

OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660

IN THE MATTER OF:
DONNA MACK

Applicant

Donna Mack

Supporting the Application

Before: Lynn Robeson Hannan, Hearing Examiner

*
*
*
*
*
*
*

OZAH Case No. 21-08

HEARING EXAMINER'S REPORT AND DECISION

TABLE OF CONTENTS

I. STATEMENT OF THE CASE	3
II. FACTUAL BACKGROUND.....	3
A. The Subject Property.....	3
B. Surrounding Neighborhood.....	5
C. Proposed Use	7
1. Conditional Use Site Plan	8
2. Operations	8
3. Parking and Signage	8
D. Environmental Issues.....	8
E. Community Response	9
III. FINDINGS OF FACT AND CONCLUSIONS OF LAW.....	10
A. Necessary Findings (Section 59.7.3.1.E)	10
1. Substantial Conformance with the Master Plan	11
2. Adequate Public Services and Facilities.....	13
3. No Undue Harm from Non-Inherent Adverse Effects	14
4. Compatibility with the Neighborhood.....	15
B. Development Standards of the Zone (Article 59.8)	17
C. Use Standards Specific to a Retail Service Establishment (§59.8.2.3).....	17
D. General Development Standards (Article 59.6).....	19

1. Parking Standards	20
2. Site Perimeter Landscaping, Screening and Outdoor Lighting (§§ 59.6.4. and 59.6.5).....	20
3. Signage (§59.6.7.).....	21
IV. Conclusion and Decision	21

I. STATEMENT OF THE CASE

Filed on March 31, 2021, the Applicant, Donna Mack, seeks a conditional use to operate a retail service establishment (a massage therapy business) at 5225 Pooks Hill Road, Bethesda, Maryland 20814. The subject property is zoned R-H (Multiple Unit, High-Rise Residential).

On June 15, 2021, the Office of Zoning and Administrative Hearings (OZAH) issued notice of a public hearing scheduled for July 23, 2021. Exhibit 17. Staff of the Montgomery County Planning Department (Planning Staff or Staff) issued its report recommending approval of the application on July 1, 2021. Staff's recommendation included the following condition of approval (Exhibit 20):

1. The Retail/Service Establishment is limited to one employee and a maximum of one client on-site at one time, by appointment only.

On July 6, 2021, the Montgomery County Planning Board also recommended approval of the application for the reasons stated by Staff. Exhibit 19. The public hearing proceeded as scheduled on July 23, 2021. Ms. Mack adopted the findings of the Staff Report as her own testimony. T. 7. No one appeared in opposition to the application and the record closed on August 3, 2021. T. 8. The Hearing Examiner re-opened the record on August 17, 2021, solely to accept a floor plan of the arcade level of The Promenade Towers marked to show the location of the proposed use. Exhibit 21.

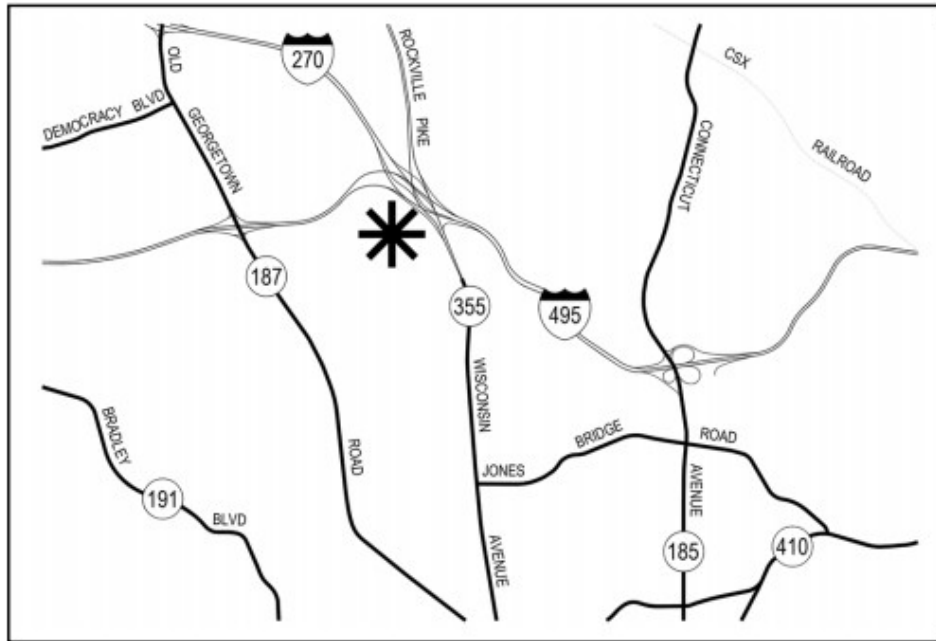
The Hearing Examiner approves the conditional use with the conditions included in Part IV of this Report for the following reasons.

