

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
(240) 777-6600

www.montgomerycountymd.gov/content/council/boa/board.asp

Case No. S-2618

PETITION OF YONG CHEN AND WEI PING PENG

OPINION OF THE BOARD

(Opinion Adopted March 9, 2005)
(Effective Date of Opinion: April 13, 2005)

Case No. S-2618 is an application for a special exception pursuant to Section 59-G-2.36 (Medical practitioners' office for use of other than a resident of the building) of the Zoning Ordinance to permit: 1) Two practitioners and one employee in the office; 2) Two occupants in this house which takes more than 50% of the floor space for residential uses; 3) Weekly hours of operation are Tuesday to Friday from 8:30 am to 6:00 pm about 40 hours, and the expected clientele volume is about 25 – 30 per week; all clients will visit with prior appointment; 4) Clients visit will be within the capacity of the designated parking lots. The Petitioners also requested waivers of the applicable parking area setbacks and the number of spaces required.

The subject property is Lot P1, Block 1, Glenwood Subdivision; located at 8601 Old Georgetown Road, Bethesda, Maryland, 20814, in the R-60 Zone.

The Hearing Examiner held a hearing on the application on November 30, 2004, and on February 14, 2005, issued a Report and Recommendation for approval of the special exception and parking waiver.

Decision of the Board: Special Exception and Parking Waiver **Granted**
 Subject to Conditions Enumerated Below.

The Board of Appeals considered the Hearing Examiner's Report and Recommendation at its Worksession on March 9, 2005. After careful consideration and a review of the record in the case, the Board adopts the Report and Recommendation and **grants** the special exception and parking waiver subject to the following conditions:

1. The Petitioners shall be bound by all of their testimony and exhibits of record, including the Site Plan, Exhibit 27.
2. Professional medical staff shall be limited to two medical practitioners.
3. No more than one non-professional support staff person may be on site at any one time.
4. Parking area landscape screening must be maintained in good condition to provide effective screening. In the event that landscape screening is removed from an adjacent property with the result that the Petitioners' screening is no longer fully effective, replacement screening must be installed on the Petitioners' property by modification to the approved special exception.
5. Petitioners must obtain a permit from the Maryland State Highway Administration to install both a "one way" and a "do not enter" sign at the existing curb cut on Old Georgetown Road, to designate that access point for exiting traffic only.
6. Petitioners shall maintain an appointment book showing the times and duration of all client appointments.
7. Parking shall be permitted only in the areas so designated on the Site Plan, Exhibit 27, and shall be expressly prohibited in the portion of the site east of the house.

On a motion by Donna L. Barron, seconded by Louise L. Mayer, with Angelo M. Caputo, Wendell M. Holloway and Allison Ishihara Fultz, Chair, in agreement the Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled petition.

Allison Ishihara Fultz
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book

of the Board of Appeals for
Montgomery County, Maryland
this 13th day of April 2005.

Katherine Freeman
Executive Secretary to the Board

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure.

TABLE OF CONTENTS

Page No.

| | |
|---|------------------------------|
| I. STATEMENT OF THE CASE | 6 |
| II. BACKGROUND | 6 |
| <u>A.</u> <i>The Subject Property and Neighborhood</i> | 6 |
| <u>B.</u> <i>Land Use History</i> | 10 |
| <u>C.</u> <i>Master Plan</i> | 10 |
| <u>D.</u> <i>Proposed Use</i> | 11 |
| <u>E.</u> <i>Front of Lots: Landscaping and Signage</i> | 13 |
| <u>F.</u> <i>Rear of Lots: Parking and Landscaping</i> | 15 |
| <u>G.</u> <i>Environment, Utilities and Public Facilities</i> | 15 |
| <u>H.</u> <i>Community Participation</i> | 18 |
| III. SUMMARY OF TESTIMONY | 18 |
| <u>A.</u> <i>Petitioner's Case in Chief</i> | Error! Bookmark not defined. |
| <u>B.</u> <i>Community Participation</i> | Error! Bookmark not defined. |
| <u>C.</u> <i>People's Counsel</i> | Error! Bookmark not defined. |
| IV. CONCLUSIONS | 20 |
| <u>A.</u> <i>Standard for Evaluation</i> | 20 |
| <u>B.</u> <i>Specific Standards</i> | 21 |
| <u>C.</u> <i>General Standards</i> | 21 |
| V. RECOMMENDATIONS | 26 |

I. STATEMENT OF THE CASE

Petition S-2618, filed June 2, 2004, requests a special exception under the R-60 Zone for a medical practitioner's office, pursuant to Section 59-G-2.36 of the Zoning Ordinance, to be located in an existing residential building on property located at 8601 Old Georgetown Road, Bethesda, known as Lot P1, Block1 in the Glenwood subdivision.

Technical Staff of the Maryland-National Capital Park & Planning Commission ("MNCPPC") reviewed the present petition and, in a report dated November 5, 2004, recommended *approval* with conditions.¹ See Ex. 23. The Montgomery County Planning Board did not consider this petition. Technical Staff submitted a supplemental memorandum on December 7, 2004 at the Hearing Examiner's request. See Ex. 30.

