

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

<b>IN THE MATTER OF:</b>	*	
<b>LEAH HANLON d/b/a</b>	*	
<b>LILY PADS CHILD CARE LLC,</b>	*	
	*	
Applicant	*	
	*	OZAH Case No. CU 15-02
Leah Hanlon	*	
For the Petition	*	
	*	
<u>Stanley D. Abrams, Esquire</u>	*	
Attorney for the Applicant	*	
*****		
Before: Martin L. Grossman, Hearing Examiner		
Director, Office of Zoning and Administrative Hearings		

**HEARING EXAMINER’S REPORT AND DECISION**

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## I. STATEMENT OF THE CASE

On January 20, 2015, the Applicant, Leah Hanlon, d/b/a Lily Pads Child Care LLC, filed an application seeking approval of a conditional use to operate a Child Day Care Center for up to 20 children (the “Lily Pads Child Care, LLC”) in her home at 9913 Old Georgetown Road in Bethesda. Her ownership is established by Maryland Real Property Records (Exhibit 4) as SDAT Tax Account No. 07-00678788. Although the application was initially filed *pro se*, the Applicant subsequently obtained counsel, and is now represented by Stanley D. Abrams, Esquire. Exhibit 30.

The Subject Site is Lot 9, Block D of the Alta Vista Subdivision, and it is zoned R-60. A conditional use is required for a child care facility for 9 or more children in the R-60 Zone, and additional requirements are specified when the number of children will exceed 12, pursuant to Zoning Ordinance §59-3.4.4.E (13-30 persons).<sup>1</sup>

The Office of Zoning and Administrative Hearings (OZAH) scheduled a public hearing to be held on May 18, 2015 (Exhibit 20), but at the request of the Applicant (Exhibits 21-23), the hearing was continued to August 10, 2015. Exhibit 24.

The application is supported by Ms. Hanlon’s next-door neighbors (Tom and Phyllis Winterburn), whose daughter actually worked in the facility, and by another neighbor, Ann Atalla, whose child attended the facility for two years. Exhibits 26 and 27. Letters of support were also filed by other users of the child care. Exhibits 31(e)(1) – (6). There has been no opposition to the application.

By letter dated May 7, 2015 (Exhibit 31), Applicant’s attorney, Stanley Abrams, updated the plans for the site, including a revised site plan (Exhibit 31(a)) and a landscape plan (Exhibit

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<sup>1</sup> All citations in this Decision are to the 2014 Zoning Ordinance for Montgomery County, adopted September 30, 2014 (Ordinance No. 17-52), as amended.

31(b)). He also included a variety of photographs of the site and the area (Exhibits 31(c) and (d)). By email dated June 8, 2015 (Exhibit 32), Technical Staff summarized the changes to the plans, as follows:

Site Plan

- The plan now includes a fence along the front property line (we are recommending a condition that it be 4' and board-on-board)
- The Applicant will remove the 450 sq ft of pavement that is within the public Right of way along Old Georgetown Road
- 700 square feet of pavement will be added to expand the existing parking for an additional 3 spaces (there is an existing 4th space). The two existing tandem parking spaces will be reserved for residential use.

Landscape Plan

- The large tree in the center of the front yard will be removed to make room for the parking expansion. A smaller tree will be planted near where the large tree is now.

By letter to Technical Staff dated June 3, 2015, Mr. Abrams further supplemented information about the proposal (Exhibit 33).

The Technical Staff of the Montgomery County Planning Department (Technical Staff or Staff) issued a report on June 11, 2015, recommending approval of the application, subject to eleven conditions. Exhibit 35. The Planning Board met on June 25, 2015, and voted unanimously to recommend approval with the conditions recommended by Staff, as indicated in the Chair's letter of July 10, 2015. Exhibit 36.

On June 22, 2015, Applicant filed her Pre-Hearing Submission. Exhibit 34. On August 6, 2015, the Hearing Examiner emailed Technical Staff seeking information about compliance with Zoning Ordinance §59-6.5.3, regarding general screening requirements. Exhibit 38. Technical Staff responded on August 7, 2015, indicating their opinion that additional trees and shrubs must be planted in the rear yard to provide screening required by §59-6.5.3.C.7. Exhibit 39.

