



## I. STATEMENT OF THE CASE

Petition S.E. 14-01, filed on August 8, 2013, requests a special exception in the R-60 Zone to operate a “group day care home”<sup>1</sup> for up to 12 children in an existing single-family, detached home at 7336 Piney Branch Road, City of Takoma Park, Maryland. Petitioner has been operating a licensed child care business (*i.e.*, a “family day care home”) in her home for up to 8 children since 1998 (Exhibit 9). A family day care home is a permitted use in the R-60 Zone, but increasing the number of children from 8 to 12 would transform the facility into a “group day care home” under Zoning Ordinance §59-A-2.1, and a special exception is required to operate a group day care home in the R-60 Zone. The property is owned jointly with Petitioner’s husband, George Leventhal, as evidenced by Maryland property records (Exhibit 5). Mr. Leventhal fully supports the proposed use on the property. Tr. 5.

Under the provisions of the Zoning Ordinance §59-G-1.12, the Hearing Examiner is authorized to hear and decide this type of petition. On August 20, 2013, the Office of Zoning and Administrative Hearings issued a notice that the public hearing would be held before the Hearing Examiner on December 13, 2013, at 9:30 a.m., in the Second Floor Hearing Room of the Stella B. Werner Council Office Building (Exhibit 16).

The Technical Staff of the Maryland-National Capital Park and Planning Commission (“M-NCPPC”) reviewed the petition and, in a report dated November 1, 2013, recommended approval

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<sup>1</sup> A “group day care home” is one of three types of “child day care facilities” defined in Zoning Ordinance §59-A-2.1. The other two are “family day care homes” for up to 8 children and “child day care centers” for 13 or more children. A “group day care home” is defined in §59-A-2.1 as:

- A dwelling in which child day care services are provided:
- a. in the home where the licensee is the provider and is a resident;
  - b. for 9 but not more than 12 children including the children of the provider, and;
  - c. where staffing complies with state and local regulations, but no more than 3 non-resident staff members are on site at any time.

with conditions (Exhibit 19).<sup>2</sup> At its regular meeting on November 14, 2013, the Planning Board voted unanimously to recommend approval, after adding two conditions to the three recommended by Technical Staff (Exhibit 20).<sup>3</sup> There has been no opposition to this application. A letter of support was filed by Seth Grimes, Councilmember, Ward 1, The City of Takoma Park. Exhibit 18.

The hearing was convened, as scheduled, on December 13, 2013, and testimony was presented in support of the petition by Petitioner Soraia P. Leventhal, who appeared *pro se*, and her husband, George Leventhal. Petitioner also submitted an Affidavit of Posting (Exhibit 22). The record was held open until December 23, 2013, to receive the transcript of the proceeding.

On December 23, 2013, the last day the record was open, Petitioner filed a letter (Exhibit 23) requesting two changes in the conditions specified in an “OZAH’s Typical Conditions in this Type of Case,” a document supplied by the Hearing Examiner at the hearing (Exhibit 21). The first concern had been discussed at the hearing – that Petitioner “would like to be able to have up to eight children in the play area at one time,” rather than being limited to six. Tr. 9. The second concerned the proposed limitation of “two non-resident staff.”<sup>4</sup> Also filed at the same time was a compact disc (Exhibit 23(a)) containing electronic copies of photographs of the premises which had been supplied as part of Exhibit 13. The record closed, as scheduled, on December 23, 2013.

There is no opposition in this case, and the special exception is supported by the evidence in the record. The Hearing Examiner will therefore grant the petition, with conditions.

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<sup>2</sup> The Technical Staff report is frequently quoted and paraphrased herein.

<sup>3</sup> The two additions were to add a condition with more restrictions on Saturday hours and a condition calling for parental agreements to drop-off and pick-up times.

<sup>4</sup> When there are substantial new filings or changes in the plans of a Petitioner, the Hearing Examiner would ordinarily keep the record open for an additional 10 days for comments by interested parties; however, he did not find that necessary regarding Petitioner’s December 23 filing since the first issue she raised had been discussed at the hearing and the second issue does not call for any change in what the Hearing Examiner had actually intended in his proposed condition 10 with regard to non-resident staff (Exhibit 21). The proposed condition was intended to limit the number of non-resident staff on site, in general, to avoid traffic and parking problems, not to limit the total number of employees overall or to prevent a Petitioner from using an additional non-resident staff member when needed on occasion as a substitute for herself. The final wording of Condition 10 in this Opinion reflects that distinction.

## II. FACTUAL BACKGROUND

### A. Subject Property and Surrounding Neighborhood

The subject site is located at 7336 Piney Branch Road, in the City of Takoma Park, Maryland. The legal description of the property is Lot 1-A and 2-A, Block 82, in the Barclay Tract Subdivision, and it is zoned R-60. The property is well described by Technical Staff (Exhibit 19, p. 6), except as mentioned in note 5 below:

The property is located in the City of Takoma Park on the west side of Piney Branch Road (MD 320) approximately 840 feet south of its intersection with Philadelphia Avenue (MD 410) and has a gradual sloping terrain as it sits at the bottom of a dip along Piney Branch Road. The site contains approximately 28,002 square feet and is developed with a one family detached house . . .<sup>5</sup> Primary access to the site is provided via a gravel driveway located off of Piney Branch Road. This driveway opens onto a gravel apron which can accommodate 2 automobiles. A brick walkway leads from the gravel apron to the entrance of the use. There is also another curb cut into the site approximately 60 feet south of the primary driveway. This curb cut terminates into an on-site gravel parking space that can accommodate one car.

The site contains many mature trees and extensive landscaping. The one family detached house sits approximately 68 feet from the roadway and the side and rear yards are fenced with a 6 foot high board on board fence.

The home, as seen from Piney Branch Road, is depicted below in a photograph supplied by Petitioner (Exhibit 13(a)(i)):