On July 16, 2004 the Board of Appeals ("Board") scheduled a public hearing in this matter for November 1, 2004, to be conducted by a Hearing Examiner with the Office of Zoning and Administrative Hearings to conduct. The public hearing was subsequently postponed to November 30, 2004, with proper notice, to allow the Petitioners to correct deficiencies in the site plan that were identified by Technical Staff. The public hearing was convened on November 30, 2004, at which time testimony and other evidence were received in support of the proposed special exception. No evidence was presented in opposition to the petition at the hearing, although one letter in opposition was received from the Huntington Terrace Citizens' Association.

The record was held open to allow additional comment by Technical Staff, and closed on December 13, 2004. By Orders dated January 20 and February 8, 2005, the Hearing Examiner extended the time for submission of her report to February 10, 2005.

II. BACKGROUND

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

A. *The Subject Property and Neighborhood*

The subject property is located at 8601 Old Georgetown Road in the R-60 Zone, at the northeast corner of Old Georgetown Road and Mckinley Street and about half a mile north of the Bethesda Central Business District. The site is 6,623 square feet in size and quadrilateral in shape, with two parallel sides. It has approximately 188 feet of frontage on Old Georgetown Road and about 51 feet of frontage on McKinley Street. Vehicular access is available from both streets.²

The subject property is developed with a residential structure containing 3,306 square feet of space, built in 1956, as well as brick pavers for the drive aisle and parking areas, and retaining walls along the side and rear property lines. Natural features include trees, evergreen shrubbery and other types of landscape screening along the street frontages and in the rear and side yards. The site is relatively flat, sloping to the south towards McKinley Street. It sites between one and three feet lower than the adjacent property. There are no streams, stream valleys or stream buffers on site.

¹ The Staff Report has been liberally paraphrased and cited in Part I of this report.

² The Staff Report states on page two that site access is form McKinley Street, but acknowledges later (p. 7) that there are two vehicular entry points, one on McKinley Street and one on Old Georgetown Road.

To the north, the subject property abuts the campus of the National Institutes of Health. Suburban Hospital is located directly across the street to the west. Abutting to the east and confronting to the south are single-family detached homes in the R-60 Zone. Technical Staff opined that the general neighborhood of the subject property extends both east and west of Old Georgetown Road, including the area between Old Georgetown Road, Maple Ridge Road/ Rosewood Drive and NIH east of Old Georgetown Road, and the area between Grant Street, Roosevelt Street and Lincoln Street west of Old Georgetown Road. The dominant land uses in the general neighborhood are NIH and Suburban Hospital. Based on maps submitted with the Staff Report, it appears that the rest of the neighborhood consists of single-family detached homes in the R-60 Zone. There are two existing special exceptions in the neighborhood: Suburban Hospital and a dental office located diagonally across the street from the subject property on the southwest corner of Old Georgetown Road and McKinley Street.

The location of the subject property and most of the general neighborhood are shown on the aerial photograph on the next page.

Aerial Photograph, Excerpted from Staff Report, Ex. 23

The two photographs provided below depict the front of the building, which faces McKinley Street. Suburban Hospital and part of the intersection are visible in the background of the bottom photograph.

McKinley Street Façade with Partial View of Adjacent House
Exhibit 9(a), top of page

Front Parking Area with Suburban Hospital in Background
Exhibit 9(a), bottom of page

The relevant portion of the zoning vicinity map is reproduced below.
Zoning Vicinity Map, Excerpted from Ex. 13(a)

B. Land Use History

The Petitioners have operated a sports injury therapy clinic at the subject site for about two years. The business was registered as a Home Health Practitioner's Office, which carries a residency requirement of at least 220 days per year. The Petitioners seek a special exception to be relieved of that residency requirement. Their testimony and written submissions indicate that they do not intend to change the nature or intensity of their practice.

The Petitioners report that for ten years prior to their acquisition of the subject property, the property was used by NIH and a preceding medical service provider. The Petitioners state that NIH had about 30 employees working full-time on the site, and that the building and layout had been stripped of their residential character both inside and outside. On the interior, the building lacked even basic bath facilities, and was loaded with heavy communication wires and telephone boxes. The parking facilities were overloaded, resulting in significant on-street parking. The Petitioners further state that they have made tremendous improvements to the appearance of the site. They replaced the cracked concrete in the main parking area with decorative bricks, and surrounded all of the parking areas with evergreen plants. The Petitioners have received no complaints from the neighbors, only compliments on their gardening work. Several neighbors have expressed appreciation of the Petitioners' care for the property, stating that their use of it is a vast improvement over the NIH use (during which no one lived on the property and it fell into disrepair) and the previous physician's office (which created parking problems).

C. Master Plan

The subject property is located within the area covered by the *Bethesda-Chevy Chase Master Plan* (the "Master Plan"). The Master Plan does not specifically address the subject property, but states that each parcel should be evaluated in the overall context of the Master Plan objectives and compatibility with the surrounding community in terms of the height and bulk of structures, vegetative buffering, topography and visibility of the use, highway access and buffering, proximity to public or quasi-public uses, proximity to community services or transit, and density of nearby properties. Staff Report at 4.

