

BOARD OF APPEALS CASE NO. 5284

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BEFORE THE

APPLICANT: Diane Murray

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ZONING HEARING EXAMINER

REQUEST: Special Exception and variance to locate a personal care boarding home in the Agricultural District; 2225 Grafton Shop Road, Forest Hill

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OF HARFORD COUNTY

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Hearing Advertised

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Aegis: 9/18/02 & 9/25/02

HEARING DATE: March 31, 2003

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Record: 9/20/02 & 9/27/02

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ZONING HEARING EXAMINER'S DECISION

The Applicant, Diane Murray (Allen), is requesting a Special Exception, pursuant to Section 267-53F(8) of the Harford County Code, for a personal care boarding home, and a variance from Section 267-34C, to allow the personal care boarding home to be located less than the required 80 feet from the property line (30 feet existing), in an AG/Agricultural District.

The subject parcel is located at 2225 Grafton Shop Road, Forest Hill, MD 21050-1325, and is more particularly identified on Tax Map 40, Grid 1C, Parcel 179. The parcel consists of 16.40± acres, is zoned Agricultural (AG) and is entirely within the Third Election district.

FINDINGS OF FACT

In addition to the Applicant, Mr. Dudley Campbell, an expert land surveyor and expert in the area of land development and regulations related to land development appeared and offered testimony in support of the Application. Mr. Anthony McClune appeared as representative of the Department of Planning and Zoning and several neighboring property owners appeared in opposition to the request. The facts are generally not in dispute and are summarized as follows:

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The Applicant has lived at the subject location since 1998. The parcel is 16.40 acres and the home was already existing when she purchased the property. The structure was built in such a manner that it was intended to be used as a personal care boarding home. The home has 8 bedrooms and 9 bathrooms. Each room and bathroom is handicapped equipped and wheelchair accessible. The Applicant has operated personal care boarding homes for 35 years and recently closed the operations she operated in Baltimore City in the Montebello area. The witness testified that she specifically sought out a large parcel with a very large home that would be adaptable for an adult personal care boarding home. She currently has 5 other residents living on the property. There are four (4) other family members living there as well. There are two full time employees of the facility and one part time employee. There is a visiting geriatric nurse that visits the property every two weeks. The Applicant is requesting a special exception to operate a boarding home at this location for adult boarders, generally of advanced age with some physical and/or health related issues. She will need to install a sprinkler system in order to go to 15 boarders but she has more than adequate facilities to accommodate that number. In order to finance operations, most boarders are supported by foundations, charities or other non-profit organizations. The residents generally have no means of support and have few, if any family members. The Applicant stated that she has had referrals in the past from various protective services agencies. No cooking is allowed in the rooms and staff prepares all meals. The Applicant does most of the food preparation. If the facility increases to 15 boarders the number of employees necessary will be 5. Since the boarders do not drive, the only traffic to and from the site is the food delivery van, the employees, an occasional ambulance and trips for appointments to doctors, dentists and the like. The Applicant cannot obtain a state license without first obtaining zoning approval from Harford County. In the opinion of the Applicant, no impacts are associated with her proposed use. The boarders spend little time outside and are generally not noticeable from adjoining properties. It will take approximately two years for the Applicant to be able to handle 15 boarders. The Applicant fully described other facilities that she has either operated or been associated with and felt that the very minimal impacts associated with a personal care boarding home were even less at this location because of the size of the house and parcel.

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The property is located outside of the development envelope where predominant land uses are rural residential and agricultural. The lot is fairly large and the home has existed at its present location since it was built. It is a non-conforming structure in regard to the 80 foot setback requirement (30 feet existing). When the house was built, the existing 30 feet was conforming to the then existing setback requirements of the Code. While Harford County Department of Health has informally stated that the septic system is adequate to accommodate the proposed number of residents, the Applicant agrees that the Health Department will need to provide a formal guidance in this regard and, if upgrades are required, the Applicant agrees to make those improvements. A well water appropriations permit will be required. The use is consistent with the master Land Use Plan and there are no environmental impacts. Mr. Campbell expressed his expert opinion that there were no identifiable adverse impacts associated with this use. It will continue to be a residential use with a slightly increased number of persons living there than the average household, but given the size of the house and parcel and the 450-500 foot distances from other residential uses, the increase in number of residents would not result in any additional impacts to adjoining properties.

