



March 3, 2023

VIA ELECTRONIC MAIL

Honorable Nicole Wilson, District 1
Orange County Commission
201 S. Rosalind Avenue, 5th Floor
Orlando, Florida 32801

Re: BZA Appeal Case No. SE-22-07-047 (8841 Palm Lake Drive)

Dear Commissioner Wilson:

Our firm represents a consortium of residents in the Palm Lake neighborhood in opposition to the above-referenced project, which the Orange County Board of Zoning Adjustment ("BZA") **denied** at its meeting on January 5, 2023. The Board of County Commissioners ("BCC") is currently scheduled to consider the Applicant's appeal of the BZA's denial of the requested special exception and variance on **Tuesday, March 7, 2023, at 2:00 p.m.** (Agenda Item VI.C.10). Our clients respectfully urge the BCC to affirm the BZA's **denial** of the requested special exception and variance, as it is indisputable that the project does **not** comply with the County's special exception and variance criteria.

Briefly stated, the Applicant is seeking a special exception and variance to operate an 8,500 square foot child day care center/private school with 146 students within the Palm Lake Manor neighborhood. The requested variance seeks a 70% reduction of the required front setback along Palm Lake Drive from 35 feet to 10.4 feet. The proposed hours of operation of the child day care center/private school are 7:00 a.m. to 6:00 p.m. (Monday-Friday), with an unspecified number of after-hours "special events" throughout the school year. Notably, access to the proposed child day care center/private school is from Palm Lake Drive – a local neighborhood street with no shoulder or striping. According to the Applicant's own traffic study, the proposed child day care center/private school will result in 597 "new" daily trips onto Palm Lake Drive – which provides the sole access to the Palm Lake neighborhood. Further, per the Applicant's own projections, at least 14% of the daily trips will cut through the Palm Lake neighborhood to access Dr. Phillips Boulevard, instead of using the intersection at Palm Lake Drive and Apopka Vineland Road which is projected to operate at a Level of Service F.

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Public Hearing C.10 Submittal 1 - Brent Spain

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In denying the special exception and variance, the BZA concluded that the proposed child day care center/private school would result in a "detrimental intrusion" into the established Palm Lake neighborhood and, thus, did not comply with the County's special exception criteria in Section 38-78 of the County's Code. In reaching such conclusion, BZA members noted that the location of a non-residential, commercial use along Palm Lake Drive and the increased traffic associated therewith, including cut-through traffic, would have a negative impact on the Palm Lake neighborhood. Our client respectfully submits that the BZA's finding that the proposed child day center/private school does not comply with the County's special exception (and variance) criteria is correct and requests that the BCC uphold the denial of the application.

In advance of the March 7 public hearing and to assist the BCC in its consideration of this matter, enclosed are courtesy copies of the following documents that were omitted from the Agenda Packet:

- Exhibit 1 The Planning Analysis that our firm submitted to the BZA, which establishes that the proposed project fails to comply with the County's special exception and variance criteria.
- Exhibit 2 The PowerPoint Presentation that our firm introduced to the BZA, which further demonstrates how the proposed project fails to comply with the County's special exception and variance criteria.

Lastly, it bears noting that the BZA's denial of the proposed child day care/private school is consistent with the County's previous denial of a special exception for a proposed religious facility on the subject property in 2014. Both the BZA and the BCC unanimously denied the proposed religious facility on the basis that such non-residential use along Palm Lake Drive would constitute a "detrimental intrusion" and was "not compatible" with the long-established Palm Lake neighborhood. Notably, the BCC denied the proposed religious facility even after the applicant limited the size of the facility to 9,000 square feet, restricted access to a right turn out and left turn in from Palm Lake Drive in order to direct traffic to Apopka Vineland Road, and agreed to signage being installed in the Palm Lake Drive right-of-way stating "Residential Area – No Through Traffic."

I appreciate the BCC's attention to this matter of great importance to the Palm Lake neighborhood. Please do not hesitate to contact me if you have any questions or need further information.