The Master Plan's general objectives include maintaining residential character along Old Georgetown Road and supporting special exceptions for "community-serving" uses. See Master Plan at 29 and 59, as cited by Technical Staff.

Technical Staff opined that the proposed special exception would be consistent with the objectives of the Master Plan. Staff observed that the use would be compatible, in terms of its overall size and impact, with the character of the surrounding single-family neighborhood and medical uses along Old Georgetown Road; that the Petitioners intend to maintain the residential appearance of the property, with no new construction or additions; that the building is slightly larger than adjacent homes, but much smaller in size than Suburban Hospital or NIH buildings; that the hours of operation and scheduling of appointments limit the scope of the use;³ that the property is

³ Technical Staff performed their analysis of the proposed use based on an understanding that hours of operation would be limited to 8:30 a.m. to 6:00 p.m., Tuesday through Friday. During the hearing, the Petitioners changed the proposed hours of operation to 8:30 a.m. to 5:30 p.m., Monday through Friday. This increases the total number of business hours from 35 per week to 40. However, the hours of operation remain within the standard business day, during times when the activity of cars and people arriving and leaving would be normal occurrences in the

buffered on all four sides by vegetation that is three to six feet high, visually screening the building and the main parking facility from the roadways and adjacent properties; that the site is in close proximity to the public and quasi-public uses at Suburban Hospital and NIH, both of which are large-scale operations with a wide scope of medical-related services and research; and that the proposal is intended to serve the community. Staff Report at 4-5.

Technical Staff noted that the Master Plan recommends avoiding excessive concentrations of special exceptions along major highway corridors, and concentrations of commercial service or office-type development. The Master Plan directs the Board of Appeals to evaluate additional special exceptions carefully, “to ensure that the residential character and vitality” of the area are not compromised. In particular, the Master Plan states that landscape guidelines should be implemented for special exceptions to maintain and encourage a high-quality appearance and residential character. Technical Staff opined that approving the medical practitioner’s office proposed here would not result in an excessive concentration of special exception uses, and emphasized that the building would remain residential and retain its residential appearance. Staff Report at 5.

D. Proposed Use

The Petitioners propose to continue operating a sports injury therapy clinic at the subject property. They represent that their practice is conducted “in a peaceful, quite and agreeable manner,” without the use of any noisy machinery, odors, or other types of nuisances. GET CITE All customers are required to make prior appointments, and their visits are carefully managed so that they do not introduce traffic, parking problems or other inconveniences to the neighborhood. The Petitioners, both medical doctors, are the only two doctors associated with the use, and represented that they do not intend to have any other doctors join their practice. Moreover, they describe their practice as “an undivided family business serving the same clients, utilizing the same appointment schedule, keeping the same medical records and employing the same treatment methods.” GET CITE TO EX. The Petitioners’ written submissions indicate that Dr. Peng works primarily as Dr. Chen’s assistant during treatment, and does not have separate appointments. See *id.*

The Petitioners agreed to a condition of approval that would limit them to no more than three clients in any one-hour period. They already maintain a written log of client appointments and readily agreed to a condition of approval requiring them to continue doing so. Hours of operation would be limited to 8:30 a.m. to 5:30 p.m., Monday through Friday. In addition to the two doctors, not more than one non-professional support staff person would be on site at any one time.

The Petitioners represent that two people will reside in the residential portion of the house at least part-time. As noted in Part __ above, they have made significant improvements to the exterior of the site, and have restored the interior of the building to allow it to serve its original residential function. The business would occupy about 1,550 square feet, approximately 47 percent of the total area of 3,306 square feet. As shown on the floor plan reproduced below, the business would occupy most of the first floor, with the exception of the kitchen. Dr. Peng testified that the business currently occupies all of the space identified for business use on the floor plan except that room next to the kitchen, which is marked “Dr. Office.” That room is currently set up as a bedroom, and is not used in connection with the business.

neighborhood. Technical Staff was not asked to comment on this change, but the Hearing Examiner thinks it highly unlikely that it would have altered Staff’s opinion.

Floor Plan, Ex. __

The Zoning Ordinance allows a home health practitioner (the current classification of the subject use) to occupy up to 33 percent of a residential structure. See Code § 59-_____. A medical practitioner's office with a special exception, on the other hand, is permitted to occupy up to 50 percent of a residential structure. See Code § 59-G-2.36(a)(2). If the special exception requested here is granted, the Petitioners intend to convert the existing first-floor bedroom to business use to take advantage of the 50 percent rule.

E. Parking

The subject property has six on-site parking spaces, four in front of the building and two at the rear, as shown on the site plan on the next page. They do not propose any changes to the parking facilities. The Petitioners have requested waivers of both the applicable parking area setbacks and the number of spaces required under the Zoning Ordinance, as described further below.

