

**DISTRICT COUNCIL FOR PRINCE GEORGE'S COUNTY, MARYLAND  
OFFICE OF THE ZONING HEARING EXAMINER**

**SPECIAL EXCEPTION  
REVISION OF SITE PLAN  
4388/01  
ALTERNATIVE COMPLIANCE  
11031**

**DECISION**

Application: Revision of Site Plan for Day Care Center for Children and Alternative Compliance  
Applicant: Kreative Kids Child Care Center/ Monika and Jalindar Mahabare  
Opposition: None  
Hearing Date: December 5, 2012  
Hearing Examiner: Maurene Epps Webb  
Disposition: Approval with Conditions

**NATURE OF PROCEEDINGS**

- (1) Special Exception 4388/01 is a request to revise Special Exception 4388 (Day Care Center for Children), approved in 2001 by the District Council, by increasing enrollment from 32 to 62 children. Applicant is also requesting alternative compliance to the provisions of the Landscape Manual (AC-11031) for the portions of three parking spaces that lie within the required landscape strip. The subject property is located on 0.2707 acre (11,789 square feet) of R-R (Rural Residential) zoned land located on the northeast corner of Collier Road and Cherry Hill Road in Beltsville, Maryland. The property is identified as 3400 Collier Road, Beltsville, Maryland.
- (2) The Technical Staff recommended approval with conditions. (Exhibit 11) The Planning Board chose not to schedule a hearing on the request and adopted the Technical Staff's recommendation as its own. (Exhibit 15)
- (3) No one in opposition to the request appeared at the hearing.
- (4) At the close of the hearing the record was left open to allow Applicant to submit a floor plan and an updated Letter of Exemption from the requirements of the Woodland and Wildlife Habitat Conservation Ordinance and additional information. One of the items was received on May 21, 2013. (Exhibits 23(a) and 23 (b))

## FINDINGS OF FACT

### Subject Property

(1) The subject site is a rectangular-shaped parcel improved with a one-story 2,630 square-foot, single-family dwelling unit constructed in 1964. The building is made of brick and siding, and has a split-foyer entrance and a walk-out basement. (Exhibit 16(a)) The building has a circular asphalt driveway, accessible from both Cherry Hill Road and Collier Road, a parking area for five vehicles on the northwest side of the building, a covered handicap ramp, and a fenced play area with play equipment in the rear and side yards.

(2) The request is exempt from the requirements of the Woodland and Wildlife Habitat Conservation Ordinance because the property is less than 40,000 square feet and has no prior TCP approvals. The Letter of Exemption has expired, however, and Applicant must submit a revised one. (Exhibits 7 and 11) The site does not contain any regulated environmental features. (Exhibit 11, p. 9)

### Surrounding Area; Neighborhood

(3) The neighborhood has the following boundaries:

- North - Powder Mill Road (MD 212);
- South - the Capital Beltway (I-95/495);
- East - Evans Trail; and
- West – Cherry Hill Road

(4) The subject property is surrounded by the following:

- North - single-family detached dwellings in the R-R Zone
- South – Collier Road and, on the other side, a single-family detached dwelling in the R-R Zone
- East – single-family detached dwellings in the R-R Zone
- West – Cherry Hill Road and, on the other side, a family day care business in a single-family detached dwelling in the R-R Zone

### Master Plan/General Plan

(5) The property is located within Planning Area 61, an area discussed in the 2010 Subregion I Master Plan and Sectional Map Amendment (“SMA”). The Master Plan identifies the property as part of the Calverton Living Area, and recommended low-density residential land uses for the area. The SMA retained the subject property in the R-R Zone.

(6) The 2002 General Plan placed the subject property within the Developing Tier. The General Plan's "vision for the Developing Tier is to maintain a pattern of low- to moderate-density suburban residential communities, distinct commercial Centers, and employment areas that are increasingly transit serviceable." (2002 General Plan, p. 36) Staff noted that approval of the instant request would not violate the General Plan's growth goals for the year 2025. (Exhibit 11, p. 5)

### **Applicant's Proposal**

(7) Applicant currently operates a Day Care Center for 32 children pursuant to SE-4388. The Applicant is seeking permission to revise SE-4388 by expanding the number of children from 32 to 62. A total of eight (8) parking spaces are required to serve the maximum enrollment of 62 children. Applicant proposes to expand the circular driveway/parking area to provide an additional four (4) parking spaces (for a total of eight (8)), to include one handicapped accessible space. The circular driveway will also be revised to allow two-way traffic. The existing handicapped ramp and roof canopy will be relocated to the west of the dwelling to provide access to the lower level. A new six-foot-tall stockade fence will be placed along the property line on the northwest and the northeast and a portion of the southeast; thus a fence will enclose the property.