Sincerely,

/s/ *S. Brent Spain*

S. Brent Spain

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cc: Mayor Jerry Demings
Commissioner Christine Moore, District 2
Commissioner Mayra Uribe, District 3
Commissioner Maribel Gomez Cordero, District 4
Commissioner Emily Bonilla, District 5
Commissioner Mike Scott, District 6
Jon Weiss, Director
Ted Kozak, Project Planner
Joel Prinsell, Deputy County Attorney



**Legal & Planning Analysis
for
SE-22-07-047 (8841 Palm Lake Drive)
Orange County, Florida**

Introduction

The following legal and planning analysis of Application SE-22-07-047 was prepared at the request of Betsy Story and a consortium of property owners in the Palm Lake community, who are directly impacted by the requested special exception and variance for an 8,500 square foot child day care center and private school for 146 children. In preparation of this analysis, I examined:

- Orange County Future Land Use Element and Future Land Use Map Series, Urban Design Element, Neighborhood Element, and Transportation Element
- Orange County Code of Ordinances, Part II Orange County Code, Chapter 9 Building and Construction Regulations, Chapter 30 Planning and Development, and Chapter 38 Zoning
- The documents related to SE-22-07-047, including the application, the special exception site plan package, the traffic impact analysis, and the BZA Staff Report for the January 5, 2023 public hearing.

My resume is attached to this analysis. I earned my law degree from Florida State University College of Law, with high honors, and earned my bachelor of science degree in Economics with a minor in Environmental Policy Analysis and Planning from the University of California at Davis. I have been practicing exclusively land use, zoning, and local government law in Florida since 2000, and I am Board Certified by The Florida Bar as an expert in City, County and Local Government Law. During my 22-year legal career, I have represented private property owners, citizen groups, developers, and local governments in land use, zoning, and environmental disputes in public hearings and court proceedings throughout the State of Florida.

Application SE-22-07-047

Background

Application SE-22-07-047 was submitted in April 2022 by McGregor Love, Esquire, as authorized agent for Iqbal H. Gagan and Salma Rafat for a proposed child day care center/private school at 8841 Palm Lake Drive, Orlando, Florida. According to Orange County records, the owners purchased the 1.75-acre parcel in 2012 for only \$20,000, presumably due to the overhead transmission line easement encumbering the vast majority of the property as discussed herein.

The property consists of a portion of Lot 3, Block A of the Palm Lake Manor subdivision, per the Palm Lake Manor Plat recorded in 1953 at Plat Book T, Page 29 of the Official Records of Orange County, Florida. Simultaneous with the plat, the original property owners recorded a "Notice of Restrictions on Real Estate" at Book 959, Page 229 of the Official Records of Orange County, Florida. Notably, Section 2 of such Restrictions states, "The Property shall not be used for commercial purposes, except farming and allied lines." Although these Restrictions were subsequently released as to Lots 1 and 2, Block A of Palm Lake Manor, they were never released as to Lot 3 or the other lots within Block A of the Palm Lake Manor subdivision.

The proposed child day care center/private school entails an 8,500 square-foot building on approximately 1.75 acres. According to the applicant, the child day care center/private school enrollment will be 146 children with an unspecified number of teachers and administrators. The proposed hours of operation are 7:30 a.m. to 5:30 p.m., daily. It is unknown whether the proposed facility intends to hold any after-hours "special events" throughout the year. In addition to seeking a special exception for the child day care center/private school, the applicant is also requesting a variance for a 70% reduction of the front setback along Palm Lake Drive from 35 feet to 10.4 feet.

Lastly, it bears emphasizing that the Board of Zoning Adjustment (BZA) and the Board of County Commissioners (BCC) **unanimously denied** a prior special exception request by the same owners for a religious facility on this property in 2014, concluding that such use failed to comply with the special exception criteria in Section 38-78 of the Orange County Land Development Code (LDC) and would constitute a detrimental intrusion into the established Palm Lake community. Although initially proposed to be 13,000 square feet, the applicant stipulated to reducing the size of the religious facility to 9,000 square feet with a right-turn only exit onto Palm Lake Drive. Nonetheless, the BCC unanimously affirmed the BZA's recommendation of denial, concluding that the proposed non-residential use on Palm Lake Drive and the increased traffic associated therewith would constitute a detrimental intrusion into the established Palm Lake residential community. Like the proposed child day care center/private school, the previously denied religious facility would have generated more than 100 p.m. peak hour trips per day on Palm Lake Drive and resulted in significant cut-through traffic.