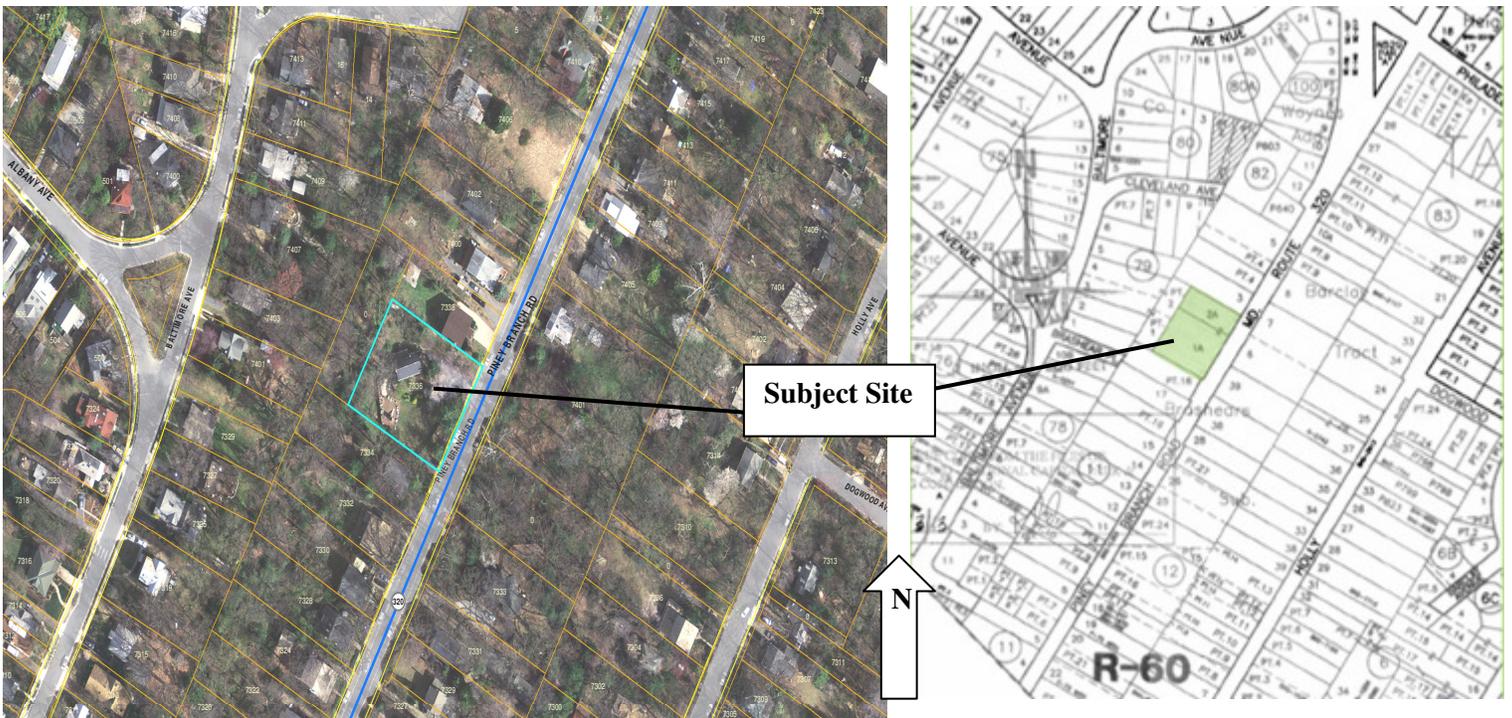


<sup>5</sup> The Hearing Examiner has excised the words “including an at grade one-car garage” from Technical Staff’s description of the property because the Planning Board noted (Exhibit 20, p. 1), and Petitioner confirmed (Tr. 7-8) that Staff was incorrect in that regard. There is no garage on the site, but rather a “parking pad immediately abutting the one-family home.” Exhibit 20, p. 1.

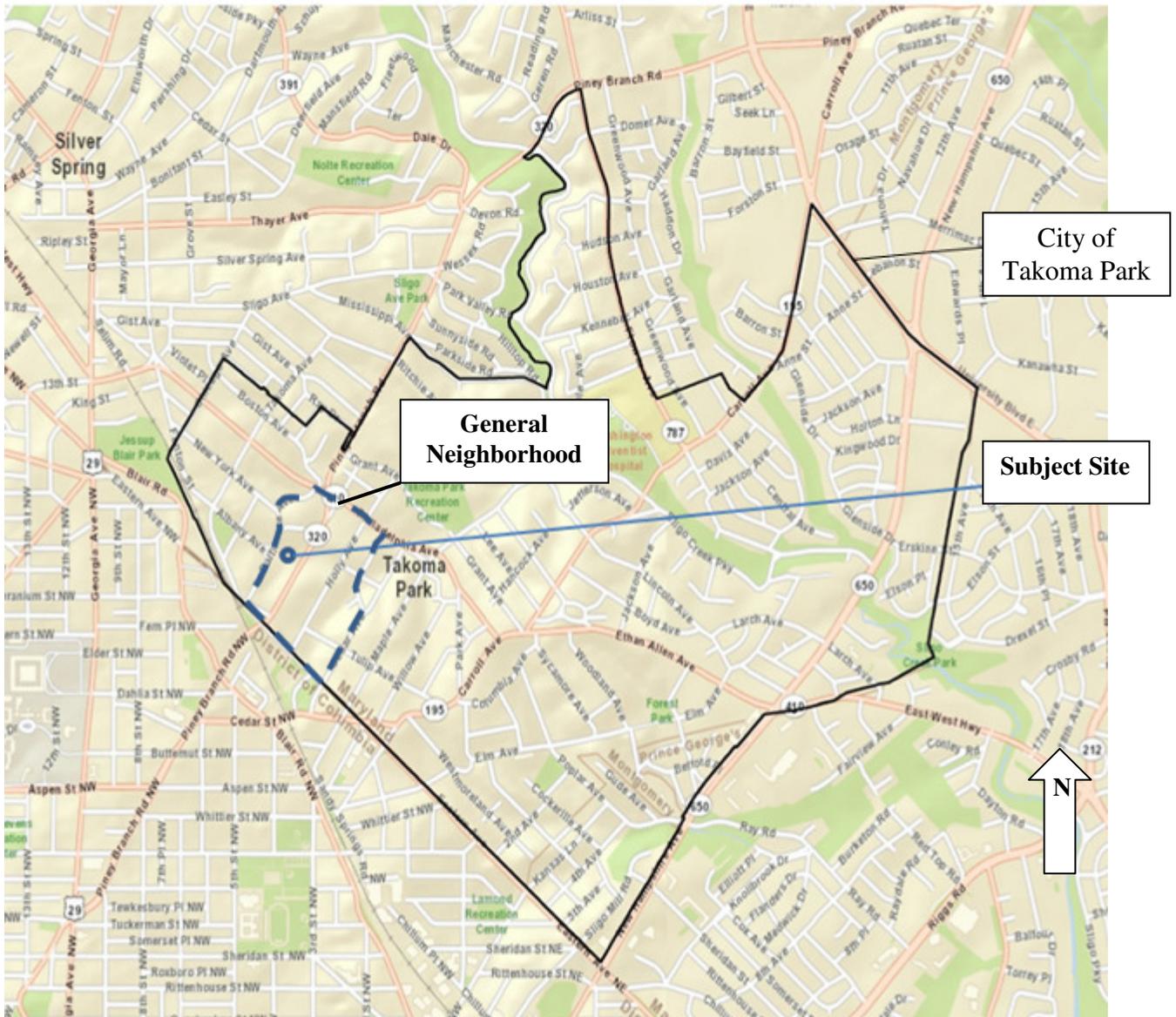
The fenced-in back yard and a portion of the outdoor play area are shown below in another of Petitioner's photographs (Exhibit 13(a)(v)):



The location of the site and the surrounding neighborhood are depicted in an aerial photo and a map from the Technical Staff report (Exhibit 19, pp. 3, 6):