The Department of Planning and Zoning agreed with the Applicant and the Applicant's witness that the proposal was consistent with the provisions of the Code and that the setback variance was a result of the very unique lot configuration including a nonconforming structure. Because of the road configuration there is actually a debatable question of whether this is a side or a rear yard setback. The property has frontage on Grafton Shop Road but also enjoys 400 feet of frontage on MD Route 23. Because the entrance drive is on Grafton Shop, the Department of Planning and Zoning considers the problematic property line a side yard line, however, because there is also frontage on Route 23, if the entrance to the parcel were there, this would be a rear yard setback line and no variance would be necessary. All of the witnesses agreed this was a unique lot configuration. Additionally, the witnesses each pointed out that the house has been used as a residence at its exact location since the 1980's without adverse impact. In order to further mitigate even the ability to notice the residence from adjoining properties, the Applicant proposes a buffer of trees be planted between the existing home and the closest residential use that will screen the existing home and use from view.

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Mr. McClune testified that 15 residents was a common number of residents as to other personal care boarding homes located in Harford County. The facility will serve an ever growing population of senior citizens that have few, if any, options available to them for this type of round the clock care. Mr. McClune, based on his experience with other similar facilities opined that the residents of these facilities were generally very quiet, don't drive, have few if any visitors and are generally accepted as members of the community where they reside as any other resident would be.

Mr. Henry Thackston, Mr. Stephen Hladkey, and Ms. Aimee O'Neill all testified in opposition to the proposal. In general, each protestant was concerned about the future expansion of the use to include more than 15 people or the addition of other buildings allowing the use to grow into more of an institutional use rather than a residential one. Ms. O'Neill was also concerned that the use could be transferred to another owner and pointed out that the property was for sale in the recent past. Mr. Hladkey was also concerned about the view of the use although there was no real explanation for what the concern involved since the view will continue to be the view of a rather large parcel with a large residence on it, much like the view of any other large residential lot in Forest Hill. However, he admitted plantings of a buffer of trees would satisfactorily alleviate much of his concern.

There was also discussion regarding the potential improper location of the driveway. That issue is not, however, before the Hearing Examiner and can be adequately addressed during the final site plan review process.

CONCLUSION

The Applicant is requesting a Special Exception pursuant to Section 267-53F(8) of the Harford County Code for a personal care boarding home, and a variance to Section 267-34C to allow the Personal care Boarding Home less than the required 80 feet from the property line (30 feet existing), in an AG/Agricultural District.

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The applicable sections of the Harford County Code are as follows:

Section 267-51. Purpose.

Special exceptions may be permitted when determined to be compatible with the uses permitted as of right in the appropriate district by this Part 1. Special exceptions are subject to the regulations of this Article and other applicable provisions of this Part 1.

Section 267-52. General regulations.

- A. Special exceptions require the approval of the Board in accordance with Section 267-9, Board of Appeals. The Board may impose such conditions, limitations and restrictions as necessary to preserve harmony with adjacent uses, the purposes of this Part 1 and the public health, safety and welfare.
- B. A special exception grant or approval shall be limited to the final site plan approved by the Board. Any substantial modification to the approved site plan shall require further Board approval.
- C. Extension of any use or activity permitted as a special exception shall require further Board approval.
- D. The Board may require a bond, irrevocable letter of credit or other appropriate guaranty as may be deemed necessary to assure satisfactory performance with regard to all or some of the conditions.
- E. In the event that the development or use is not commenced within three (3) years from date of final decision after all appeals have been exhausted, the approval for the special exception shall be void. In the event of delays, unforeseen at the time of application and approval, the Zoning Administrator shall have the authority to extend the approval for an additional twelve (12) months or any portion thereof.

Section 267-53F(8)

The special exceptions enumerated herein, in addition to other conditions as may be imposed by the Board, shall comply with the following requirements:

Personal-care boarding homes. These uses may be granted in the AG, RR, R, R1, R2, R3, R4, RO, VB and VR Districts, provided that:

- (a) The proposed use shall be located in a single-family detached dwelling.

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- (b) The proposed use meets the minimum lot size requirements for a conventional single-family residence in the district where located.
- (c) A maximum density of one (1) boarder per two thousand (2,000) square feet of lot area shall be maintained.
- (d) Adequate off-street parking shall be provided.
- (e) Where an application is for construction of a new dwelling, the building shall be similar in appearance to other single-family dwellings in the neighborhood.

Section 267-34C requires an 80 foot setback, A 30 foot setback exists.

Section 267-11 permits variances and provides:

"Variances from the provisions or requirements of this Code may be granted if the Board finds that:

- (1) By reason of the uniqueness of the property or topographical conditions, the literal enforcement of this Code would result in practical difficulty or unreasonable hardship.
- (2) The variance will not be substantially detrimental to adjacent properties or will not materially impair the purpose of this Code or the public interest."

The Hearing Examiner finds that the Applicant's proposal can meet or exceed each specific requirement of the Code. The proposed use is entirely within a single-family detached dwelling and contains 14 acres more than the Code requires for such a use. Only 15 boarders are being requested which is far less than the density of 1 boarder per 2000 square feet allows. There is adequate room to provide the 7 parking spaces recommended by the Department as adequate for such a facility. This is an existing building and no new construction is being requested.