Special Exception Criteria & Analysis

Section 38-77, LDC, lists child day care centers as a special exception in the R-CE (Country Estate District) zoning category. Section 38-1, LDC, defines child day care centers as "a structure in which the owner or operator, for compensation, provides supervision and temporary care for more than ten (10) persons, who are not related by blood or marriage and not the legal wards or foster children of the owner or operator." The criteria for special exceptions are listed in Section 38-78, LDC, as follows:

Sec. 38-78. Special exception criteria.

Subject to section 38-43 and section 30-43 of this Code, in reviewing any request for a special exception, the following criteria shall be met:

- (1) *The use shall be consistent with the comprehensive policy plan.*
- (2) *The use shall be similar and compatible with the surrounding area and shall be consistent with the pattern of surrounding development.*
- (3) *The use shall not act as a detrimental intrusion into a surrounding area.*
- (4) *The use shall meet the performance standards of the district in which the use is permitted.*

- (5) *The use shall be similar in noise, vibration, dust, odor, glare, heat producing and other characteristics that are associated with the majority of uses currently permitted in the zoning district.*
- (6) *Landscape buffer yards shall be in accordance with section 24-5 of the Orange County Code. Buffer yard types shall track the district in which the use is permitted.*

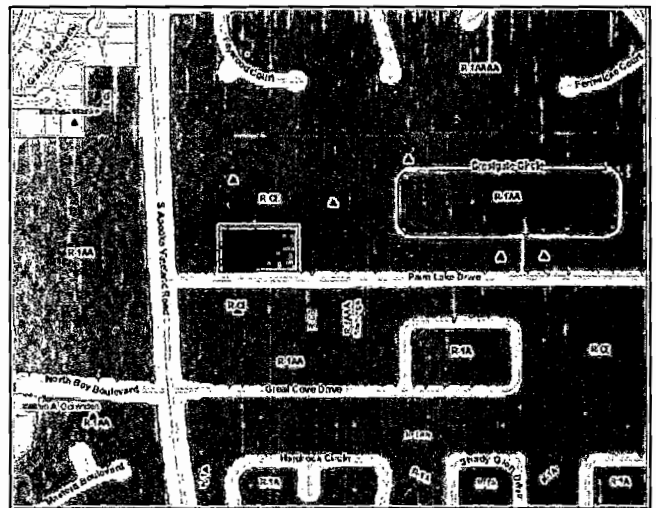
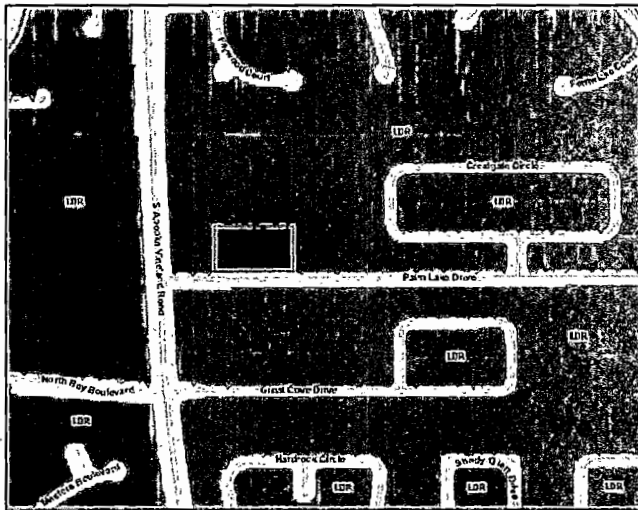
Application SE-22-07-047 does **not** meet the special exception criteria found in Section 38-78(1), (2), (3), (5), and (6). Each of these deficiencies is outlined in detail below.

A. Section 38-78(1): The use shall be consistent with the comprehensive policy plan

1. Future Land Use and Zoning Designations

The Future Land Use Map designation for the subject property is Low Density Residential (LDR), which allows residential dwelling units at a gross density of 0 to 4 dwelling units per acre. The surrounding properties are also LDR. The subject property is zoned R-CE, Country Estate District. The R-CE district is a primarily residential district that allows for very low residential densities. The minimum lot size is 1 acre. The surrounding properties are R-CE, R-1AAAA, R-1AAA, R-1AA, and R-1A, which are single-family large lot residential districts. The Future Land Use Map and Zoning Map for the subject and surrounding properties are shown below:

Future Land Use & Zoning Maps



Source: Orange County InfoMap. Last visited January 3, 2023.