The public hearing proceeded as scheduled on August 10, 2015. The Applicant appeared

with counsel, and she was the only witness. At the beginning of the hearing, Applicant's counsel indicated that he accepted the findings of Technical Staff (Tr. 7), but he was unaware of the email exchange between the Hearing Examiner and Technical Staff and Staff's conclusion that additional trees and shrubs were needed in the back yard for screening to comply with Zoning Ordinance §59-6.5.3.C.7. Exhibit 39. Mr. Abrams argued that the existing 6 foot tall, board-on-board fence provided more than adequate screening in the back yard, and the Hearing Examiner stated that he would keep the record open until August 20, 2015, to give Applicant the opportunity to discuss this issue with Technical Staff and reply on the record. Tr. 8-13. At the hearing, Applicant introduced an affidavit of posting (Exhibit 40) a larger version of the site plan (Exhibit 41), an existing conditions plan (Exhibit 41(a)), a rendered site plan (Exhibit 42) and a photograph of the existing sign for the facility (Exhibit 43). The Applicant testified about her proposed use, and agreed to the conditions recommended by the Technical Staff and the Planning Board. Tr. 57.

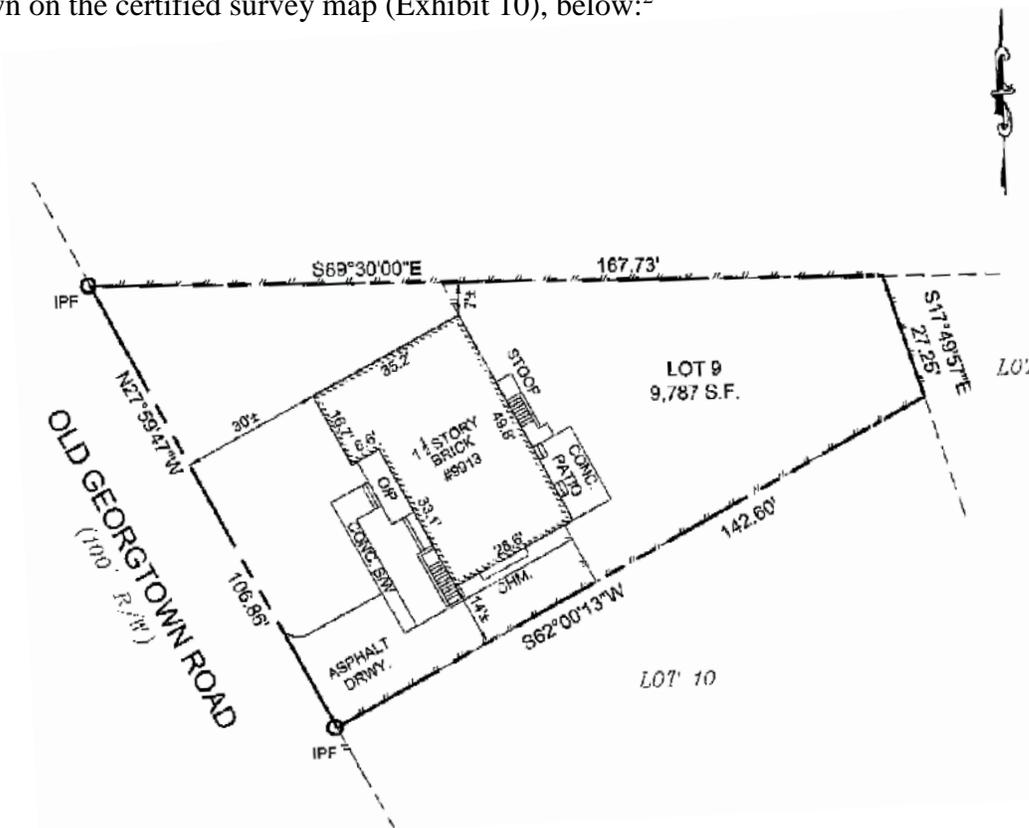
While the record was open following the hearing, Mr. Abrams exchanged emails with Technical Staff on the question of whether Zoning Ordinance §59-6.5.3.C.7. requires the Applicant to plant trees and shrubs in the back yard, in addition to the fence. Exhibits 44-49. Technical Staff argued that the Code requires it in addition to the fence, and that alternative compliance under Zoning Ordinance §59-6.8 was not available in this case (Exhibits 45 and 47). Mr. Abrams strongly disagreed, arguing that it makes no sense to require screening in addition to a fence which totally screens the back yard (Exhibits 44, 46 and 49). As will be discussed in Part III.D.3. of this Report and Decision, the Hearing Examiner agrees with Mr. Abrams' argument. The record closed, as scheduled, on August 20, 2015.