II. FACTUAL BACKGROUND

A. The Subject Property

The subject property contains a multi-story residential development known as "The Promenade Towers" located on the west side of Rockville Pike (Md. Rte. 355) just south of the

interchange with the Capital Beltway (I-495) in Bethesda, Maryland, that includes limited commercial services. A vicinity map from the Staff Report (Exhibit 20, below) shows the property's general location:



The property consists of 24 acres on the north side of Pooks Hill Road and is improved with approximately 1,071 dwelling units and the “arcade” level on the ground floor. Staff advises that the arcade contains office and retail uses serving residents in the building and the surrounding area, as well as a gym and pool for residents. Exhibit 20, p.3. An aerial view of the property is shown on the following page (Exhibit 20, p. 3).

The property is in the Lower Rock Creek watershed, which is a “Use I” watershed. Use I watersheds include water suitable for swimming and active recreation, fish growth and propagation (other than trout) and other items. Exhibit 20, p. 3. There are also some forested areas adjacent to the site. The site contains no environmentally sensitive features, such as flood plains, steep slopes, etc. *Id.*



Figure 1 – Aerial photo of the Subject Site (outlined in red)

Aerial View of Subject Property
Exhibit 20, p. 3

B. Surrounding Neighborhood

For the purpose of determining the compatibility of the proposed use, it is necessary to delineate the “surrounding neighborhood” (*i.e.*, the area that will be most directly impacted by the proposed use). Once delineated, the Hearing Examiner must assess the character of the neighborhood and determine whether the impact of the use will adversely affect that character.

Staff defines the neighborhood boundaries as I-495 and I-270 to the north, townhouse developments to the south, Maryland Rte. 355 to the east, and Whitely Park Condominiums to the west, outlined in orange, below (Exhibit 20, p. 4, on the next page).

Staff characterizes the area as “mid- and high-density residential townhouses and condominium buildings, as well as the Bethesda Marriot Hotel in the R-H, R-30, and CR Zones.” *Id.*, p. 4. According to Staff, there are 17 special exceptions and conditional uses within the surrounding area, 16 of which are located within the subject property (*Id.*):



Surrounding Area
Exhibit 20, p. 4.

5225 Pooks Hill Road, Promenade Towers

- S-2559: banking services for residents
- S-449: gift shop
- S-407: flower shop
- S-2598: medical office
- S-623: jewelry store
- S-384: medical office
- S-1057: framing/vanity store
- S-325/S-438: dental office
- S-507: travel office
- S-651: beauty shop
- S-322/S-503: (a) restaurant/deli, (b) beauty salon, (c) dry cleaners, (d) grocery store
- S-326: nonresident dentist
- S-1838: nonresident medical office
- S-2686: boutique
- S-293: private club
- S-333: nonresident medical office

5400 Pooks Hill Road, Whitley Park Condominiums

- S-319: Private Tennis Club

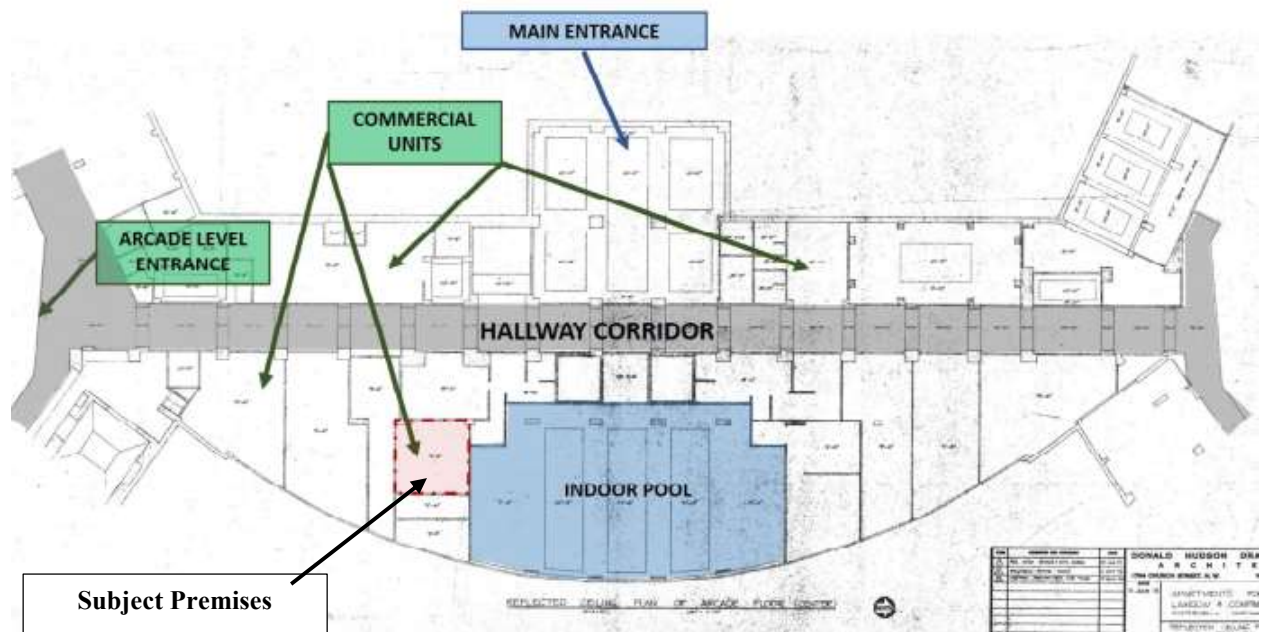
The Hearing Examiner agrees with Staff both as to the boundaries of the neighborhood and its characterization. Rockville Pike, I-270, and the Capital Beltway (I-495) are all major roads beyond which the direct impacts of the use are too attenuated to differentiate from impacts caused