2. Comprehensive Plan Policy Analysis

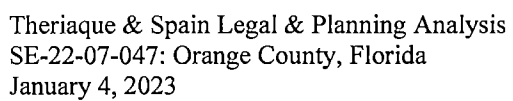
As evidenced by the Future Land Use (FLU) policies referenced below, there is no adopted Floor Area Ratio (FAR) for the LDR future land use category. FLU 1.1.2.A lists only residential densities and residential uses for the LDR category. FLU 1.1.5 states that the County may establish FARs and densities in its Land Development Code. The R-CE zoning district, however, has no FAR established in the LDC. By contrast, FLU 8.1.1 establishes that FARs, or FARs and densities, are established for other future land use categories. The

absence of a FAR in the LDR future land use category indicates that non-residential uses are not permitted in LDR pursuant to the County's Comprehensive Plan.¹

In addition to the above-stated deficiency, the child day care center, by definition, is a "commercial" business. The subject site, however, is an inappropriate location for commercial development. Indeed, FLU 1.4.3 states that "[t]he location of commercial development shall be concentrated at major intersections and within Activity Centers and Neighborhood Activity Nodes within the Urban Services Area." Notably, there are no "commercial" uses along Palm Lake Drive and approval of the proposed child day care center/private school would allow the unwarranted encroachment of a commercial use into an established low-density, residential community.

3. Compatibility with Surrounding Uses

As shown on the Future Land Use and Zoning Maps above, the character of the surrounding area is one of predominantly single-family, low-density residential uses. The subject property is located within the Palm Lake Manor subdivision. There are single-family homes to the south and east of the proposed site along Palm Lake Drive. The proposed 8,500-square foot child day care center/private school is 40% larger than the average gross floor area (including non-living space) of the six (6) houses closest to the subject property along Palm Lake Drive. There is a religious use, the Christ Community Church, located to the north of the subject property. However, unlike the current proposal, such church has direct ingress/egress solely from S. Apopka Vineland Road, and is a much less intense use – *i.e.*, a 5,834 square-foot building on 5.59 acres according to the Orange County Property Appraiser (equating to a FAR of 0.02 compared to a FAR of 0.11). In addition to the surrounding single-family homes, there is also a Duke Energy Electric Substation located to the east of the subject property. Most of the subject property is covered by an overhead powerline easement. Immediately west of the subject property is a stormwater retention facility. An aerial map showing the subject and surrounding properties is provided below as is an excerpt from the applicant's proposed site plan:



Neither the County's Comprehensive Plan nor the LDC provides a definition of compatibility. Therefore, the definition of compatibility in the Florida Statutes is utilized for the purposes of this report. Compatibility is defined in Section 163.3164(9), *Florida Statutes*, as follows:

A condition in which land uses or conditions can coexist in relative proximity to each other in a stable fashion over time such that no use or condition is unduly negatively impacted directly or indirectly by another use or condition.

The County's Comprehensive Plan provides several relevant policies related to compatibility. FLU 1.4.2 requires land use changes to be compatible with and serve existing neighborhoods. FLU 8.2 states that compatibility is the fundamental, or first, consideration in all land use and zoning decisions, which would include this special exception application. Recognizing that compatibility does not mean that a proposed use must be identical to surrounding uses, FLU 8.2.11 states that other considerations such as design, urban form, and physical integration into the surrounding area should be considered in determining compatibility. As shown in the analysis of FLU 1.4.6 below, the proposed site plan does ***not*** use design or physical integration to fit into the form of the residential neighborhood in which the applicant desires to locate. Further, the application is ***not*** conditioned to include conditions that would address compatibility, presumably because the site is so constrained that options for location, landscaping, buffering, and design are severely limited.

FLU 1.4.4 specifically targets the issue of encroachment of commercial activities into residential areas. In previous special exception applications, Orange County Staff has interpreted the activities of a child day care center to be similar to commercial activities.