For the reasons set forth at length in this Report and Decision, the Hearing Examiner approves the conditional use application, subject to the conditions listed in Part IV.

## II. FACTUAL BACKGROUND

### A. The Subject Property

The subject property is a 9,787-square-foot lot, zoned R-60, and located at 9913 Old Georgetown Road, Bethesda. It occupies Lot 9 in Block D of the Alta Vista Subdivision, as shown on the certified survey map (Exhibit 10), below:<sup>2</sup>



Technical Staff describes the site as follows (Exhibit 35, p. 2):

... It contains a one and one-half-story house, which serves as both a residence and the location for Lily Pads Child Care (figure 1). The Subject Site has a large parking area with a paved driveway on the southeastern side of the house that extends into the front yard and into the Old Georgetown Road public right-of-way. A 6-foot tall fence surrounds the Subject Site on all sides except in the front. The rear yard is fully enclosed and has play equipment for the existing day care. Pedestrian access to the house is by a concrete sidewalk that leads to the front entrance.

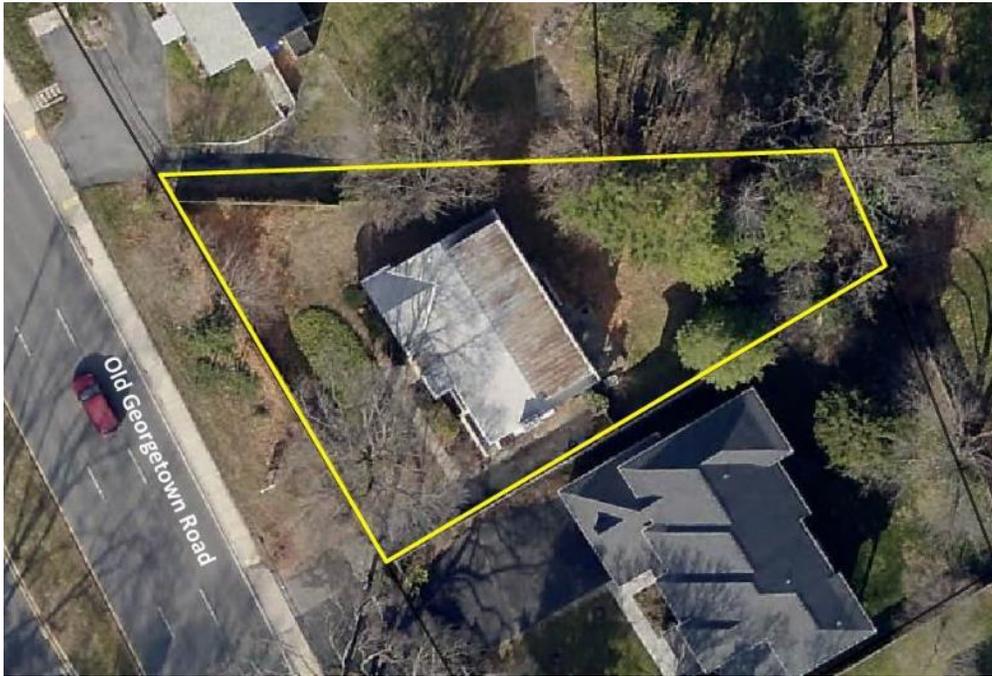
The Subject Site is well-landscaped; trees and shrubs line the side and rear property lines of the Subject Site. Small bushes border the house and a large red maple tree

<sup>2</sup> The Technical Staff report incorrectly identifies the site as “Lot 6.” Exhibit 35, p. 2. The correct identification of “Lot 9” can be seen on the Maryland SDAT record (Exhibit 4) and on the certified site survey (Exhibit 10).