by the general public. The facility will be in an arcade level for uses designed to serve the residents in the immediate area, thus, smaller neighborhood boundaries are appropriate.

The neighborhood area clearly consists of residential townhouses and multi-family type dwelling, a hotel, and ancillary retail and recreational uses designed to serve that community.

C. Proposed Use

The Applicant proposes to continue to operate a massage therapy business consisting of approximately 187 square feet in a commercial suite on the arcade level of the multi-family building. A floor plan of the arcade level (Exhibit 20, p. 4), with the location marked is shown on the following page.



**Floor Plan Arcade Level
Exhibit 21(a)**

1. Conditional Use Site Plan

Because the use is contained within an existing building, the site plan consists of the Arcade Level Floor Plan (above), the record plat (Exhibit 9), and a floor plan of the interior space (Exhibit 11). The business will occupy commercial space C14s in the location shown on the preceding page. The business has existed at this location since 2008, but did not have special exception approval. The Applicant proposes no changes to the existing features of the site.

2. Operations

Hours of operation will vary by the length of appointments, which run between 30 and 90 minutes. The Applicant proposes to have no more than five appointments per day and does not propose to employ any staff. Exhibit 9. According to Ms. Mack, most clients are residents of The Promenade Towers and have assigned parking spaces, although some visit from the surrounding neighborhood. *Id.*

3. Parking and Signage

Parking at The Promenade Towers consists of 1,068 spaces for residents. There are four additional surface parking lots containing 421 spaces for guests, visitors, contractors and customers of the commercial area. Exhibit 20, p. 6. The parking configuration is shown in a graphic from the Staff Report (*Id.*, p. 6, on the next page).

The Applicant proposes one 11” by 13” sign (130 square feet) on the door of the facility within the arcade level of The Promenade Towers.

D. Environmental Issues

Staff advises that there are no environmental issues with the application. Exhibit 20. As the Applicant does not propose any exterior changes, the proposed use is not subject to the Forest



Promenade Towers
Parking Configuration
Exhibit 20, p. 6

Conservation Law (Chapter 22A of the Montgomery County Code), nor are any other environment site features affected.

E. Community Response

Twenty-two clients of Ms. Mack submitted letters supporting the application, citing the health benefits of her massage therapy. Exhibit 14. No letters were received in opposition to the application.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A conditional use is a zoning device that authorizes certain uses provided that pre-set legislative standards are met. Pre-set legislative standards are both specific to a use, set forth in Article 59.8 of the Zoning Ordinance, and general (*i.e.*, applicable to all conditional uses), in Division 59.7.3 of the Zoning Ordinance. The specific standards applied in this case are those for retail service establishment. *Montgomery County Zoning Ordinance*, §59.8.B.7.

Weighing all the testimony and evidence of record under a “preponderance of the evidence” standard (*Zoning Ordinance*, §7.1.1.), the Hearing Examiner concludes that the conditional use proposed in this application, with the conditions imposed in Part IV of this Report and Decision, satisfies the specific and general requirements for the use.

