operates a Pathway Child Development Center in Montgomery Village, which is licensed for 99 children up to the age of 12.

Petitioner now seeks approval to operate a child daycare center at the subject property with an enrollment of no more than 30 children and no more than 28 children on site at any one time.

³ Petitioner states that the subject property is her residence. Opposition counsel submitted substantial documentary evidence and elicited testimony tending to suggest that Petitioner does not, in fact, reside at the subject property. See Exs. 72-75. Petitioner owns a total of three residences in the eastern/north part of the County: the subject site on Muncaster Mill Road, a larger house close by on Minuteman Drive, and a condominium unit in Montgomery Village. Each one is described in state tax records as her principal residence, which Ms. General explained is the way the state system accounts for all properties that are not rentals, including properties in which family members reside. Ms. General stated that she bought the two additional homes for her two daughters, but later admitted that one of her daughters was no longer living in the Minuteman Drive house, which had been her residence. Ms. General admitted that she receives her mail at both the Minuteman Drive house and the condominium, her car is registered at the Minuteman Drive address, and her driver’s license lists the Minuteman Drive address as her residence (she in fact changed the address listed with the Department of Motor Vehicles from Muncaster Mill Road to Minuteman Drive when she renewed her driver’s license in November, 2005). Tr. Dec. 12 at 76-90. In addition, Eileen Fanburg, who runs Arbor Place with her husband, Dr. Walter Fanburg, testified that on May 16, 2005, she called the telephone number of the subject property and inquired about the availability of child care services. Tr. Dec. 16 at 74. She spoke with someone who identified herself as the owner’s daughter, Zina. When Ms. Fanburg asked whether anyone lived in the house, she was told that no one lives there, and that Zina locks up every night. *Id.* at 74-75.

In the face of persuasive evidence that Ms. General does not reside at the subject property, and Ms. General’s failure to provide any convincing testimony to the contrary, the Hearing Examiner concludes that Ms. General does not reside at the subject property. As a result, she is not authorized under the Zoning Ordinance to provide any child day care services at that location under present circumstances. Opposition counsel argued that this fact should be the basis for an inference that, if the proposed special exception is granted to permit a larger day care center, Petitioner will show a similar disregard for land use regulations and will not abide by the conditions of the special exception, e.g. by limiting outdoor play to the number of children and hours represented in this hearing. The fact that Ms. General appears to have provided false information about her residence at the subject site to the Hearing Examiner, Technical Staff and her counsel reflects negatively on her general credibility. Having found sufficient other grounds to deny the requested special exception, however, the Hearing Examiner finds it unnecessary to draw any conclusions as to whether (i) Petitioner’s current violation of the Zoning Ordinance implies a likelihood that she would not abide by operating conditions that might be imposed as part of a special exception, or (ii) such an inference is an appropriate basis for denial of a special exception.

As a special exception, there would be no requirement for the provider to reside on site. No changes are proposed to the exterior of the building.

Petitioner intends to enroll children from the age of six weeks to five years old. Proposed hours of operation are 7:00 a.m. to 6:30 p.m., Monday through Friday. Petitioner intends to employ a total of eight staff members, including herself, but to have no more than six staff members on site at any one time. Although the exact numbers, ages and schedules of the children cannot be stated with certainty, Petitioner anticipates that arrival/departure times for staff and children would follow a schedule such as that shown below (see Ex. 70; Tr. Dec. 12 at 48-50):

Time	Children Present	Total Children	Staff Present
7-7:30 a.m.	1 infant	1	2
7:30 – 9:30 a.m.	9 infants + 1 toddler grouped together 5 two-year-olds 6 pre-schoolers	21	5
9:30 a.m. – 1:00 p.m.	12 infants 6 two-year-olds 10 pre-schoolers	28	6
1:00 – 3:00 p.m. Naptime, fewer staff required	Some part-time children arrive/depart	28	5; some part-time staff arrive/depart
3:00 – 4:30 p.m.		28	6
4:30 to 5:00	Some children depart	25	5
5:00 – 6:00 p.m.	More children depart	13	3
6:00 – 6:30 p.m.	Remaining children and staff depart		

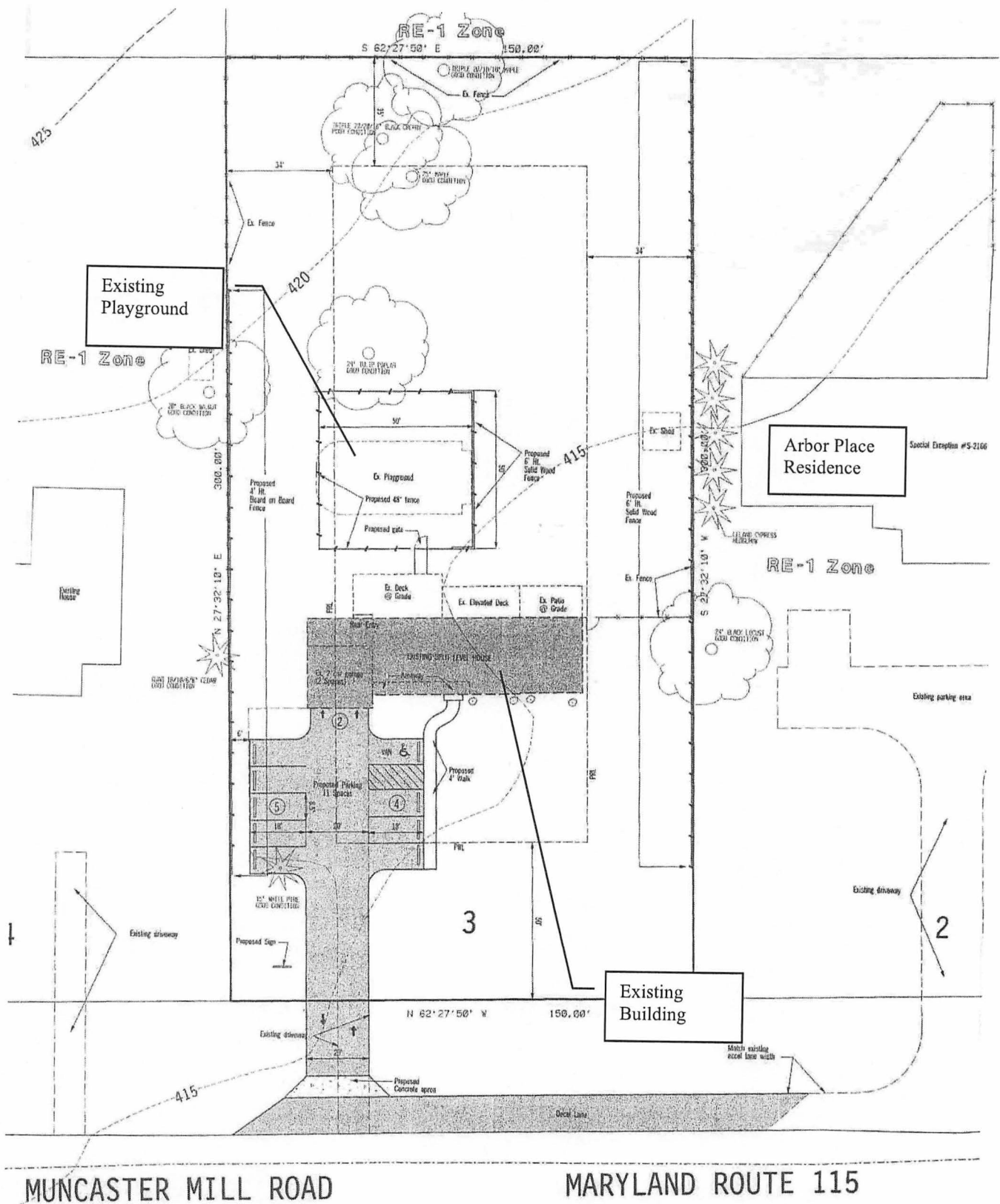
Ms. General testified that staffing would comply with State-mandated ratios of staff members to children: one staff member for every three infants (six weeks through 24 months); one staff member for every six two-year-olds (24 to 36 months); and one staff member for every ten children ages three, four and five. When asked how she balances the ages of the children and the number of staff, she emphasized that she does not accept more infants than her staffing allows, and she adjusts her staffing if arrival or departure times change. Ms. General noted that some age groups can be combined, particularly at the start and end of the day when there are fewer children. Infants and two-year-olds might be combined, for example, or two-year-olds might be combined with older pre-schoolers.

Regarding arrivals and departures of the children, Ms. General observed that based on past experience and the ages planned for this location, she expects only a few children to arrive before 7:30, with most arriving between 7:30 and 9:30, and a few more arriving by bus from the local elementary school pre-school program at midday. Departures would start after nap-time in the afternoon, with the number of children decreasing between 4:30 and 5:00 p.m. and again between 5:00 and 6:00 p.m. Ms. General testified that drop-off and pick-up are typically very quick, three to five minutes for infants and a minute or two for pre-schoolers. Tr. Dec. 12 at 120.

Outdoor play at the proposed child day care center would be limited to groups of no more than ten children at one time, with careful supervision at all times. Petitioner proposes specified outdoor play times of 10:00 to 11:30 a.m. and 3:30 to 4:30 p.m. All outdoor play would take place within a fenced play area behind the house. The property has a very large backyard, which currently has some playground equipment in the middle, surrounded by mulch and a circular sidewalk. As shown on the site plan on the next page, Petitioner proposes to create an enclosed 50-foot square area, with the playground equipment in the center, by installing chain-link fencing on three sides and solid wood fencing on the east side, facing Arbor Place.

Petitioner explained that for outdoor play, the children would go out one class at a time, 30 minutes per class. One group would consist of infants, limited to six infants at a time because of the number of staff and strollers available. The infants would be walked around in double strollers for five or ten minutes, then the staff would bring the first group of infants inside and get another group, who would get their ten minutes in the stroller. All of the infants would share a 30-minute time slot outdoors. See Tr. Dec. 12 at 102-106. The toddler group, 24 months to 36 months, would get 30 minutes, and so would the three-to-five-year-old group. In all cases, Ms. General emphasized that there would be no more than ten children outside at one time, with supervision, and they would be restricted to the fenced play area. She noted that a small plastic slide for toddlers is currently on a patio near the house, but will be transferred to the fenced play area if the special exception is approved.

Site Plan, Ex. 62, graphics only
(See next page for notes)



Site Data and General Notes from Site Plan, Ex. 62

SITE DATA

1. Gross Area: 1.03 Acres
2. Lot 3, Block A, Sycamore Acres
3. Zoned RE-1
4. Proposed Land Use = Child Day Care for up to 30 children
(Special Exception 59-G-2.13.I(a))
5. Area of Existing Forest Cover: 0
6. There are no streams, stream buffers, 100 year floodplain areas or non-tidal wetland areas on or adjacent to the subject property.
7. Watershed: Upper Rock Creek
8. There are no steep slopes (over 25% gradient) on the subject property.
9. There are no slopes over 15% gradient containing erodible soils on the subject property.
10. Parking:

	Required	Provided
Children (30) (1 space per 6)	5	5
Teachers (Max. 6 on site at any one time)	6	6
Total	11	11
11. Hours of operation:
Monday - Friday: 7:00AM to 6:30PM

WAIVER REQUESTED FOR FRONT AND SIDE YARD PARKING SETBACK

General Notes

1. This property is exempt from Montgomery County Article 22 Forest Conservation Regulations per Exemption #4-05066E, issued September 22, 2004 by M-NCPPC.
2. Boundary and on-lot surface feature information from survey by Haller-Blanchard & Associates, Frederick, Md., dated May, 2003
3. This lot located in Plat Book 34, Plat #2216.
4. Topographic data and off-lot surface feature information from M-NCPPC digital files - Tile # 221NW4.

D. Vehicular Access and Parking

The subject site currently has vehicular access via a driveway on Muncaster Mill Road. The driveway is currently approximately 16 feet wide at the entrance and 38 feet wide closer to the house, accommodating eight parked cars. The proposed site plan, reproduced on page 16 above, shows a slight widening of the driveway entrance to 20 feet, and additional pavement in the front yard to create enough space for eight standard parking spaces, one handicapped accessible space and a 20-foot drive aisle, plus two spaces in the garage. The site plan also shows the addition of a concrete apron and a deceleration lane in the right-of-way for Muncaster Mill Road, which would allow cars to get out of the westbound travel lane before slowing down enough to turn into the driveway. There is not enough room for an acceleration lane headed west for exiting cars, because the driveway is so close to the western property line. Mr. Blumberg stated, moreover, that the State Highway Administration ("SHA") did not call for an acceleration lane. The deceleration lane would connect with the existing deceleration/acceleration lane in front of Arbor Place to the east. Technical Staff notes that Petitioner would require SHA approval for the driveway improvements shown within the right-of-way for Muncaster Mill Road, which is a state roadway.

Mr. Doggett raised concerns about the vehicular access shown on the site plan. Tr. Dec. 16 at 98. He anticipates clashes between vehicles exiting Arbor Place, using the 12-foot-wide acceleration lane to accelerate onto Muncaster Mill Road, and vehicles coming to the child day care center, which would need to use the same connected 12-foot lane to decelerate and enter the site. Mr. Doggett also considers it problematic that the child day care center would not have an acceleration lane, which he considers more important than a deceleration lane. Moreover, he feels that the deceleration lane, connecting to the existing deceleration/acceleration lane in front of Arbor Place, would in effect create a third lane of traffic on Muncaster Mill Road and detract from the residential appearance of the area. Mr. Doggett noted a consistent appearance along Muncaster Mill Road to the west of the subject site, with a swath of open space on each lot and a culvert abutting the road. He finds that the 20-foot width proposed here for the driveway, as well as the deceleration lane and the

intrusion of the proposed parking lot into the front yard setback, would give the subject site an appearance inconsistent with the single-family residential character of the lots to the west. *Id.* at 110-112.

The parking lot presents three issues: sufficient spaces to provide for drop-offs and pick-ups; setback waivers; and lighting. Each will be addressed in turn.