1. Parking Area Setbacks

Pursuant to Code § 59-E-2.38, parking facilities for special exception uses in residential zones are to be set back from the property lines "not less than the applicable building front and rear yard and twice the building side yard required in the zone." The subject property is considered to have two front yards, one facing McKinley Street and the other facing Old Georgetown Road, and two side yards, but no rear yard. Under the R-60 Zone, the minimum setbacks are 25 feet for the front yard and 8 feet for side yards. Accordingly, the parking areas on the subject property would have to be set back 25 feet from both streets and 16 feet from each of the side property lines to satisfy those standards. Staff Report at 7. In actuality, the main parking area at the front of the building is set back approximately ten feet from McKinley Street, ___ feet from Old Georgetown Road and ___ feet from the property line abutting the adjacent single-family home. *Id.* START HERE, COMPLETE THIS PARA WITH DATA FROM DAN – put in page for site plan. THEN GO TO ENVIRONMENTAL

The Petitioners request waivers of these setback requirements to permit them to maintain their current parking areas. Technical Staff opined that no waivers are required, because the subject property was platted and constructed in 1956, at which time the Zoning Ordinance did not impose any parking setback requirements for special exception uses in residential zones. Staff Report at 8. Staff observed that it would be difficult to supply an adequate number of parking spaces on this site while complying with today's setback requirements. This is particularly true on Old Georgetown Road, where significant frontage was dedicated for road widening.

The Hearing Examiner is not in agreement with Technical Staff about the need for waivers. It is standard practice to apply development standards that were in effect at the time a building was constructed, under most circumstances. However, there is no evidence that the current parking facilities existed in 1956, and it is clear that no special exception applied to the site at that time. Accordingly, the Hearing Examiner perceives no legal basis for applying 1956 standards for special exception parking lots in this case. Moreover, it has been this Hearing Examiner's experience that Technical Staff apply current parking lot standards for new special exceptions, and even in some cases for modifications of existing special exceptions. Thus, the Hearing Examiner recommends that the Board of Appeals consider and make a decision on the requested parking setback waivers.

Under Code § 59-E-4.5, the Board of Appeals is authorized to waive any parking requirement in Chapter 59-E that is not necessary to accomplish the following objectives:

- (a) The protection of the health, safety and welfare of those who use any adjoining land or public road that abuts a parking facility. Such protection shall include, but shall not be limited to, the reasonable control of noise, glare or reflection from automobiles, automobile lights, parking lot lighting and automobile fumes by use of perimeter landscaping, planting, walls, fences or other natural features or improvements.
- (b) The safety of pedestrians and motorists within a parking facility.
- (c) The optimum safe circulation of traffic within the parking facility and the proper location of entrances and exits to public roads so as to reduce or prevent traffic congestion.
- (d) The provision of appropriate lighting, if the parking is to be used after dark.

Although Staff in this case believe waivers were not necessary, they nonetheless provided a very helpful analysis of these four objectives, which is summarized below. Staff concluded that the parking facilities on the subject property satisfy each of the stated objectives.

Technical Staff found that adjacent properties are reasonably protected from automobile glare, lights and fumes, and from parking lot lighting, by a retaining wall and plant screening greater than three feet in height. Exterior lighting is residential in style, and is limited to doorway lighting on the building. Staff noted that the Petitioners agreed to a condition of approval that would limit on-site parking to six cars, avoiding the need to have a car parked along the side of the building, closer to the adjacent single-family dwelling than the other two parking areas.

Technical Staff noted that pedestrians will be able to safely access their vehicles or the sidewalks on either of the adjacent roadways, and that motorists will be able to safely maneuver into and out of the site. Safety would be enhanced by a condition of approval recommended by the State Highway Administration, which would require the Old Georgetown Road access point to be posted with signs allowing its use as a right-turn-out exit only, and prohibiting its use as an entrance. This would create a one-way traffic pattern along the side of the house and in the rear, where the drive aisles are fairly narrow, particularly if cars are parked at the rear of the house.

Technical Staff stated that the proposed special exception would not operate after daylight hours, and that residential lighting is provided for parking areas. The Hearing Examiner notes that during winter months, it may be dark when the last clients of the day are making their way to their cars. However, the evidence suggests that existing residential-type lighting is adequate for this limited purpose.

The photographs that follow provide views of each of the parking areas provided on the subject property, which support Technical Staff's finding regarding buffering.

Main Parking Area in Front of House, Ex. 9(c) bottom of page

**View of Rear Parking Area Abutting NIH, Looking West Towards
Old Georgetown Road Exit, Ex. 9(c) top of page**

**View of Rear Parking Area Looking East Towards
Adjacent Residential Property, Ex. 9(b) bottom of page**

2. Number of Parking Spaces Required

Under Section 59-E-3.7, a medical practitioner's office is required to have at least four on-site spaces per practitioner. In this case, that calls for eight on-site spaces. The site plan as originally submitted showed seven spaces on-site, which included one on the east side of the house. The Petitioners also pointed out that they have two permits for on-street parking (street parking at this location requires a residential permit). Technical Staff recommended that the Petitioners remove the parking space on the east side of the house to allow better circulation through the property, which would leave six spaces on site. Staff suggested that the two permits for on-street parking be considered as part of the parking provided for the use, which would allow the Petitioners to satisfy the requirement for eight parking spaces.