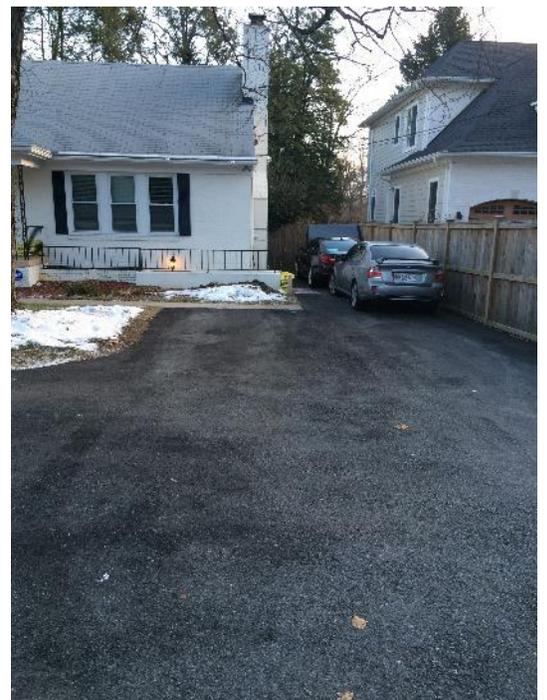
sits near the center of the front yard besides the parking area.

The Subject Site is well-lit; there is residential lighting by each basement entrance, the front door, the rear of the house to illuminate the back yard, and on the south side of the house by the driveway.

The site is depicted in an aerial photograph supplied by Technical Staff (Exhibit 35, p. 3):



The front of the home and part of the driveway and parking area are depicted below in photos taken by the Applicant (from Exhibit 15(a)):



The fenced-in rear yard is depicted in other photos from Exhibit 15(a):



**B. Surrounding Neighborhood**

For the purpose of determining the compatibility of the proposed use, it is necessary to delineate and characterize the “surrounding neighborhood” (*i.e.*, the area that will be most directly impacted by the proposed use). Staff proposed defining the boundaries of the surrounding neighborhood as “generally bounded by Greenlawn Drive to the north; Jarvis Lane to the south; the houses across from the Subject Site on Old Georgetown Road to the west; and Dickerson Avenue to the east . . .” (Exhibit 35, p. 3), and it is depicted below in a map from the Staff report (at p. 4).



The Hearing Examiner feels that Technical Staff may have defined the neighborhood a bit too broadly on the east, because the area likely to be most impacted probably extends only to Hunt Street, which is not labelled on Staff’s map. He reaches this conclusion because the proposed facility will have no visual impacts to the east, will create few new trips during the peak hours and will be located on a major state road (Old Georgetown Road), thus creating little traffic impact on the neighborhood side streets. The Hearing Examiner also notes that the street labelled by Staff as “Dickerson Avenue” on the east is actually Broad Street. The Hearing Examiner has therefore adopted a neighborhood aerial map from the “Bing Maps” site on the internet, and is hereby taking official notice of it, as it is depicted below:



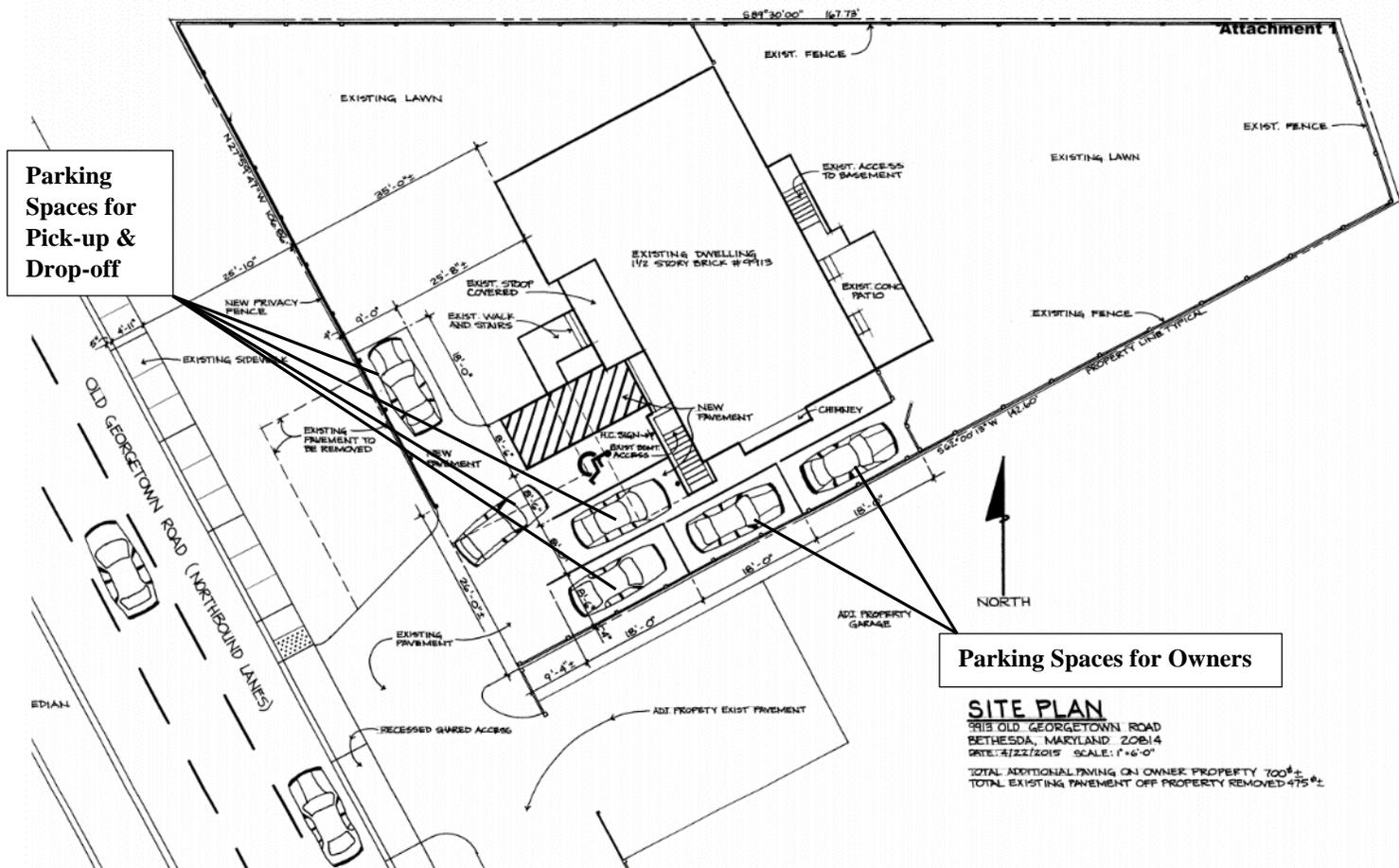
The Hearing Examiner’s defined neighborhood is generally bounded by Greenlawn Drive to the north; Jarvis Lane to the south; the houses confronting the Subject Site on Old Georgetown Road to the west (*i.e.*, Belhaven Road); and the houses on Hunt Street to the east. As with Technical Staff’s recommended neighborhood, the Hearing Examiner’s neighborhood is composed of R-60 zoned single-family residential properties and the Ratner Museum.