A. Necessary Findings (Section 59.7.3.1.E)

The general findings necessary to approve a conditional use are found in Section 59.7.3.1.E. of the Zoning Ordinance. Standards pertinent to this approval, and the Hearing Examiner’s findings for each standard, are set forth below.¹ The standards for approval fall into four main categories:

1. Substantial Conformance with the Master Plan;
2. Adequate Public Services and Facilities;
3. No Undue Harm from Non-Inherent Adverse Effects; and
4. Compatibility with the Neighborhood

E. Necessary Findings

1. To approve a conditional use application, the Hearing Examiner must find that the proposed development:

a. satisfies any applicable previous approval on the subject site or, if not, that the previous approval must be amended;

¹ Although §59.7.3.1.E. contains six subsections (E.1. through E.6.), only subsections 59.7.3.1.E.1., E.2. and E.3. apply to this application. Section 59.7.3.1.E.1. contains seven subparts, a. through g.

Staff advises that the application complies with the site plan approving the multi-family building and arcade, as well as a subsequent amendment for an accessory structure. Ex. 20, p. 9.

Conclusion: Having no evidence to the contrary, the Hearing Examiner finds that the proposed use complies with all previous approvals.

b. satisfies the requirements of the zone, use standards under Article 59.3, and to the extent the Hearing Examiner finds necessary to ensure compatibility, meets applicable general requirements under Article 59.6;

Conclusion: The subject property is in the R-H (multi-unit, high-rise planned residential zone). While this remains a valid zoning designation under the 2014 Zoning Ordinance, it may not be applied to any new properties. *Zoning Ordinance*, §59.8.1.1. Thus, the specific standards of both 59.3 (specific use standards for retail service establishments) and 59.8 (Zones Retained from Previous Ordinance.) Therefore, this report reviews the development standards and specific use standards contained in Articles 59.3 and 59.8; and the applicable development standards contained in Article 59.6. Each of these Articles is discussed below in separate sections of this Report and Decision (Parts III.B, C, and D). The Hearing Examiner finds that the application satisfies the requirements of Articles 59.8 and 59.6 as explained below.

1. Substantial Conformance with the Master Plan

c. substantially conforms with the recommendations of the applicable master plan;

The property lies within the geographic area covered by the *1990 Bethesda-Chevy Chase Master Plan* (Master Plan or Plan). Staff reports that the Master Plan does not contain any site-specific recommendations for this property but did reconfirm the R-H Zoning for the property. According to Staff, the Master Plan cautioned against a concentration of conditional uses (formerly special exceptions) in residential neighborhoods and along highway corridors but did find that

conditional uses could be compatible if it conforms with the general and specific standards set by the Zoning Ordinance. Staff found the use met the Plan's guidelines (Exhibit 20, p. 8):

The Promenade Towers was constructed in 1971, prior to the approval of the Master Plan, which reconfirmed the R-H zoning for the Property. The Promenade Towers does not front on a highway corridor and is adjacent to other medium and high-density residential developments, not within a single family detached neighborhood. From Pooks Hill Road, The Promenade Towers maintains a residential character, with one monument sign for the residents and no additional signage indicating there are commercial tenants on the Property. The Subject Application, which is similar in scale and operations to the previously approved special exceptions within the Arcade Level of The Promenade Towers, will not change the character of the building or neighborhood. The use has existing onsite for over a decade prior to being issued a Notice of Violation. There are no changes proposed to the interior or exterior of the unit. Therefore, the proposal is in substantial conformance with the R-H Zone and the Master Plan.

Conclusion: The Hearing Examiner agrees with Staff that the use conforms to the Master Plan, primarily because it does not change the visual or operational impact of the existing building nor does it contravene the Plan's general guidelines for conditional uses. The Plan sought to (1) discourage excessive concentration of non-residential special exceptions along major highways because of their visual impact, (2) avoid overconcentration of retail/service special exceptions in residential neighborhoods, (3) prevent special exception design that is incompatible with the residential community, and (4) support special exceptions that contribute to the service and health objectives of the Master Plan. Examples of these uses included child and elderly care, group homes, and nursing homes. *Plan*, pp. 31-33.

The proposed use meets these guidelines. Because it is interior to the existing multi-unit residential building, it is not visible from any roadway and does not affect the primarily residential character of the site. The impact of the use (needing at most only 2 parking spaces for Ms. Mack and a client) is amply supported by on-site parking. Many of Ms. Mack's clients also submitted letters attesting to the health benefits of Ms. Mack's practice, and the use provides a health service

to residents of the building and nearby neighborhood. The Hearing Examiner finds that this standard has been met.