F. Landscaping, Lighting and Signage

The subject property is effectively landscaped and buffered with a variety of evergreens, shrubs, grass, flowers, and small trees, as well as low, stone retaining wall of varying height that runs along the northern and eastern property lines. The locations of plantings are shown on a landscaping and illumination plan, reproduced on the next page. A photograph showing the extensive landscaping along the eastern property line follows on page __. Landscaping features on other parts of the property can be seen on photographs provided earlier in this report.

Section 59-E-2.83 of the Zoning Ordinance requires parking facilities for special exception uses in residential zones to provide screening "in a manner that is compatible with the area's residential character." Screening must be at least six feet high, and must consist of evergreen landscaping, a solid wood fence, a masonry wall, a berm, or a combination of such features. See *id.* Along street right-of-ways, screening must be at least three feet high and consist of evergreen landscaping, a solid wood fence, or a masonry wall. See *id.*

Landscaping and Illumination Plan, Ex. 6

The subject property's landscaping appears to satisfy the requirements of Section 59-E-2.83 with regard to the street frontages. Moreover, the total height of the wall and vegetative screening along the northern and eastern boundaries is a minimum of six feet in height. However, as pointed out by the adjacent neighbor to the east, Carol Banta of 5333 McKinley Street, some of the tall trees along that property line are on the neighbor's property, not the Petitioners. See Ex. 21. Ms. Banta has no plans to remove these plantings, but she understandably declines to assume any obligation to retain these plantings or any kind of privacy screen on her property for the benefit of the Petitioners' business.

Photograph of Side Yard Landscaping, East Side of Property Exhibit 9(a) bottom of page

As Technical Staff notes, it is impossible to tell exactly which plants are on the Petitioners' property without a tree and topography survey. However, the Petitioners have not contested Ms. Banta's representation that the taller vegetation on the east property line belongs to her.

In an effort to avoid imposing duplicative requirements where an effective screen currently exists, while placing the burden on the Petitioners to ensure that an effective screen remains in place as long as the use is in operation, Technical Staff crafted a recommended condition of approval that would require the Petitioners to maintain the parking area landscape screening. In particular, the condition states that if landscape screening is removed from an adjacent property, such screening must be replaced on the Petitioners' property by modification of the approved special exception.

Staff Report at 1. The Hearing Examiner explained the meaning of this condition to the Petitioners, and expressed to them that they could choose to erect six-foot screening on the property now, in connection with their current petition, or they could leave the site as is for the time being, knowing that if any plants are removed on the property to the east (or on the NIH property to the north) that make the screening ineffective, they will bear the responsibility to request a modification of their site plan and to install appropriate screening. The Petitioners testified that they prefer to leave the site as is for the time being, and come back for a modification at a later date if necessary.

Exterior lighting on the subject property is limited to two fixtures: a 200-watt entrance light about the front door to the building on McKinley Street, and a 200-watt motion sensor light on the east side of the building, near side entrance and a staircase that leads to the second floor. Both are residential-type fixtures. The Petitioners do not propose any changes to the exterior lighting. Technical Staff opines that the existing lighting will not cause any objectionable illumination or glare because it is located below the second level of the building, above the entrances.

The Petitioners currently have an identification sign on the front door of their building. They also propose to erect a free-standing sign near the walkway that leads from the building to Old Georgetown Road. The sign would measure 36 inches wide by eight inches tall, and would read "Sports Injury Therapy Clinic." See Ex. ___. The Petitioners stated that the sign would not be illuminated, and they agreed to a condition of approval specifying that the sign will conform to Montgomery County signage requirements, and requiring them to submit a representation of the sign to the Board of Appeals before it is installed. The location proposed for the new sign may be seen on the site plan reproduced on page ___ above.

G. Development Standards

The table below, adapted from a table provided in the Staff Report, compares the development standards for the R-60 Zone with conditions on the subject property.

| Development Standard | Requirement | Existing Condition |
|--|--------------------|---|
| Minimum Lot Area | 6,000 sq. ft. | 6,623 sq. ft. |
| Minimum Yard Requirements for Main Building: | | |
| From any street line | 25 feet | 18 ft. from Old Georgetown Rd. |
| From side lot line | | 44 ft. from McKinley Street |
| One side | 8 ft. | |
| From rear lot line | 20 ft. | 14 feet from east property line 20 feet from north property line |
| Maximum building height | 35 ft. | 22 ft. |
| Maximum building coverage | 35% | 25% |

For a corner lot, both street frontages are treated as front yards, and for analysis purposes one of the remaining sides is designated the rear and the other is designated the side. In this, for purposes of its analysis Technical Staff treated the northern (NIH) property line as the rear and the eastern property line (adjacent to a single-family home) as the side.

Technical Staff notes that the building on the subject property satisfied the applicable 25-foot setback requirement from Old Georgetown Road when it was built. The setback decreased to the current 18 feet when as a result of a frontage dedication for the widening of Old Georgetown Road. Because it was the result of a dedication, the 18-foot setback is not considered a zoning violation.

H. Environment, Utilities and Public Facilities

The present petition is exempt from forest conservation requirements because it does not involve any building activities and no existing forest or trees would be removed. See Ex. 7. The subject property contains no other environmental resources such as wetlands or stream buffers.