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| FLU1.4.4 | The disruption of residential areas by poorly located and designed commercial activities shall be avoided. Primary access to single-family residential development through a multi-family development shall be avoided. (Added 12/00, Ord. 00-25, Policy 3.2.12-r). |
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FLU 1.4.6 provides specific criteria for evaluating conversions of residential use to non-residential use. In the case of this special exception, approval of the request to locate a child day care center/private school in R-CE and in an existing neighborhood would be such a conversion. The proposed child day care center/private school does ***not*** comply with the criteria in FLU 1.4.6 as discussed below:

FLU1.4.6 The County shall consider the following criteria when evaluating, on a case-by-case basis, whether conversion of residential use to non-residential use may be permitted:

- A. There has been a significant change in area land use character;
- B. The adjacent road satisfies one or more of the following: is a major street, as identified in the Land Development Code; provides access to an existing mix of residential and non-residential uses; or will support a compatible mix of uses based on existing conditions;
- C. The site satisfies one or more of the following: is adjacent to commercial or office uses that are consistent with the Comprehensive Plan and Land Development Code; adjoins an intersection of two streets; or adjoins wetlands, stormwater facilities or other features that serve to buffer the use from adjacent residential uses;
- D. Sufficient land area is available to support the land use intensity increase, such as the need for parking, stormwater retention, on-site maneuvering, and meeting minimum site and building standards of the requested zoning district;
- E. The converted use shall be compatible with adjacent land use;
- F. The conversion would provide a commercial or office use that has the potential to serve the neighborhood in which it is located;
- G. Outside traffic resulting from the converted use would not adversely affect the residential neighborhood;
- H. All other applicable policies detailed for non-residential use shall be met; and
- I. A mix of uses shall be encouraged. Office use, in a residential scale and character, may be considered to be a transitional use between commercial and residential uses. (Policy 3.6.5-r; Amended 6/12, Ord. 2012-14)

- #A. There has not been a significant change in the character of the surrounding area. The immediate area is predominately low-density, single-family residential homes. There has not been an encroachment of non-residential activities into the area. To the contrary, the proposed child day care center/private school would be the only non-residential, commercial use on Palm Lake Drive.
- #B. The adjacent road, Palm Lake Drive, is not a major street; does not provide access to a mix of residential and non-residential uses; and will not support a compatible mix of uses based on existing conditions. Palm Lake Drive is a local road that serves the existing neighborhood. The road is a 24-foot asphalt surface with no pavement markings, shallow drainage swales, and a sidewalk on the north side of the street.
- #C. The site is not adjacent to any commercial or office uses; does not adjoin the intersection of two streets; does not adjoin a feature that serves to buffer it from adjacent residential uses. There are homes on the south side of Palm Lake Drive, which would be visually impacted by the non-residential use.
- #D. Sufficient land area is not available on the 1.75-acre site to support the increase in intensity. The site is restricted by a Duke Energy overhead powerline easement, which was in place when the applicant purchased the property. As such, the 8,500 square-foot building is wedged into the southeast corner of the site immediately at the 10-foot side yard setback line and encroaching 25 feet into the 35-foot front yard setback. The front elevation faces the parking lot, with the side/rear elevations of the building facing Palm Lake Drive. The only other non-residential use in the immediate area is the Christ Community Church on S. Apopka Vineland Road, located to the north

of the subject property. Unlike the current proposal, access to the church is solely from S. Apopka Vineland Road, and the single-story building is residential in character.