### C. Proposed Use

The Applicant currently operates a Family Day Care facility (for up to 8 children) in the walkout basement and rear yard of her home. The subject conditional use application seeks approval for a Day Care Center, pursuant to §3.4.4. E. of the Zoning Ordinance, for up to 20 children, ranging in age from six weeks to five years. She has operated her facility since January of 2010, currently with two employees, one full-time and one part-time. Applicant’s Statement of Operations (Exhibit 6) and Tr. 22.

#### 1. Site Plan, Access, On-Site Parking and Areas for Drop-off and Pickup of Children

The final site plan, reproduced below (Exhibit 31(a) and, in an enlarged version, Exhibit 41) shows the details of the proposed use, including the proposed site access, parking and the location for drop off and pick up of children.



Technical Staff noted the following external physical changes proposed for the site (Exhibit 35, p. 5),

The proposal includes removing the large Red Maple tree in the front yard to expand the parking facility from three spaces to six spaces (an additional 700 square feet) (figure 4). The tree will be replaced with a smaller tree that will be located near the expanded parking facility. In order to reduce the impact of the increased parking, the proposal includes installing a four-foot tall board-on-board privacy fence at the front boundary and thus completely enclosing the property (the side and rear lot lines already have a fence). The proposal also includes removal of the existing 450 square feet of pavement in the public right of way. Subject to Maryland State Highway Administration's approval, vegetation will be installed to stabilize the soil after the pavement is removed.

Applicant's attorney expanded on the proposed physical changes in his May 7, 2015 letter to Technical Staff (Exhibit 31):

Pursuant to the parking tables located in Section 6.2.4(B) of the Montgomery County Zoning Ordinance, the proposed Day Care Center must have a minimum of three parking spaces (including a handicapped space, *see* Section 6.2.3(A)). Ms. Hanlon plans on having 4 parking spaces to be used for her Child Care Center, one of which is already existing. . . .

The Site Plan [Exhibit 31(a), shown above] depicts a total of 6 spaces, but two of the spaces are tandem parking spaces along the side of the house to be used solely by Ms. Hanlon and her husband for their personal vehicles. New pavement will be installed for two new regular parking spaces and one handicapped parking space for use by the Child Care Center. . . . The last tandem parking spot closest to Old Georgetown Road will serve as the fourth and final parking spot for the Center. As can be seen from the Landscape Plan [Exhibit 31(b)], there is still a large amount of grass and green space in the front of Ms. Hanlon's home. The entirety of her front yard will not be taken up by pavement. . . .

As can also be seen on the Site Plan, there is pavement leading from the existing driveway towards the front of the property. That pavement exists on a Maryland State Highway right-of-way area. From the road, the pavement looks to be part of Ms. Hanlon's driveway. If necessary, and with the permission of the State, Ms. Hanlon can remove that paved area in order to decrease the total perceived area of pavement in the front of her home. If the pavement in the right-of-way is removed, and new pavement is installed for the three new parking spaces closer to the house, the perceived amount of pavement in front of Ms. Hanlon's home will look no different that it currently looks right now.

Most importantly, Ms. Hanlon is proposing to build a fence along the front

of her property, abutting Old Georgetown Road, in order to help shield the proposed new parking spaces from public view. The fence would be similar in nature to her neighbor's fence at 9911 Old Georgetown Road, which shields the paved driveway of that property from public view. . . .

## 2. Site Landscaping, Lighting and Signage

Applicant's Landscape Plan (Exhibit 31(b)), Applicant's attorney noted at the hearing, should more accurately be called a rendered site plan, as he denominated the larger version introduced at the hearing (Exhibit 42). Tr. 15. It is reproduced below:



Actually, Exhibits 31(b) and 42 appear to the Hearing Examiner to be more of a Landscape Plan than a Rendered Site Plan because they depict trees and shrubs that are not on the final site plan (Exhibit 31(a)). In any event the plan does show, as observed by Applicant's attorney, that the entirety of her front yard will not be taken up by pavement, as there will be large amount of grass and green space in the front of Ms. Hanlon's home. There are also ample

green areas to the north side of the home and in the rear yard. Technical Staff found that “Lighting and landscaping on the property are adequate. The lighting for the day care center is the existing lighting on the Subject Site. The lighting is located beside the front entrance to the house, the front entrance to the basement, and the rear entrance to the day care. All are 60 watts and do not intrude on neighboring properties.” Exhibit 35, p. 16. The Applicant confirmed that no changes are planned in the existing site lighting. Tr. 25.