2. Adequate Public Services and Facilities

f. 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. If an approved adequate public facilities test is currently valid and the impact of the conditional use is equal to or less than what was approved, a new adequate public facilities test is not required. If an adequate public facilities test is required and:

i. if a preliminary subdivision plan is not filed concurrently or required subsequently, the Hearing Examiner must find that the proposed development will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage; or

ii. if a preliminary subdivision plan is filed concurrently or required subsequently, the Planning Board must find that the proposed development will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage; and

Staff advises that the property will not need to be subdivided and therefore, the Hearing Examiner must make the determination as to whether public facilities are adequate to service the use. Staff advises that all facilities are adequate; the Applicant submitted a Traffic Statement indicating that there will be only five trips during the morning peak period and four trips during the evening peak period. Exhibit 15.

Conclusion: The proposed use consists of only 187 square feet of an existing, large residential multi-unit building. Utilities, fire and police services, water and sewer and storm drainage are existing and storm drainage, if it does not comply with current regulations, is grandfathered as existing "site design". *Zoning Ordinance*, §7.7.1.A.1. The Planning Board's Local Area Transportation Review (LATR) Guidelines, exempt projects that will generate under 50 person

trips during the peak hour. The Applicant has submitted a Traffic Statement indicating that vehicle trips during the entire peak period (*i.e.*, 6:30 a.m. to 9:30 a.m. and 4:00 p.m. to 7:00 p.m.) will not exceed five in the morning and four in the evening. Staff advises that the maximum number of trips during the peak hour is two. Exhibit 20, pp. 12-13. The Hearing Examiner finds that this standard has been met.

3. No Undue Harm from Non-Inherent Adverse Effects

g. will not cause undue harm to the neighborhood as a result of a non-inherent adverse effect alone or the combination of an inherent and a non-inherent adverse effect in any of the following categories:

- i. the use, peaceful enjoyment, economic value or development potential of abutting and confronting properties or the general neighborhood;*
- ii. traffic, noise, odors, dust, illumination, or a lack of parking; or*
- iii. the health, safety, or welfare of neighboring residents, visitors, or employees.*

Conclusion: This standard requires the Hearing Examiner to identify inherent and non-inherent adverse effects of the proposed use on nearby properties and the surrounding area. Inherent adverse effects are “adverse effects created by physical or operational characteristics of a conditional use necessarily associated with a particular use, regardless of its physical size or scale of operations.” *Zoning Ordinance*, §1.4.2. Inherent adverse effects, alone, are not enough to deny a conditional use. Non-inherent adverse effects are “adverse effects created by physical or operational characteristics of a conditional use not necessarily associated with the particular use or created by an unusual characteristic of the site.” *Id.* A conditional use may be denied if it will have non-inherent adverse effects, alone or in combination with inherent effects, that cause “undue” harm to the surrounding neighborhood.

Technical Staff concluded that the inherent adverse effects of a retail service establishment located in a multi-unit residential building include “(1) vehicular trips to and from the Site, (2) parking for the proposed use, and (3) impact to residents.” Exhibit 20, p. 12.

Staff concluded that the scale of the building and operational characteristics were inherent to the use. They found that parking is “ample” for the use and is limited by a 2-hour time limit and monitored by a security guard. Exhibit 20, p. 8. Staff determined that it will not impact residents because the use has already existed for 10 years at the site and is in a location specifically designated for limited commercial uses. *Id.* The hours of operation, limited to appointments only, permit the applicant control the amount of traffic to and from the facility.

Conclusion: The Hearing Examiner finds that all operational and physical characteristics of the use are inherent to a small retail service establishment in a multi-unit residential building for the reasons stated by Staff.

4. Compatibility with the Neighborhood

Several sections of the Zoning Ordinance require a proposed conditional use be compatible with the existing character of the surrounding neighborhood.

Section 59.7.3.1.E.1 includes the standards of approval below:

d. is harmonious with and will not alter the character of the surrounding neighborhood in a manner inconsistent with the [master] plan.

e. will not, when evaluated in conjunction with existing and approved conditional uses in any neighboring Residential Detached zone, increase the number, intensity, or scope of conditional uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area; a conditional use application that substantially conforms with the recommendations of a master plan does not alter the nature of an area;²

² Section 59.7.3.2.E.2 contains an additional requirement for conditional uses in single-family detached zones: “Any structure to be constructed, reconstructed, or altered under a conditional use in a Residential Detached zone must be

Staff concluded that the application met the first standard above because no physical alteration will be made to the exterior or interior of the multi-unit building. Nor did Staff find that the addition of this conditional use to existing conditional uses would alter the character of the area because it is in an area designated for retail service establishments that serve the residents and the surrounding community.