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In evaluating any special exception use, the Hearing Examiner is cognizant of the provisions of Section 267-9I of the Harford County Code entitled, Limitations, Guides, and Standards”. A discussion of each of those provisions follows:

Section 267-9I

Limitations, guides and standards. In addition to the specific standards, guidelines and criteria described in this Part 1 and other relevant considerations, the Board shall be guided by the following general considerations. Notwithstanding any of the provisions of this Part 1, the Board shall not approve an application if it finds that the proposed building, addition, extension of building or use, use or change of use would adversely affect the public health, safety and general welfare or would result in dangerous traffic conditions or jeopardize the lives or property of people living in the neighborhood. The Board may impose conditions or limitations on any approval, including the posting of performance guaranties, with regard to any of the following:

- (1) The number of persons living or working in the immediate area.***

No additional employees are immediately proposed. If the facility grows to the requested 15 boarders, an additional three (3) employees will be needed. This is a negligible increase in the number of persons working in Forest Hill.

- (2) Traffic conditions, including facilities for pedestrians, such as sidewalks and parking facilities, the access of vehicles to roads; peak periods of traffic; and proposed roads, but only if construction of such roads will commence within the reasonably foreseeable future.***

The evidence indicates that little or no traffic is generated from the proposed use different than that normally associated with any other residential use.

- (3) The orderly growth of the neighborhood and community and the fiscal impact on the county.***

The use is permitted in the AG zone by special exception and is legislatively predetermined to be compatible with other uses in the zone unless there is substantial evidence that would overcome the presumption. No such evidence was presented to the Hearing Examiner.

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- (4) *The effect of odors, dust, gas, smoke, fumes, vibration, glare and noise upon the use of surrounding properties.*

No such impacts are associated with this use.

- (5) *Facilities for police, fire protection, sewerage, water, trash and garbage collection and disposal and the ability of the county or persons to supply such services.*

Police protection will be provided by the Harford County Sheriff's office and Maryland State Police. Fire protection will be provided primarily by the Forest Hill, Fallston and Jarrettsville volunteer fire companies. Private trash removal is required.

- (6) *The degree to which the development is consistent with generally accepted engineering and planning principles and practices.*

The Department of Planning and Zoning and the Applicant's land development expert both concluded that the proposal was consistent with generally accepted engineering and planning principles and practices. No evidence to the contrary was presented.

- (7) *The structures in the vicinity, such as schools, houses of worship, theaters, hospitals and similar places of public use.*

No such structures were identified.

- (8) *The purposes set forth in this Part 1, the Master Plan and related studies for land use, roads, parks, schools, sewers, water, population, recreation and the like.*

The proposed use as requested is consistent with the County's Master Plan.

- (9) *The environmental impact, the effect on sensitive natural features and opportunities for recreation and open space.*

There are no environmental impacts associated with this request. The use has been in continuous residential use since the 1980's and will continue its use as a residence if this requested is approved.

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(10) *The preservation of cultural and historic landmarks.*

Not applicable to this request.

In reaching any decision in a special exception case, the Hearing Examiner is necessarily guided by Maryland judicial decisions that have considered such requests. Under Maryland law, the special exception use is part of the comprehensive zoning plan sharing the presumption, that, as such, it is in the interest of the general welfare, and therefore, valid. The special exception use is a valid zoning mechanism that delegates to an administrative board a limited authority to allow enumerated uses which the legislature has determined to be permissible absent any fact or circumstance negating the presumption.

The duties given the Board are to judge whether the neighboring properties in the general neighborhood would be adversely affected and whether the use in a particular case is in harmony with the general purpose and intent of the plan. Schultz v. Pritts, 291 Md. 1, 432 A. 2d 1319, 1325 (1981) (“Schultz”).

“While the applicant in such a case has the burden of adducing testimony, which will show that, his use meets the prescribed standards and requirements of the zoning code, he does not have the burden of showing affirmatively that his proposed use accords with the general welfare. If he shows to the satisfaction of the Board that the proposed use would be conducted without real detriment to the neighborhood and would not actually adversely effect the public interest, he has met his burden. The extent of any harm or disturbance to the neighboring area and uses is, of course, material; but if there is not probative evidence of harm or disturbance in light of the nature of the zoning involved or of factors causing disharmony to the functioning of the comprehensive plan, a denial of an application for special exception is arbitrary, capricious, and illegal. Turner v. Hammond, 270 Md. 41, 54-55, 310 A. 2d 543, 550-551 (1973) (“Turner”).

The appropriate standard to be used in determining whether a requested special exception use should be denied is whether there are facts and circumstances that show the particular use proposed at the particular location proposed would have any adverse effect above and beyond those inherently associated with such a special exception use irrespective of its location within the zone.” See Schultz at 432 A. 2d 1327.