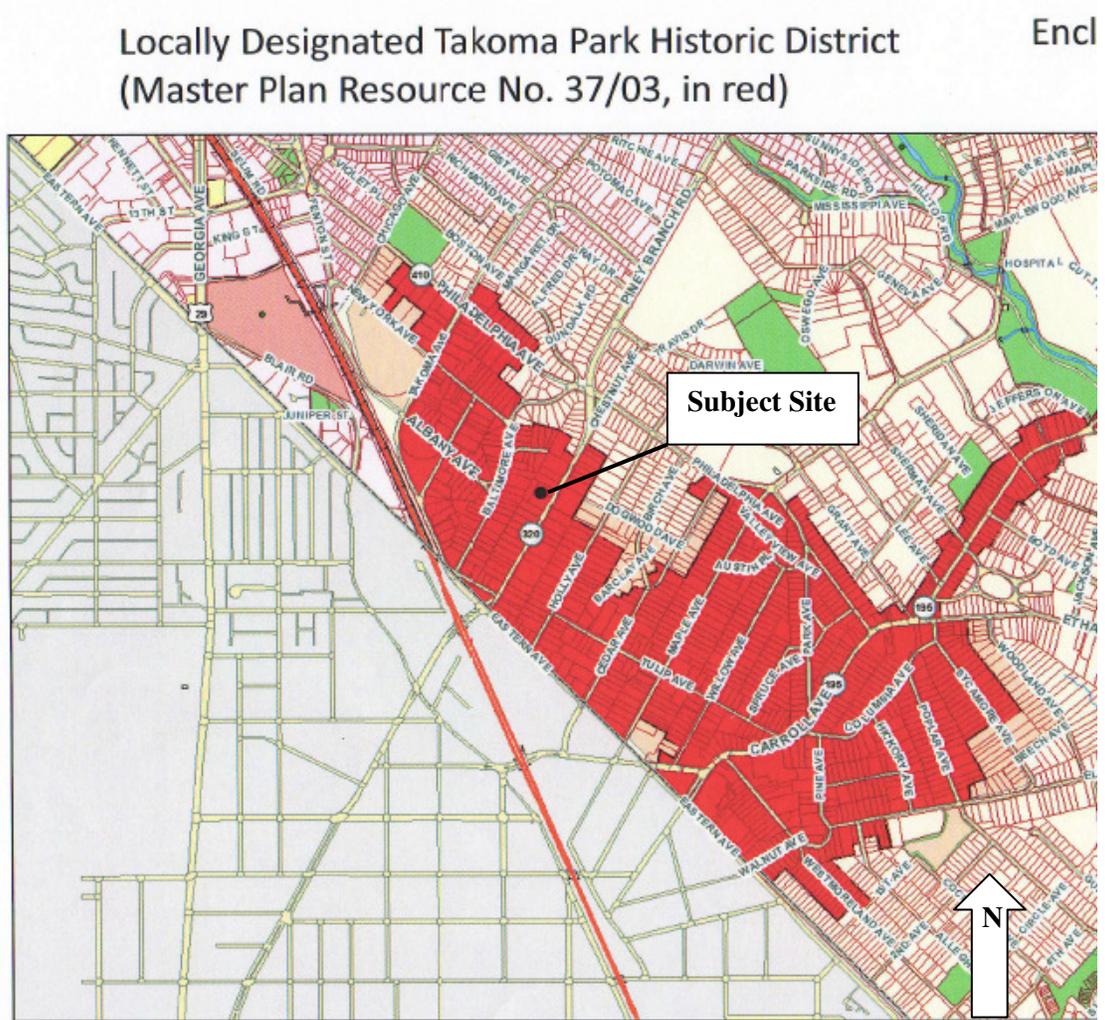
Technical Staff recommended defining the general neighborhood surrounding the subject property as generally bounded by Eastern Avenue to the south, Philadelphia Avenue to the north, Birch and Cedar Avenues to the east and Baltimore Avenue to the west, as depicted below in a map that also shows the borders of the City of Takoma Park (Exhibit 19, pp. 5-6):



The Hearing Examiner accepts Technical Staff’s recommended definition of the general neighborhood, which Staff describes as “composed of a variety of one family houses . . . zoned R-60.” Exhibit 19, p. 6. Staff notes that there are 15 approved special exceptions in the defined

neighborhood, but none of them is a child care facility. Two of the special exceptions are for home occupations (S-1353 approved on 2/6/87 for a beauty shop and S-217 for a photography service approved on 2/6/79), and the remaining thirteen are for accessory apartment units.

The Planning Board also observed that the subject site is located within the Takoma Park Historic District (Resource 37/03), and provided an attachment depicting the Historic District, which is reproduced below (Exhibit 20, p. 1 and Exhibit 20(a)):



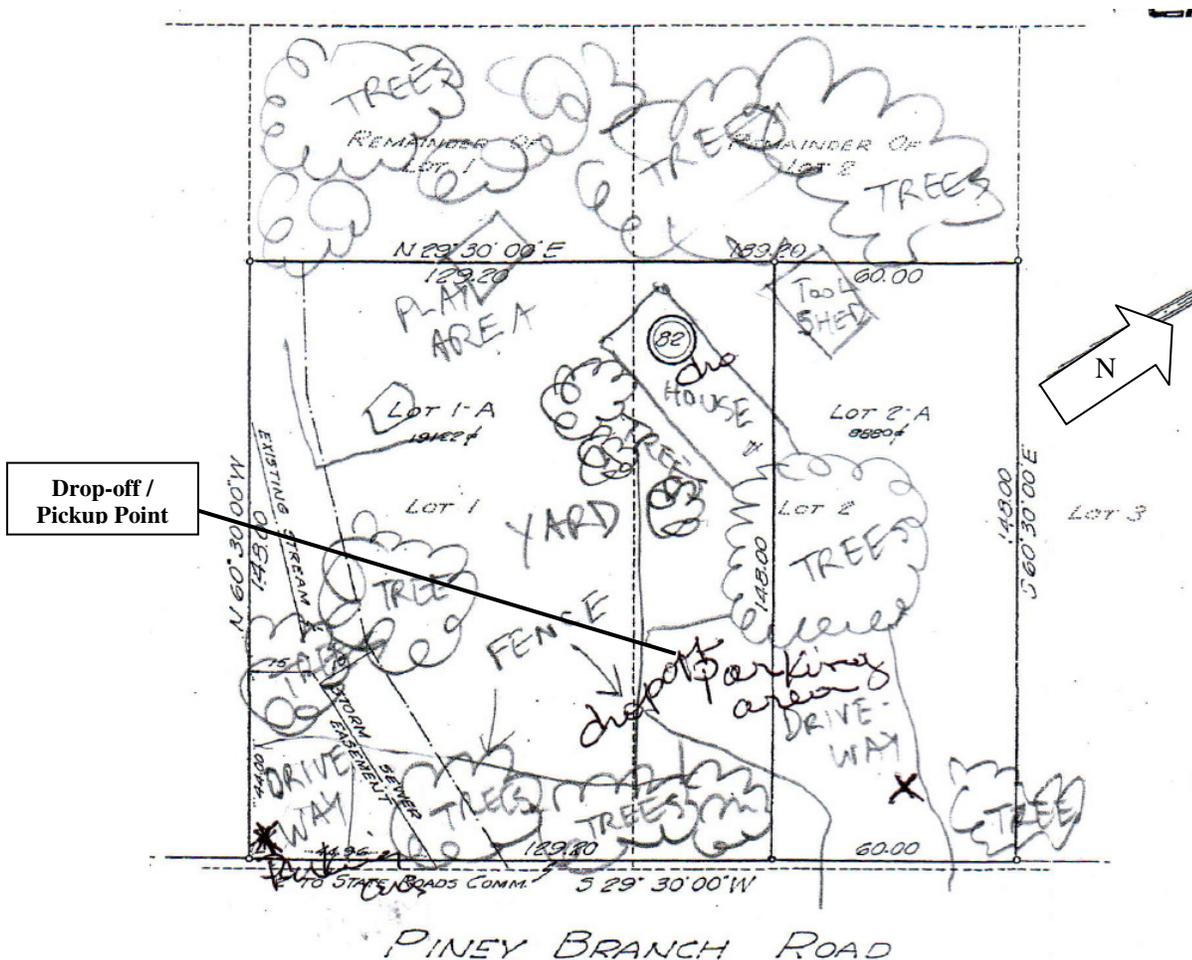
As noted by the Planning Board, there are no proposed changes to the exteriors of the building or structures in the subject application. Exhibit 9 and Tr. 21-22. In case those plans change, the

following condition, to which Petitioner has not objected, is imposed in the final part of this Decision:

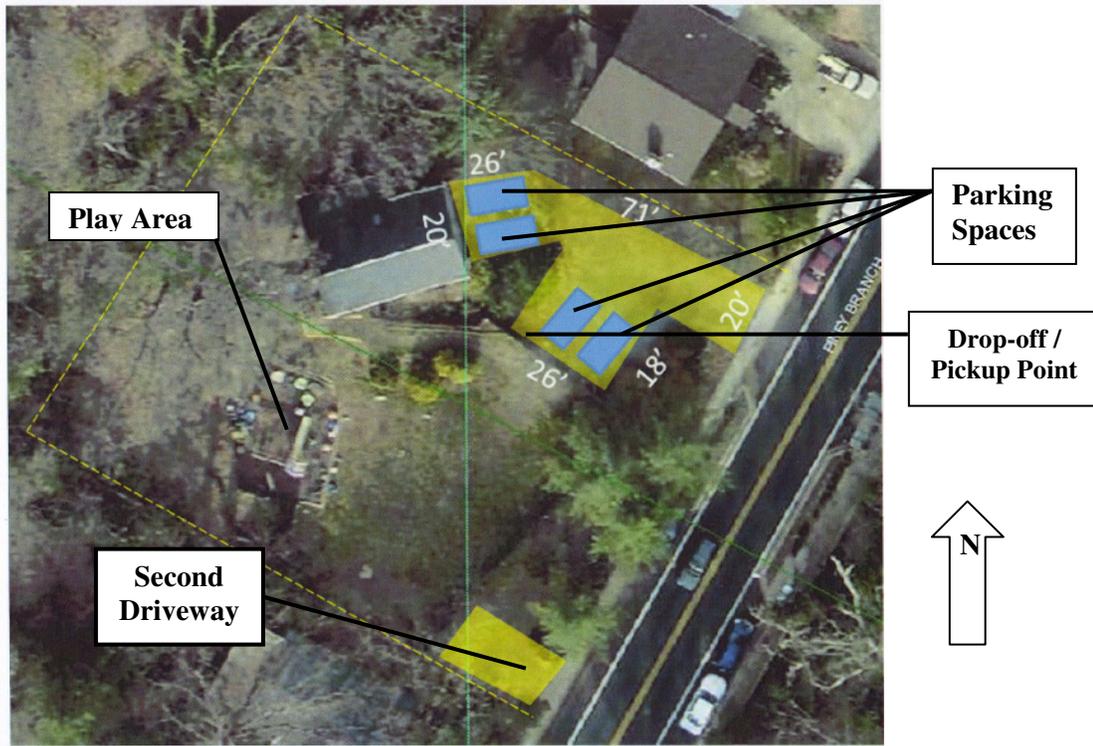
The subject property is located within the Takoma Park Historic District (Resource 37/03). If changes to exteriors of buildings, structures or features within the environmental setting of historic resources are proposed, Petitioner is required to obtain approval of an historic work permit from the Historic Preservation Commission.

**B. The Proposed Use, Landscaping, Lighting, Signage and the Environment**

Petitioner proposes to expand the existing “family day care home” for up to 8 children into a “group day care home” for up to 12 children. The daycare is located in the existing single-family home and in an outside play area, located in the spacious, fenced-in, back and side yards. The outdoor play area is designated on the Site Plan (Exhibit 4), which is an annotated Plat of the site:



The locations of the house, trees, play area, parking, site-access, drop-off/pickup area and other features are shown on the above site plan. Some of these features (especially the parking area) can be more clearly seen on an aerial photo supplied by the Planning Board (Exhibit 20(b)):



Additional photographs supplied by Petitioner depict the special exception area outside and inside (Exhibits 13(a)(vi) and 13(b)(i)) :



No signage has been proposed for the site, and the Hearing Examiner has imposed a condition specifying that Petitioner may not display a sign for the child care facility unless it is approved by the Department of Permitting Services and a permit is obtained. A sign, if erected, may not exceed two square feet and may not be lighted. A copy of the permit should be filed with OZAH before any sign is posted.

Petitioner testified that no external changes to the site are proposed, nor will additional outdoor lighting be installed, as there is already adequate lighting on the premises. Tr. 21-22.

Technical Staff found that “The only exterior lighting noted for this application will be the continued use of an existing outdoor building mounted light associated with the residence. This light will not cause glare into the adjacent residential properties.” Exhibit 19, p. 14. There are no environmental issues because there will be no exterior changes. Environmental Planning Staff noted that the site is exempted from forest conservation laws based on the size of the site, and they recommended approval of the special exception. Attachments 5 and 6 to Exhibit 19.

### **C. Operational Characteristics**

Petitioner currently runs a family day care in her home for up to eight children. She is licensed by the State Child Care Administration and has completed 90 hours of required certification credits as well as met continuing education requirements of 12 credits per year. Exhibit 9. A copy of her current state license to care for up to eight children is in the record as Exhibit 7, and as required under Code §59-G-2.13.1(a)(4), the Petitioner has submitted an affidavit affirming that she will comply with all applicable State and County requirements (Exhibit 8). The Petitioner recited in her Statement accompanying her application (Exhibit 9) that she has a B.A. in Psychology from George Washington University, where she took substantial coursework in Early Childhood Education.

In addition to the Petitioner, two non-resident staff are employed to operate the child care

facility. Although no increase in the number of non-residential staff on site at any one time is proposed for the group day care home, Petitioner reasonably requests the flexibility of having additional non-residential employees available should a substitute for herself or one of the regular employees be needed. Exhibit 23. The Hearing Examiner has imposed a condition which would allow that flexibility, and also noted that an additional staff may be present if required by state licensing authorities or in emergency conditions.<sup>6</sup> This flexibility will not create a parking or traffic issue because, historically, Petitioner's non-resident staff members have taken public transportation, leaving the area adjacent to the proposed use's parking spaces clear for pick-ups and drop-offs. Exhibit 9.

Zoning Ordinance §59-E-3.7 requires that a group day care home provide one parking space for every non-resident staff member, in addition to the residential parking requirement, but allows the required number of spaces to be provided on the street abutting the site. As noted by the Planning Board (Exhibit 20, pp. 1-2), a parking pad adjacent to the home satisfies the requirement for two residential parking spaces, and in addition, the two required spaces for the proposed use are located on the site, with an adequate space for pick-up and discharge of children adjacent thereto. *See* Exhibit 20(b), reproduced on page 9 of this report. The Planning Board letter recited Petitioner's explanation that (Exhibit 20, pp. 1-2):

many of her clients arrive at the site by foot or by bus, as a Ride-On bus stop is located directly in front of the property. Clients have staggered arrival and departure times to the site throughout the day. . . . [I]n the many years of operating the existing family day care home use, clients have not encountered any conflicting vehicular movements either entering or exiting the subject property.

