



*Via E-Mail*

October 18, 2021

Dane County Zoning and Land Regulation Committee  
City County Building  
210 Martin Luther King, Jr. Blvd.  
Room 116  
Madison, WI 53703

RE: Conditional Use Permit Application – 7069 Applewood Dr.

Dear Members of the Committee:

This law firm represents the Applewood Hill Homeowners Association (hereinafter “Applewood”) and 40 of 41 resident homeowners of the Applewood Hill neighborhood. Applewood vehemently opposes granting a Conditional Use Permit (hereinafter “CUP”) to Sarah Tuttle and Bright Beginnings Day School LLC (“Bright Beginnings”) to operate a day care business or school in Applewood Hill at 7069 Applewood Drive in the Town of Middleton. Applewood respectfully requests that your Committee should deny this application for a CUP.

Applewood and its water utility have filed a legal action against the owner of 7069 Applewood Drive and Bright Beginnings. The lawsuit seeks a judicial declaratory ruling on the legality of Bright Beginnings operating a commercial child care facility at this site under the Dane County Ordinances, the neighborhood covenants, and the water utility agreement. A motion for a temporary injunction is pending with the court asking that no child care facility be permitted to operate at the site pending the court’s ruling.

In spite of the pending legal action, Bright Beginnings began operating a day care facility/school at the site on September 7, 2021, with seven children. At the time of opening, Bright Beginnings had yet to receive site approval from the State of Wisconsin Department of Children and Family Services. In the short time the facility has been open, the neighborhood’s fears and concerns have become reality. Nearby residents report there has been a significant increase in the level of noise. Nearby residents are acutely aware of the additional 30+ vehicles passing their homes each day due to the day care facility.

Additionally, there are regularly at least two, and at times as many as six, vehicles parked in the driveway of 7069 Applewood throughout the day. Further, neighbors of the site report customers of Bright Beginnings are using their driveways as turnarounds.

Resident concerns about safety are also proving to be well-founded. One neighbor reports he was nearly struck by a distracted customer of Bright Beginnings who was driving to the child care facility. The non-resident customers of Bright Beginnings present a danger to pedestrians walking on this narrow neighborhood street that has no sidewalks or streetlights.

The Town of Middleton refused to act on the applicant's request for a CUP. Because the Applicant has not met its burden to show it will satisfy each of the eight standards for approval of a CUP, and because the Applicant's intended use of 7069 Applewood Drive is inconsistent and incompatible with the design, intention and character of the Applewood Hill neighborhood, the Committee should deny the CUP application.

### **Applewood Hill Neighborhood**

Applewood Hill is a close-knit community of 41 single family homes located at the eastern edge of the Town of Middleton just off Junction Road and to the immediate south of the entrance to the Roman Catholic Diocese of Madison. It was the creation of Madison developer, James Burkhard, who envisioned a neighborhood of one-family homes nestled among apple and tall pine trees. Applewood came into being in 1966 and Mr. Burkhard, his attorney and consultants drafted and recorded a Declaration of Covenants and Restrictions creating and empowering Applewood "to provide for the preservation of the values and amenities in said community..... for the benefit of said property and each owner thereof."

The neighborhood is unique and physically different from the majority of neighborhoods. There are no through streets. The neighborhood is extremely quiet with minimal traffic from non-residents. The single street is a narrow circular loop. There is one way in and out of the neighborhood. The neighborhood's access point at Junction Road is at the bottom of a substantial hill. (See Ex. A – Satellite Overview of Neighborhood).

### **The Property's Current Owner and Bright Beginnings Day School**

The 7069 Applewood Drive property was purchased by 11 Eleven LLC earlier this year. The owners of 11 Eleven LLC are not disclosed in the CUP application. Prior to 11 Eleven LLC's purchase, the house was used as a single family home since its construction 40+ years earlier.

Bright Beginnings is a company that operates a series of commercial day care centers, each of which purports to meet the county's technical definition of an in home day care because a Bright Beginnings employee lives at the property. The company currently runs five day care sites in West Madison and the Town of Middleton. The applicant's other facilities are located in neighborhoods with multi-family housing, other commercial day care centers, and/or roads designed for greater traffic volumes.

### **Pending Legal Issues**

One of Bright Beginnings' arguments for a CUP is that it is simply seeking approval for one additional child than it could otherwise host in the house. They rely upon the opinion of Dane

County Zoning Administrator Roger Lane, an opinion which is at odds with the analysis of the Town of Middleton's attorney, Eileen Brownlee, of Boardman Clark.