- #E. The proposed child day care center/private school is not compatible with the existing low-density, residential land uses. The facility will operate 7:30 a.m. to 5:30 p.m., daily. The proposed enrollment of 146 students results in a significant number of people coming in and out of the neighborhood on a daily basis. The standard for compatibility is whether two uses can co-exist in relative proximity over time without undue direct or indirect adverse impacts. The approval of an 8,500 square-foot building with the capacity to hold 146 students operating 10 hours a day would create direct and indirect adverse impacts to the existing single-family residential neighborhood, which is currently free from encroachment by any non-residential use.
 - #F. Although it is possible that the child day care center/private school has the potential to serve children within the Palm Lake community, the reality is given the facility's size and student enrollment that it will primarily serve children located outside of the Palm Lake community. Indeed, the applicant's own traffic impact study establishes that the facility will be pulling traffic from outside the Palm Lake community into the residential neighborhood.
 - #G. Outside traffic resulting from the converted use would adversely affect the residential neighborhood. Palm Lake Drive is a local road that serves the existing residential neighborhood. Traffic volumes are so low on the road that traffic control markings, such as a double-yellow line or side road lines, are absent. The roadway is used by pedestrians, bicyclists, and equestrians as well as vehicles. According to the applicant's own traffic impact study, the proposed facility will generate an additional 597 daily trips onto Palm Lake Drive, including 115 a.m. peak hour trips and 118 p.m. peak hour trips. By comparison, the 1.75-acre property could have one (1) single-family home on it according to the R-CE district standard of a 1-acre minimum lot size (Section 38-1501, LDC). The p.m. peak hour trip generation standard for single-family residential dwelling units (210) is 1.0 trip. Thus, one (1) home would generate one (1) p.m. peak hour trip (1.0 trip/1DU X 1DU = 1 trip).
- The location of the proposed child day care center/private school will also promote and increase cut-through traffic in the Palm Lake neighborhood as parents will likely choose to access Palm Lake Drive via Dr. Phillips Boulevard, which is less congested than S. Apopka Vineland Road. Indeed, the applicant's own traffic study predicts that at least 14% of the daily traffic will cut through the Palm Lake neighborhood. Such cut-through traffic was one of the primary reasons the BZA and the BCC denied the previous special exception request for a religious facility on this same property – which, like the day care/school, would generate more than 100 peak hour trips.
- #H. Other applicable policies for non-residential uses found in the Urban Design Element have not been met. The proposed building form is not compatible with surrounding buildings in size, shape, and scale, as required by UD 2.2.2 of the County's Comprehensive Plan. In fact, the proposed building is 40% larger than the six (6) closest homes. The proposed building entrance is also oriented toward the parking lot and away from the street, and the side/rear of the building faces Palm Lake Drive, contrary to UD 2.3.1.
 - #I. This provision is not relevant to the application.

B. Section 38-78(2): The use shall be similar and compatible with the surrounding area and shall be consistent with the pattern of surrounding development

Section 38-78(2), LDC, requires “the use to be similar and compatible with the surrounding area and shall be consistent with the pattern of surrounding development.” The proposed child day care center/private school use is not similar to or consistent with the surrounding area and surrounding development patterns. The child day care center/private school is an 8,500 square-foot building on 1.75 acres. The building is located in the far southeast corner of the property at the street edge. The side/rear of the proposed building will face Palm Lake Drive. The floor area ratio (FAR) for the subject property is 0.11. By contrast, the church located to the north of the subject property has a FAR of 0.02. The scale and location of the proposed building also contribute to the incompatibility of the use to the surrounding area. As previously discussed, the proposed building is 40% larger than the average gross area of the six (6) closest houses. Moreover, there are no non-residential uses on Palm Lake Drive.

Also, the hours of operation and the size of the student population intensify the proposed use. The applicant states that the enrollment will be 146 students in addition to staff. The applicant proposes hours of operation from 7:30 a.m. to 5:30 p.m., daily. It is not specified whether any “special events” will happen at other times throughout the year, as is commonplace at child day care centers/private schools.

C. Section 38-78(3): The use shall not act as a detrimental intrusion into a surrounding area

Section 38-78(3), LDC, requires that “the use shall not act as a detrimental intrusion into a surrounding area.” The proposed commercial child day care center/private school would locate an 8,500 square-foot building, outdoor playground, and 32-space parking lot with lighting in an area that is low-density, residential in character.

As previously noted, the proposed child day care center/private school will generate an additional 597 daily trips on Palm Lake Drive, including 115 a.m. peak hour trips and 118 p.m. peak hour trips. By comparison, a single-family home on the property would generate one (1) peak hour trip. Further, the traffic impact study predicts that at least 14% of the “new” traffic from the child day care center/private school will “cut-through” the Palm Lake community to Dr. Phillips Boulevard. Again, such cut-through traffic was one of the primary reasons the BZA and the BCC denied the previous special exception request for a religious facility on this same property.

Despite the applicant’s assurances, it is also likely that the 32-space parking lot with one driveway access point will become congested during peak pick-up and drop-off times in the morning and afternoon. There is also no provision for overflow parking on the proposed site for daily activity and/or special events. With a population of 146 students with family members, and an unspecified number of employees and administrators, it is likely that overflow cars will park along Palm Lake Drive resulting in further encroachment into the neighborhood. Again, Palm Lake Drive is a quiet, local residential roadway. In fact, neighbors frequently walk, bike, and ride horses in the right of way.