Number of spaces. The proposed parking lot and existing garage provide for the minimum number of parking spaces required under the Zoning Ordinance, which is 11 spaces: one space for each staff member (six on site at one time) and one space for every six children enrolled ($30/6 = 5$). Petitioner's land planner, Al Blumberg, opined that 11 spaces would be sufficient. He based this opinion on the operational information supplied by Ms. General, as well as on his experience with other child day care facilities that he has worked on over the years. He noted, as confirmed by Ms. General's testimony, that unlike a school with a fixed starting time, children at day care centers arrive at staggered times. Moreover, as a general matter, each car stays only a few minutes. In response to a question from the Hearing Examiner, Mr. Blumberg noted that if all of the parking spaces were full when a parent arrived – which he considers unlikely – there would be room for two cars to wait in the driveway, and a third in the portion of the right-of-way that lies outside the travel lanes. Mr. Blumberg stated that the ratio of one parking space for every six children has worked at other locations in the County and there is no reason to think that the use proposed here would not have the same distribution pattern. He did acknowledge that there is no on-street parking at this location because the shoulders of the roadway are taken up by large drainage ditches.

Mr. Doggett considers the number of parking spaces extremely tight, with only four spaces available to non-handicapped parents when all six staff members are present. Mr. Doggett has found that parents pick up their children at day care centers in bunches, related to their work hours. He anticipates that six or seven cars could arrive at once, and some would end up parking in the 20-foot drive aisle, allowing only one-way movement and potentially leading to cars standing in the road right-of-way. This, in turn, could lead to conflicts with cars exiting Arbor Place.

Mr. Doggett also finds the 20-foot width between the two rows of parking spaces quite tight, although he realizes that is the county standard. Mr. Doggett's practice is to provide for a minimum of 22 feet, and even that is less than the 25 feet recommended by "Timesaver Standard," which he described as the architect's Bible for site layouts.

Technical Staff opined that the proposed site plan would provided an adequate area for the discharge and pick up of children, noting that the number of spaces complies with the minimum required under the Zoning Ordinance. Staff Report at 13; Supplemental Staff Report, Ex. 53. Staff did not, however, offer any analysis or support for this conclusion. *See id.* Transportation Planning Staff stated that the parking layout would have to be reviewed by the Montgomery County Department of Permitting Services ("DPS") prior to use and occupancy. *See* Transportation Planning Staff Memorandum of April 18, 2005, attached to Staff Report. This is at odds, however, with the experience of counsel and the Hearing Examiner, which suggests that in the case of special exceptions, DPS defers to the decision-maker to determine the adequacy of the proposed parking lot layout and impose whatever conditions are deemed appropriate. *See* Tr. Dec. 12 at 5-6.

Setback waivers. The location proposed for the parking lot builds on the location of the existing driveway and parking area, which are, naturally, aligned with the garage. This location does not, however, comply with applicable setback requirements. The minimum side yard in the RE-1 Zone is 17 feet, and a special exception in a residential zone must provide double the normal side yard setback. In this case, that calls for a 34-foot side setback. As shown on the site plan, however, Petitioner proposes to maintain the western edge of the existing parking area, which is about six to eight feet from the western property line, requiring a 28-foot waiver of the side yard setback. The front setback applicable to this parking lot requires it to be set back a minimum of 50 feet from the right-of-way for Muncaster Mill Road; as proposed, the parking lot would be 42 feet from the property line, requiring an eight-foot waver of the front yard setback.

Mr. Blumberg testified that alternative locations were considered for the parking lot, such as behind the house. This would have placed the parking closer to Arbor Place, without the building in

between as a noise and visual buffer. Moreover, it would have required extending the driveway around the side of the house, still violating the side yard setback requirement and resulting in a greater amount of impervious surface on the site. Alternatively, putting the parking lot in the middle of the front yard to achieve two 34-foot setbacks would obscure the residential appearance of the house. For these reasons, the site plan proposes to keep the existing pavement and extend it farther into the front yard.

To mitigate potential adverse impacts on the adjacent residence to the west, Petitioner proposes a board-on-board wooden fence along the western property line, and substantial evergreen screening of the parking lot. As shown on the Landscape Plan on the next page, the parking lot would be edged along the north, east and west sides with evergreen trees, and would have red maples in three of the four corners.

Mr. Blumberg testified that one might be able to see into the parking facility from Muncaster Mill Road, looking straight down the driveway, but that the primary visual impression for passer-by would be from the evergreens, which he characterized as typical for residential landscaping. Petitioner proposes a four-foot wooden fence along the western property line, rather than the typical six-foot fence, out of deference to her western neighbor, Theresa L. Grubbs. Ms. Grubbs states in a letter that for the past 53 years, she has enjoyed looking out her east-facing bedroom window to watch “spectacular sunrises, snowfall or whatever landscape God and nature had decreed.” Ex. 42. She asks that the boundary have only shrubbery or a low, decorative fence to preserve her ability to see the landscape, and to witness the children’s enjoyment of outdoor play. Ms. Grubb states that she sees no need for a tall fence, especially as a noise barrier, since there is no noise evident. *See id.*

Mr. Blumberg opined that the requested parking setback waivers should be granted. He noted that only one new parking space would be placed within the 50-foot setback, and that potential impacts on the adjacent residence to the west would be mitigated by fencing and landscaping. Noting that the Hearing Examiner is authorized to grant parking setback waivers if the objectives of Section 59-E-4.2 are satisfied, he opined that those objectives – protecting the health, safety and welfare of those using adjoining land and public roads, and providing for safe circulation within the parking facility and

Landscape Plan Notes, from Ex. 63

PLANT LIST

Key #	Botanical Name	Common Name	Size*	Quantity	Remarks
1	Acer rubrum 'October Glory'	October Glory Red Maple	3.5"-4" cal.	6	B & B, well formed canopy
2	Thuja occidentalis 'Emerald'	Emerald Arborvitae	5' - 6' ht.	31	B & B only, plant 4' o.c.
3	Cupressocyparis leylandii	Leland Cypress	5' - 6' ht.	12	B & B only, plant 10' o.c.

SIZE* All plant material specified on this plant list shall conform to size, root condition, ball dimensions, spread / height, etc., as specified in "American Standard for Nursery Stock" (ANSI Z60.1), most recent edition, published by the American Nursery & Landscape Association, Washington, D.C.



Parking Facility Shade (Par Sec. 59-E-2.83(d) of Mont. Co. Zoning Ordinance)

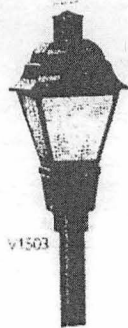


Graphic symbol for shaded areas (15 yr. tree growth)

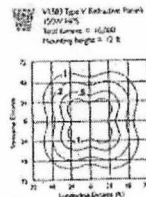
Area of parking facility pavement on-site: 3,380 sq.ft.
 Required Minimum 30% Shade Area: 1,015 sq.ft.
 Shade Proposed:
 1,200 sq.ft. (3 proposed Red Maples - 36' dia. canopy in 15 years - based on "Trees Technical Manual" 48' dia. in 20 years)
 TOTAL SHADE AREA = 1,200 sq.ft. (36%)

Proposed Exterior Lighting

-  Decorative residential post / light - 8' height: 1 proposed
-  Wall Mounted Light: 2 proposed



INDEPENDENCE V1503
HORIZONTAL FOOTCANDLES



Luminaire
 HADCO Model V1503, "Independence", 8' Pole Height, 100W Incandescent or up to 40W Fluorescent (or equal)

Luminaire Photometrics
 Photometrics shown above for 150W High Pressure Sodium. Actual 0.1 footcandle isolux line will not exceed above value and will be substantially less measured horizontally from fixture.

Wall Mounted Light
 Fixture to be Dramatex 800 Series, mfr. by Diversified Lighting (www.dvlighting.com); #WMD, 2/18D11 - two 18W double twin tube fluorescent (or equal). Fully enclosed bulbs, 350 degree shielding, down aimed.

proper location of entrances to prevent traffic congestion – would be satisfied in this case. Tr. Dec. 9 at 79-80. Mr. Blumberg stated that the landscaping and fencing would screen the abutting property from automobile-oriented impacts such as noise, glare, light and fumes, and that the parking lot would be safe for pedestrians because it would have adequate lighting and a direct connection to the main building entrance. He noted that the deceleration lane would provide for safe access from the adjacent roadway, the sight distances are more than adequate, and the minimal amount of traffic using this driveway would not have an adverse impact on Muncaster Mill Road.

On cross-examination, Mr. Blumberg opined that the proposed parking lot would have no adverse effect on the adjoining property to the west because the fencing and landscaping would provide effective separation and screening. Tr. Dec. 9 at 181-82. He readily admitted that he is not a noise expert, noting that his opinion is based on standard land planning principles and on the advice of the Petitioner's noise expert in this case. Mr. Blumberg agreed that a solid wall is much more effective as a noise barrier than a single row of trees. He conceded that the fence proposed along the western property line would be a board-on-board wood fence, which he had explained earlier in the hearing has gaps between the boards, and therefore lets more noise through than a solid wood fence. Mr. Blumberg agreed that given the location of the existing garage, which intrudes into the middle of the 34-foot setback area, there is no way to avoid the need for a waiver from the setback requirements and still be able to use the garage. *Id.* at 183.

Mr. Doggett opined that the requested waiver from the side yard parking lot setback would place the parking lot too close to the neighboring property to the west. He stated that even with the screening, the neighboring house would be impacted by noise, and by light from car headlights deflecting off of buildings. Tr. Dec. 16 at 95. Mr. Doggett explained that the reason the Zoning Ordinance requires twice the normal side yard setback for special exception parking lots is to avoid disturbing the peace and tranquility of the people next door with noise, lighting and general activity. In his view, the proposed fencing and plantings would not provide the same buffering and protection as a 34-foot setback – normally, the 34-foot setback would include plantings as well, as an aesthetic screen.

Mr. Doggett anticipates that the neighbor to the west would easily be able to hear slamming car doors and engines turning on, particularly given that her house sits close to the shared property line. Moreover, with a board-on-board fence, headlights from cars pulling into spaces would be visible next door, reflecting off of the day care center building.⁴

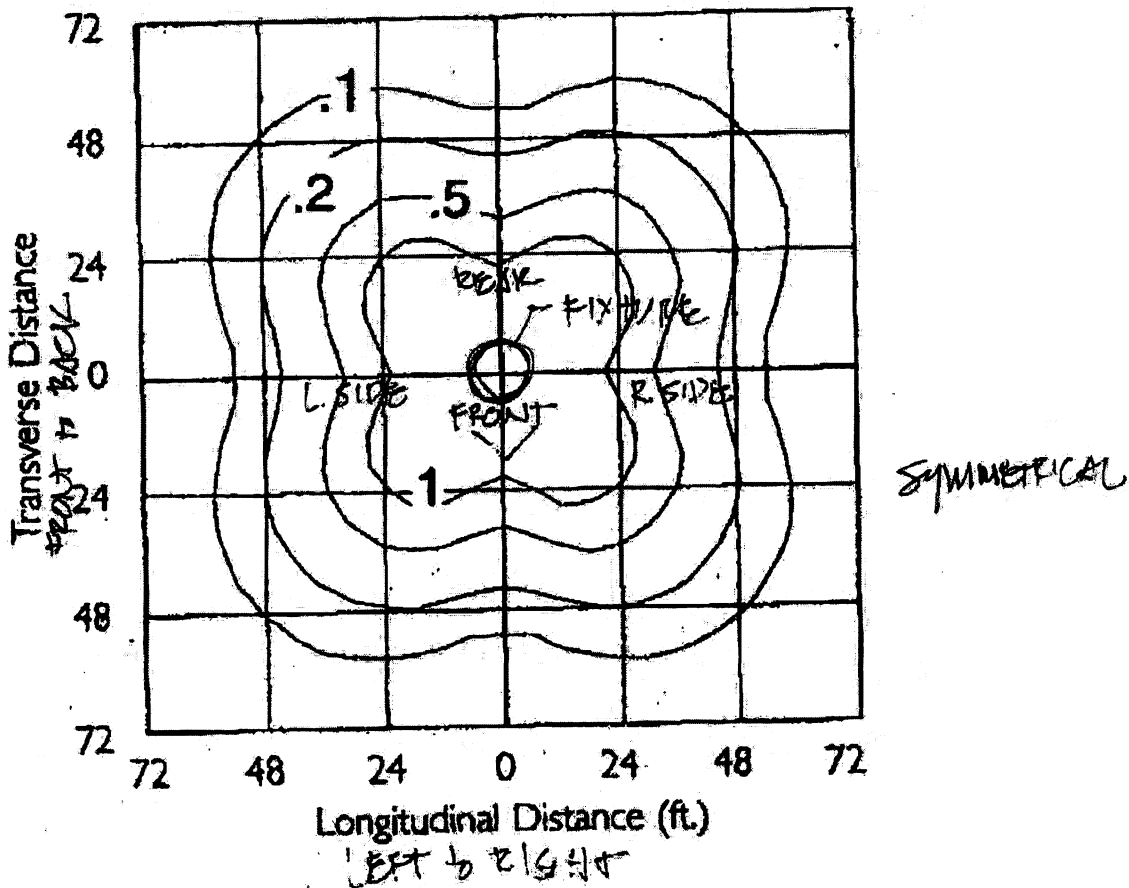
Mr. Doggett also opined that the requested front-yard parking setback waiver should not be granted. *Id.* at 107. He argued that doing so would reduce the open space, which contributes to the residential appearance of the site.

Technical Staff recommended granting the requested parking setback waivers, observing that the proposed parking lot would replace the existing parking area, resulting in only minor modifications to the existing impervious surface, and that its location on the property is the most practical and appropriate relative to the proposed use. See Staff Report at 12, 21. Staff also notes that the parking area would be screened by perimeter evergreens, would have adequate shading as required under the Zoning Ordinance, and would be unlikely to adversely impact nearby residential uses or the area's transportation system. Staff finds, moreover, that the proposed parking lot would provide safe and adequate parking for the child day care center.

Lighting. The existing garage has two residential-style exterior lights. Petitioner proposes to add a single pole light for the parking lot, to be located at the northeast corner of the parking area, adjacent to the walkway to the house. The pole would be eight feet tall and residential in scale and appearance. A complete photometric map was not provided, but the Landscape Plan, Ex. 63, includes a diagram showing how many footcandles of illumination the proposed light pole would generate at various distances: within approximately 24 feet of the light, illumination would be one footcandle; by about 36 feet from the light, illumination would drop to 0.5 footcandles; at 48 feet away, illumination would be 0.2 footcandles; and at about 60 feet, the level of illumination would be 0.1 footcandles. The photometric diagram is shown below in at an expanded size, with explanatory notations from Mr. Blumberg.