(8) The existing play area will be pulled back from the property line and will be enclosed by a four-foot-tall chain link fence. Landscaping will be placed outside of the play area. The Zoning Ordinance requires a play area of 2,325 square feet for half of the children enrolled. Applicant is providing a play area of 2,400 square foot play area. The play area is in excess of 40 feet from the closest dwelling located on a neighboring property. (Exhibit 16 (a); T. 9) The play area is northeast of the existing structure; that, . and two shade trees will provide sufficient shade during the warmer months.

(9) Applicant proposes to add a 3 foot X 6 foot-wide concrete dumpster pad with a 4-foot-high trash container. The dumpster pad will be enclosed by a stockade fence on three sides.

(10) Ms. Mahabare testified that she owns the subject property and has operated a Day Care Center at the site since 2001.<sup>1</sup> The students range in age from six weeks to eight years old. She stated that she would comply with all of the recommendations suggested by the Technical Staff, *infra*.

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<sup>1</sup> She is the second owner of the use, however.

(11) Mark Ferguson, accepted as an expert in the area of land use planning, testified that the vast bulk of the neighborhood consists of affordable homes in the R-R or R-S Zones. (T. 4-5) The building on the subject property is not used as a dwelling now, and will not be used as one if the instant request is granted. The witness opined that the request comports with all applicable provisions of the Zoning Ordinance, reasoning as follows:

To the best of this planner's professional knowledge, information and belief, with the revisions proffered by staff, and with the approval of Alternative Compliance AC-11031, the proposed use in accordance with the Special Exception site plan proposed by the Applicant will meet all of the applicable requirements and regulations of the Zoning Ordinance, including setbacks, lot coverage, signage requirements and parking requirements....

Furthermore, the traffic generated by the proposed day care center will be moderate, and the existing through driveway configuration will prevent any need for queue onto Cherry Hill Road, or to need to back out into traffic. The proposed play area will be adequately fenced, and its greater separation from adjacent dwellings will further protect the welfare of residents in the area....

This planner believes that the presumption of validity that is imparted by the inclusion of this use type in the Table of Uses for the R-R zone is by itself a strong degree of evidence that the proposed use will not be detrimental to the use or development of adjacent properties or the general neighborhood. But this planner also believes that several factors reinforce this principle... The subject property is developed with a single-family dwelling that is of common architectural character with the surrounding dwellings; this building will remain to enclose the expanded proposed day care center.

Furthermore, the proposed moderate scale of operation of the day care center, the proposed landscaping to buffer the proposed use from the surrounding dwellings, and the residential character of the parking and driveways suggest that the character of the neighborhood will not be appreciably affected by the new use....

(Exhibit 19, pp. 8-9)

(12) He expounded on this view during his testimony at the hearing:

Essentially, ... the existing day care center is in a single-family house that's characteristic of those in the neighborhood. The proposed expansion would not expand the house- it would keep the same character. There is an existing driveway already with parking spaces in it. It's a through driveway that connects both from Collier to Cherry Hill Road. The proposed expansion would simply add four parking spaces. The corners of three of those parking spaces project into the required landscape strip, so the Alternative Compliance is sought because of that. There is a comparable amount of landscaping that is being proposed, however, in the areas that are in front of the spaces that project into the corner that are in excess of the landscaping requirements. The total planning area is comparable, so in my opinion it's of equal quality to standard compliance.

Because it's maintaining the character of the neighborhood and because the use is further more out principally on Cherry Hill Road – not back into the neighborhood, so it won't pull traffic back in – but yet affords cars the ability to pull off Cherry Hill Road to be able to ingress and egress and perhaps even queue so you won't impede traffic on Cherry Hill Road [t]his will have no adverse impact on the neighborhood....

There will be a substantive buffer of landscaping. Additionally, the subject Site Plan actually proposes to pull the play area back. At the moment, it's mulched right out to the property line and there's a six-foot stockade fence which separates that from its neighbors. The proposed plan will actually pull the play area back and have a duplicate fence so that there will be a four-foot chain link fence surrounding the play area at some distance from the property line and then landscape buffering and then a six-foot fence which is a sight-tight that runs along the property line, so there will be substantive buffers between it and its immediate neighbors.