Mr. Lane believes a child care facility may operate with less than eight children without a CUP. In discussing the matter with him, he admitted this use was not among the enumerated permitted uses for the SFR-08 zoning district. He reached his conclusion because there is no zoning district (residential, commercial, etc.) in the Dane County Ordinance where a child care business with less than eight children is explicitly permitted. Believing that such activity must be permitted somewhere, he reasoned that it must be implicitly permitted in SFR-08.

Mr. Lane's line of reasoning is flawed for two reasons. First, it ignores and undercuts the list of explicitly permitted uses for SFR-08. Dane County Ordinance 10.200(2)(b)(3) discusses zoning districts and plainly states that "Land uses not listed as either permitted uses or conditional uses are considered to be prohibited in that zoning district." There is no question that a child care facility is not one of the twelve permitted uses in 10.251 for a property in SFR-08. The zoning administrator's interpretation writes an additional permitted use into the ordinance, essentially amending the ordinance. This is a task reserved for the Dane County Board.

Second, this unstated, alleged permitted use does not make sense in light of the restrictions placed on other permitted uses. If a family operates a small child care business out of their own house as a home occupation, they are subject to all of the ten restrictions stated in 10.004(72) imposed upon home occupations. However, in the present case, one of the Tuttle's employees is operating a child care business out of a house owned by a third party, 11Eleven, LLC. Because this situation does not fit under any of the enumerated permitted uses, this commercial child care business does not get a free pass without any restrictions. Common sense would suggest that the Dane County Board did not intend to allow a family business to skirt the otherwise applicable zoning restrictions for home occupations by removing all family members from the premises.

Bright Beginnings contends the restrictions of the Dane County Ordinance are superseded by a state statute (Wis. Stat. § 66.1017) stating a municipality may not prevent a family child care home from being located in a zoning district where a single family residence is a permitted use. The company relies upon the statute to reach a conclusion that a child care facility must always be a permitted use without conditions regardless of the wording of a local zoning ordinance.

The applicant's interpretation is inconsistent with the plain reading of the statute and the legislative intent behind the statute. Under Wis. Stat. § 66.1017, municipalities are allowed to apply "to a family child care home the zoning regulations applicable to other dwellings in the zoning district in which it is located." This language was added by the Wisconsin Legislature during the creation of the current statute's predecessor. The language has survived intact in the current statute. The author of this addition to the statute, Rep. Sharon Metz, stated when creating the amendment that the intent of the language was to "Clarify that local governments may apply the same regulations to family day cares as to other residences."

As a result, it is clear the legislature did not intend for any business that meets the technical definition of a family child care home to win an unfettered and unrestricted ability to operate. Such a business must abide by the same regulations as other residences in the zoning district. Bright

Beginnings must meet Dane County's requirements for a home occupation (or another permitted use) to operate its commercial child care facility.

Furthermore, it is unresolved whether Bright Beginnings' unique structure even qualifies as a family child care home under Wis. Stat. 66.1017. Licensure as a family child care home by DCF under Wis. Stat. § 48.65 does not extend to schools. Wis. Stat. § 48.65(2)(b) ("This section does not include any of the following: . . . (b) a public or parochial school or a tribal school.") The title of the company is Bright Beginnings Day School. The publicly available website refers to its employees as teachers. Accordingly, there is an open question as to whether Bright Beginnings is a school or a family child care home.

Due to the many questions of law surrounding this matter, Applewood has filed a legal action seeking a judicial declaratory ruling on whether the Dane County Ordinance permits a child care facility with less than eight children to operate in the SFR-08 zone without a CUP. Applewood has also asked the court to enter a temporary injunction enjoining the operation of a child care facility at the Applewood Drive location pending the court's declaratory ruling on the ordinance. As a result, Applewood requests Dane County either deny the CUP or delay taking action on this application until the court has issued its ruling.

### **Vierbicher Report**

The Town of Middleton hired Vierbicher to review the impact of the day care. Its report underestimated the increase in traffic by relying on generic, generalized traffic data that is inconsistent with the actual traffic in the neighborhood. In analyzing the traffic impact from a day care in the neighborhood, the report cites the unsupported number of 6-10 trips/day/household, employs the incorrect definition of a trip, and states that the increase in traffic due to the day care will be between 4% and 6%.

No sources are cited in the traffic portion of the report to indicate the origin of the value of 6-10 trips per day per household. According to the US Department of Energy website, the average number of trips per day per household is 5, and that value is dropping annually.