⁴ Mr. Doggett acknowledged that the current resident of the home to the west, Ms. Grubbs, supports the present application. He observed, however, that a compatibility determination must still be made, because properties can

Lighting Distribution Diagram, Ex. 81



Mr. Blumberg estimated that the location proposed for the light pole is just over 60 feet from the western property line of the subject property and about 90 feet from the eastern property line. Tr. Dec. 9 at 36-37. Thus, the level of illumination along the western property line would be 0.1 footcandles, which is consistent with the Zoning Ordinance’s standard for special exception lighting in residential zones (Code § 59-G-1.23(h)). No illumination would reach the eastern property line from the proposed parking lot.

Mr. Blumberg estimated that the distance from the location propose for the light pole to the farthest parking space in the lot is about 70 feet. *Id.* at 209. At that distance, Mr. Blumberg estimates that the light pole would produce only about 0.1 footcandles of illumination. *Id.* He

change hands at any time, and the special exception, if approved, would be there indefinitely.

conceded, on cross-examination, that if other spaces in the lot were occupied, particularly by tall vehicles such as minivans and sport utility vehicles, even that low level of lighting would be blocked. *Id.* at 209-210. Arbor Place argued that the lighting as proposed would be inadequate for safe use of the parking lot during darkness, such as the typical afternoon pick-up times in the winter, or 7:30 a.m. during winter.

Technical Staff found that the proposed lighting would be appropriate and would not have adverse impacts. See Ex. 53.

E. Landscaping and Fencing

Petitioner proposes fencing and landscaping as the principal means of mitigating potential adverse effects on adjoining land uses. In consultation with Technical Staff, Petitioner developed a site plan that provides for a four-foot board-on-board fence along the western property line, as discussed above with regard to the parking area; a six-foot, solid wood fence along the eastern property line; and two groups of Leland Cypress trees (tall evergreens) along the eastern property line. As shown on the landscape plan on pages 22-23, the adjoining Arbor Place property to the east has an existing row of Leland Cypress trees that screens the group home building from the subject property. Petitioner proposes to plant a line of trees on her property at each end of the trees on the Arbor Place property, overlapping slightly. This would create, in effect, a continuous line of Leland Cypress that would visually screen Arbor Place's back garden, building and parking area (in front of the building) from the subject property. As noted earlier, Petitioner also proposes to install a six-foot, solid wood fence along the eastern edge of the play area providing two sound barriers: a solid wooden fence at the edge of the play area, and an additional solid wood fence along the property line. The landscape plan also provides for the addition of three Maple trees at three corners of the play area.

Without commenting on the request from the adjoining neighbor to the west, Ms. Grubb, Technical Staff recommends a six-foot wooden fence along the western property line to provide visual screening. The Hearing Examiner finds it unnecessary to make a finding on the appropriateness of the four-foot fence v. a six-foot fence, given that the special exception is being denied, but notes that the

tension between the standard approach of screening special exception uses, which calls for tall fencing, and the expectation of neighbors that they will be able to enjoy the expansive vistas common in large-lot areas, is symptomatic of the difficulties Petitioner has encountered in trying to convert the subject property to a commercial use in a fashion that will not adversely affect her neighbors.

Technical Staff also recommends a row of at least 13 Leland Cypress trees along the northern property line, to provide visual screening for neighbors in that direction. See Staff Report at 12, 14. This is consistent with specific condition no. (5) applicable to child day care special exceptions under Code § 59-G-2.13.1, which authorizes the Hearing Examiner to require landscaping and screening to provide a “physical and aesthetic barrier to protect surrounding properties from any adverse impacts resulting from the use.” Petitioner argues, however, that in light of the very large lots in this neighborhood and the significant distance between the sources of activity related to the proposed special exception and the nearest neighbors to the north, such screening is unnecessary (the house on the subject property is approximately 350 feet from the closest house to the north, and the proposed play area is about 116 feet from the northern property line and 260 feet from the nearest house). The Hearing Examiner agrees, and would not require such screening if the special exception were to be approved.

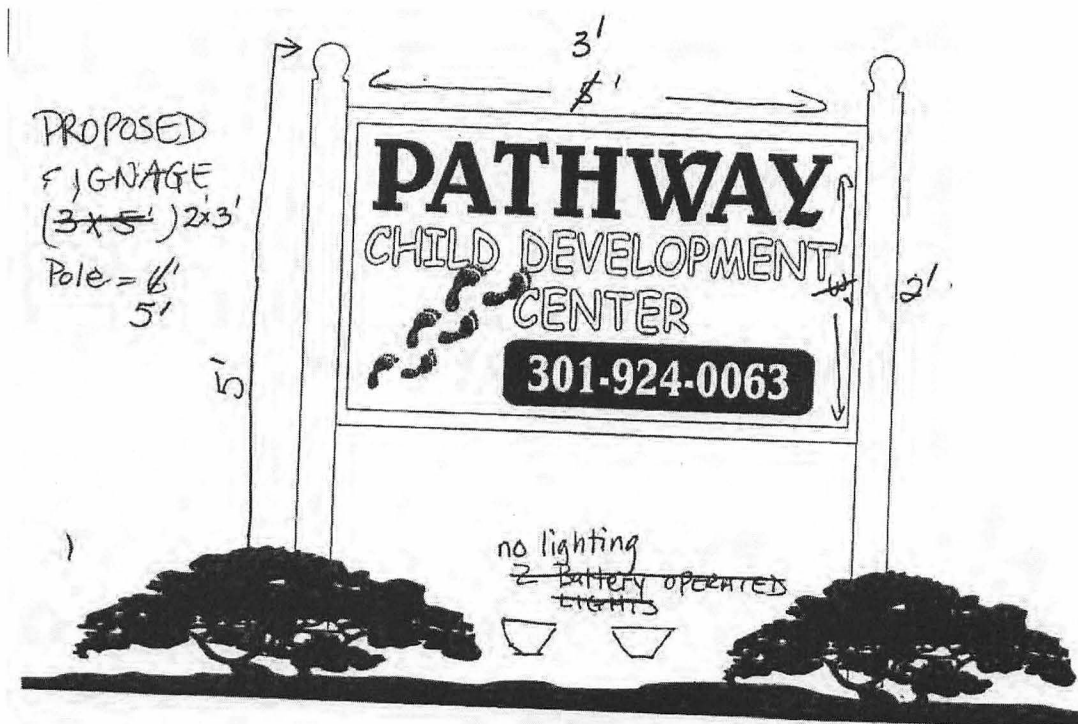
F. Signage

Petitioner proposes to install a sign measuring two feet by three feet, sitting on five-foot posts, with the top of sign roughly level with the top of the posts. This is an improvement over the original sign request, which was for a three foot by five foot sign on six-foot posts, with two lights. A representation of the proposed signage is shown on the next page (hand written notations show the changes made to the sign proposal at the hearing).

Petitioner proposed a smaller sign at the suggestion of the Hearing Examiner, who considered the original sign proposal to be very large and obtrusive for a residential neighborhood. Eliminating the lighting is a very positive step, because it would have extended the sign's visual impact on the neighborhood into the evening and early morning hours. Reducing the dimensions of the sign

also is helpful. Six square feet of signage is much less obtrusive than 15 square feet. The proposed sign would still require a variance from county sign regulations, however, and the five-foot height would make the sign very visible. The Hearing Examiner is not persuaded that even a six-foot-square sign would be compatible with preserving the residential appearance of the site, particularly on five-foot posts. Moreover, Technical Staff's positive recommendation was premised on a recommendation, tucked into Staff's comments on compliance with the general conditions, that signage be limited to "a ground or monumental sign with brick material or a simple wooden sign with no lights or illumination." Staff Report at 17. While Petitioner has eliminated the lighting, the five-foot posts appear to be inconsistent with Staff's recommendation.

Proposed Sign, Ex. 79



G. Potential Impact on Arbor Place and Neighborhood

The most difficult issue in this case, and the source of its contentious character, is the potential for the proposed child day care center to have adverse impacts on Arbor Place, the geriatric care facility that operates next door. To assess this issue, this section includes descriptive material

concerning Arbor Place and the treatment of Alzheimer's disease, including evidence provided by Alzheimer's experts for both sides, a summary of the views of the land planning experts for both sides and an analysis of noise-related evidence presented by experts for both sides.

1. Arbor Place

The Board of Appeals granted a special exception for Arbor Place in 1995, to permit a group home for 15 residents suffering from Alzheimer's and other diseases related to dementia. The special exception was modified in 2000 to permit an addition to the north end of the building and an increase in the number of residents from 15 to 16.⁵ See Ex. 66(c). Arbor Place is operated by the husband and wife team of Dr. Walter Fanburg and Mrs. Eileen Fanburg. Dr. Fanburg is a medical doctor licensed by the State of Maryland, with a board-certified specialty in Psychiatry, and Added Qualifications in Geriatric Psychiatry, administered by examination. See Ex. 34, Tr. Dec. 16 at 11-12. Dr. Fanburg has worked in psychiatry since his graduation from medical school in 1962. From 1966 to 1999 he was in private practice as a general psychiatrist. He testified that he began dealing with geriatric patients in the 1990s, when he started performing consultations for long-term care facilities, mostly in Montgomery County. He worked with another psychiatrist in making visits to about 20 long-term care facilities, mostly nursing homes and some assisted-living facilities. They found that roughly 70 to 80 percent of nursing home residents had some form of dementia, principally Alzheimer's.⁶ After a number of years of such consultations, Dr. Fanburg concluded that the care provided for people with dementia was appalling (which, he noted, it continues to be in most facilities in the United States). He felt that based on his experience, he could do it better. He and his wife researched various facilities for Alzheimer's patients, read the available literature, and developed a plan for Arbor Place, which opened on May 6, 1998. During 1999 Dr. Fanburg gave up all other aspects of his psychiatric practice to devote all of his time to Arbor Place. In light of his extensive background in the field, Dr. Fanburg was designated an expert in the treatment of geriatric dementia, including Alzheimer's.

⁵ Testimony indicated that the facility has 15 bedrooms. The approved addition has not been built.

⁶ Dr. Fanburg explained that dementia is a generic term, and Alzheimer's is one of its forms. He stated that roughly 60 percent of dementias are categorized as Alzheimer's. For the sake of simplicity, he and his wife refer to Arbor Place as an Alzheimer's facility, although it accepts residents with various forms of dementia.

Dr. and Mrs. Fanburg sought to provide at Arbor Place model care for people with dementia. They felt that such care could best be provided in a small facility, with about 15 rooms, and in a quiet, residential area. They wanted to be as close in to the larger metropolitan area as they could afford, so that families would have easy access. The Fanburgs looked for a site with the help of a planner at the MNCPPC, and decided that the Muncaster Mill Road site was appropriate. The property was a good size and the neighborhood was quiet, and the Fanburgs decided, with the help of MNCPPC staff, that their plans would not have a negative impact on the neighbors.

Today, Arbor Place has an occupancy of 15, with 15 private bedrooms. At the time of the hearing the facility had 13 residents, plus one who was in the hospital. The youngest resident is about 75 years old, and the oldest is 100. The average age is in the mid-80s, and all of the residents have some form of dementia. Tr. Dec. 12 at 15-16. Dr. Fanburg stated that four of the current residents are severely impaired and two are profoundly impaired; the implication was that the remainder are mildly or moderately impaired. *Id.* at 28-29. Alzheimer's is a fatal illness, and the condition of each resident changes over time. The longest time that a resident has survived after moving into Arbor Place was four years and three months, and the average time between a person moving in and passing away is closer to three years. *Id.* at 35.

Arbor Place has 22 people on the payroll. At the busiest time of day, the staff on duty consists of a registered nurse, an activities person and about three caregivers. In addition, Dr. and Mrs. Fanburg are there virtually seven days a week. Regular visitors to the site include physical therapists, beauticians, a manicurist, housekeeping services, family members and volunteers. If a patient needs to go to a doctor's office or the hospital, either the family or someone else designated by Arbor Place takes them. Some residents refuse to leave for any reason because a change of environment is very disturbing. Other residents leave occasionally to visit family.

Dr. Fanburg emphasized that every detail in the design for this facility was chosen for the comfort, safety, security and well-being of the residents. The Fanburgs chose an architect who commonly builds large houses, with the idea of making this a comfortable house. One of the impacts of

dementia is that as the brain deteriorates, patients have more and more difficulty comprehending what is around them. Because of that, Arbor Place was designed to make the space easily comprehended by people with deteriorating cognitive abilities. People with Alzheimer's often tend to congregate at doors and try to get out, so from the inside, the main door out, leading into the front vestibule, has no hardware – it looks like a solid wall. As a result, residents don't congregate there. Instead, they congregate towards the back of the main room, where there are French doors leading out to the garden, lots of glass and skylights. They spend most of their time there, looking onto the garden. The French doors are kept open all day when the weather is good.

Dr. Fanburg described several features of the garden that were designed with particular care. The concrete walkway is beige, because when it was first poured in gray, they learned that beige would be easier on the eyes, with less glare, so it was changed to beige. When the garden was first built, there was a one-foot drop between the patio and the landscaped area below. That was an unacceptable tripping hazard, so the Fanburgs had the grade of the whole backyard raised to the level of the patio. The garden has heavy, teak furniture that is comfortable, and that residents can't pick up and throw at one another. The plantings were chosen carefully for aesthetics and to avoid any poisonous plants. The garden is enclosed by a locked chain link fence, so that residents can't wander out onto the road, and the fence is painted black, which makes it less visible than green. The center of the garden was originally planted with grass, but that turned out to be an unstable surface for residents to walk on, so they replaced it with a putting green of synthetic grass.