(T. 7, 8-9)

### **Landscaping/Alternative Compliance**

(13) The subject property has a row of evergreen trees that serves as a buffer along its property lines adjacent to the single-family dwellings. (Exhibits 16 (a)-(b)) The Applicant requests alternative compliance for the width of a landscape strip because the corners of three of the required parking spaces will be located therein. Additional landscaping is provided to offset the request.

(14) The Alternative Compliance Committee recommended approval of the request. It offered the following support for its recommendation:

The applicant is requesting Alternative Compliance from Section 4.2, Requirements for Landscape Strips along Streets, of the Landscape Manual, along the site's frontage of Collier and Cherry Hill Roads. The applicant chose Option 1, in the Developing Tier, for a Section 4.2 landscape strip, which requires a minimum ten-foot-wide landscape strip, planted with one shade tree and ten shrubs per 35 linear feet of street frontage, excluding driveway openings. Four of the proposed parking spaces, located in front of the building, are angles [s]o that each corner lies within five feet of the right-of-way lines, encroaching into the ten-foot-wide strip area. Additionally, existing shade trees within the right-of-way prohibit the planting of large shade trees within portions of the landscape strip. Therefore, the applicant is requesting approval of a reduced landscape strip of five to ten feet wide to accommodate the proposed parking, and to allow for ornamental and evergreen trees to substitute for some of the required shad[e] trees. The applicant proposes to provide two shade trees, six ornamental and evergreen trees, and 47 shrubs. Given the fact that the existing nonresidential use has existed on this site since 2001, that the full landscape strip width is being provided for the majority of the frontage, and that an equivalent amount of planting material is being provided, the Alternative Compliance Committee finds the applicant's proposed alternative compliance measures to be equally effective as normal compliance with Section 4.2 of the Landscape Manual.

(Exhibit 11, p. 49)

**Agency Comment**

(15) Staff recommended approval with several conditions. In reaching its recommendation, Staff offered the following comment:

The proposed facility will provide a service that is beneficial and convenient to the surrounding residents and its community for it is close to home and schools in the area. For this reason, the proposal is well suited for the area. Additionally, the proposed use will not be detrimental to the health, safety and welfare of county residents due its location on a collector street rather than on an interior neighborhood street, and the site's ability to buffer and screen the use from the view of adjoining residents....

This application is subject to the *2010 Approved Subregion I Master Plan and Sectional Map Amendment* which recommends single-family residential uses. The subject property is located within the R-R Zone, which allows a day care center through special exception approval. The proposed use is presumed to be compatible with the zone and will not substantially impair the integrity of the approved master plan or the General Plan recommendations for the residential areas....

None of the responses from any referring agencies received by staff indicate that the proposed expansion of the day care center, with the included conditions, will adversely affect the health, safety, or welfare of residents or workers in the area. Review of ... this application by the Transportation Planning Section's memorandum dated January 17, 2012 recognized that, while there will likely be an additional 25 trips per hour during peak hours using the unsignalized Cherry Hill Road/Collier Road intersection, the additional trips would not pose apparent safety issues that would result from the expansion. Thus, this review is strictly within the required findings of health, safety, or welfare of the residents or workers in any area....

(Exhibit 11, p. 10)

**LAW APPLICABLE**

(1) A major revision of the approved Special Exception Site Plan for a Day Care Center must meet the requirements of Sections 27-317 and 27-348.01.

(2) Section 27-317 states as follows:

(a) A Special Exception may be approved if:

(1) The proposed use and site plan are in harmony with the purpose of this Subtitle;  
(2) The proposed use is in conformance with all the applicable requirements and regulations of this Subtitle;

(3) The proposed use will not substantially impair the integrity of any validly approved Master Plan or Functional Master Plan, or, in the absence of a Master Plan or Functional Master Plan, the General Plan;

(4) The proposed use will not adversely affect the health, safety, or welfare of residents or workers in the area;

(5) The proposed use will not be detrimental to the use or development of adjacent properties or the general neighborhood; and

(6) The proposed site plan is in conformance with an approved Type 2 Tree Conservation Plan; and

(7) The proposed site plan demonstrates the preservation and/or restoration of the regulated environmental features in a natural state to the fullest extent possible in accordance with the requirement of Subtitle 24-130 (b)(5).

(b) In addition to the above required findings, in a Chesapeake Bay Critical Area Overlay Zone, a Special Exception shall not be granted:

(1) where the existing lot coverage in the CBCA exceeds that allowed by this Subtitle, or

(2) where granting the Special Exception would result in a net increase in the existing lot coverage in the CBCA.