Technical Staff did not address signage on the property. There is a small, freestanding, unilluminated sign along the frontage of the site, and it is depicted below (Exhibit 43):



The Applicant testified that there would be no changes in the site sign, which she asserts is no larger than two square feet. Tr. 25-26. There is no contrary evidence in the record, and the sign appears from the photograph to be approximately two square feet in size.

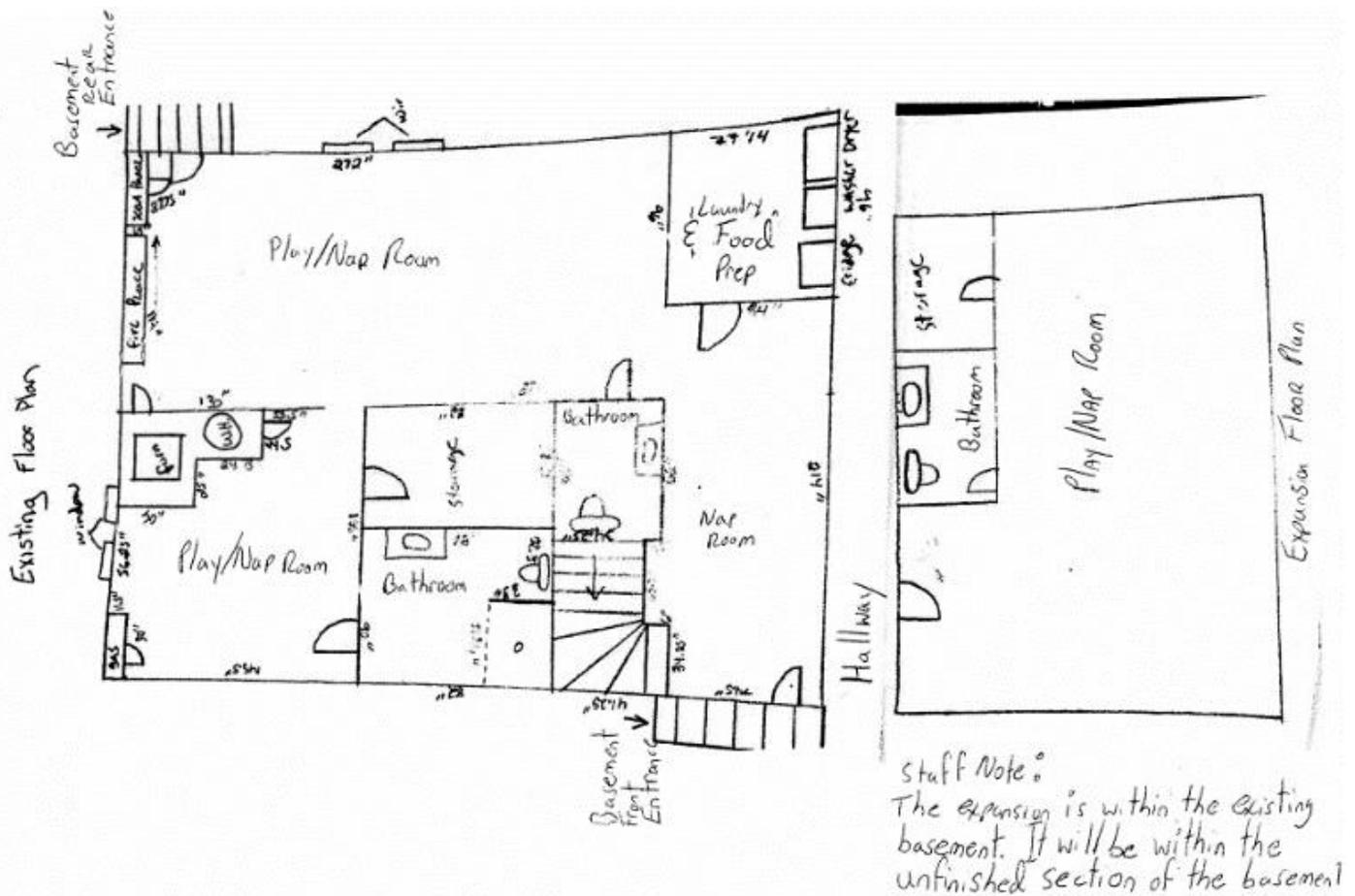
### 3. Internal Physical Arrangements for Site Operations