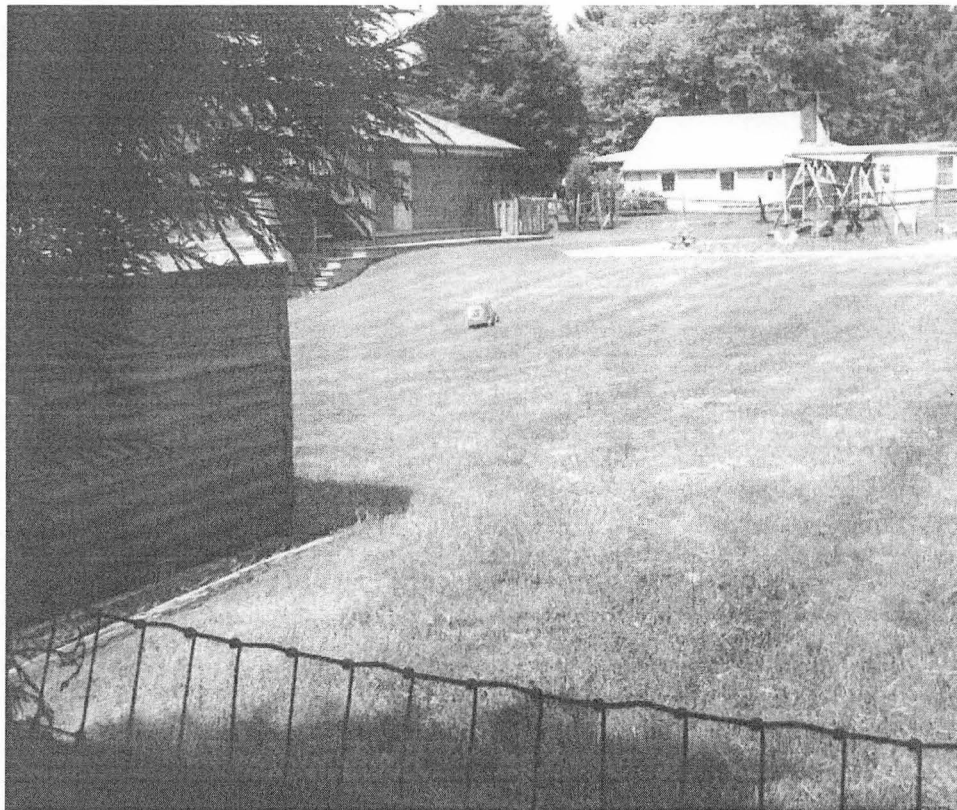
Each of the bedrooms has a window. At the west end of the facility, closest to the subject property, there is one bedroom with a window facing onto the garden and one facing the parking area in front of the building. Bedroom windows are kept open whenever the weather permits.

The front of the building is shown on page 8. The photographs that follow depict the and the rear garden and surrounding views.

Arbor Place Garden, Ex. 82(b)



View from Arbor Place Property Line to Rear Yard of Subject Site



View from Arbor Place Property of Neighboring House to the East, Ex. 83(b)**2. Treatment of Alzheimer's Patients**

Both parties agree that individuals with Alzheimer's tend to suffer from memory loss, problems with physical coordination, agitation, anger and frustration. They disagree as to whether the noise and activity generated by the proposed child day care center, particularly in the back yard, would have adverse effects on Arbor Place residents.

a. Petitioner's Expert in the bio-psycho-social approach to understanding and treating Alzheimer's

Petitioner presented as an expert witness Dr. Steven Sabat, Professor of Psychology at Georgetown University in Washington, D.C. Dr. Sabat has taught at Georgetown for over 30 years and has focused on Alzheimer's disease for the last 25. He has a bachelor's degree in psychology, a masters degree in experimental psychology and a PhD. in neuropsychology. Dr. Sabat published a book on Alzheimer's in 2001 and co-edited a book on dementia that was scheduled for publication in

January 2006.⁷ He has also written numerous articles and given many lectures about Alzheimer's. Dr. Sabat described the goal of his work as understanding what people with Alzheimer's are experiencing, so as to identify and facilitate the use of whatever remaining cognitive and social abilities they have. Tr. Dec. 9 at 104. By identifying abilities that patients still have, Dr. Sabat believes information can be provided to families and caregivers that will improve the quality of life of those living with Alzheimer's. *Id.* Dr. Sabat freely admitted that he has never run a treatment program for individuals with Alzheimer's, but he observed that in doing detailed case studies, he has spent a great deal of time with Alzheimer's patients in their homes, in nursing homes and in adult day centers. In researching his 2001 book, the shortest amount of time he spent with any individual was over the space of nine months, twice a week for two hours at a time, plus additional time with family caregivers and other adult children. Dr. Sabat spent as much as two years with other individuals, helping them and their families to improve their quality of living.

Dr. Sabat is not a medical doctor, so he cannot prescribe medicine. He engages in a bio-psycho-social approach to understanding disease, which involves examining the psychological and social circumstances of a person's life to try and reduce causes of things like agitation and depression without the use of medication. In light of his extensive experience in the field, Dr. Sabat was designated an expert in the bio-psycho-social approach to understanding and treating Alzheimer's. Tr. Dec. 9 at 114.

Dr. Sabat described himself as an advocate for people with Alzheimer's disease, and stressed that would never want to do anything to compromise the well-being of Alzheimer's patients. *Id.* at 115-16. He testified that visited the subject property before agreeing to work on this case. He looked at the proximity of the building, the parking area and the play area to Arbor Place and its garden, and familiarized himself with the proposed child day care operation.

⁷ A review of Dr. Sabat's 2001 book by the head of Geriatrics and Internal Medicine at Baycrest Centre for Geriatric Care, Toronto, describes the book as providing cogent and perceptive observations that can be extremely helpful in clinical practice and program development, a "must read" for any practitioner whose clientele include patients with Alzheimer's disease. See Ex. 44(b).

Dr. Sabat noted that the effects of Alzheimer's disease may be described in many ways. It tends to affect short-term memory, language abilities and the ability to take care of normal life activities such as dressing and eating. These losses, understandably, result in anxiety, anger and frustration. Symptoms can also include hallucinations and delusions. Dr. Sabat testified that one of the situations when people with Alzheimer's often become agitated is in bathing, when they may resist having a caretaker involved in what was once a private activity. They may also appear to be combative because they feel humiliated, in circumstances when the person causing the humiliation is not aware of it. Over-stimulation can also trigger agitation. Dr. Sabat observed that he read through material submitted by Arbor Place concerning the effect of noise in triggering agitation in Alzheimer's patients, and he noted that most of those materials do not directly address "environmental noise," by which Dr. Sabat appears to mean background noise. Tr. Dec. 9 at 121-22. Dr. Sabat opined that the kind of noise that has been associated with causing agitation is in the immediate environment, meaning in the same room where the patient is. He conceded that very loud noises from equipment like jackhammers or backhoes would not be a good idea, but stressed that the literature does not really address outside noise issues.

Dr. Sabat is not aware of any studies demonstrating that children playing outside have had any kind of negative impact on people with Alzheimer's, and suggests that if such studies existed, he would likely be aware of them. He noted that he has spent a fair amount of time in a building that houses both an adult day care center for people with brain injuries, including Alzheimer's, and along the same hallway a child day care center, about 100 feet away. Children were brought into the adult day care center at various holidays, and the patients had a very positive, almost joyful reaction to the children. Dr. Sabat acknowledged that not every person with Alzheimer's will enjoy every single child – there are plenty of perfectly normal, healthy adults who don't enjoy children. He noted that he has been in situations where a child cried within earshot, and the reaction on the part of the person with Alzheimer's was concern more than anything else.

Dr. Sabat has not visited Arbor Place, but he understands that the residents were placed there by relatives who chose it as a very positive environment for people with Alzheimer's. He stated that people living in a group home situation probably are not in the end stages, where hospice care may be required, but are ambulatory, and able to feed themselves to some degree. He stated "I would suspect . . . that the people who live there are perhaps in the moderate to severe stages of the disease or maybe even some in the early stages. . . ." *Id.* at 127. Dr. Sabat's understanding of the proposed child day care center is that it would have up to 28 children, including 35-40 percent infants, and that children would be outside for half an hour at a time in small groups. Petitioner's counsel asked Dr. Sabat whether the sound of no more than 10 children ages five and younger in the play area of the proposed child day care center would be distressing to residents of Arbor Place, assuming that some or all of the residents were in the garden behind Arbor Place. Dr. Sabat responded as follows (Tr. Dec. 9 at 128):

Well, in my opinion, I don't see that that is going to cause negative effects. I don't see that that -- let's put it this way. I don't see that having children playing outside 90 feet away from -- or more from this garden area and 90 feet that is blocked off by different sound barriers and such, I don't see that that sort of noise, if there is noise, would have the kinds of negative effects that the same kind of noise above and hustle and bustle would have if the same children were in the same room with people who had Alzheimer's Disease.

Petitioner's counsel then asked Dr. Sabat whether the voices of children in the next yard or even a child crying would be likely to have any kind of disruptive effect on the well-being of an individual with Alzheimer's. His response to this question follows (*Id.* at 129-39):

I really can't answer the question. I mean, you'd have to be more specific. I mean, I think if a person heard a child crying might say, somebody's crying, somebody do something. I mean, maybe some child needs some help. You know, that kind of reaction. I don't know that it will have a reaction. I'm not sure what disruptive would mean. I don't think it would necessarily. Some people would react, hey, tell that kid to stop shouting or crying or whatever, somebody take care of that child, or something to that effect. Would that compromise the -- on the occasion that a child might cry at a distance like that, would that compromise that person's well-being, I really can't say that it would.

Finally, Dr. Sabat opined that the proposed child day care center would not have an adverse impact on Arbor Place, noting that he would not be testifying if he thought it would.

Under cross-examination, Dr. Sabat emphasized that there is a big difference between watching children playing at a distance and having lots of activity right next to you. He stated, for example, that little boys running around making noise in the Arbor Place garden would not be beneficial to residents enjoying a quiet moment there, but the same boys running around and making noise 90 feet away, behind a fence, would not be at all the same situation. Dr. Sabat was careful to avoid generalizations, and so was reluctant to answer categorically the Hearing Examiner's question as to whether the noise of the little boys playing 90 feet away would be something negative. He stated that it might be somewhat negative for some person on a particular day, and it might not on another. Tr. Dec. 9 at 141-42. He explained that science can never say anything with certainty, but can only make statements in a probabilistic way. *Id.* at 143.

Finally, Dr. Sabat opined that all things considered, it would be better to have a visual barrier between the child day care and Arbor Place, to provide sound mitigation. If the fencing and trees were not part of the proposal for the subject site, Dr. Sabat would be less likely to be testifying for the Petitioner. He stressed that he would not want to compromise the living environment at Arbor Place in any way, and he thinks it would be foolish not to have sound barriers.

b. Opposition Expert in the treatment of geriatric dementia, including Alzheimer's

Dr. Fanburg served as an expert witness for Arbor Place. His qualifications and designation as an expert in the treatment of geriatric dementia, including Alzheimer's, are discussed in Part II.G.1 above.

Dr. Fanburg opined that the operation of the day care center proposed in this case would create objectionable noise, would adversely affect the health, safety and general welfare of Arbor Place residents, and would be detrimental to the use and peaceful enjoyment of Arbor Place. He noted that contrary to the assumption made by Dr. Sabat, four of the residents are severely impaired and two are profoundly impaired (suggesting that nine of the residents are moderately or mildly impaired). Tr. Dec. 16 at 27-28. Dr. Fanburg stated that Arbor Place is dealing with a population that is easily agitated. Agitation may be as simple as wandering, or aimlessly opening and closing drawers, or it can be

stomping your feet, throwing your walker, speaking in a loud, aggressive manner, or screaming, kicking and assaulting staff or other residents. *Id.* at 39. Dr. Fanburg described these as common symptoms of dementia, which are manifested by most people more and more as they become more impaired. Arbor Place tries to avoid agitation by providing a space that is easily understood, and therefore not frightening or overwhelming. They provide a lot of light and quiet music, and the staff speaks to the residents in a non-threatening way. All of the programming is designed to distract people who are agitated, to focus their attention on the here and now.

Dr. Fanburg noted that the garden plays a number of roles. It is a place for quiet enjoyment, which includes group activities such as reading poetry and doing stretching exercises. When someone does become agitated, staff tries to remove them to a quieter place, which is often the garden. There the staff can walk a resident around the circular path, showing them the flowers and the birds, and comforting them.⁸ As a medical doctor, Dr. Fanburg can also prescribe tranquilizers to calm a patient. He considers medication a last resort, however, because it is very hazardous to an impaired population that already has difficulty walking and is prone to falling.

Dr. Fanburg described the residents of Arbor Place as exquisitely sensitive to various stimuli, including loud voices, shouting, screaming or commotion. He believes that noise from a playground 86 feet away would disturb residents who are outside enjoying the moment, or who have gone outside to try and calm down. He noted that people suffering from dementia sometimes are confused. They may have delusions or hallucinations, and they may interpret sounds differently than a healthy person would. Dr. Fanburg referred to the testimony of the mother of one resident, noting that the resident in question is somewhat obsessional and paranoid, and if she heard a crying child she probably would believe the child has been hurt and it's her fault. Dr. Fanburg readily acknowledged that not all of the residents would be disturbed by the sound of a crying child, but he is persuaded that

⁸ Dr. Fanburg's testimony about the sensitivity of people with dementia to outside stimuli, and their tendency to become agitated, was supported by several publications about dementia and Alzheimer's that were submitted into the record. See Exs. 34 and 64. Dr. Fanburg stated that the paucity of articles addressing the negative effects of stress and noise on Alzheimer's patients reflects the fact that the relationship is so obvious, no one wants to spend research dollars on it. Tr. Dec. 16 at 44.

some would be. He also noted that agitated behavior can be contagious within a group of people suffering from Alzheimer's, and may lead to altercations between residents that put all the residents at risk. Moreover, dealing with these situations takes the caregivers away from all the other things they do to take care of the residents. The risk of agitation spreading among the residents is one reason that staff often take a person out into the garden to calm down.

Dr. Fanburg noted that for some residents, hearing a sound and not being able to see the source might make the sound more disturbing. Moreover, he voiced a concern that the garden might feel closed in with the trees and fencing proposed for the subject property. The Hearing Examiner asked Dr. Fanburg whether, if the proposed special exception were approved, he would prefer to have the fencing and tall trees that have been proposed, for noise buffering, or to keep the open vista that garden currently enjoys. His response made clear that there is no scenario under which he would consider the proposed child day care center compatible with Arbor Place. Tr. Dec. 16 at 36-38. Dr. Fanburg fears that with a solid fence along the property line, Arbor Place residents would feel like they are in a stockade, so he finds the fence unacceptable. He would prefer to have plantings, but realizes they would have no mitigating effect on sound. *Id.* at 37-38.

Under cross-examination, Dr. Fanburg acknowledged that there are quite a few visitors to the facility in addition to the regular staff, including family members, physical therapists, beauticians, cleaning staff, and volunteers from church groups, local schools and the Girl Scouts. He stated that from time to time, those visits have become a problem, and they have had to ask visitors to leave. They have also had to stop cleaning activities when the noise becomes disturbing to residents. Dr. Fanburg emphasized that what goes on within the facility is in his complete control, whereas noise from next door would not be. Tr. Dec. 16 at 50. He agreed that if a resident were disturbed by sound taking place next door, staff could bring the resident inside, away from the noise, but expressed resentment at the notion of having to do that. *Id.* at 63.