Technical Staff confirmed that "a Ride-On bus stop is located on Piney Branch Road directly in front of the site. The Takoma Park Metrorail station is approximately 0.6 mile from the property." Exhibit

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<sup>6</sup> Zoning Ordinance §59-A-2.1 restricts the number of non-resident staff members who may be on site at any given time to no more than 3, in the definition of "Group Day Care Home."

19, p. 4. Technical Staff analyzed the safety of the drop-off pickup area as follows (Ex. 19, p. 15):

Given the number of children proposed (up to 12) automobile queuing on the site is not anticipated to be an issue. Additionally, the history of existing clients arriving to the site by foot, and the Ride-On bus stop located in front of the property offer alternative methods of transportation to the site. Based on a staff site visit, the existing gravel apron area will serve as an adequate area for discharge and pick up of children arriving to the site by automobile.

Based on this record, the Hearing Examiner finds that the subject site satisfies the Code requirements for parking spaces and that the drop-off pickup spot will provide a safe area for the discharge and pick-up of children accessing the site by automobile. The minimal impact of the proposed special exception on the County's transportation facilities will be discussed in Part III. C. of this report.

The hours of operation for the proposed use are Monday through Friday, 8:30 a.m. to 5:30 p.m. Petitioner maintains that the facility mostly serves nearby residents who walk to the daycare center (Exhibit 9); however, to minimize the possibility of any impact on the neighborhood from the additional arrivals and pick-ups, a condition of the special exception would require that any vehicular arrival and departure times for the children be staggered, through contractual agreement between the Petitioner and the parents, so that no more than six vehicles visit the site within any one 30-minute period to drop off or pick up children.

Petitioner is also proposing to offer children's art classes on Saturdays for no more than 8 children, with only one non-resident staff member. Mrs. Leventhal indicated that the Maryland Department of Education Licensing Specialist who supervises her child care operation has approved the idea of the Saturday art classes. Exhibit 17. The Planning Board Chair noted in her letter to the Hearing Examiner that, although the issue was not discussed by the Planning Board, in her view, "the Saturday art classes are a non-inherent characteristic of this use as such classes are not commonly offered at group day care homes." Exhibit 20, p. 2. The Hearing Examiner agrees that this aspect of

the use is a non-inherent operational characteristic, but finds that it is unlikely to cause any disruption to the neighbors, given the small numbers involved, the limited hours and the extensive screening of the subject site. At the suggestion of the Planning Board, the hours of operation on Saturdays are limited by condition to only one 4-hour period, with a maximum of 8 children, between the hours of 9:30 a.m. and 5:30 p.m.

One other operational issue raised by the Petitioner was the limitation proposed by Technical Staff and the Planning Board that outdoor play times be limited to six children at any given time. She requested that that number be raised to eight because with a mix of infants and older children at the day care, “it would not be functional” to have a limit of six children outside at any one time. Exhibit 23 and Tr. 9-10. Petitioner testified that she has never had any complaints from the neighbors concerning noise. Tr. 9. Technical Staff evaluated the potential noise impact of outdoor play as follows (Exhibit 19, p. 10):

The outdoor play area is effectively screened by a six foot high board on board fence and mature landscaping. . . . The noise generated by the children would occur while they are in the play area which is located in the side and rear yards. Given the existing fence, extensive onsite landscaping and the site’s location on Piney Branch Road, noise generated by children while in the play area is likely to be an insignificant amount when compared to the noise generated by the daily flow of traffic along this roadway.

Given the fencing and the extensive foliage on the property, as well as Staff’s evaluation, the Hearing Examiner finds that there would be no disruption to the neighborhood to allow Petitioner to have up to eight children in outdoor play at any given time. A condition of the special exception so provides. As is generally the case with this type of special exception, another condition prohibits the use of a public address system or amplified music outside the building.

#### **D. Community Reaction**

There was no opposition to the proposed group day care home. On the contrary, a letter of

support was filed by Seth Grimes, Councilmember, Ward 1, The City of Takoma Park. Exhibit 18.

Mr. Grimes stated, *inter alia*,

I have heard only good things about Ms Leventhal's child-care facility, which provides a highly valued service in our community. I have heard no objections from neighbors and believe the special exception will not have any negative effect on nearby property owners or others in the neighborhood. I urge you to approve Ms Leventhal's petition . . .

### **E. Master Plan Conformance and Compatibility with the Neighborhood**

The subject site is located within the area covered by the Takoma Park Master Plan, approved and adopted in December 2000. Technical Staff notes that the property is located near the Flower Village, which it characterized as a major neighborhood center and commercial focal point, approximately 1.3 miles north at the corner of Piney Branch Road and Flower Avenue. Exhibit 19, p. 6. The Plan recommends this area for one-family residential use and confirms the R-60 Zone. Staff's comments on the consistency of the proposed special exception with the goals of the Takoma Park Master Plan are as follows (Exhibit 19, p. 6):

The Plan vision for the Flower Village was that the services that it provided should be safe, successful, community-serving, attractive and convenient. The Group Day Care proposed by the applicant will provide much needed community services to area residents and will further these goals. Additionally, the Plan noted the following: "support the provision of a diverse range of commercial services in Takoma Park, such as basic shopping services to nearby neighborhoods, highway commercial services and regionally serving business" (page 40). The applicant's proposed group day care home facility will further expand the range of services being offered in the Flower Village neighborhood and the City of Takoma Park as a whole. Additionally, many residents of this community are transit-dependent and it is important that community serving businesses such as child care be easily accessible by transit. The property is within walking distance to the existing Takoma Park Metrorail station, a Ride-On a bus stop is located in front of the site, and the planned Purple Line facility will be within walking distance to this special exception use.

Technical Staff does not mention any specific reference in the Plan to the need for child care services, but the Hearing Examiner notes that on page 30, the Plan specifically "[s]upport[s] the

provision and location of adequate social, employment, and health facilities and services to meet the needs of area residents.” The Hearing Examiner finds that child care services fits within the tenor of that recommendation.

Technical Staff also finds that the proposed use is “compatible with the existing neighborhood and meets the requirements of the R-60 zone special exception purpose and standards.” Exhibit 19, p. 6. Staff concludes that the proposed use is consistent with the Takoma Park Master Plan because “the subject application furthers the Plan’s general guidance and is compatible architecturally with the adjoining neighborhood . . .” Exhibit 19, p. 6.

While there does not appear to be any definitive language in the Master Plan, the Hearing Examiner agrees that the proposed use appears to be consistent with its objectives. At the very least, the Plan recommends the R-60 Zone for the site, and that zone permits the proposed special exception if the specified statutory requirements are met. Moreover, Petitioner plans no external modifications to the subject property and there is sufficient parking to accommodate the proposed use. Therefore, the requested special exception will maintain the residential character of the area and will have little or no negative impact upon the community. On the contrary, it will provide a needed community service, as suggested by Councilmember Grime’s letter (Exhibit 18). Thus, it is fair to say that the planned use, a group day care home in a single-family, detached home, is not inconsistent with the goals of the Takoma Park Master Plan.