The Petitioners' site planner testified that the subject property is and would continue to be served by adequate utilities. Technical Staff states that the property is served by adequate public facilities, including public water and sewer. Transportation Planning Staff notes that the proposed use would generate fewer than 50 vehicle trips during the morning and evening peak hours and, therefore, a traffic study is not required to satisfy Local Area Transportation Review requirements. For purposes of current Policy Area Transportation Review requirements, the subject property is located within the Kensington-Wheaton policy area, which had remaining capacity of 2,529 jobs as of November 30, 2003 – more than adequate to accommodate the modest use proposed here.

I. Community Participation

The

III. SUMMARY OF TESTIMONY

The Petitioners, Young Chen and Wei Ping Peng, attended and participated in the hearing. They were assisted by a family member, Rong Ping Wu, whose spoken English is more fluent. At various points during the hearing, Mr. Wu served as a translator or spokesperson for Mr. Chen and Ms. Peng.

Mr. Wu stated that the Petitioners would like to make a change in their Statement of Proposed Activity regarding the number of clients. Instead of three or four clients in a two-hour period, the Petitioners intend to have no more than three clients in any *one-hour* period. Tr. at 6.

Mr. Wu offered some corrections to the Staff Report. First, he stated that the report (p. 3) does not calculate correctly the amount or percentage of the building that the Petitioners plan to devote to the proposed special exception. The report says that the Petitioners will use 1,067 square feet or 33 percent of the building for the business. In fact, the Petitioners wish to use the maximum permitted in the Zoning Ordinance, 1,550 square feet, which is almost 50 percent of the building. As Mr. Wu pointed out, Technical Staff's error was due to reliance on the numbers the Petitioners put on their submitted floor plan, which has the figured of 1,067 square feet at the bottom of the page. See Ex. 5.

Mr. Wu explained that the Petitioners submitted here the floor plan they had prepared when they registered their business as a home practice, which permits up to one third of the floor area of a house to be used for business purposes. Under the rules for a medical practitioner's office with a special exception, the Petitioners would be permitted to use up to 50 percent of the building for business purposes. Ms. Peng stated that they intend to convert a first-floor bedroom to business use to take advantage of the 50 percent rule. Tr. at 11.

The Staff Report includes a recommended condition of approval (condition no. 4) that would require the Petitioners to add screening for their parking area in the event that trees currently located on an abutting neighbor's property are removed. Mr. Wu stated that the Petitioners' site plan shows a wall along that property line, which should be adequate screening. The Hearing Examiner pointed out that the Section 59-E-2.83 requires that a special exception in a residential area provide six-foot-tall screening along its parking area, consisting of evergreen landscaping, a solid wood fence, a masonry wall, a berm or a combination of those elements. The Hearing Examiner explained that Technical Staff initially thought those requirements were met in this case by the existing trees, but then a letter arrived from the adjacent neighbor saying that those trees are on her property. A special exception holder is not permitted to rely perpetually on features on another property to satisfy its screening requirement. Accordingly, Technical Staff attempted to craft a condition that would avoid forcing the Petitioners to duplicate landscaping that already exists, but would make clear that they are obligated to replace that screening if it dies or is removed. The Hearing Examiner and People's Counsel further explained that if the neighbor's trees die or are removed, the Petitioners will need to submit a request to the Board of Appeals for a modification of their special exception site plan, to show the new trees or other screening they plan to install.

Following a translation and discussion off the record among Mr. Wu, Mr. Chen and Ms. Peng, Mr. Wu stated that the Petitioners agree to abide by the condition that Technical Staff recommended, keeping the low wall they have now and replacing it with something higher if the neighbor's trees are removed. Tr. at 17.

With the correction identified as to square footage, Mr. Wu stated that the Petitioners would like to adopt the Staff Report as part of their evidence.

With regard to the operation of the business, Mr. Wu stated that each client appointment generally lasts about an hour, maybe a little longer. Tr. at 18. (The Hearing Examiner notes that one of the Petitioners' written submissions states that the therapeutical instruments employed generally require two hours per person per session. See *Ex. ___*.) The submitted Statement of Operations describes operating hours as 8:30 a.m. to 6:00 p.m., Tuesday through Friday. Have reviewed that and discussed with the Petitioners the permanency of those hours once they become part of a special exception, Mr. Wu stated that the Petitioners would like to change the specified hours of operation to 8:30 a.m. to 5:30 p.m., Monday through Friday.

The Hearing Examiner pointed out that an eight-hour day, with up to three clients per hour, means as many as 24 clients in a day. Mr. Wu acknowledged that normally the Petitioners do not see that many patients in a day. However, they prefer to leave some flexibility on the number of clients, and therefore prefer to not to limit the total number per day to a lower number than 24. Mr. Wu confirmed that all clients are by appointment, and there are no weekend operations. He stated that the Petitioners already maintain a written record of appointments and will continue to do so. They currently have only one staff person on site at a time, in addition to the two doctors, and plan to continue operating in that manner.

With regard to parking, the Petitioners were aware that Technical Staff believes they should show only six parking spaces on site, rather than seven. Mr. Wu indicated that in discussions with Staff, it was apparent that the space Staff suggested removing is the one on the east side of the property, which is a single space with no other parking spaces around it. The Petitioners feel that six parking spaces on site would be sufficient for their use, and agree to remove the seventh space as suggested. The space was physically removed from the site plan during a break.