Dr. Fanburg acknowledged that the statement of operations submitted to the Board of Appeals in connection with Arbor Place's special exception application described particular times of day

as structured activity periods – 9:30 to 11:30 in the morning, and 2:00 to 4:30 in the afternoon. He emphasized, however, that the timing of activities has to be flexible because of the characteristics of the population, and that people may be out in the garden at any time of day or evening. Moreover, group activities may take place just as readily outside as inside.

On further cross-examination, Dr. Fanburg acknowledged that he had written to family members of Arbor Place residents about his concerns regarding the proposed child day care center, and asked them to write in their comments. He was surprised to find how many of the family members used his language verbatim in their letters. He conceded that he did not provide the family members with Petitioner's materials describing how the child day care center would be run, e.g. the number of children who would be outside at any one time. *Id.* at 52. Dr. Fanburg also alerted two neighbors to the project: a neighbor behind the subject property, who did not seem very interested, and the woman who lives adjacent to the subject property to the west.

Dr. Fanburg conceded that in looking for articles about negative effects of noise on people with dementia, he did not find any specific references to the sound of children playing – some references to noise were generic, and some referred to things like intercoms, loud televisions, other types of background noise. He acknowledged that there are probably many articles on the benefits of interacting with children, and agreed that visits from children can be beneficial, but only if they are under his control. If a child who is visiting Arbor Place gets unruly, noisy or disturbing to the residents, they make the child leave.

Under continued cross-examination, Dr. Fanburg was asked how staff try to calm an agitated resident during inclement weather, or in the middle of the night, when the garden is not an option. He responded that first they try to divert their attention from whatever is disturbing them, or deal with the source of the disturbance if they can identify it, for example incontinence, or clothing that is too tight. If two residents are having an altercation they will separate them, putting them into their private rooms. Dr. Fanburg stated that the residents use the garden a great deal, even in the winter. He described the traffic noise from Muncaster Mill Road as a low pitch in the background. He admitted that

when he and Mrs. Fanburg identified their current location, he was concerned about the possibility of road noise being disturbing. He found, after the building was complete, that road noise was not a problem.

Dr. Fanburg stated that he finds the presence of the church across the street comforting, and has never experienced any problems from it. With regard to the Montessori School associated with the Church of the Nazarene, Dr. Fanburg stated that if he stands on the front steps, he can hear children on the playground, but not if he is in the garden. As for the existing child day care center next door, which Petitioner states has six children outside at one time, Dr. Fanburg testified that he has never seen as many as six children outside at once. In fact, he has rarely seen children outside or any evidence of people living in the house. He has seen up to four children outside with a staff person, but only on rare occasions. He admitted that he has not been disturbed by the children outside, even though they can play anywhere on the property. Dr. Fanburg also conceded that it's possible he has not been outside during the children's play times, although during the pendency of this case he has made a special effort to see if there were children present.

When asked about the use of the subject property at the time the Fanburgs purchased the Arbor Place property, Dr. Fanburg said that it was occupied by an elderly lady who was an artist. She was initially concerned about the impact Arbor Place would have on her, but became so fond of it that she told her survivors to give Arbor Place first option to purchase the property after she passed away. They chose not to purchase it for two reasons. First, Dr. Fanburg never imagined that anyone would conceive of permitting "bedlam" next door, and he thought the county would protect Arbor Place. Secondly, he did not want to incur a substantial cost that would require increasing their already expensive rates, just to protect their property from something that might happen next door.

Mrs. Fanburg also testified, confirming that the measures the staff uses to help calm an agitated resident often include walking in the garden. Mrs. Fanburg is involved in hands-on care of the residents and modeling behavior for the staff, as well as other duties, and it is not unusual for her to help calm an agitated resident. She stated that going outside helps tremendously – it provides a

change of scenery, with the sounds, the sky and the plants. She described the garden as a very normalizing, wonderful environment. Tr. Dec. 16 at 68. Mrs. Fanburg noted that the flowers are changed each season, and in the summer the residents are involved in planting a vegetable garden. What she hears in the garden is the birds, not road noise.

Mrs. Fanburg confirmed that at times, children or babies visiting Arbor Place have been asked to leave because they disturbed residents, although the parents are sometimes offended. Like her husband, Mrs. Fanburg admitted that she has not been disturbed by noise from the existing child day care center next door. She has seen three or four children outside with a caretaker a few times, and has heard only normal talking. Mrs. Fanburg presented a copy of an inspection report pertaining to the existing child day care center, which she obtained from the Maryland Child Care Administration. See Ex. 84. The report indicates that on a particular day in August, 2004, between 1:00 and 3:00 p.m., there were only four children present at the center, although the capacity was 12 and enrollment was ten. The Hearing Examiner gives little weight to this document because it provides only a one-time snapshot of attendance at the facility, but it does tend to confirm the Fanburgs' observations about the number of children playing outside.

Under cross-examination, Mrs. Fanburg stated that she has not had any problem in the garden with noise from either the parking area on the subject site, the child day care center on the subject site, the Bible Church across the street, or the nearby Montessori School.

c. Lay Witnesses

Three adult children of Arbor Place residents testified in opposition to the proposed child day care center.⁹ Tr. Dec. 9 at 145-59. Marilyn Berman Pollans testified that her mother-in-law was formerly in an assisted living facility with round-the-clock aides and was deteriorating. She was over-medicated, not eating and not being kept clean. She had an evaluation done by an outside nurse, who recommended a very quiet, stable environment. Ms. Pollans was delighted to find Arbor Place, which is a lovely, home-like setting with private bedrooms and a quiet garden. She stated that her mother-in-law

⁹ Opposition counsel noted that many more relatives of Arbor Place residents would have been willing to testify, but that he felt a small sampling would be better, to avoid repetition.

is now 100 years old and doing very well at Arbor Place. She is fragile, however, and Ms. Pollans fears that she will get agitated if there is a lot of noise and disruption and that, as a result, her health will be compromised. She described the Arbor Place garden as very peaceful, with no sounds but the birds. Ms. Pollans admitted that she really had no details about what was being proposed next door, but she understood that there would be about 30 children playing outside. Her concern about noise and agitation did not change, however, when she was told that there would be only ten children playing outside at any one time.

Dee Ann Gretz testified that her 88-year-old mother has lived in Montgomery County for 55 years, and at Arbor Place since 2003. Ms. Gretz said that it is painful to describe how difficult life had become for her before she moved to Arbor Place. She was fearful and easily agitated, and was upset by any change or unexpected event. Ms. Gretz observed that at Arbor Place, the staff are usually able to redirect her mother's focus when she becomes distracted. She noted that the tranquility of the garden is a major factor in her mother's contentment. Ms. Gretz stated that a major source of anxiety for her mother is a concern that she may have caused a problem for someone else. Ms. Gretz believes that if she heard a child crying or shouting next door, her mother would feel that she had somehow caused the child to be distressed, and would not be able to understand that it was not her fault. Ms. Gretz acknowledged that children do come to visit at Arbor Place on occasion, noting that at a recent birthday party there were grandchildren present and everyone was charmed.

Stephanie Waldron testified that her mother, who is normally a resident of Arbor Place, was in the hospital at the time of the hearing. She stated that her mother's decline into dementia was saved by her extreme good fortune in finding Arbor Place, where her mother has a fantastic quality of life because it is a very controlled environment. Ms. Waldron described Arbor Place as serene, safe, nurturing, peaceful, and stimulating in a good way. She noted that she lives near a school and the sound of children playing is music to her ears, but that residents of Arbor Place need a controlled environment, and distractions outside their environment would be very detrimental. Ms. Waldron also feels that a tall fence or tall trees would take away from the beauty of the garden. The garden right now

is perfect, with the tall trees next to the building and then a vista on the other side. Ms. Waldron added that her mother has a greater tendency to become agitated as her disease advances. She has advanced dementia at this point, and different things get her upset at different times. Ms. Waldon was not aware that there is already a child day care center on the subject property. She stated that she has never seen children or been aware of play things on the property, and agreed that to date, the existing child day care center has not been a problem. When asked whether her concerns would be alleviated by learning that the play area and the yard would be fenced, there would be only ten children outside at one time, and none would be over age five, Ms. Waldron stated that she trusts Dr. Fanburg absolutely due to his brilliant care of her mother, so if Dr. Fanburg is concerned, she is concerned. Tr. Dec. 9 at 158-589.

3. Noise Evidence

Ms. General and Arbor Place presented noise experts with contrary opinions as to whether noise from the proposed child day care center would adversely affect Arbor Place residents. Their testimony is summarized below (no written reports were submitted).

a. Petitioner's Noise Expert

Petitioner's noise expert, Gerald Henning, was designated an expert in noise and acoustics. Tr. Dec. 12 at 132. He testified that to evaluate the impact on Arbor Place of sound associated with the proposed day care center, he visited the existing day care center at a time when children were playing outdoors. Mr. Henning stated that the children were mostly in the area of the playground equipment, where the proposed play area would be located. Some were swinging, others were riding tricycles, and some were kicking a ball around the field. At the beginning of the play time there were five children, and later a smaller one arrived, held in a child carrier. The children's ages ranged from 10 months to age three and a half.

Mr. Henning conducted noise measurements at three locations in the rear yard, both before the children came outside and while they were out: on the east property line, the west property line and the north property line. He explained that the most pertinent noise description to assess

potential noise disturbance is “A-weighted sound levels,” or dBa, as used in the Montgomery County Noise Code. *Id.* at 134. Mr. Henning described this as “a single level reading that simulates the way we hear as people” by weighing more heavily the frequencies that we hear better (we don’t hear low frequencies as well as we hear middle frequencies). *Id.* at 134-35.

The background noise levels that Mr. Henning measured at the property lines before the children came outside, consisting primarily of traffic noise, were 51 to 56 dBa. He took his measurements between the play area and the properties on each side of the subject site. Mr. Henning explained that in order to measure a noise impact, there has to be a certain amount of noise above background to get a valid reading. He found it very difficult to get such a reading at the property lines on this site. The background noise was variable, and the sound from the children was so low that in general he was not able to get an accurate reading, suggesting that the noise levels created by the children were below background noise levels – below 51 dBa. The only valid measurement he got of sound from the children was when some children chased a ball to within 10 or 15 feet of him while he was taking sound measurements along the western property line. That cause sound levels to go over 60 dBa for an instant. *Id.* at 137. To provide some perspective, Mr. Henning stated that general conversation is about 60 dBa at a distance of about three feet from the person speaking. *Id.* at 140-41. He also noted that the County Noise Ordinance sets a daytime sound limit of 65 dBa, measured at the receiving property, and a nighttime limit of 55 dBa.

Mr. Henning observed that the children’s voices were audible, and he could distinguish between them and the traffic noise because the children’s voices were in a higher frequency range than the rumble of traffic. Nonetheless, it was masked a great deal by the background noise.

When asked what sound levels he would expect from ten children, Mr. Henning opined that the sound level would increase, on average, by about three dBa. He based this on the “physics of sound,” with an assumption that the additional five children would make about the same amount of noise as the first five. *Id.* at 139. He further explained that if sound levels increase by 10 dBa, subjectively that will sound about twice as loud. An increase of 3 dBa, on the other hand, will be barely

perceptible. Moreover, Mr. Henning opined that sound levels traveling to Arbor Place would actually be *lower* than currently, because the children would be limited to the fenced play area, and sound would be blocked by two solid wood barriers which, in combination, would substantially reduce sound levels. Mr. Henning opined that even if a child were to cry or yell, making a noise louder than normal conversation, it would not be problematic, in light of the distance to the property lines and the noise barriers.

Turning to the proposed parking area, Mr. Henning opined that in light of the distance between that area and Arbor Place, relative to the noise from Muncaster Mill Road, the sound from activities in the parking area would be insignificant for residents of Arbor Place. *Id.* at 145. He also opined that sound levels from the parking area would be insignificant for the adjacent home to the west, due to the traffic noise from Muncaster Mill Road.

Mr. Henning did not anticipate any adverse noise impacts on any bedrooms located at the western end of Arbor Place, because he observed that there are no windows on that end of the building.

In response to a question about what sound levels he would expect inside the Arbor Place garden, Mr. Henning stated that there would be two differences: greater distance from the source of the sound (the play area), and lower levels of background noise because the building would provide some shielding from roadway noise. He expects that the two effects would “balance each other out to some extent.” Tr. Dec. 9 at 147-48. He noted that there was substantial shielding from the buildings where he took his measurement, so he would not expect background noise levels to be significantly lower, but there would be a little bit of difference.

Mr. Henning concluded by opining that the noise levels generated by the proposed child day care center would be so low that they would not cause objectionable noise for residents of Arbor Place or any other surrounding property. *Id.* at 148.

Under cross-examination, Mr. Henning described the kinds of noises he heard from the children as vocal sounds that come out as kids play. He noted that the children in strollers were not

really making any sound. He indicated that he expects the playing sounds he heard would be audible inside the Arbor Place garden, given that they were audible at the property line.

Mr. Henning testified that he understands the residents of Arbor Place have Alzheimer's and are more sensitive to noise than the general population. He compared the sound levels created by the children with the kind of levels he expects must take place inside the facility, given that "people have to function," and he concluded that the noise from the children would not be objectionable. Mr. Henning viewed the garden as a place for residents to relax outdoors. When told that it is used for therapeutic purposes and to calm people down, he stated that was "not far off from the general quality I was looking at." *Id.* at 156.

Mr. Henning acknowledged that there are windows facing north and west at the west end of Arbor Place, just not facing west. When asked about noise impacts in the bedroom at that end of the building, if the windows were open, Mr. Henning was not sure whether the children's sounds would be audible inside.

Mr. Henning acknowledged that a solid barrier, like a fence, actively shields noise in close proximity to it, but that as you get farther away from the barrier, the noise "shadowing" effect generally lessens. The effectiveness of the barrier is determined by elements such as its height and its distance from the receiving area.

Mr. Henning stated that he has previously assessed noise levels at playgrounds, although he could not come up with any details on the spot. He agreed that on the day he was there, there were only three or four children who were not in strollers or carriers, and none of the children got hurt and really screamed, as children sometimes do. He postulated that the sound of a child's scream would be in the same range as the general sounds they make when they play, although louder. Even at that louder level, Mr. Henning expects that the noise level at the property line would be low. He agreed that tonal or impulsive sounds are required to be five decibels lower in Montgomery County than other sounds. A "tonal" sound is defined in the County Noise Ordinance as a "prominent, discrete tone

. . . often perceived as a whine or hum that can be heard distinctly as a single pitch or a set of pitches,” with additional technical specifications. Code § 31B-5(q).