(3) Section 27-348.01 states as follows:

(a) A day care center for children may be permitted, subject to the following:

(1) The District Council may specify the maximum number of children to be enrolled, which may not be increased by State or local health, education, or fire regulations;

(2) An ample outdoor play or activity area shall be provided, in accordance with the following:

(A) All outdoor play areas shall have at least seventy-five (75) square feet of play space per child for fifty percent (50%) of the licensed capacity or seventy-five (75) square feet per child for the total number of children to use the play area at one (1) time, whichever is greater;

(B) All outdoor play areas shall be located at least twenty-five (25) feet from any dwelling on an adjoining lot, and shall be enclosed by a substantial wall or fence at least four (4) feet in height;

(C) A greater set back from adjacent properties or uses or a higher fence may be required by the District Council if it determines that it is needed to protect the health and safety of the children utilizing the play area;

(D) Any off-premises outdoor play or activity area shall be located in proximity to the day care center, and shall be safely accessible without crossing (at grade) any hazardous area, such as a street or driveway;

(E) The play area shall contain sufficient shade during the warmer months to afford protection from the sun;

(F) Sufficient lighting shall be provided on the play area if it is used before or after daylight hours to insure safe operation of the area; and

(G) Outdoor play shall be limited to the hours between 7 A.M. and 9 P.M.;

(3) In the C-W, C-M, I-1, I-2, and I-4 Zones, a Special Exception for a day care center for children shall be allowed only if the Council finds that existing development and uses in the neighborhood (particularly on adjacent properties) will not adversely affect the proposed use.

(b) In addition to the requirements of Section 27-296(c), the site plan shall show:

- (1) The proposed enrollment;
- (2) The location and use of all buildings located on adjoining lots; and
- (3) The location and size of outdoor play or activity areas.

(c) Any day care center for children which has, on or before the effective date of this Ordinance, fully complied with the provisions of this Subtitle in effect at the time the use commenced shall not be required to meet the requirements of this Section, provided that the use has not been expanded or changed since that time. Any expansion or change shall be governed by the provisions of this Section, or of Sections 27-445.03, 27-464.02, 27-475.02, or 27-541.02.

(d) For the purposes of this Section, enrollment shall mean the largest number of children enrolled in the center in any one (1) session.

(4) The request for Alternative Compliance must satisfy Section 1.3 of the Landscape Manual. That section provides, in pertinent part, as follows:

- a. The standards contained in this manual are intended to encourage development which is economically viable and environmentally sound. The standards are not intended to be arbitrary or to inhibit creative solutions. Project conditions may justify approval of alternative methods of compliance with the standards. Conditions may arise where normal compliance is impractical or impossible, or where maximum achievement of the purposes of this manual can only be obtained through alternative compliance. Requests for alternative compliance may be approved for any application to which the requirements of this manual apply, when one or more of the following conditions are present:

- (1) Topography, soil, vegetation or other site conditions are such that full compliance with the requirements of this manual is impossible or impractical; or improved environmental quality would result from the alternative compliance.
- (2) Space limitations, unusually shaped lots, prevailing practices in the surrounding neighborhood, in-fill sites, and for improvements and redevelopment in older communities.
- (3) Change of use on an existing site increases the buffer required by Section 4.7, Buffering Incompatible Uses, of this manual, more than it is feasible to provide.
- (4) Safety considerations make alternative compliance necessary.
- (5) An alternative compliance proposal is equal or better than normal compliance in its ability to fulfill the design criteria in Section 3, Landscape Elements and Design Criteria, of this manual.

(5) The Court of Appeals provided the standard to be applied in the review of a special exception application in Schultz v. Pritts, 291 Md 1, 432 A2d 1319, 1325 (1981):



Whereas, the applicant has the burden of adducing testimony which will show that his use meets the prescribed standards and requirements, he does not have the burden of establishing affirmatively that his proposed use would be a benefit to the community. If he shows to the satisfaction of the [administrative body] that the proposed use would be conducted without real detriment to the neighborhood and would not actually adversely affect 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 no probative evidence of harm or disturbance in light of the nature of the zone involved or of factors causing disharmony to the operation of the comprehensive plan, a denial of an application for a special exception use is arbitrary, capricious, and illegal.

The record in this case reveals “no probative evidence of harm or disturbance in light of the nature of the zone involved or of factors causing disharmony to the operation of the comprehensive plan”. It would, therefore, be proper to grant the request, once the conditions addressed below are satisfied.

### **CONCLUSIONS OF LAW**

(1) The purposes of the Zoning Ordinance are listed in Section 27-102. Fifteen purposes are enumerated. This Examiner finds that the proposed use will specifically promote the following purposes:

To protect and promote the health, safety, morals, comfort, convenience, and welfare of the present and future inhabitants of the County

This purpose is furthered since the Applicants are providing a needed service by offering child care to those who reside and/or work in the area.