<https://www.energy.gov/eere/vehicles/articles/fotw-1041-august-6-2018-households-take-fewer-vehicle-trips-2017>

Also, all the calculations in the report are made using the incorrect definition of a "trip." According to the US Department of Energy website:

*A vehicle trip is defined as one start and end movement from location to location in a single privately-operated vehicle regardless of the number of persons in the vehicle.*

Using the definition of a trip from the US Department of Energy, the proposed day care would generate following average daily number of trips:

8 children pickup and drop off in morning = 16 trips  
8 children pickoff and drop off in afternoon = 16 trips

2 workers enter and leave Applewood = 4 trips.

If there are also people living in the house, then according to US Department of Energy, this generates 5 more trips.

Add these numbers up, and according to the US Department of Energy's definitions, Bright Beginnings generates 41 daily trips.

The Applewood neighborhood currently generates the following daily trips:

41 households x 5 trips per household = 205 trips.

With the day care, Applewood would generate:

(40 households x 5 trips per household) +41 trips from BBDS = 241 trips.

In sum, the addition of the day care would result in an 18% increase in traffic. This increase is significant, and what makes it even more of a problem is that the increase in traffic would occur almost exclusively during the morning and evening rush hours.

An 18% increase in traffic generated by a single home in the neighborhood is an unacceptable disproportionally high increase. The Tuttle's plan generates as much traffic from their facility alone as nearly 1/5th of the neighborhood. If all homes in Applewood chose to operate an 8-child daycare the traffic in the neighborhood would increase by over 730% - obviously the neighborhood could not sustain this level of traffic increase. The Applewood neighborhood, in which the Tuttles do not reside, should not be forced to shoulder this burden to facilitate the next branch of the Tuttle's business.

### **Evaluation of Conditional Use Permit Application Standards**

This applicant has the burden of proof to demonstrate that it meets each of the eight standards established by Dane County before a CUP may be issued. The present application is replete with conclusory responses provided by the day care owners that are unsubstantiated, incomplete, and in some cases are contradicted by the realities of the neighborhood. This letter analyzes each of the standards at issue below.

#### **Standard 1. The proposed land use will not be detrimental to or endanger the neighborhood health, safety, comfort, or general welfare.**

Submitted response: "Having 8 children at the home will not endanger public health, safety, comfort or general welfare."

Safety. There are three (3) safety concerns. First, introducing additional vehicles to the choke point at Junction Road during the morning and evening rush hours will create backups and likely accidents. The single access point is at the bottom of a curved hill that is frequently slippery in the winter. Additional vehicular traffic, especially by people who are unfamiliar with the neighborhood, is likely to increase the hazardous nature of this intersection.

Second, the narrow circular loop street, Applewood Drive, is frequently walked by residents and has no streetlights. Day care customers driving their vehicles in and out to pick up and drop off their kids presents a definite safety issue. Residents have noticed that non-resident visitors to the neighborhood have less regard for the posted 25 mph speed limit than do established residents. The rush hour darkness during Fall, Winter, and Spring will exacerbate the danger posed to pedestrians by hectic day care customers.

Third, the lack of streetlights presents a safety issue for the day care customers. The house at 7069 Applewood Drive has a circular single lane driveway. Parents will park on the road to avoid being parked in or having to wait in a cue to drop off or pick up their kids. This presents a dangerous situation because you will have little kids running to cars on a dark and narrow street with no streetlights during the morning and afternoon rush hours.

General Welfare. The residents adjacent to the day care have already experienced a negative impact upon their comfort and general welfare. The noise level from the day care property has increased with seven children running around in the yard multiple times each day and parents' vehicles shuttling in and out twice a day. Further, other Bright Beginnings day care facilities contain numerous pieces of small and large playground equipment that is consistent with a commercial day care.

**Standard 2. The uses, values and enjoyment of other properties in the neighborhood already permitted shall be in no foreseeable manner be substantially impaired or diminished by establishment, maintenance or operation of the proposed conditional use.**

Submitted response: "The neighborhood already consists of many homes with children. Additionally, a homeowner could run a family daycare home out of their property without a conditional use permit if they had less than 7 children at the home. Finally, properties of homes near other Bright Beginnings' locations have not experienced any property value loss."

Enjoyment. Applewood Hill already has many homes with children. It should be noted, however, that each of those homes with children are vehemently opposed to locating a day care center in Applewood. Additionally, none of the Applewood homes with children has close to eight children.

Further, Bright Beginnings' employees have disrupted residents' enjoyment of the neighborhood. Many residents in Applewood walk the circular street for exercise. Bright Beginnings' employees have taken the kids at the day care out for walks as well and, when passing residents out on walks, they have directed nasty, condescending comments towards them. This is disrupting the peaceful character and residents' enjoyment of the neighborhood.