When asked how much the proposed fencing would be expected to reduce sound levels, Mr. Henning estimated a reduction of about ten decibels, so the sound would be about half as loud. Tr. Dec. 12 at 168-69. He acknowledged that sound goes away from the source sort of like a bubble, and in general, ignoring barriers, sound will fall off at a rate of 6 dBa for every doubling of the distance. In response to a question from the Hearing Examiner, Mr. Henning stated that a row of trees has no real effect in blocking sound, although there is somewhat of a psychological effect if the source of the sound is blocked visually.

b. Opposition Noise Expert

Opposition witness George Spano was designated an expert in acoustics. He noted that there are three ways of solving noise problems: lower the noise at the source; create a barrier; or move the receiver. Tr. Dec. 9 at 208. He described himself as having heard every sound complaint one can possibly think of, including complaints about car doors slamming at a restaurant on Brookeville Road in Chevy Chase. He described the parking lot as about 25 to 40 feet from the windows of the nearest neighbor, and described the house to the west of the subject property as about 40 feet from the parking area. In Mr. Spano’s opinion, doors slammed in the parking lot at the subject site would be heard in the adjacent residence to the west. The sound would be mitigated by the proposed fence and trees, but would still be clearly audible. He noted that the restaurant that had neighbors complaining about slamming doors also had a fence and trees. Considering the arrivals and departures of 28 children each day, Mr. Spano estimated that would result in more than one hundred car doors opening and closing each day. Tr. Dec. 9 at 182. He would expect that to have an impact on the use and enjoyment of the neighboring property.

Having visited Arbor Place and its garden, Mr. Spano stated that most of what he heard in the garden were birds chirping, and intermittent traffic noises from Muncaster Mill Road. He measured the sound level from the birds at 45 dBa and from the traffic at 50 dBa, going up to about 51

dBa if a truck went by. There were no children playing outside at that time. Mr. Spano agreed that the sound level of typical adult conversation is 60 dBa, which he described as a critical level, because that is a typical level the ear is accustomed to. Mr. Spano agreed that an increase in sound levels of 10 dBa is perceived as making the sound twice as loud.

Considering the sound mitigation measures shown on the site plan, Mr. Spano opined that with ten children in the play area, "when the children become robust in their voice communications it would be clearly audible," meaning that when they scream they will be clearly audible. *Id.* at 186-87. He stated that screaming would be a totally different type of noise from the background noise, and could be disturbing to some people, based on individual perceptions. Mr. Spano suggested that the natural impulse when we hear a child scream is to see whether the child has been injured, to know what the scream means. It is an alerting sound, and with repetition could become objectionable.

Mr. Spano described one experience he had in measuring sound, in connection with a school development. He measured the sound levels at a playground with 25 11-year-old children, at a distance of 15 to 25 feet, and found that the levels went from the high 60's to 70 dBa. *Id.* at 188-89. Mr. Spano stated that in his view, the sound levels from ten children would not be much lower, "because actually when you're measuring it what you get is the event of the noise. . . . You hear this child, you hear that child, you hear this child and, so, what I think is you get [sic] density of the sound is higher with more children, but, the levels don't change much." *Id.* at 189. If the distance were doubled twice (to approximate the greater distance in the present case, from 25 feet to 50, and then from 50 to 100), the sound level would decrease by 12 dBa, or 13 if it's a grassy area, bringing it down from 70 to 57. Mr. Spano had no recollection of doing any playground noise study involving smaller groups of children at the younger ages at issue here, five and under. He believes that 11-year-olds and children five and under make about the same amount of noise, based on his own experience.

Mr. Spano agreed that a single row of trees would have no real sound mitigation effect. Moreover, he finds that sound barriers can work less well if there are trees around them, because the trees scatter the sound as it travels over the barrier. Mr. Spano would not expect a "double mitigating"

effect from having two fences, one along the play area and one on the property line. He finds that a sound barrier generally is more effective closer to the source of the sound, so the fence along the play area would have more mitigating effect than the one on the property line. He suggested that the two fences might reduce sound from the play area by five dBa, reducing the estimated 57 dBa to 52. Mr. Spano opined that with background sound levels at 45 dBa, sounds at the 52 dBa level would be noticeable. He noted that even if the sound level from the children playing were at the same dBa as background noise, it would be distinguishable, partly because the intermittent nature of the children's sounds might be annoying.

Mr. Spano described his experience in measuring the sound of screams at an amusement park, where his company did noise control for many years. He found that screams carried farther than any other noise, and could be heard hundreds of feet away, even if only one or two people were screaming. He suggested that a scream could be fully ten dBa higher than the normal sounds of a child at play, maybe more. *Id.* at 197.

Mr. Spano discussed the County's 5-dBa decrease in acceptable noise levels for tonal sounds, noting that the decrease is imposed because tonal sounds are more annoying than other sounds. He also noted that the Noise Ordinance forbids anyone from creating a "noise disturbance," defined in Code § 31-B(2)(m) as "unpleasant, annoying, offensive, loud, or obnoxious." *Id.* at 200. Mr. Spano described a "discrete tone" (part of the definition of tonal) as a shrill sound, like whistling, or a single key on a piano. Based on screams he has heard from children in restaurants and airplanes, Mr. Spano considers a shrill scream to be "tonal."

Mr. Spano concluded that the proposed child day care center would be detrimental to and incompatible with the quiet, serene garden at Arbor Place because "screaming is not consistent with serenity." *Id.* at 203-204.

Under cross-examination, Mr. Spano conceded that he had not conducted any of the tests set out in the definition of "tonal" sounds to determine if the sounds of children would meet that definition. *Id.* at 210-211. He stated that he thinks it is "entirely possible" that three-year-olds would

make the same amount of noise playing with a ball as 11-year-olds (which the Hearing Examiner found unlikely). *Id.* at 212. He did not respond directly to a question about whether screams on a roller coaster really equate to the screams of a three-year-old on a playground. *Id.* at 213.

Mr. Spano stated that when he took sound measurements in the Arbor Place garden, there were about ten people in the main room, some eating, some watching television with the volume on low. He did not pick up any noise from the inside when doing his measurements. Mr. Spano clarified that when he said the sounds of children would be clearly audible, that did not necessarily mean objectionable – the sounds might be objectionable to some people. He feels that screams would be objectionable to Arbor Place residents because they would not know what the screams mean.

Mr. Spano conceded that in extrapolating from the playground measurements he took in an earlier project, he used the high end of both the noise estimate and the distance – 70 dBa and 25 feet. If he had used the low end of his estimate, in the 60s, and the low end of the distance estimate, 15 feet, the result would have been a sound estimate for children playing on the subject property of 40 dBa, which would not be noticeable in the environment of the garden. *Id.* at 216-217. With the fencing, the sound would be even lower.

Land Planner Opinions

Ms. General and Arbor Place presented land planning experts with contrary opinions as to whether the proposed child day care center would adversely affect Arbor Place residents. Their testimony and opinions on some topics are discussed in earlier parts of this report. Their testimony on the fundamental issue of compatibility and overall adverse effects is summarized below (no written reports were submitted).

a. Petitioner's Land Planning Expert

Mr. Blumberg opined that the proposed child day care center would have no adverse effects on Arbor Place or its residents. He stated that the arrivals and departures of children and staff would not affect Arbor Place because of the physical separation created by the buildings, landscaping, fencing and distance. Tr. Dec. 9 at 61. Mr. Blumberg opined that nothing proposed in this application

should be considered a non-inherent characteristic. He considers all the elements typical of child day care facilities: a building for indoor activities, an outdoor play area, parking, pick up and drop off areas, vehicular trips by staff and parents, lighting for safety and convenience, and noise from playing children. Tr. Dec. 9 at 72. In Mr. Blumberg's view, inherent and non-inherent adverse effects measure only the characteristics of the proposed structure and uses, not potential adverse effects on an abutting property. *Id.* at 74-75.

Mr. Blumberg opined that the proposed use would be in harmony with the general character of the neighborhood because the building would retain its residential appearance, and the nature of the activity, traffic and parking conditions would be similar to many other uses in the neighborhood. He stressed that although all of the effects of the use would be inherent, Petitioner has taken multiple steps to mitigate those effects – fencing, landscaping, limiting the number of children outside at one time and placing the parking lot as far away from Arbor Place as possible. He opined that the proposed use would not be detrimental to the use and peaceful enjoyment of surrounding properties, and Arbor Place in particular, stating that “this use with its modest, inherent, adverse impacts and all the mitigation efforts that we have made to limit any adverse impact on the abutting neighbor will not be detrimental to that use . . . from a land planning perspective.” Tr. Dec.9 at 92. Mr. Blumberg noted that uses involving children and the elderly are not inherently adverse to one another, and in fact, often have a symbiotic relationship. He observed that the elderly love to have children come visit, helping them remember when they and their own children were younger. Thus, he sees no reason to consider a child day care center inherently detrimental to an adjacent group home for the elderly.

b. Opposition Land Planning Expert

Mr. Doggett opined that the proposed day care center would be anything but a compatible use next to Arbor Place, and would be detrimental to the use and peaceful enjoyment of both Arbor Place and the residence to the west. Tr. Dec. 16 at 88-89. He visited Arbor Place three times, including the garden, which he noted is not just a recreation area, but a therapeutic place. He

was struck by the emotional fragility of the residents. Having granted a special exception to Arbor Place, which requires and has strived to create a quiet environment, Mr. Doggett feels it would be wrong for the County to then approve something next door that would be commercial in nature, and cannot be considered a quiet addition to the neighborhood.

Having designed playground layouts during many years as an urban designer for Fairfax County, as well as in private practice, Mr. Doggett stated that keeping them away from residential areas is a fundamental principle of playground design. In his experience, fences and trees can reduce noise, but they do not eliminate it. *Id.* at 91-92.

Apart from the noise issue, Mr. Doggett opined that the proposed child day care center would be incompatible at the proposed location because of the general level of activity – 30 people arriving in the morning and leaving at night, with their lights on in the winter. Mr. Doggett considers that level of activity incompatible with residential zoning generally, and particularly with a residence caring for people with dementia. Tr. Dec. 16 at 103-104. Mr. Doggett's view that child day care is generally incompatible with residential zoning puts him at odds, of course, with the County Council's legislative determination that child day care centers may be approved in numerous residential zones, subject to a special exception. Mr. Doggett did qualify his views by stating that a smaller day care center, with up to 12 children, could be designed in a way that would be compatible with a residential setting. *Id.* at 122.

Mr. Doggett further opined that the proposed child day care center would detract from the residential character of the neighborhood. He noted that the neighborhood already has a number of non-residential uses, including the two churches across the street, with their large parking lots, and the Montessori School, which has a very high level of activity. Adding another lot with a commercial-type drive and parking area would be detrimental – it would make a bad situation worse. *Id.* at 123-25. Mr. Doggett observed that more recent developments in the vicinity have respected the typical residential appearance of the area, in which large front yards and 10-foot-wide driveways are common, by creating

a single access drive for a cluster of several homes. That way each group of homes has only one access point onto Muncaster Mill Road, rather than several.

5. Planning Board

As noted earlier, the Planning Board voted 3-to-0, with one member absent, to recommend denial of the subject application. The recommendation letter states the Planning Board's view that Petitioner did not meet her burden of proving that Arbor Place would not be negatively affected by the proposed child day care center. See Ex. 40. The Planning Board found specifically that Petitioner had not sufficiently demonstrated compliance with general conditions number (6) ("Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone") and (7) ("Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area") under Code § 59-G-1.21. See *id.*

H. Development Standards

As shown in the table on the next page, adapted from the Staff Report, the existing building complies with all applicable development standards of the RE-1 Zone. As discussed in Part ___ above, the proposed parking facility would not comply with setback requirements applicable to all special exception uses in residential zones under Section 59-E-2.83. Petitioner seeks a partial waiver of those requirements.

Development Standards

Development Standard	Requirement	Proposal
Minimum Lot Area	40,000 sq. ft.	44,867
Minimum Lot width		
At front building line	125 ft.	150 ft.
At street line	25 ft.	150 ft.
Minimum Building Setbacks		

Front yard	50 ft.	Approx. 90 ft. ¹⁰
Rear yard	35 ft.	Approx. 180 ft.
Side yard (one side)	17 ft.	Approx. 25 ft. ¹
Sum of both sides	35 ft.	Approx. 60 ft. ¹
Minimum Parking Facility Setbacks		
Front yard	50 ft.	42 ft. (8-ft. waiver requested)
Rear yard	35 ft.	165 ft.
Side yard (one)	34 ft.	6 ft. (28-ft. waiver requested)
Sum of both sides	70 ft.	Approx. 90 ft. ¹¹
Maximum Building Height	50 ft.	Approx. 16.5 ft.
Maximum Building Coverage	15 %	5%
Parking space requirement	1 space/employee 1 space/6 children	11 spaces

I. Transportation and Environment

Transportation Planning Staff at MNCCP recommended approval of the present petition, finding that the proposed use would generate fewer than 30 peak-hour trips during the weekday morning and evening peak periods, and that, therefore, a traffic study is not required under the Local Area Transportation Review requirements. See Transportation Planning Memorandum dated April 18, 2005, attached to Staff Report. Transportation Planning Staff notes that an access permit would be required from SHA for the commercial curb-cut, and concludes that the proposed use would have no adverse effects on nearby roadway conditions. As noted earlier, Transportation Planning Staff did not specifically analyze the safety and appropriateness of the proposed driveway entrance and deceleration lane.

The present petition is exempt from forest conservation requirements because it proposes very limited land disturbance. Technical Staff notes that there are two significant trees on the site, both of which would be preserved. Petitioner would be required to comply with Department of Permitting Services regulations for stormwater management and sediment and erosion control.

¹⁰ This measurement was scaled off by the Hearing Examiner.

¹¹ Technical Staff described the "sum of both sides" requirement as 35 ft. (residential), and noted that Petitioner proposed to provide "31 ft. (special exception use)". Staff Report at 9. The Hearing Examiner is mystified by these numbers and has substituted her own reading, i.e., Section 59-E-2.83 requires that the parking facility be set back twice the building side yard required in the zone, in the RE-1 Zone the sum of both sides is required to be 35 feet, and doubling that makes it 70 feet. The Hearing Examiner scales off the distance between the proposed parking facility and the eastern property line at about 85 feet, leading to about 90 feet as the sum of both sides.