Conclusion: Zoning Ordinance §59.7.3.1.E.1.d looks at whether the use will impair the character of the neighborhood as envisioned by the Master Plan. The Hearing Examiner has already found that the use conforms to the Master Plan. The use will not require exterior alterations to the building, generates minimal traffic, and there is ample parking. The Hearing Examiner agrees with Staff that the first standard above is met.

Zoning Ordinance §59.7.3.1.E.1.e asks whether the proposed conditional use, in combination with other conditional uses in the surrounding area, will “tip the scales” and cause the area to transition away from its existing residential character develop under the Master Plan. While there are 17 special exceptions located in the surrounding area, all but one are in the arcade level of The Promenade Towers that is specifically designed for these uses. There are no exterior alterations either to the arcade level or the exterior of the larger building and traffic generated is minimal. The Hearing Examiner finds that this standard has been met.

3. The fact that a proposed use satisfies all specific requirements to approve a conditional use does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require conditional use approval.

Conclusion: The application satisfies all specific requirements for the conditional use, and with the conditions imposed to mitigate adverse impacts, meets the standards required for approval.

compatible with the character of the residential neighborhood.” As the subject property is not located in a residential detached zone, it does not apply.

B. Development Standards of the Zone (Article 59.8)

In order to approve a conditional use, the Hearing Examiner must find that the application meets the development standards of the R-H Zone, contained in Article 59.8 of the Zoning Ordinance.

Staff concluded that the application meets the development standards of the R-200 Zone and included a table comparing the minimum development standards to what is provided on the record plan for the building. Exhibit 9. The Hearing Examiner reproduces this table from the Staff Report below (Exhibit 20, p. 8):

Table 1: R-H Zone Development Standards- Section 59.8.5.2.B.2

Development Standard	Required/ Permitted	Proposed
Minimum Lot Area	40,000 SF	1,075,932 SF
Minimum Lot Width at Front Building Line	200 ft	225 ft
Maximum Density	1 unit per 1,400 sf	1,071 units
Maximum Lot Coverage	12%	12%
Minimum Front Setback	25 ft	460 ft
Minimum Side Setback ¹	20 ft	196 ft
Minimum Sum of Side Setbacks ¹	30 ft	528 ft
Minimum Rear Setback ¹	30 ft	188 ft

¹ For buildings over 30' in height, all of the setbacks shown in Section 59.8.2.5.B.2 must be increased by 1' for each foot of height over 30.

Conclusion: The undisputed evidence in this case demonstrates that the conditional use meets all development standards required by the R-H Zone shown in the chart above. The Hearing Examiner finds this standard has been met.

C. Use Standards Specific to a Retail Service Establishment (§59.8.2.3)

The specific use standards for approval of a commercial service establishment in the R-H Zone are set out in Section 59.8.2.3.B of the Zoning Ordinance, which incorporates the standards of Section 59.3.5.11.B. Compliance with these is analyzed below:

§59.8.2.3.B.7. A Restaurant and Retail/ Service Establishment may be permitted in the R-H zone by the Hearing Examiner under Section 7.3.1, Conditional Use if:

a. the Restaurant or Retail/ Service Establishment:

- i. primarily serves the residents of the building or complex in which it is located and does not deliver to non-residents;***
- ii. is located on the ground-level, except that a restaurant may located on the top floor or penthouse; and***
- iii. is located and constructed to protect tenants of the building from noise, traffic, odors, and interference with privacy; and***

Staff concluded that the application meets these standards (Exhibit 20, p. 10):

The Massage Therapy use will primarily serve the residents of the building. While the Applicant states that other clients may drive from nearby, a predominant number of clients reside within the building. There are no deliveries to non-residents. The Arcade Level is located on the ground level of the Promenade Towers, there are no residential units on this floor of the building to protect tenants from any potential noise, traffic, odors and/or interference with privacy.

Conclusion: Having no evidence to the contrary, the Hearing Examiner agrees with Staff that this standard has been met.

b. there are no entrances to the Restaurant or Retail/Service Establishment directly from the exterior

Conclusion: The record establishes that the entrance to the massage therapy practice is from the interior of the arcade level of the multi-story building. Exhibit 20, p. 10. The application meets this standard.

c. A Retail/Service Establishment must be a:

- i. bank or savings and loan office;***
- ii. barber and beauty shop;***
- iii. book store;***
- iv. drug store;***
- v. dry cleaning and laundry pick-up station;***
- vi. florist;***
- vii. food and beverage store;***
- viii. gift shop;***
- ix. jewelry store;***
- x. laundromat;***
- xi. newsstand;***
- xii. office; or***
- xiii. variety and dry goods store.***

Conclusion: A “massage therapy” practice is not a use specifically listed under the permissible uses in the R-H Zone. In this situation, the Zoning Ordinance tasks DPS with the determination whether uses not specifically listed fall within a more general category or is “similar in impact, nature, function and duration.” *Zoning Ordinance*, §59.3.1.2.E. In this case, DPS determined that the use can be classified with the permitted uses listed. Exhibit 20, p. 10. The Hearing Examiner finds that this standard has been met.