The Petitioners agreed to add to their site plan a notation showing where they plan to install a free-standing identification sign. They agreed to a condition requiring them to abide by Montgomery County sign regulations, and to submit a depiction of the sign to the Board of Appeals before installation, to be held in the file for enforcement purposes. The Petitioners stated that their sign would not be illuminated.

Ms. Peng stated that, as shown on Exhibit 4, there are two exterior lights, one at the front of the building and one at the rear. The entrance light in the back of the building is on a motion sensor. Ms. Peng stated that they have never had complaints about the lighting from their neighbors.

The Hearing Examiner questioned the Petitioners, via Mr. Wu, with regard to the specific condition that permits a medical practitioner's office in a residential zone only if suitable office space is unavailable in the nearest commercial zone or the nearest medical clinic office building constructed per special exception. After conferring with the Petitioners, Mr. Wu stated that the Petitioners chose the subject property because it is a convenient location with easy access for clients, and because the therapeutical nature of their treatment requires the quiet, cozy setting that a residential neighborhood can provide. Tr. at 28-29. He also noted, in response to questioning by the People's Counsel, that the prior to its acquisition by the Petitioners, the subject property was used for about nine years as a medical practitioner's office.

Mr. Wu confirmed that the Petitioners do not intend to have any other doctors join their practice.

Barabara Green, a long time friend of the Petitioners, testified in support of the petition. She stated that she was involved in the opening of their clinic at the subject site, and has talked to several of the neighbors about it, once with Mr. Peng and once by herself. She found that the adjacent neighbors and those within three or four houses down are all delighting with the appearance of the subject property and its use, and with the Petitioners as neighbors. Ms. Green stated that in her view, the Petitioners have done nothing but enhance the property.

IV. 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 proposed special exception, with the conditions recommended at the end of this report, 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 non-residential professional office. 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 characteristics associated with a non-residential professional office are a single-family structure to house the office use, a parking facility adequate to accommodate employees and visitors and an identification sign. Technical Staff suggests that typical operational characteristics of a non-residential professional office include client visits primarily during the weekday, with limited activity on the weekend, especially Saturday, and trips to and from the site by employees and delivery services during normal business hours. Absent any analysis or data to support this position, the Hearing Examiner is not persuaded that non-residential professional offices, which are limited to recognized professions such as doctors, lawyers and architects, necessarily involve weekend operating hours. Moreover, the record includes no evidence as to whether the early morning hours and early evening hours proposed in this case are typical of the use. Absent specific evidence to the contrary, the undersigned is inclined to believe that the operating hours typically associated with a non-residential professional office are closer to standard business hours of 9 a.m. to 5 p.m., Monday through Friday. However, the precise definition of inherent v. non-inherent operating hours need not be determined here because the evidence supports the conclusion that, even if the proposed operating hours should be considered non-inherent adverse effects, the inherent and non-inherent adverse effects associated with the use proposed here are not sufficient to support denial of the special exception.

All of the physical and operational characteristics of the proposed use other than early morning and early evening hours and weekend activities are typical of non-residential professional offices and should be considered inherent in the use. Moreover, In light of the limitations on the number of employees, client visits and deliveries to which the Petitioners have agreed, the level of activity anticipated on the subject property would not cause adverse effects sufficient to justify denial of the petition.

B. Specific Standards

The specific standards for a non-resident professional office are found in §59-G-2.38. The provisions of this section and the Hearing Examiner's findings with respect thereto are as follows:

C. General Standards

The general standards for a special exception are found in Section 59-G-1.21(a). The Technical Staff report and the Petitioner's written evidence and testimony provide sufficient evidence that the general standards would be satisfied in this case, as outlined below.

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 non-residential professional office is a permitted use in the R-60 Zone at locations designated as appropriate for such uses in the applicable master or sector plan. As discussed in Part IV.B. above, the subject property is so designated in the applicable Sector Plan.

(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 comply with the standards and requirements set forth for the use in Code §59-G-2.38, as detailed in Part IV.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: For the reasons discussed in Part IV.B. above, the evidence supports the conclusion that the proposed use would be consistent with the *Forest Glen Sector Plan*.

(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, a very low intensity and unobtrusive character of activity, and a negligible impact on traffic and parking. It would involve no new structures. The neighborhood contains existing medical office uses that are located, like the subject property, along Georgia Avenue, where their impact on the character of the adjoining residential neighborhoods is minimized. The Hearing Examiner concludes, based on the

preponderance of the evidence, that the proposed use would be in harmony with the general character of the neighborhood.

- (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: Due to the low intensity of the activities involved and their unobtrusive nature, as well as planned enhancements to the physical appearance of the property, the evidence supports the conclusion that the proposed use would not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site.

- (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: The evidence supports the conclusion that due to the nature of the activities involved, the proposed use would cause no objectionable noise, vibrations, fumes, odors, dust or physical activity at the subject site. Exterior lighting is limited to residential-type fixtures that illuminate the parking lot. The undisputed testimony of the Petitioners' site planner supports the conclusion that these lighting fixtures would not create any objectionable illumination or glare.