Such facts and circumstances must be strong and substantial to overcome the presumption that the proposed use be allowed in the district. Anderson v. Sawyer, 23 Md. App. 612, 329 A. 2d 716, 724 (1974) (“Anderson”).

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The law in Maryland is clear that the localized impact caused by a special exception must be unique and atypical in order to justify denial. Sharp v. Howard County Board of Appeals, 98 Md. App. 57, 632 A. 2d 248 (1993) (“Sharp”).

In determining whether the presence of the proposed uses would be more harmful here than if located elsewhere in the AG zone, one must take into account the area where the use is proposed. AT&T Wireless Services v. Mayor and City Council of Baltimore, 123 Md. App. 681, 720 A. 2d 925 (1998) (“AT&T”).

In Mossburg v. Montgomery County, 107 Md. App. 1, 666 A. 2d 1253 (1995) (“Mossburg”) the Court of Special Appeals had occasion to restate and clarify the law in Maryland regarding special exceptions. There the Court found that the Board of Appeals of Montgomery County improperly denied a special exception for a solid waste transfer station in an industrial zone. In reversing the Circuit Court, which upheld the Board's decision, the Court of Special Appeals found that the decision to deny the special exception was not based on substantial evidence of adverse impact at the subject site greater than or above and beyond impact elsewhere in the zone and, therefore, the decision was arbitrary and illegal. There the Court said:

“The question in the case sub judice, therefore, is not whether a solid waste transfer station has adverse effects. It inherently has them. The question is also not whether the solid waste transfer station at issue here will have adverse effects at this proposed location. Certainly it will and those adverse effects are contemplated by the statute. The proper question is whether those adverse effects are above and beyond, i.e. greater here than they would generally be elsewhere within the areas of the County where they may be established, ... In other words, if it must be shown, as it must be, that the adverse effects at the particular site are greater or “above and beyond”, then it must be asked, greater than what? Above and beyond what? Once an applicant presents sufficient evidence establishing that his proposed use meets the requirements of the statute, even including that it has attached to it some inherent adverse impact, an otherwise silent record does not establish that that impact, however severe at a given location, is greater at that location than elsewhere.” (emphasis supplied)

Thus, the Court of Special Appeals emphasized that once the applicant shows that it meets the requirements for the special exception under statute, the burden then shifts to the Protestants to show that impacts from the use at a particular location are greater at this location than elsewhere. If the Protestants fail to meet that burden of proof, the requested special exception must be approved.

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In this case, the Applicant has demonstrated that she can meet or exceed all of the specific requirements of the Code. No facts were presented, nor does the Hearing Examiner believe any exists, to rebut the presumption of compatibility afforded such a use. The proposed personal care boarding home is a residential use and the only thing that differentiates this use from any other residential use is that these persons are not related as family members. While the number of persons may be somewhat larger than the typical family residence in Harford County there are larger than typical families found in Harford County and this particular use will not have any adverse impacts different from or more intrusive than a large family might have at this location. There are likely less impacts than might be associated with a large family consisting of 11 or 12 children with the associated children's activities that can be much noisier and more obtrusive than the noise associated with physically challenged senior citizens.

The subject property is unique. It enjoys two road frontages which makes the question of property line debatable as to whether the setback required is a side yard setback or a rear yard setback. In any event the existing house has been located within its present setback for more than 20 years and is non-conforming. But for this request, no variance or other notice would even be paid to the location of the house. There are great distances between residences at this location so the purposes of the Code in providing adequate open space and separation between residential uses is clearly met. It would be a hardship to require the Applicant to physically relocate the house to accommodate this requirement, particularly when the result would not serve any material purpose.

The Hearing Examiner, after consideration of all of the testimony and application of the Harford County Code and Maryland judicial opinions regarding the law of special exceptions and area variances, recommends approval of the subject request subject to the following conditions.

1. The Applicant shall prepare a detailed site plan to be reviewed and approved through the Development Advisory Committee (DAC)
2. The number of boarders shall be limited to 15.
3. The Applicant shall obtain any and all necessary permits and inspections.

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4. The Applicant shall prepare and submit a landscaping plan for review and approval by the Department of Planning and Zoning. The plan shall include, at a minimum, provision for plantings of trees and shrubbery that will screen the use from view of adjoining properties and will provide a suitable relocation for the existing driveway so it is entirely on the Applicant's property.
5. The Applicant shall make provision for a minimum of seven (7) parking spaces.
6. No further expansion of the special exception use beyond the existing structure or that includes more than fifteen (15) boarders shall be permitted without further Board of Appeals review and approval.

Date APRIL 30, 2003

William F. Casey
Zoning Hearing Examiner