§59.3.5.11.B.1. Definition.

Retail/Service Establishment means a business providing personal services or sale of goods to the public. Retail/Service Establishment does not include Animal Services (see Section 3.5.1, Animal Services) or Drive-Thru (see Section 3.5.14.E, Drive-Thru).

Conclusion: The massage therapy practice to be established provides personal massage therapy to clients, as evidenced by letters from clients submitted in the record of this case. Exhibit 14(a) – (v). The application meets the definition of “Retail/Service Establishment” under the Zoning Ordinance.

b. Where a Retail/ Service Establishment is allowed as a conditional use, it may be permitted by the Hearing Examiner under Section 7.3.1, Conditional Use, and the following standard:

The building must be designed in a way that reduces its scale and contributes to its visual interest. Long building walls should have projections, recessions, or other effective treatments that improve building design.

Conclusion: As the commercial space here lies entirely within a multi-unit residential building, any commercial characteristics are more than adequately screened from the surrounding residential neighborhood, meeting the intent of this section. This standard has been met.

D. General Development Standards (Article 59.6)

Article 59.6 sets the general requirements for site access, parking, screening, parking lot

landscaping, lighting, and signs. The requirements of these sections need be satisfied only “to the extent the Hearing Examiner finds necessary to ensure compatibility.”

1. Parking Standards

Staff illustrates the required number of parking spaces as follows (Exhibit 20, p. 11):

Table 2: Parking Requirements- Division 59.6.2.4

Section	Parking	Required Spaces	Proposed
59.6.2.4.A 59.6.2.4.B	Vehicle Parking Requirement	170 square feet of Retail Services Total: 1	12 Shared Commercial Visitor Parking Spaces Total: 12
59.6.2.4.C	Bicycle Parking Requirement	1 short term 1 long-term	25 short term available in garage 190 available across two bike storages rooms on-site

Conclusion: Retail service establishments must provide 5 parking spaces for every 1,000 square feet. While the floor plan for this use (Exhibit 11) shows that the premises will contain 187 square feet, Staff reports the correct number of required spaces in the above table.³ This standard has been met.⁴

2. Site Perimeter Landscaping, Screening and Outdoor Lighting (§§ 59.6.4. and 59.6.5)

Division 59.6.4 and 59.6.5 of the Zoning Ordinance set minimum standards for site lighting and landscaping, which are intended to “preserve property values, preserve and strengthen the character of communities, and improve water and air quality,” and to ensure appropriate screening between uses. *Zoning Ordinance*, §§59.6.4.2, 59.6.5.1.

Conclusion: Neither of these sections apply to this application. Section 59.6.4 applies only to new lighting fixtures, which the applicant does not propose to install. *Id.*, §59.6.4.2. Screening of the

³ Fractions of parking spaces are rounded up to the nearest whole number. *Zoning Ordinance*, §59.6.2.3.A.1. As the number of spaces required for both 170 square feet and 187 square feet fall below 1.0, the minimum number of spaces required for either calculation is 1.0 space: $187 \text{ s.f.} / 1,000 \text{ s.f.} = .187$; 5 parking spaces per thousand $\times .187 = .9$ parking spaces.

⁴ Sections 59.6.2.5.K and 59.6.2.9.B. and C. of the Zoning Ordinance impose additional setback, screening, and landscaping requirements on parking areas for conditional uses with three or more spaces. As the use proposed here will use only 1 space that is a part of a larger, established parking area, the existing parking design is permitted without regard to these requirements. *Zoning Ordinance*, §59.7.7.1.A.

exterior of the site was implemented upon approval of the site plan for the property, which is grandfathered under Section 59.7.7.1.A.1 of the Zoning Ordinance.

3. Signage (§59.6.7.)

Section 59.6.7. of the Zoning Ordinance regulates signage. Signs that are not visible beyond the property lines of the subject property do not require a permit and are exempt from the number, size, and placement requirements of the Zoning Ordinance unless they are signs that are specifically prohibited.

Conclusion: The Applicant proposes a 130-square foot sign on the entrance to the retail establishment inside the arcade level of the building. Therefore, it will not be visible beyond the property line of The Promenade Tower and is exempt from the permitting and other requirements of Section 59.6.7. The sign will consist of lettering on the door stating, “Therapeutic Massage Associates.” As such, the sign is not prohibited under Section 59.6.7.4.