Other than a wall, the application does not propose any sound mitigation plan for the outdoor playground. It is also anticipated that some sort of signage will be allowed either on the building or at the driveway entrance. The location of commercial signage along Palm Lake Drive – a local residential road – would be inappropriate.

For the reasons of size, scale, intensity, number of trips, and commercial signage, the proposed child day care center/private school constitutes a detrimental intrusion into the surrounding residential area.

D. Section 38-78(4): The use shall meet the performance standards of the district in which the use is permitted

There are no “performance standards” established for the R-CE zoning district. However, as discussed herein, the applicant is seeking a variance to reduce the required front yard setback by more than 70% – from 35 feet to 10.4 feet. The variance is unjustified and fails to meet the County’s published variance criteria in Section 30-43, LDC.

E. Section 38-78(5): The use shall be similar in noise, vibration, dust, odor, glare, heat producing and other characteristics that are associated with the majority of uses currently permitted in the zoning district

The majority of uses currently permitted in the zoning district are single-family residential homes. Moreover, there are no non-residential uses along Palm Lake Drive. The non-residential use located to the north of the subject property is the Christ Community Church, which lists its activities as limited to Sunday late morning and Wednesday late morning and evening, and has direct access solely from S. Apopka-Vineland Road, not Palm Lake Drive. Of concern with the proposed commercial child day care center/private school would be noise, activity, lighting, and traffic that is not consistent with the surrounding uses in that the child day care center/private school would operate daily, with hours from 7:30 a.m. to 5:30 p.m., in addition to unspecified special events. These issues have been discussed in more detail elsewhere in the report.

F. Section 38-78(6): Landscape buffer yards shall be in accordance with section 24-5 of the Orange County Code. Buffer yard types shall track the district in which the use is permitted

At this juncture, there do not appear to be any specific buffers that will be provided for the site. Although the applicant submitted a proposed landscape plan as part of the application materials, Duke Energy has not given express written consent for such landscaping to be installed within its 170-foot powerline easement. Additionally, consistent with its efforts to sandwich the 8,500 square foot triangular building into the far southeast corner of the property, the applicant seeks to provide a 6-foot wall and reduced 5-foot landscape buffer along such portion of Palm Lake Drive in conjunction with the 70% reduction in the required front yard setback. Per the County’s Comprehensive Plan, special exceptions may be conditioned to address issues of compatibility through the use of buffers. By way of comparison, the electric utility substation to the east of the site has a substantial buffer (more than 60 feet) along Palm Lake Drive.

Previous Special Exception Denials

The Neighborhood Element of the Comprehensive Plan lists as its first goal the maintenance of residential character:

GOAL N1 Maintain the residential character of neighborhoods through land use regulations.

Part of that maintenance of residential character requires that the BZA be consistent with the enforcement and implementation of the County’s codes and regulations.

To that end, several similar special exceptions for child day care centers/schools, which were denied by the BZA or the BCC, are referenced below as additional support for the recommendation of denial of SE-22-07-047. Denial of this special exception would be consistent with the County's decisions in these prior cases.

SE-19-03-198: Wondermere Garden Preschool

The Wondermere Garden Preschool special exception sought to develop a Montessori preschool (18 months to 6 years of age) for up to 200 students in the R-CE zoning district on Windermere Road. The BCC overturned the BZA's recommendation of approval, concluding that the proposal failed to meet the special exception criteria in Section 38-78, LDC, and would constitute a detrimental intrusion into the established rural residential area.

SE-14-03-003: Faith Center Ministries Child Day Care Center

The Faith Center Ministries special exception sought to convert an existing residence into a religious use and an educational facility for 63 students. The subject property was located in an A-1 zoning district on Hiawasse Road. The BZA found that the approval of the application would create a detrimental intrusion into the neighborhood and create a traffic-safety issue in accessing the proposed school. The BCC affirmed the denial.

SE-11-11-089: Preston Child Day Care Center

The special exception for the Preston child day care center involved a 50-student facility on 0.5-acres located in an R-1A zoning district on E. Cleveland Street. The BZA found that the application did not meet the requirements of Section 38-78, LDC, for approval of special exceptions. The BCC affirmed the denial.