### **III. FINDINGS AND CONCLUSIONS**

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in

others. The zoning ordinance establishes both general and specific standards for special exceptions, and the Petitioner has the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Technical Staff and the Planning Board concluded that Petitioner will have satisfied all the requirements to obtain the special exception, if she complies with the recommended conditions (Exhibits 19 and 20).

Weighing all the testimony and evidence of record under a “preponderance of the evidence” standard (Zoning Ordinance §59-G-1.21(a)), the Hearing Examiner concludes that the instant petition meets the general and specific requirements for the proposed use, as long as Petitioner complies with the conditions set forth in Part IV, below.

#### **A. Standard for Evaluation**

The standard for evaluation prescribed in Code § 59-G-1.2.1 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. 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-1.2.1. 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 “group day care home” use. Characteristics of the

proposed facility that are consistent with the “necessarily associated” characteristics of group day care home uses will be considered inherent adverse effects, while those characteristics of the proposed use that are not necessarily associated with group day care home uses, or that are created by unusual site conditions, will be considered non-inherent effects. The inherent and non-inherent effects thus identified must then 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.

Technical Staff identified the following inherent characteristics of a group day care home (Exhibit 19, p. 9): (1) vehicular trips to and from the site; (2) outdoor play areas; (3) noise generated by children; (4) drop-off and pick-up areas; (5) parking and (6) lighting. To this list, the Hearing Examiner would add one more item – (7) a dwelling in which most of the services are provided. Since group day care homes vary only slightly in the number of children permitted (*i.e.*, from 9 to 12), and non-resident staff on site is limited to no more than 3 by Zoning Ordinance §59-A-2.1, there is not a great variety in the scale of group day care homes.

Technical Staff did not find any non-inherent adverse effects in this case (Exhibit 19, p. 10), but the Chair of the Planning Board suggested that the proposed Saturday art classes would be a non-inherent characteristic (Exhibit 20), and the Hearing Examiner agrees. Such weekend art classes are certainly not a typical feature of group day care homes. The Hearing Examiner also notes that the location of the site within the Takoma Park Historic District is a non-inherent site characteristic. However, neither of these non-inherent characteristics warrants denial of the special exception because any potential adverse effects can be avoided by appropriate conditions. As discussed earlier in this Opinion, conditions addressing these issues have been included as part of the Decision in Part IV, below.

The remaining characteristics of the proposed use are consistent with the inherent characteristics identified for a group day care home. The building is not of an unusual size or design, but rather is an existing one-family residence in a residential area; the outdoor play area is fenced and screened, and the number of children using it at one time would be limited; adequate parking is provided on site; the pick-up/drop-off area is located on the site, and it can accommodate the expected number of cars without queuing onto the public street; lighting is residential in style and will not be increased for this special exception; and the amount of additional traffic generated would not be unusual, nor would it pose a burden on public facilities. The Hearing Examiner concludes that the combination of inherent and non-inherent characteristics of the proposed special exception will not result in any adverse impacts upon the neighborhood, if the specified conditions are followed.

### **B. Specific Standards**

The specific standards for Child Day Care Facilities are found in Code § 59-G-2.13.1. The Technical Staff report, the Planning Board Letter, and the Petitioner's evidence provide adequate proof that the specific standards would be satisfied in this case, as outlined below.

#### **Sec. 59-G-2.13.1. Child day care facility.**

- (a) *The Hearing Examiner may approve a child day care facility for a maximum of 30 children if:*
- (1) *a plan is submitted showing the location of all buildings and structures, parking spaces, driveways, loading and unloading areas, play areas, and other uses on the site;*

Conclusion: The submitted Site Plan (Exhibit 4) and the photographic exhibits in the record satisfy this requirement.

- (2) *parking is provided in accordance with the parking regulations of article 59-E. The number of parking spaces may be reduced by the Hearing Examiner if the applicant demonstrates that the full number of spaces required in section 59-E-3.7 is not necessary because:*

- (A) *existing parking spaces are available on adjacent property or on the street abutting the site that will satisfy the number of spaces required; or*
- (B) *a reduced number of spaces would be sufficient to accommodate the proposed use without adversely affecting the surrounding area or creating safety problems;*

Conclusion: Code § 59-E-3.7 requires that a group day care home provide one parking space for every non-resident staff member in addition to the residential parking requirement, but allows the required number of spaces to be provided on the street abutting the site. In this case, there are at least four off-street spaces available on the site,<sup>7</sup> as evidenced by Exhibit 20(b), reproduced on page 9 of this opinion. The Hearing Examiner therefore finds that there are sufficient parking spaces on site to satisfy the statutory requirement.

- (3) *an adequate area for the discharge and pick up of children is provided;*

Conclusion: As stated by Technical Staff and discussed on pages 11-12 of this Opinion, “Based on a staff site visit, the existing gravel apron area will serve as an adequate area for discharge and pick up of children arriving to the site by automobile.” Exhibit 19, p. 15. The Hearing Examiner so finds.

- (4) *the petitioner submits an affidavit that the petitioner will:*
  - (A) *comply with all applicable State and County requirements;*
  - (B) *correct any deficiencies found in any government inspection; and*
  - (C) *be bound by the affidavit as condition of approval for this special exception; and*

Conclusion: The required affidavit has been submitted (Exhibit 8).

- (5) *the use is compatible with surrounding uses and will not result in a nuisance because of traffic, parking, noise or type of physical activity. The hearing examiner may require landscaping and screening and the submission of a plan showing the location, height, caliper, species, and other characteristics, in order to provide a physical and aesthetic barrier to protect surroundings properties from any adverse impacts resulting from the use.*

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<sup>7</sup> There are five spaces if the second driveway on the property is counted; however, due to its location, Technical Staff did not count the parking space available on that driveway towards the proposed special exception use. Exhibit 19, p. 8.

Conclusion: As discussed in Part II of this Opinion and Decision, the evidence demonstrates that the proposed use would be compatible with surrounding uses and would not result in a nuisance because of traffic or parking. As to noise and physical activity, it should be noted that the back yard is fenced and landscaped, so any noise would be mitigated, and the Hearing Examiner has included conditions prohibiting any amplified sound in the back yard and limiting the number of children in outdoor play to a maximum of eight at a time. Outdoor operations are limited to normal work hours, and the facility will not operate in the evenings, so the impact on the neighborhood is reduced. The hours for the proposed Saturday art classes have been restricted by a condition recommended by the Planning Board to minimize any adverse effect on the community. Technical Staff found that, “The proposal will be compatible with the surrounding neighborhood and will not result in nuisances due to the traffic, parking, noise or any type of physical activity.” Exhibit 19, p. 16. The Hearing Examiner agrees.

- (b) *A child day care facility for 31 or more children may be approved by the Board of Appeals subject to the regulations in subsection (a) above, and the following additional requirements: . . .*

Conclusion: Not applicable.

- (c) *The requirements of section 59-G-2.13.1 do not apply to a child day care facility operated by a nonprofit organization and located in: . . .*

Conclusion: Not applicable.

### **C. General Standards**

The general standards for a special exception are found in Code § 59-G-1.21(a). The Technical Staff report, the Planning Board Letter, the exhibits and the testimony of the Petitioner provide ample evidence that the general standards would be satisfied in this case.

**Sec. 59-G-1.21. General conditions.**

**§5-G-1.21(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 group day care home use is a permissible special exception in the R-60 Zone, pursuant to Code § 59-C-1.31(d).