IV. Conclusion and Decision

As set forth above, the application meets all the standards for approval in Articles 59.8, 59.6 and 59.7 of the Zoning Ordinance. Based on the foregoing findings and conclusions, the application of Donna Mack for a conditional use under Section 59.8.2.3.B. of the Zoning Ordinance to operate a retail service establishment (a massage therapy practice) at 5225 Pooks Hill Road, Maryland, is hereby **GRANTED**, subject to the following conditions:

1. The retail service establishment is limited to the area shown on the arcade floor plan (Exhibit 21(a)).
2. There may be no employees of the retail service establishment.
3. No more than one client may visit the premises at the same time.
4. Clients must be scheduled by appointment only.

5. The Applicant and any successors in interest must obtain and satisfy the requirements of all Federal, State, and County licenses, regulations, and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the conditional use premises and operate the conditional use as granted herein. The Applicant and any successors in interest shall at all times ensure that the conditional use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements, including the annual payment of conditional use administrative fees assessed by the Department of Permitting Services.

Issued this 17th day of August, 2021.



Lynn A. Robeson
Hearing Examiner

NOTICE OF RIGHT TO APPEAL

Any party of record may file a written request to appeal the Hearing Examiner's Decision by requesting oral argument before the Board of Appeals, within 10 days issuance of the Hearing Examiner's Report and Decision. Any party of record may, no later than 5 days after a request for oral argument is filed, file a written opposition to it or request to participate in oral argument. If the Board of Appeals grants a request for oral argument, the argument must be limited to matters contained in the record compiled by the Hearing Examiner. A person requesting an appeal, or opposing it, must send a copy of that request or opposition to the Hearing Examiner, the Board of Appeals, and all parties of record before the Hearing Examiner.

Additional procedures are specified in Zoning Ordinance §59.7.3.1.f.1. Contact information for the Board of Appeals is:

Montgomery County Board of Appeals
100 Maryland Avenue, Room 217
Rockville, MD 20850
(240) 777-6600
<http://www.montgomerycountymd.gov/boa/>

PLEASE CHECK THE BOARD'S WEBSITE FOR HOURS OF OPERATION AND FILING PROCEDURES DURING THE COVID PANDEMIC.

Parties requesting or opposing an appeal must not attempt to discuss this case with individual Board members because such ex parte communications are prohibited by law. If you

have any questions regarding this procedure, please contact the Board of Appeals by calling 240-777-6600 or visiting its website: <http://www.montgomerycountymd.gov/boa/>.

NOTIFICATION OF DECISION TO BE SENT TO:

Donna Mack, Applicant
Barbara Jay, Executive Director, Montgomery County Board of Appeals
Stephanie Dickel, Planning Department
Grace Bogdan, Planning Department
Greg Nichols, Manager, Department of Permitting Services
Victor Salazar, Department of Permitting Services
Michael Coveyou, Director, Finance Department
Charles Frederick, Esquire, Associate County Attorney

OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660

IN THE MATTER OF:
DONNA MACK

Applicant

*
*
*
*

OZAH Case No. 21-08

Before: Lynn Robeson Hannan, Hearing Examiner

ORDER RE-OPENING AND CLOSING THE RECORD

The above-captioned case seeks a conditional use to operate a massage therapy practice on the arcade level of The Promenade Towers, a multi-unit residential development at 5225 Pooks Hill Road, Bethesda, Maryland. A public hearing was held on July 23, 2021, and the record closed on August 3, 2021. After the record closed, the Hearing Examiner requested Staff to pinpoint the location of the proposed use on the arcade floor plan included in the Staff Report. Exhibits 20, 21.

Staff promptly provided the information so the Hearing Examiner could include it in this report for enforcement purposes and to ensure the context of the proposed use is clearly understood.

For this reason, the Hearing Examiner re-opens the record today, August 17, 2021, to receive the graphic showing the location of the proposed massage therapy business on the arcade level floor plan. Exhibit 21(a). The record hereby closes immediately.

Issued this 17th day of August, 2021.



Lynn Robeson Hannan
Hearing Examiner

COPIES TO:

Donna Mack
Barbara Jay, Executive Director
Board of Appeals
Stephanie Dickel, Planning Department

Grace Bogdan, Planning Department
Greg Nichols, Manager, Department of Permitting Services
Victor Salazar, Department of Permitting Services
Michael Coveyou, Director, Finance Department
Charles Frederick, Esquire, Associate County Attorney