J. Other Community Participation

The record contains a letter from Michelle and Christopher Gorman, parents of an infant who is (or was, at the time) enrolled at the current child day care center at the subject site. See Ex. 14. The Gormans are very pleased with the level of personal attention the teachers show the children and “the consistent sense of order and calm.” Ex. 14. They do not specifically address the special exception petition, but recommend Pathways at Greta’s Place to other parents.

The record contains two letters from the Chinese Bible Church of Maryland, which is located directly across the street from the subject site. The first letter, dated August 22, 2005, states a concern that the proposed facility would need acceleration and deceleration lanes for safety reasons. See Ex. 45. The letter notes that the “typical speed” in front of the church is 50 – 55 miles per hour, and that several very serious rear-end collisions have taken place directly in front of the church. Ex. 45.

The second letter, dated January 11, 2006, arrived on the last day that the record was open, after the hearing, for the additional 30-day sign-posting period. This letter states that the church “mistakenly believed the special exception was not being pursued because the sign was not posted for a long period of time,” but recently learned that hearings had been held and changes made since the church’s initial review and comments. See Ex. 87. The second letter reiterates the church’s concern about the safety of the entrance, noting that the plans show only a “modest” deceleration lane, and an acceleration lane with insufficient distance to accelerate. The church suggests realigning the entrance to allow equal distance for acceleration and deceleration. The letter also suggests that the parking facility appears to be too small, which will result in cars waiting in the deceleration lane.

The church’s January letter also raises a concern about stormwater run-off, noting that the church property has suffered from roadway run-off flowing into its main entrance. Due to the higher elevation of the subject site, the church is concerned about any alteration of the recently completed stormwater culvert that was installed by SHA. The church requests that if the petition is granted, maintenance of the stormwater culvert at the same holding capacity be imposed as a mandatory

stipulation. The church notes that in other cases, SHA has waived such requirements because of cost or other reasons.

The record contains letters from nine family members of Arbor Place residents who are opposed to the present petition (two of the writers also testified at the hearing). See Ex. 41. In nearly identical language, the letters praise the extraordinary quality of life that their family members have at Arbor Place, attributing this to “the very quiet and peaceful environment both within the residence and in the secure back yard.” The letters further state that Alzheimer’s patients can be confused by noise and commotion, which can lead to agitation and aggressive behavior, and they voice a concern that “up to 30 children next door, running about, yelling and otherwise out of control,” will have negative effects on Arbor Place residents. Dr. Fanburg acknowledged under cross-examination that he had written to family members of Arbor Place residents about the petition, and he expressed surprise at how many of them had used his words verbatim. The Hearing Examiner finds Dr. Fanburg’s expression of surprise disingenuous, and gives little weight to these letters because they indicate that the writers were given incorrect or misleading information suggesting that the proposed child day care center would have 30 children running around outside, out of control and yelling. The evidence is clear that if the proposed child day care center were approved, there would be no more than ten children outside at one time, they would be limited to a fenced play area, and they would be under adult supervision at all times. There is not a shred of evidence to suggest that there would be 30 children “running around, out of control and yelling.” The Hearing Examiner’s denial of this petition is based on an expectation that even well-behaved children and infants in small groups can make unexpected, loud noises as part of their play, or for other reasons. It is not based on an expectation that Ms. General and her staff would allow the children in their care to be running around, out of control.

III. CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met. Pre-set legislative standards are both specific and general. The special exception is also evaluated in a site-specific context because there may be locations where it is not

appropriate. Weighing all the testimony and evidence of record under a “preponderance of the evidence” standard (see Code §59-G-1.21(a)), the Hearing Examiner concludes that the Petitioner has not met her burden of demonstrating that the proposed special exception would satisfy all of the specific and general requirements for the use.

A. Standard for Evaluation

The standard for evaluation prescribed in Code § 59-G-1.21 requires consideration of the inherent and non-inherent adverse effects of the proposed use, at the proposed location, on nearby properties and the general neighborhood. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.21. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a child day care facility. Characteristics of the proposed use that are consistent with the characteristics thus identified will be considered inherent adverse effects. Physical and operational characteristics of the proposed use that are not consistent with the characteristics thus identified, or adverse effects created by unusual site conditions, will be considered non-inherent adverse effects. The inherent and non-inherent effects thus identified must be analyzed, in the context of the subject property and the general neighborhood, to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Physical and operational characteristics associated with a child day care facility include a building for indoor facilities, an outdoor play area with attendant noise, parking facilities, site lighting

adequate for safety and security, and traffic associated with transporting staff and children to and from the site. Technical Staff identified the requested parking facility setback waivers as a non-inherent characteristic of the proposed use, but concluded that no adverse effects would flow from granting the waivers. Petitioner's land planner, Mr. Blumberg, identified no non-inherent characteristics of the proposed use. Mr. Blumberg specifically stated that in his view, inherent and non-inherent adverse effects measure only the characteristics of the proposed structure and uses, not potential adverse effects on an abutting property. His conclusion that the proposed use has no non-inherent characteristics led Mr. Blumberg, inexorably, to find that the use should be approved. The Opposition land planner, Mr. Doggett, clearly considers the proposed use incompatible with Arbor Place, but he did not frame his conclusions in terms of inherent and non-inherent adverse effects. The Hearing Examiner's analysis will deal first with the crux of the case, which is the potential for adverse effects on Arbor Place and its residents.

Arbor Place and its Residents. The Hearing Examiner disagrees with Mr. Blumberg's position that an assessment of inherent and non-inherent adverse effects must be confined to the limits of the subject site. In the Hearing Examiner's view, "unusual characteristics of the site" may include the location of the site and nearby features.¹² In this case, the subject property abuts an existing group home that is extremely sensitive to noise and commotion, so much so that unexpected noises can have negative effects on the health of its residents. This is not typical of a child day care facility and,

¹² The Hearing Examiner has twice recommended to the Board of Appeals the denial of a special exception on such a basis. One case was a child day care center proposed for a site abutting a narrow, curving road with limited sight distances. See Special Exception Case No. S-2471. In that case, the Hearing Examiner found that its location next to this road was an unusual physical characteristic of the site that constituted a non-inherent adverse effect. This adverse effect was part of the basis for the recommendation of denial. The Board of Appeal's denial of that special exception based on the Hearing Examiner's recommendation was upheld at the circuit court level and is pending in the Court of Special Appeals. See *Kids N Care Learning Center LLC and Heshmatollah Eskandari v. The Montgomery County Board of Appeals*, Civil No. 250687, Court of Special Appeals of Maryland. In Special Exception Case No. S-2476, the Hearing Examiner recommended denial of an automobile filling station special exception, principally because the site was located at the entrance to an area that had been identified in the Master Plan for pedestrian-oriented uses. Again, the location of the site was considered an unusual physical characteristic constituting a non-inherent adverse effect. The Board of Appeal's denial of that special exception, based on the Hearing Examiner's recommendation, was upheld at the circuit court and the Court of Special Appeals. No further appeal has been sought. See *Safeway, Inc. v. Montgomery County, Md.*, unreported decision No. 1693, Court of Special Appeals of Maryland, December 13, 2005.

therefore, must be considered a non-inherent adverse effect of the proposed special exception. As such, it merits careful scrutiny.

The evidence was overwhelming and undisputed that because they suffer from Alzheimer's or other forms of dementia, residents of Arbor Place are easily agitated by any number of things, including noise. Petitioner's medical expert, Dr. Sabat, argued that noise-related agitation is generally based on noise very close to the individual, in the same room, not sound that may be coming from a play area 90 feet away. Dr. Sabat unquestionably has a great deal of expertise concerning Alzheimer's patients, and his academic work clearly can be of significant benefit to medical practitioners and their patients. It was apparent, however, that his practical experience in observing the causes of agitation in a person with dementia and helping them to calm down is limited. Dr. Fanburg, on the other hand, has many years of day-to-day experience observing and dealing with agitation among the particular population at issue, the residents of Arbor Place. Dr. Fanburg did not attempt to adopt the facially unpersuasive position that *any* noise from children playing next door would be disturbing to *all* of the residents at Arbor Place. He maintained, however, that based on his long experience with the residents at Arbor Place, some of whom are seriously or profoundly impaired, he expects that the inevitable noise created by groups of ten children playing on the subject property would be disturbing to some of the residents, on some occasions, particularly if a child screams in play or for some other reason. Given the physical and emotional fragility of the residents of Arbor Place, Dr. Fanburg finds it unacceptable to expose them to that risk.

The Hearing Examiner was persuaded that Dr. Fanburg has a better understanding of the likelihood that Arbor Place residents would be disturbed by playground noise than Dr. Sabat. Moreover, even Dr. Sabat could not state categorically that the proposed child day care facility would have no adverse impact on Arbor Place residents. Dr. Sabat displayed his high professional standards by refusing to provide a categorical response, stating that science deals in probabilities, not absolutes. Thus, the Hearing Examiner was faced with weighing the probabilities perceived by Drs. Sabat and

Fanburg, and found Dr. Fanburg more persuasive due to his intimate, day-to-day experience with the subject population.

It must be acknowledged that children at the proposed day care center would not be outside all day – their outdoor time would be limited to an hour and a half in the morning and one hour in the afternoon. For most uses found in residential neighborhoods, the sounds of ten children on a playground during two limited periods of time would not be an imposition. Based on the evidence of record, the Hearing Examiner concludes that for Arbor Place, it would be a significant imposition. Dr. and Mrs. Fanburg and their staff would be faced with two choices: (a) continue to leave the back doors open in good weather and use the garden freely, with the risk that residents may be disturbed by screaming or loud playing next door, or (b) close the doors and keep residents inside during the day care facility's outdoor play times. The former involves risks of agitation that are probably unacceptable, and the latter would be a significant imposition on the therapeutic options available to the staff and residents. Accordingly, despite the limited time periods involved, the Hearing Examiner considers the potential adverse effects to be significant.

The testimony provided by the two noise experts was inconclusive. Petitioner's expert, Mr. Henning, opined that if the proposed special exception were approved and implemented, noise levels traveling to the Arbor Place property would actually *decrease*, because the children would be limited to a fenced play area and sound would be blocked by two solid wood fences. He based his conclusion, however, on his assessment of current noise levels when children are playing in the back yard. He attempted to measure the sound of the children playing, and on the day that he was present, there were "a couple" of infants in strollers or carriers, and three or perhaps four children up to the age of three and a half. Mr. Henning acknowledged that the infants he observed were not able to move around, and were not really making any sound. He provided no real explanation, however, for why he believes that ten children between the ages of three and five would produce sound levels only three decibels higher than that produced by three to four children under age four.

The Opposition noise expert, Mr. Spano, was no more persuasive than Mr. Henning regarding noise estimates. He maintained, with little explanation, the highly unpersuasive position that ten children between the ages of three and five would produce roughly the same amount of noise as 25 11-year-old children. From basic life experience, the Hearing Examiner cannot accept this proposition. Very young children are capable of making a great deal of vocal noise, but in a playground setting, the more robust play of 11-year-olds can result in more noise. Moreover, it defies logic to say that ten children would produce the same level of noise as 25. Mr. Spano made an attempt to explain why this was so, saying that greater numbers affect the density of the sound, but not the volume. If this is an accepted scientific principle, Mr. Spano did not succeed in explaining it persuasively.

The two noise experts disagreed about the mitigating effects of the proposed fencing. Mr. Henning stated that the two fences, combined, would decrease sound from the play area by about ten decibels, effectively cutting the perceived sound level in half. Mr. Spano stated that the fence on the property line would have little effect because it would be too far from both the source and the receiver; he estimated the mitigating effect of the fence along the play area as reducing the sound level by five decibels. Mr. Spano's explanation for his conclusion on this point was more detailed and, as a result, somewhat more persuasive than Mr. Henning's. This suggests that the proposed fencing would decrease the sound level, but not necessarily to a level that is imperceptible.

Mr. Spano was somewhat more persuasive than Mr. Henning with regard to the impacts of screaming on noise levels, again because he provided a more detailed analysis. Mr. Spano related screams to "tonal" sounds, which the Montgomery County Noise Ordinance regulates more strictly than general noise because, as Mr. Spano explained, prominent, single-tone noises are more annoying than other noises. As counsel brought out in cross-examination, Mr. Spano's opinion on this point is not supported by the specific calculations called for in the Noise Ordinance. Nonetheless, his analysis supports the conclusion that if the children were to scream – which is almost inevitable, at some point, in any group of infants and young children – the noise would be significantly louder and more disturbing. Even if the general sounds of the children playing would be fairly low, after the mitigation

provided by the fences, no persuasive evidence was presented to demonstrate that the sound of a child screaming would not be loud enough to be disturbing.

In addition, evidence provided by Arbor Place suggests that the proposed fencing and tall trees would have their own adverse effects, potentially outweighing the value of the noise mitigation they provide. Dr. Fanburg and others felt that the fencing and trees would have a negative effect on the aesthetics of the Arbor Place garden, which currently enjoys an expansive vista of open space toward the west. (Of course, the Petitioner has the right as a property owner to install fencing and tall trees if she so chooses, but it is a different thing for the County to approve such measures as part of a special exception.) Moreover, due to their confused mental state, some Arbor Place residents could be more upset by a noise whose source they cannot see, than by one they can see and understand. If the cure is worse than the problem it attempts to fix, that suggests the proposed use is simply incompatible. It may be that the most important thing Mr. Spano said was an offhand comment elicited near the end of his testimony, that there are only three ways to solve a noise problem: reduce the noise at the source, create noise barriers, or move the noise receiver. The first of these possibilities is not feasible in this situation, the second creates its own adverse effects, and the third is not under discussion. Thus, it appears that the noise impacts anticipated from the proposed use cannot be mitigated in a way that is compatible with the existing group home.

Petitioner introduced evidence, principally through the cross-examination of Dr. and Mrs. Fanburg, that the current child day care facility on the subject property has not caused any problems or adverse effects for Arbor Place. The implication is that if the current child day care doesn't cause problems, a large one would not cause problems, either. The Hearing Examiner is not persuaded that this is necessarily the case. Abundant evidence was presented indicating that the current child day care is a very modest operation, with six to eight children present on any given day, and that they do not spend very much time outdoors. With a larger number of children, both the amount of outdoor play time and the number of children outside at one time would like increase, with correspondingly greater impacts.