SE-09-07-004: Casanova Child Day Care Center

The special exception for the Casanova child day care center involved the conversion of a single-family residence into a child day care center for 100 students on 4.56 acres located in an A-2 zoning district on Whispering Pines Road. The BZA found that the application did not meet the requirements of Section 38-78 (1), (2), and (3), LDC, for approval. The BCC affirmed the denial.

Variance Criteria

In conjunction with the special exception, the applicant has also requested a variance to reduce the front yard setback from 35 feet to 10.4 feet – more than a 70% reduction. The BZA is provided with the following instructions on approval of zoning variances.

Section 30-43 of the Orange County Code stipulates specific standards for the approval of variances. No application for a zoning variance shall be approved unless the Board of Zoning Adjustment finds that all of the following standards are met:

- 1. Special Conditions and Circumstances – Special conditions and circumstances exist which are peculiar to the land, structure, or building involved and which are not applicable to other lands, structures or buildings in the same zoning district. Zoning violations or nonconformities on neighboring properties shall not constitute grounds for approval of any proposed zoning variance.*
- 2. Not Self-Created – The special conditions and circumstances do not result from the actions of the applicant. A self-created hardship shall not justify a zoning variance; i.e., when the applicant himself by his own conduct creates the hardship which he alleges to exist, he is not entitled to relief.*
- 3. No Special Privilege Conferred – Approval of the zoning variance requested will not confer on the applicant any special privilege that is denied by the Chapter to other lands, buildings, or structures in the same zoning district.*
- 4. Deprivation of Rights – Literal interpretation of the provisions contained in this Chapter would deprive the applicant of rights commonly enjoyed by other properties in the same zoning district under the terms of this Chapter and would work unnecessary and undue hardship on the applicant. Financial loss or business competition or purchase of the property with intent to develop in violation of the restrictions of this Chapter shall not constitute grounds for approval.*
- 5. Minimum Possible Variance – The zoning variance approved is the minimum variance that will make possible the reasonable use of the land, building or structure.*
- 6. Purpose and Intent – Approval of the zoning variance will be in harmony with the purpose and intent of this Chapter and such zoning variance will not be injurious to the neighborhood or otherwise detrimental to the public welfare.*

It bears emphasizing that **ALL** of the standards have to be met in order to grant the zoning variance. Based upon the submittals, the applicant is apparently relying upon the existing Duke Energy overhead powerline easement as the basis for the variance request. However, the applicant purchased the property with full knowledge of the easement and paid a reduced price for the property – i.e., only \$20,000 – as a result thereof. Thus, no special circumstances exist to warrant the requested variance (Criteria #1). Likewise, the applicant has created the hardship “by his own conduct” and proposal to develop such a large building on the site (Criteria #2). Approval of the variance would also confer a special privilege upon the applicant – i.e., a 70% reduction in the front yard setback – that is denied others in the same zoning district (Criteria #3). Literal interpretation of the code would also not deprive the applicant of rights commonly enjoyed by other properties because other properties

comply with the required setback and the applicant could do so by reducing the size of its proposed building (Criteria #4). The requested variance is also not the minimum possible variance, as the building size could easily be reduced to meet the front yard setback (Criteria #5). Finally, approval of the variance is not in harmony with the purpose and intent of the Code, which clearly requires minimum front yard setbacks, and will be injurious to the neighborhood (Condition #6).

Conclusion

In sum, as discussed in this report, the requested special exception is **not** consistent with the special exception criteria found in Section 38-78, LDC, including consistency with the Comprehensive Plan, consistency and compatibility with the surrounding area, intrusion into the residential area, being of similar characteristics and impacts as the surrounding residential area, and buffering. In addition, the applicant has **not** demonstrated compliance with the criteria in Section 30-43(3), LDC, for the requested variance, including that a hardship exists on the property that was not known to the applicant prior to the purchase of the property. Finally, the County has previously denied special exceptions for child day care centers/private schools seeking to locate in established neighborhoods and residential areas, even child day care centers of less intensity and with lower child enrollment than the current project. Simply put, the approval of this child day care center/private school inside the long-established Palm Lake community would allow a non-residential use within a quiet and stable residential neighborhood, which is currently free from encroachment of any non-residential/commercial uses.