*(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 complies with the specific standards set forth in § 59-G-2.13.1 for a Child Day Care Facility use as outlined in Part III. 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 a 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: The subject site is within the area covered by the Takoma Park Master Plan, which was approved and adopted in December of 2000. For the reasons set forth in Part II. E. of this Opinion and Decision, the Hearing Examiner finds that the planned use, a group day care home in a single-family, detached home, is consistent with the goals of the Takoma Park Master 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 group day care home will be in harmony with the general residential character of the neighborhood because it will be housed in an existing single-family home, and there will be no external changes to the structure. The rear yard play area is completely fenced in and well screened by landscaping. The parking is adequate, and the site can easily handle the pick-up and drop-off of children without cars backing into the street. There are no other group day care homes in the general neighborhood, so there is clearly not an excess of similar uses. Exhibit 19.

(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: The Hearing Examiner concludes that the proposed use will not be detrimental to the peaceful enjoyment, economic value or development of surrounding properties at the site. As noted above, the proposed use will have almost no physical impact on the nearest residences. On the positive end, it will provide “a highly valued service in [the] community.” Exhibit 18.

(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: Based on the nature of the use, it will not cause objectionable vibrations, fumes, odors and dust. As discussed in Part III.B of this Opinion, the special exception, as

conditioned, will cause no objectionable noise or physical activity at the subject site. Technical Staff found that “[t]he only exterior lighting noted for this application will be the continued use of an existing outdoor building mounted light associated with the residence. This light will not cause glare into the adjacent residential properties.” No new lighting will be added, and operations cease at 5:30 p.m. The Hearing Examiner therefore finds that there will not be objectionable illumination or glare at the site as a result of the special exception.

- (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: Technical Staff did not report any other group day care homes in the neighborhood.

There are two home occupations and thirteen accessory apartment units in the neighborhood (Exhibit 19, p. 6), but by their nature, these are all located within residences and thus do not alter the predominantly residential nature of the area. The Hearing Examiner finds that the group day care home proposed in this case will not increase the number, scope, or intensity of special exception uses sufficiently to affect the area adversely or alter the nature of the area. Moreover, as previously discussed, the proposed use is consistent with the recommendations of the Master Plan, and therefore, under the terms of this criterion, will not alter the nature of the area.

- (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 group day care home will not be a danger to public health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site. On the contrary, it will provide a needed service to the public.

(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: Technical Staff reports that the site will be adequately served by existing public facilities. Exhibit 19, p. 12. There is no contrary evidence, and the Hearing Examiner so finds.

- (A) *If the special exception use requires approval of a preliminary plan of subdivision, the Planning Board must determine the adequacy of public facilities in its subdivision review. In that case, approval of a preliminary plan of subdivision must be a condition of the special exception.*
- (B) *If the special exception:*
- (i) *does not require approval of a new preliminary plan of subdivision; and*
  - (ii) *the determination of adequate public facilities for the site is not currently valid for an impact that is the same as or greater than the special exception's impact;*
- then the Board of Appeals or the Hearing Examiner must determine the adequacy of public facilities when it considers the special exception application. The Board of Appeals or the Hearing Examiner must consider whether the available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the application was submitted.*

Conclusion: The special exception sought in this case would not require approval of a preliminary plan of subdivision and there is no currently valid determination of the adequacy of

public facilities for the site, taking into account the impact of the proposed special exception. Therefore, the Hearing Examiner must consider whether the available public facilities and services will be adequate to serve the proposed development under the applicable Growth Policy standards.<sup>8</sup> These standards include Local Area Transportation Review (LATR) and Transportation Policy Area Review (TPAR). Transportation Planning Staff did do such a review, and concluded that the proposed use would add fewer than three additional trips during each of the peak-hour weekday periods. Exhibit 19, Attachment 4, p. 3. Since the existing house, combined with the proposed use, would generate fewer than 30 total trips in the weekday morning and evening peak hours, the requirements of the LATR are satisfied without a traffic study. Since the proposed use is estimated to generate fewer than three additional peak-hour trips, TPAR is also satisfied without the payment of an impact tax. Therefore, the Transportation Staff concluded, as does the Hearing Examiner, that the proposed use “would have no adverse impact on the transportation network.” Exhibit 19, Attachment 4, p. 3.

Public facilities also include police, fire, and health facilities. The 2012-2016 Subdivision Staging Policy provides that “[t]he Planning Board and staff must consider the programmed services to be adequate for facilities such as police stations, firehouses, and health clinics unless there is evidence that a local area problem will be generated.” Resolution 17-601, p. 21. There is no evidence in this case of a “local area problem” regarding police, fire or health services, so the Hearing Examiner finds that those public services are adequate as well.

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<sup>8</sup> The Council changed the name for its “Growth Policy” to “Subdivision Staging Policy.” The version of that policy in force when the subject petition was filed was the “2012-2016 Subdivision Staging Policy,” adopted by the Council on November 13, 2012, in Resolution 17-601.

- (C) *With regard to public roads, the Board or the Hearing Examiner must further find that the proposed development will not reduce the safety of vehicular or pedestrian traffic.*

**Conclusion:** Transportation Staff found that the special exception “will have no adverse traffic impact on existing are roadway conditions or pedestrian facilities . . .” Exhibit 19, Attachment 4, p. 1. The evidence of record supports that finding, and the Hearing Examiner therefore concludes that the proposed use would have no detrimental effect on the safety of vehicular or pedestrian traffic.

**D. Additional Applicable Standards**

**59-G § 1.23. General development standards**

- (a) **Development Standards.** *Special exceptions are subject to the development standards of the applicable zone where the special exception is located, except when the standard is specified in Section G-1.23 or in Section G-2.*

**Conclusion:** The proposed use meets the development standards of the R-60 Zone, as shown in the following Chart from Page 13 of the Technical Staff report (Exhibit 19):

**Development Standards – R-60 Zone**

Development Standards	Required	Provided
Minimum Lot Area	6,000 sq. ft.	28,002 sq. ft.
Minimum Width at Proposed Street Line:	25 ft.	149 ft.
Minimum Front Yard Setback:	25 ft.	68 ft.
Minimum Side Yard Setback:		
<ul style="list-style-type: none"> <li>• One side</li> <li>• Sum of Both</li> </ul>	8 ft. 18 ft	30 ft. 59 ft.
Minimum Rear Yard Setback:	20 ft.	33 ft.

- (b) **Parking requirements.** *Special exceptions are subject to all relevant requirements of Article 59-E.*

Conclusion: Zoning Ordinance §59-E-3.7 requires that a group day care home provide one parking space for every non-resident staff member, in addition to the residential parking requirement, but allows the required number of spaces to be provided on the street abutting the site. As stated by Technical Staff (Exhibit 19, p. 13), “This parking requirement for the requested special exception use can be accommodated on-site as there are two spaces for residents and two spaces for the non-resident employees located in the gravel driveway and apron area; the site’s primary access point on Piney Branch Road.” As previously discussed, the Hearing Examiner finds that there is sufficient parking to meet the code requirements and to ensure safety.