To promote the conservation, creation, and expansion of communities that will be developed with adequate public facilities and services

The proposed use will not place any additional burden upon the public facilities in the area; accordingly, this purpose of the Zoning Ordinance is met.

*To promote the most beneficial relationship between the uses of land and buildings and protect landowners from adverse impacts of adjoining property*

The Application does not alter the residential character of the neighborhood and meets all required setbacks. Thus, this purpose is accomplished.

*To insure the social and economic stability of all parts of the County*

This purpose is also furthered by the instant Application since the Applicant will add to the County tax base and provide a needed use to parents and/or guardians in the area.

(Section 27-317(a)(1)).

(2) The Special Exception Site Plan shows the proposed enrollment, location, and use of buildings located on adjoining lots, and location and size of proposed play areas, as required by Section 27- 348.01(b).

(3) The subject proposal is required to have approximately 2,325 square feet of play area for one-half of the maximum enrollment (31 children) and provides 2,400 square feet. There will be no off-premises outdoor play or activity area, nor will the play area be used before or after daylight hours, thereby minimizing any adverse impact that children at play may have upon neighboring properties. The outdoor play area is at least 40 feet from the closest dwelling on an adjacent lot. The play area does contain sufficient shade during warmer months, with the addition of the trees in the manner proffered by Applicant. (Section 27-348.01(a)).

(4) Once alternative compliance is granted, the proposed use does not require the grant of a variance or departure and, therefore, is in conformance with all applicable regulations. (Section 27-317(a)(2)).

(5) The proposed use will not substantially impair the integrity of the Master Plan for Subregion I, nor adversely affect the health, safety, or welfare of, residents in the area. The Master Plan calls for this area to remain residential in character, and the instant application will not alter said character given the access from Cherry Hill Road (a master-planned collector roadway) and Collier Road (a non-interior residential street), the fencing and the landscaping provided. (Section 27-317(a)(3)).

(6) Additionally, the fencing of the play area, and limited hours of its use lessen the impact of noise on adjacent properties, thereby insuring that the special exception will not be detrimental to the use or development of said properties. For the same reasons it will not adversely affect the health, safety or welfare of residents or workers in the area. (Section 27-317(a)(4) and (5)).

(7) The Application is exempt from the requirements of the Woodland and Wildlife Habitat Conservation Ordinance. (Section 27-317(a)(6)). The site does not contain any regulated environmental features. (Section 27-317 (a)(7)) The property does not lie within the Chesapeake Bay Critical Area Overlay Zone. (Section 27-317 (b))

(8) Finally, the request for Alternative Compliance should be granted. The parking spaces are a requirement that cannot be relocated elsewhere on the site. I agree with

Staff that, given the number of plant units proffered and the fact that the full landscape strip width will be provided for the majority of the frontage, Applicant's proposed alternative compliance measures are equally effective as normal compliance. (Landscape Manual, Section 1.3)

## DISPOSITION

Approval of SE-4388-01 and Alternative Compliance 11031, subject to the following conditions:

1. Prior to the issuance of any permits Applicant shall revise the Special Exception Site Plan and Landscape Plan as follows:
  - a. Revise General Note 28 to reflect that the outdoor play area's use shall be from 10:0 a.m. to 6:00 p.m. (daylight hours only), and that only 31 children are permitted thereon at one time;
  - b. Remove General Note 10c regarding available parking on the public right-of-way;
  - c. Revise the tree canopy coverage schedule to accurately reflect the type, size, and number of existing and proposed trees on site;
  - d. Revise Section 4.9 schedule titled "Sustainable Landscaping Requirements" on the landscape plan (page SP-1a) to accurately reflect the total number of proposed and required native ornamental trees;
  - e. Revise the plant schedule on the landscape plan (page SP-1a) to show the correct number of major shade trees on the site;
  - f. Relocate the proposed dumpster pad and trash enclosure outside of the landscape strip and screen them from all sides as shown in the approved alternative compliance site plan;
  - g. Provide details of the trash enclosure;
  - h. Correct the bearing along Collier Road to match the record plat; and,
  - i. Submit an updated Letter of Exemption from the requirements of the Woodland and Wildlife Habitat Conservation Ordinance.
2. Prior to the issuance of any permits Applicant shall submit the revised Special Exception and Landscape Plans to the Office of the Zoning Hearing Examiner for review, approval and inclusion in the record.