Property Values. Applewood residents have valid reasons to be concerned the day care will lessen their property values. This day care center does not look like any other home in the neighborhood. At least twice a day it already has up to six cars in the driveway as children are dropped off or picked up. Consistent with other sites operated by Bright Beginnings, neighborhood residents have observed that there are multiple cars parked in the driveway all day. Some have commented that the property is beginning to look like a commercial parking lot.

**Standard 4. There are adequate utilities, access roads, drainage, and other necessary improvements to allow the land use, or improvements are planned to provide adequate measures.**

Submitted answer: “Yes—there are sufficient utilities and the like to accommodate up to eight children at the property.”

Access Roads. The day care anticipates at least eight vehicles visiting the property twice a day for pick up and drop off. During many times of the year these times occur when it is dark. There are no streetlights at or near the property to mitigate the safety risk posed by multiple people with children parking and navigating a darkened street during the morning and evening rush hours.

Water Utility. Applewood has its own community water utility (the smallest in the State). Within the last year, water system maintenance has caused Applewood residents to go without water for up to two weeks. Bright Beginnings has presented no evidence that the increased demand on the water system from eight children and two adults will not further stress the system.

**Standard 5. Adequate measures have been or will be taken to provide adequate ingress /egress to public streets and the proposed conditional use will not present traffic conflicts.**

Submitted answer: “There will be very little additional traffic as a result of a small family daycare home.”

Ingress/Egress/Traffic Conflicts. An 18%+ increase in traffic is certainly not “very little additional traffic.” The single access road into and out of the neighborhood is a problem for accommodating the additional vehicles from day care customers and staff. The narrow road into the neighborhood from Junction Road is at the bottom of a significant hill. It is currently very challenging for residents to enter and exit the neighborhood during the rush hour times. Adding the vehicles of day care customers trying to enter and exit the neighborhood during these same time periods to drop off and pick up their children will exacerbate this problem.

This situation is made worse during winter weather. Applewood Drive is hazardous until plowed, and then, if cars are parked on the road, the plow just plows around them creating further problems for road traffic. Additionally, it is not uncommon for residents to have difficulty navigating up the hill into Applewood during icy or snowy conditions. Sometimes residents must leave their vehicles at the entrance to the neighborhood until the hill is plowed and salted. With increased traffic into and out of Applewood, accidents are bound to occur at the bottom of the hill as vehicles wait to turn onto Junction Road. Adding vehicles to these traffic conditions would be dangerous.

**Standard 6. The conditional use shall conform to all applicable regulations of the district in which it is located. Provide information on any necessary licensing, or regulations associated with the proposed land use. Explain any buffering or screening that will be installed as part of the proposed use.**

Submitted answer: “Yes, see enclosed.”

Applicable Restrictions. The applicants admit the covenants and deed restrictions of Applewood Hill are relevant as they enclosed them with their application and refer to them in their answer to Standard 6. At the August 4, 2021, Town of Middleton Plan Commission meeting the applicants indicated they have no intent to violate any restrictive covenants.

However, Applewood’s covenants do not permit a commercial business to occupy a home in Applewood. Multiple covenants and restrictions make it quite clear that this or any day care operating in the community is not allowed. Applewood has restrictions on fences, outbuildings (there are outbuildings on some of Ms. Tuttle’s day care centers), signs, etc. Further, the water utility deed restrictions make clear that the utility is only for single family residential use.

Dane County should also consider whether Bright Beginnings can prove its proposed use will abide by “all applicable regulations” where there is a pending legal action seeking a declaration that its intended use is in violation of applicable zoning ordinances and/or covenants.

### **Summary**

The applicant has not and cannot meet its burden to show that it will satisfy each of the eight standards for approval of a CUP. The increased traffic from non-resident customers of the day care is likely to disrupt the serene character of the neighborhood as the customers rush to drop off and pick up their kids. This is especially true for the immediate neighbors of the day care. Twice daily they will hear eight or more vehicles arrive and leave from the property and regularly hear the outdoor noise from the kids.

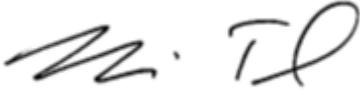
Equally important, the additional traffic will create safety issues. The start up of day care operations has already created one close call when a neighbor was nearly hit by a vehicle driven by a customer of Bright Beginnings. The additional traffic will further stress the already tenuous single hilly ingress/egress point at Junction Road, especially in winter when the hill is frequently snowy or icy. It is likely to also endanger pedestrians walking on the narrow neighborhood street as well as day care customers who are arriving and leaving without the benefit of streetlights.