- (c) **Minimum frontage.** *In the following special exceptions the Board may waive the requirement for a minimum frontage at the street line if the Board finds that the facilities for ingress and egress of vehicular traffic are adequate to meet the requirements of section 59-G-1.21:*
- (1) *Rifle, pistol and skeet-shooting range, outdoor.*
  - (2) *Sand, gravel or clay pits, rock or stone quarries.*
  - (3) *Sawmill.*
  - (4) *Cemetery, animal.*
  - (5) *Public utility buildings and public utility structures, including radio and T.V. broadcasting stations and telecommunication facilities.*
  - (6) *Riding stables.*
  - (7) *Heliport and helistop.*

Conclusion: This special exception is not included in the above list. Moreover, the proposed use will not result in any change in the site’s frontage, which meets required standards.

- (d) **Forest conservation.** *If a special exception is subject to Chapter 22A, the Board must consider the preliminary forest conservation plan required by that Chapter when approving the special exception application and must not approve a special exception that conflicts with the preliminary forest conservation plan.*

Conclusion: Technical Staff determined that this project is exempt from the forest conservation

regulations (Exhibits 6 and 19, Attachment 5). No trees will be disturbed.

- (e) **Water quality plan.** *If a special exception, approved by the Board, is inconsistent with an approved preliminary water quality plan, the applicant, before engaging in any land disturbance activities, must submit and secure approval of a revised water quality plan that the Planning Board and department find is consistent with the approved special exception. Any revised water quality plan must be filed as part of an application for the next development authorization review to be considered by the Planning Board, unless the Planning Department and the department find that the required revisions can be evaluated as part of the final water quality plan review.*

Conclusion: Inapplicable. This provision applies only to sites where there will be land disturbance within a Special Protection Area, which is not the case here.

- (f) **Signs.** *The display of a sign must comply with Article 59-F.*

Conclusion: Petitioner does not propose any signs. A condition has been imposed which provides that Petitioner may not display a sign for the child care facility unless it is approved by the Department of Permitting Services and a permit is obtained. A sign, if erected, may not exceed two square feet and may not be lighted. A copy of the permit should be filed with OZAH before any sign is posted.

- (g) **Building compatibility in residential zones.** *Any structure that is constructed, reconstructed or altered under a special exception in a residential zone must be well related to the surrounding area in its siting, landscaping, scale, bulk, height, materials, and textures, and must have a residential appearance where appropriate. Large building elevations must be divided into distinct planes by wall offsets or architectural articulation to achieve compatible scale and massing.*

Conclusion: There will be no external building modifications, so the building will maintain its residential character.

- (h) **Lighting in residential zones.** *All outdoor lighting must be located, shielded, landscaped, or otherwise buffered so that no direct light intrudes into an adjacent residential property. The following lighting standards must be met unless the Board requires different standards for a recreational facility or to improve public safety:*

(1) *Luminaires must incorporate a glare and spill light control device to minimize glare and light trespass.*

(2) *Lighting levels along the side and rear lot lines must not exceed 0.1 foot candles.*

Conclusion: Technical Staff found that “The only exterior lighting noted for this application will be the continued use of an existing outdoor building mounted light associated with the residence. This light will not cause glare into the adjacent residential properties.” Exhibit 19, p. 14. The Hearing Examiner therefore finds that there will not be objectionable illumination or glare at the site as a result of the special exception.

Based on the testimony and evidence of record, I conclude that the group day care home use proposed by Petitioner, as conditioned below, meets the specific and general requirements for the special exception, and that the Petition should be granted, subject to the conditions set forth in Part IV of this Opinion and Decision.

#### IV. DECISION

Accordingly, based on the foregoing findings and conclusions, Petition No. S.E. 14-01 for a special exception in the R-60 Zone to operate a group day care home for up to 12 children in an existing single-family detached home, at 7336 Piney Branch Road, City of Takoma Park, Maryland, is hereby **GRANTED**, subject to the following conditions:

1. The Petitioner shall be bound by all of her testimony and exhibits of record, and by her representations identified in this Opinion and Decision.
2. In accordance with Code § 59-G-2.13.1(a)(4), the Petitioner shall be bound by the Affidavit of Compliance submitted in connection with this case, Exhibit 8, in which Petitioner certified that she will comply with and satisfy all applicable State and County requirements, correct any

deficiencies found in any government inspection, and be bound by the affidavit as a condition of approval for the special exception.

3. The group day care home use is limited to 12 children on site at any one time; nor shall the number of children exceed the number authorized by State licensing authorities. The ages of the permitted children will be determined by State licensing authorities.
4. The hours of operation will be between 8:30 a.m. and 5:30 p.m., Monday through Friday. The hours of operation on Saturdays are limited to only one 4-hour period with a maximum of 8 children, between the hours of 9:30 a.m. and 5:30 p.m.
5. Vehicular arrival and departure times for the children shall be staggered, through contractual agreement between the operator of the day care home and the parents, so that no more than six vehicles visit the site within any one 30-minute period to drop off or pick up children. In no event may a child be dropped off before Petitioner or a staff member is present to supervise that child; nor may a child be left alone if a parent is late in making a pick-up.
6. Children must be accompanied by an adult to and from the child-care entrance.
7. Petitioner shall not use a public address system of any kind outside the building, nor shall any amplified music be played outside the building.
8. All children must be under the direct supervision of a staff member at all times. No more than eight children shall be permitted to play outdoors at any one time. Outdoor play times must not start before 8:30 a.m., Monday through Friday. All gates or other access to the outside play area must be secured during outdoor play in a manner that will prevent any of the children present from opening such access and wandering off.
9. The Petitioner shall maintain the grounds in a clean condition, free from debris, on a daily basis.

10. Two non-resident staff are permitted on site at any one time; however, one additional non-resident staff person may be present when needed as a substitute for the Petitioner or for a regular non-resident staff member.<sup>9</sup> One additional non-resident staff may also be present if required by state licensing authorities or in emergency conditions.
11. Petitioner must continue to provide all the existing fencing and landscaping, as depicted on the Site Plan (Exhibit 4).
12. Petitioner may not display a sign for the child care facility unless it is approved by the Department of Permitting Services and a permit is obtained. A sign, if erected, may not exceed two square feet and may not be lighted. A copy of the permit should be filed with OZAH before any sign is posted.
13. The subject property is located within the Takoma Park Historic District (Resource 37/03). If changes to exteriors of buildings, structures or features within the environmental setting of historic resources are proposed, Petitioner is required to obtain approval of an historic work permit from the Historic Preservation Commission.
14. Petitioner must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioner shall at all times ensure that the special exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

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<sup>9</sup> Historically, Petitioner's non-resident staff members have taken public transportation, leaving the area adjacent to the proposed use's parking spaces clear for pick-ups and drop-offs. Zoning Ordinance §59-A-2.1 restricts the number of non-resident staff members who may be on site at any given time to no more than 3, in the definition of "Group Day Care Home."

Dated: January 8, 2014



Martin L. Grossman  
Hearing Examiner

**NOTICE OF RIGHT TO APPEAL**

Any person, board, association, corporation or official aggrieved by a decision of the Hearing Examiner under this section may, within ten days after this decision is rendered, appeal the decision to the County Board of Appeals in accordance with the provisions of Section 59-G-1.12(g) of the Zoning Ordinance.

cc: Petitioner  
All parties of record  
The Planning Board  
Department of Permitting Services  
Department of Finance  
All parties entitled to notice of filing