- (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: The proposed special exception is consistent with the recommendations of the Sector Plan, and therefore, is not considered to alter the nature of the area. Only two other special exception uses have been identified in or near the general neighborhood, both of which are medical offices located along Georgia Avenue rather than within the adjoining residential neighborhoods. Moreover, the subject property historically has been used for professional offices almost continuously for more than 40 years. For all of these reasons, the Hearing Examiner concludes that the proposed use would not increase the number, intensity, or scope of special exception uses in the area sufficiently to affect the neighboring one-family residential area adversely or alter its character.

- (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 supports the conclusion that the proposed use would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site.

- (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 services and 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 far fewer than 50 vehicular trips during the weekday peak hours. Accordingly, the proposed use is not subject to Local Area Transportation Review requirements. Adequate jobs capacity exists within the Kensington-Wheaton Policy Area to satisfy Policy Area Transportation Review requirements.

- (ii) 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 preponderance of the evidence supports a conclusion that the proposed use would have no detrimental effect on the safety of vehicular or pedestrian traffic, and may have a beneficial effect due to the entrance improvements required by SHA.

- (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 the Petitioners have met the burden of proof and persuasion.

D. Parking Facility Waivers

Based on Technical Staff's well-reasoned opinion concerning the factors enumerated in Section 59-E-4.5, as well as the photographs and other evidence presented, the Hearing Examiner recommends that the Board of Appeals grant the parking setback waivers requested. The parking areas are well buffered, and the smallest setbacks abut either roadways or the NIH campus, not residential uses. Compliance with the setback requirements would be difficult or impossible, and is not necessary to satisfy the objectives stated in Section 59-E-4.5.

To ensure that the one residential use adjacent to the subject property is adequately buffered from the impacts of parking on the subject site, the Hearing Examiner has included a recommended condition of approval that would prohibit parking in the side yard adjacent to that residential use. This prohibition is consistent with the final site plan, on which the Petitioners removed a side-yard parking space at Technical Staff's suggestion. The possibility of a condition specifically prohibiting parking in the side yard was not discussed at the hearing, but the Petitioners' removal of the side yard parking space from their site plan suggests that they would not object to such a condition.

The Hearing Examiner is persuaded that, as a practical matter, the six on-site spaces and two on-street parking permits will be adequate for the proposed use. Because client appointments are limited to a maximum of three in any one-hour period, even if there is some overlap between the end of one appointment and the beginning of the next, the six on-site spaces will be enough for six clients. The two on-street parking permits would allow the Petitioners to park on the street when they have a full day of appointments, leaving the on-site spaces for clients. In the Hearing Examiner's view, however, these factors weigh in favor of granting a waiver, rather than considering the requirements of the Zoning Ordinance to be fulfilled.

Section 59-E-3.7 is titled "Schedule of Requirements," and it explicitly states "Off-street parking space must be provided as follows: . . . **Office, medical practitioner's.** Not less than 4 parking spaces for each practitioner occupying or using such office." The Hearing Examiner reads this as a clear requirement for eight parking spaces *on the subject property*. On-street parking and off-street parking are not the same, and in the undersigned's view should not be considered equivalent. The Zoning Ordinance requires *off-street* parking quite specifically, to limit adverse effects on neighbors from non-residential uses that could take up street parking spaces and make it more difficult for residents and their guests to find convenient parking. The Hearing Examiner is very reluctant to see that requirement diluted by considering permits to park on the street as the equivalent of on-site parking spaces. Making that decision in this case would open the door to other applicants arguing for similar treatment, perhaps in situations where the impact on neighbors would be less innocuous.

The subject property does not have enough space to accommodate the eight on-site parking spaces required by the Zoning Ordinance. However, the limitation on the number of appointments taking place per hour and the Petitioners' ability to park their own vehicles on the street during busy times serve as persuasive evidence that in this instance, requiring all eight on-site parking spaces is not necessary to achieve the goals stated in Section 59-E-4.5, as reproduced on page ___ above. Accordingly, a waiver from the requirements of Section 59-E-3.7 should be granted to allow the

proposed special exception to move forward with six on-site parking spaces instead of eight.

V. RECOMMENDATIONS

Accordingly, based on the foregoing findings and conclusions and a thorough review of the entire record, I recommend that Petition No. S-2588, which requests a special exception under the R-60 Zone for a non-residential professional office to be located in two separate, existing buildings at 9911 and 9913 Georgia Avenue in Silver Spring, known as Lots 2 and 3, Block 1, of the Forest Glen subdivision, be **granted** with the conditions listed below and that the requested parking waivers be **granted** to permit the setbacks shown on the Site Plan, exhibit 29(a):

8. The Petitioners shall be bound by all of their testimony and exhibits of record, including the Site Plan, Exhibit 29(a), and the Landscape and Lighting Plan, Exhibit 29(c), and by the testimony of their witnesses and representations of counsel identified in this report.

9.

Dated: February 10, 2005

Respectfully submitted,

Françoise M. Carrier
Hearing Examiner