Ultimately, the Hearing Examiner agrees with the Planning Board's conclusion: the Petitioner has not met her burden of demonstrating, by a preponderance of the evidence, that the proposed special exception would not have an adverse impact on Arbor Place and its residents. Arbor Place has not demonstrated conclusively that there *would* be an adverse impact, but they do not bear that burden. The Hearing Examiner is persuaded that the proposed special exception has a high likelihood of adverse impact on Arbor Place, which is enough to undermine the Petitioner's case.

The Hearing Examiner finds Technical Staff's recommendation of approval in this case unpersuasive. First and foremost, Technical Staff was not privy to the considerable evidence presented at the hearing concerning the impact of noise on persons with dementia. Staff clearly had been exposed to some of this evidence by Arbor Place, but discounted it due to a lack of "clear guidelines, policies or studies" concerning the impact of noise on this population. See Staff Report at 15. Staff may have neglected to remember the lens through which all special exception petitions in Montgomery County must be viewed: the petitioner bears the burden of demonstrating compliance with the Zoning Ordinance. If an opposition party presents substantial, probative evidence that tends to indicate that a use would result in adverse effects, this evidence must be weighed against Petitioner's contrary evidence under the preponderance of the evidence test – if the comparison results in a tie, Petitioner has not met his or her burden of proof.

Technical Staff also relied on at least one element that is not a binding commitment on the part of the Petitioner. In assessing the impacts of the proposed child day care center, Staff relied on Petitioner's representation that about 40 percent of the children would be infants, who presumably make less noise outdoors (unless they decide to scream for some reason) because they are in strollers, not running around. The Petitioner has not made a commitment to maintaining an enrollment of at least 40 percent infants, and doing so would be impractical. Thus, Staff's reliance is misplaced.

In assessing the impact of noise from the proposed use on Arbor Place, Staff compared it to the level of activity existing in the neighborhood, with two churches and a pre-school across the street. Staff found that "[g]iven the existing residential and institutional nature of the immediate area,

the established pattern of activities on the neighboring properties and on the street, as well as the level of noise generated by these activities, it is very unlikely that the level of noise from the proposed day care would result in a notable adverse impact that would increase the intensity of existing conditions, in terms of noise and traffic." Staff Report at 17. Staff may have reached this conclusion based on good information about the levels of activity and noise in the immediate area, but that information is not revealed in the record. The only information in the record about activity levels in the immediate vicinity of the site was from the cross-examination of Dr. and Mrs. Fanburg, both of whom testified that they can hear noise from the uses across the street only from the front of the Arbor Place facilities, not from the inside or the rear garden. Thus, the preponderance of the evidence available to the Hearing Examiner does not support Staff's conclusion.

Operational Characteristics. The Hearing Examiner finds that most of the operational characteristics of the proposed use should be considered inherent, with the exception of the requested parking setback waivers, the deceleration lane and the signage. The building would retain its residential appearance, which is not unusual in any way, the play area would be fairly typical for a small child day care facility, and the number of trips would not be unusual. The location of the parking area, however, and the resulting request for setback waivers, are not typical of child day care facilities, and therefore must be considered non-inherent.

The Hearing Examiner found Technical Staff's and Mr. Blumberg's recommendations to grant the requested parking waivers unpersuasive. Mr. Doggett's testimony that the adjacent home to the west would be adversely affected by the proximity of the parking lot had the ring of truth. The parking lot would be only six feet from the property line, and only 40 feet from the neighboring house. Mr. Henning opined that noise from the parking lot would not be noticeable compared to the existing roadway noise, but offered nothing to support his conclusion. Mr. Spano voiced a contrary opinion, stating that each time a car door slams shut, it will be audible from the neighboring home. He based this on experience with a restaurant parking lot with similar proximity to homes, where there have been many complaints about car doors. A board-on-board fence has some ability to block sound and light,

but as Mr. Blumberg himself explained, the gaps between the boards inevitably allow some sound and light to leak through. All agreed that the evergreen screen would serve a visual purpose, but that a single row of trees has no real noise mitigating impact. Mr. Doggett's contention that headlights bouncing off the subject building would be a source of light intrusion on the neighboring property was uncontested. Technical Staff and Mr. Blumberg both reasoned, probably correctly, that the location proposed for the parking area is the best place for it on the subject site, given the location of the garage and the need to preserve a residential appearance to the greatest extent possible. However, just because it is the best possible location on the site does not mean it is acceptable – if the best possible location would have unacceptable adverse impacts, that is in indication of fundamental incompatibility of the use. Based on the preponderance of the evidence, the Hearing Examiner concludes that the requested parking setback waivers would have to be denied due to likely adverse effects on the adjoining property to the west.

The Hearing Examiner finds that the evidence does not support a conclusion, one way or the other, concerning the safety of the proposed entrance and deceleration lane. Neither party offered an expert witness on transportation issues, and Technical Staff did not address these issues except to state that Petitioner should contact the State Highway Administration about them. If the Hearing Examiner were inclined to grant the requested special exception, written documentation would first be required of SHA's approval of the entrance and deceleration lane.

The Hearing Examiner considers the proposed signage to be a non-inherent adverse effect because of its size and height. It is not unusual, based on past cases, for a child day care facility to have a small sign. A sign that requires a variance from the Sign Ordinance, however, is not typical. The Hearing Examiner finds that the proposed sign would adversely affect the general neighborhood of the subject property by detracting from the residential appearance of the site.

For the reasons stated above and in Parts III.B. and C. below, the Hearing Examiner concludes that the proposed special exception should be denied due to unacceptable levels of non-inherent adverse effects.

B. Specific Standards

The specific standards for a child day care facility are found in §59-G-2.13.1. For the reasons stated in Part III.A. above and in the following discussion, the Hearing Examiner concludes that the proposed facility would not satisfy all of these specific standards.

Sec. 59-G-2.13.1. Child day care facility.

- (a) The Hearing Examiner may approve a child day care facility for a maximum of 30 children if:
- (1) a plan is submitted showing the location of all buildings and structures, parking spaces, driveways, loading and unloading areas, play areas and other uses on the site;

Conclusion: A plan showing the location of all such features has been submitted. See

Ex. 62.

- (2) parking is provided in accordance with the Parking Regulations of Article 59-E.

The number of parking spaces may be reduced by the Hearing Examiner if the applicant demonstrates that the full number of spaces required in Section 59-E-3.7 is not necessary because:

- (A) existing parking spaces are available on adjacent property or on the street abutting the site that will satisfy the number of spaces required; or
- (B) a reduced number of spaces would be sufficient to accommodate the proposed use without adversely affecting the surrounding area or creating safety problems;

Conclusion: The proposed parking facility would satisfy the requirements of Article 59-E with regard to the number of spaces and with regard to screening. As discussed in detail in Part III.A. above, the parking facility would require significant waivers of applicable setback requirements, the granting of which would result in unacceptable adverse impacts on the adjoining residence to the west.

- (3) an adequate area for the discharge and pick up of children is provided;

Conclusion: Based on the preponderance of the evidence, the Hearing Examiner finds that the number of parking spaces proposed is adequate for the use, given the fact that children arrive and depart at varied times, and that there is room on-site for two cars to wait for a space to open up. The Hearing Examiner does not consider the proposed lighting to be adequate for safe and convenient

pick-up and drop-off, because the parking spaces farthest from the single light pole would not be adequately lit. The parking lot lighting is symptomatic of why the proposed use is fundamentally incompatible on this site: Petitioner cannot install more than one light pole without creating unacceptable light spillage (and possibly glare) on the neighboring property to the west, but the minimal, residentially-compatible lighting she has proposed would not provide enough light to serve the entire parking facility.

(4) the petitioner submits an affidavit that the petitioner will:

- (A) comply with all applicable State and County requirements;
- (B) correct any deficiencies found in any government inspection; and
- (C) be bound by the affidavit as a condition of approval for this special exception; and

Conclusion: Petitioner has complied with this condition. See Ex. 13.

(5) the use is compatible with surrounding uses and will not result in a nuisance because of traffic, parking, noise or type of physical activity. The hearing examiner may require landscaping and screening and the submission of a plan showing the location, height, caliper, species, and other characteristics, in order to provide a physical and aesthetic barrier to protect surrounding properties from any adverse impacts resulting from the use.

Conclusion: For all of the reasons stated in Part III.A. above, the Hearing Examiner finds that the proposed use would not be compatible with surrounding uses, particularly the two uses on either side of the site. The parking facility would have unavoidable adverse impacts on the adjoining neighbor to the west, and the noise of children using the outdoor play area has a high likelihood of adverse effects on residents of the group home adjoining to the east. Moreover, the evidence is not adequate to determine whether the proposed access point and deceleration lane would be safe and adequate, and the proposed signage would detract from the residential character of the site and the area. Petitioner has proposed significant landscaping and screening, but due to the limitations of the site, and the nature of the proposed use and adjoining land uses, the fundamental incompatibilities cannot be overcome with landscaping and screening.

- (b) A child day care facility for 31 or more children may be approved by the Board of Appeals subject to the regulations in subsection (a), and the following additional requirements . . .

Not applicable.

C. General Standards

The general standards for a special exception are found in Section 59-G-1.21(a). For the reasons stated in Part III.A. above and in the following discussion, the Hearing Examiner concludes that the proposed facility would not satisfy all of these general conditions.

Sec. 59-G-1.21. General conditions:

- (a) A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:

- (1) Is a permissible special exception in the zone.

Conclusion: A child day care facility is a permitted use in the RE-1Zone.

- (2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

Conclusion: The proposed use would not comply with the standards and requirements set forth for the use in Code §59-G-2.13.1, as detailed in Part III.B. above.

- (3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the commission. Any decision to grant or deny special exception must be consistent with any recommendation in an approved and adopted master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.

Conclusion: The *2005 Olney Master Plan* recommends that special exception projects "should be compatible with the development pattern of the adjoining uses in terms of height, size, scale, traffic and visual impacts of the structures and parking." Staff Report at 6. The Master Plan also recommends minimizing "the negative impacts of special exception uses such as non-residential character, visibility of parking lots, excessive size, height and scale of buildings and intrusive lighting." *Id.* In light of the conclusion stated above that the proposed use would be incompatible with

neighboring uses, the Hearing Examiner likewise finds that the proposed use would be inconsistent with the Master Plan.

Arbor Place argued that the proposed use would also run afoul of a Master Plan recommendation that future special exception uses with the potential to create a commercial appearance along major roads should be discouraged. Technical Staff did not address this portion of the Master Plan. Without Staff's guidance, the Hearing Examiner is at something of a loss to determine whether Muncaster Mill Road should be considered a "major road" for this purpose. Moreover, having already concluded that the proposed use would be inconsistent with the Master Plan due to compatibility problems, the Hearing Examiner sees no need to analyze an additional Master Plan argument.

- (4) Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.

Conclusion: The proposed facility would have no effect on population density, no new free-standing structures, a relatively low intensity and character of activity, and no impact on parking conditions, given that there is on-street parking. The evidence is not sufficient to assess whether the proposed use would create traffic problems in the neighborhood, given the uncertainty about the safety and adequacy of the proposed entrance and deceleration lane.

- (5) Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: For the reasons described in Part III.A. above, the Hearing Examiner concludes that Petitioner has not demonstrated, by a preponderance of the evidence, that the proposed use would not be detrimental to the use and peaceful enjoyment of the adjoining properties to the east and west. The noise from children playing outside has a high likelihood of disturbing residents of Arbor Place, with potential health consequences for that fragile population, and the proposed mitigation measures are unacceptable due to their own adverse effects. The proximity of

the proposed parking facility to the adjacent home on the west is likely to result in noise and light intrusion on that home, which would not be adequately mitigated by the measures proposed.

- (6) Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: For the reasons stated above and in Part III.A., the Hearing Examiner finds that the evidence is not sufficient to conclude that the proposed use would cause no objectionable noise or physical activity at the subject site.

- (7) Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.

Conclusion: After much research and discussion, the parties agreed that the only currently operating special exception in the general neighborhood is Arbor Place. The Hearing Examiner has concluded that the proposed use would have adverse effects on the general neighborhood, irrespective of whether it is considered independently or in conjunction with Arbor Place. The Hearing Examiner notes, however, that although there is a residential character to the general neighborhood, the predominant character is mixed, due to a large number of religious uses.

- (8) Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: The evidence does not support the conclusion that the proposed use would not adversely affect the health and general welfare of residents of the adjoining properties to the east and west.

- (9) Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.

Conclusion: The evidence supports the conclusion that the subject property would continue to be served by adequate public facilities with the proposed use.

- (i) If the special exception use requires approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of granting the special exception. If the special exception does not require approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Board of Appeals when the special exception is considered. The adequacy of public facilities review must include the Local Area Transportation Review and the Policy Area Transportation Review, as required in the applicable Annual Growth Policy.

Conclusion: Subdivision approval would not be required. The proposed use would generate fewer than 30 vehicular trips during the weekday peak hours, so it is not subject to Local Area Transportation Review requirements. Policy Area Transportation Review requirements no longer apply, per the current AGP Policy Element.

- (2) With regard to findings relating to public roads, the Board . . . must further determine that the proposal will have no detrimental effect on the safety of vehicular or pedestrian traffic.

Conclusion: The evidence is not sufficient to draw a conclusion as to whether the proposed access point and deceleration lane would have a detrimental effect on the safety of vehicular traffic. The evidence suggests that there is little pedestrian traffic because there are no sidewalks.

- (b) Nothing in this Article relieves an applicant from complying with all requirements to obtain a building permit or any other approval required by law. The Board's finding of any facts regarding public facilities does not bind any other agency or department which approves or licenses the project.

Conclusion: No finding necessary.

- (c) The applicant for a special exception has the burden of proof to show that the proposed use satisfies all applicable general and specific standards under this Article. This burden includes the burden of going forward with the evidence, and the burden of persuasion on all questions of fact.

Conclusion: The record substantiates a finding that Petitioner has not met the burden of proof and persuasion.

IV. DECISION

Based on the foregoing findings and conclusions and a thorough review of the entire record, Petition No. SE 05-2, requesting a special exception under the RE-1 Zone for a child day care facility to be operated in an existing structure located at 4419 Muncaster Mill Road in Olney, is hereby ***denied.***

Dated: March 10, 2006

Françoise M. Carrier
Hearing Examiner

NOTICE OF RIGHT TO APPEAL

Any person, board, association, corporation or official aggrieved by a decision of the Hearing Examiner under this section may, within ten days after this decision is rendered, appeal the decision to the County Board of Appeals in accordance with the provisions of Section 59-G-1.12(g) of the Zoning Ordinance.

cc: All Parties of Record