The proposed day care business conflicts with the covenants of both the Applewood neighborhood and the water utility which specify the property is for single family residential use. The residents of Applewood are overwhelmingly against the operation of a day care in the neighborhood. An association survey revealed that every household, except the house at issue, is opposed to the operation of the child care facility in Applewood.

Applewood Hill Homeowners Association respectfully requests that Dane County deny the application for a CUP for the property at 7069 Applewood Drive. Thank you for your time and consideration in this matter.

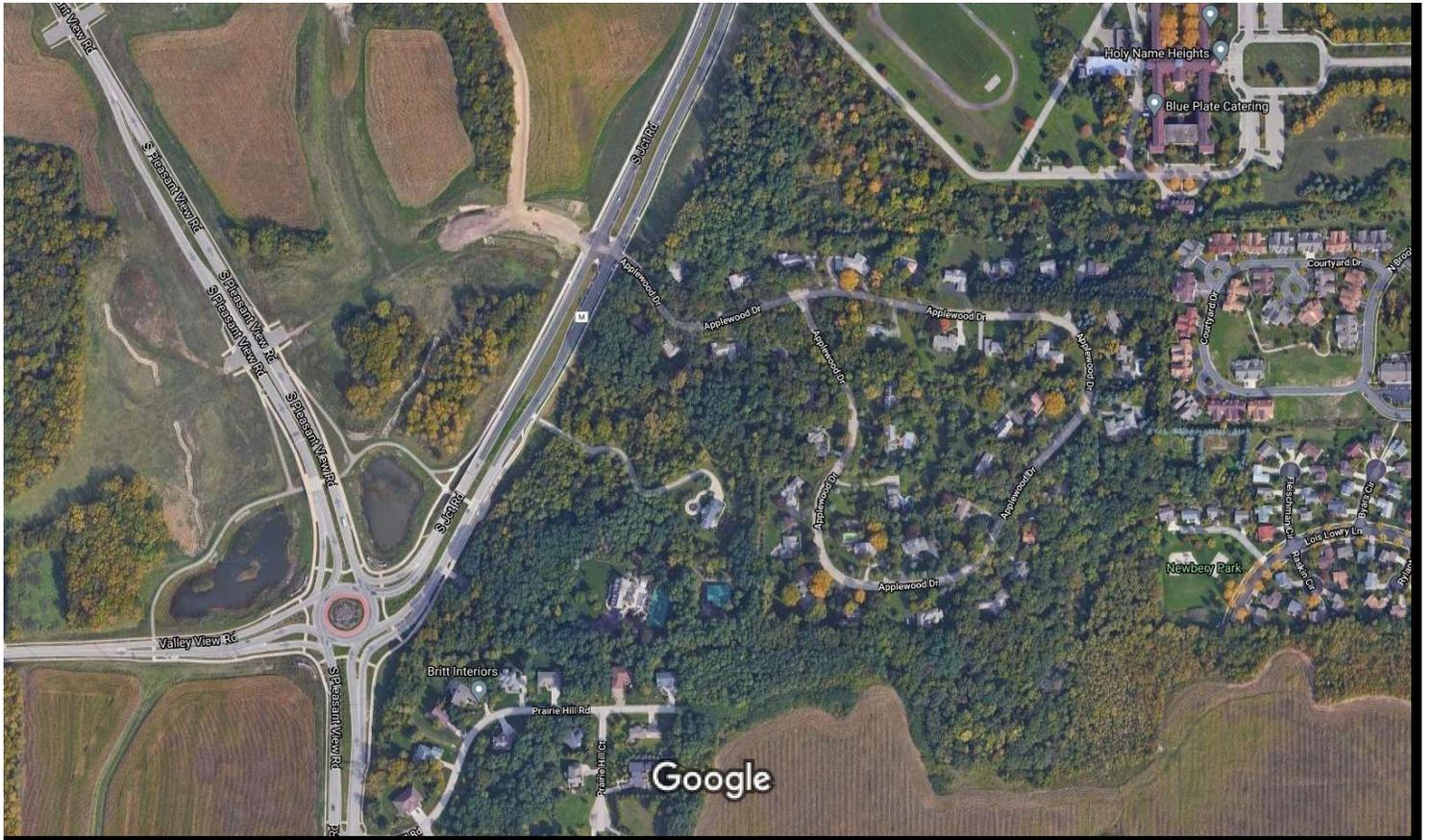
Sincerely,

TROST, LLC

A handwritten signature in black ink, appearing to read "K. Trost". The signature is stylized and cursive.

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CC: Applewood Hill HOA



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