The proposed internal physical characteristics of the facility were summarized by

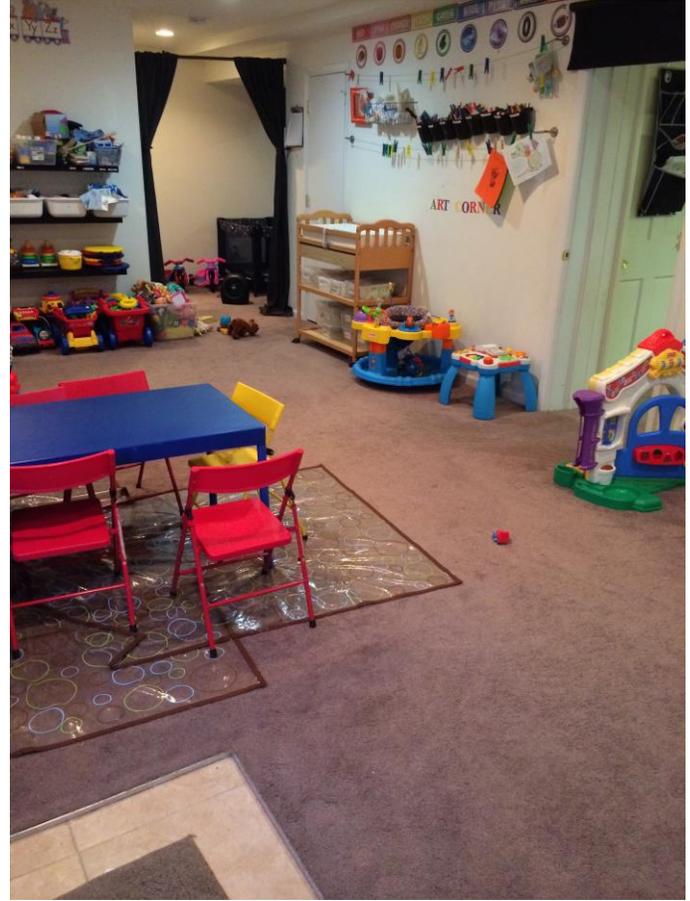
Technical Staff (Exhibit 35, p. 4):

The proposed day care center will be located in the basement of the house, where the existing day care is located . . . . In order to serve more children, the Applicant will increase the floor area of the existing basement from 800 square feet to 1,250 square feet by finishing a portion of the unfinished section of the basement, so the footprint of the house will not change. Currently, the existing day care contains a large and a small playroom/nap area, two bathrooms, a nap room, a storage area, and a food preparation room. The 450-square foot expansion will allow for an additional play/nap room, a storage room, and another bathroom. There are two existing entrances to the basement from outside: one is from the front yard and leads to the front of the large play/nap room; the other is from the rear yard and leads to the rear of the large play/nap room. These will continue to serve as the entrances to the center.

The Floor Plan (Exhibit 35, Attachment 4) is shown below:



The existing child care area is depicted in photographs supplied by the Applicant, two of which are reproduced below (from Exhibit 15(b)):



#### 4. Operations

Proposed operations were summarized by Technical Staff (Exhibit 35, p. 5)

The proposed day care center will operate Monday through Friday from 7:30 A.M. to 6:30 P.M. Parent drop-off and pick-up times will be staggered from 7:30 A.M. to 9:45 A.M. and from 3:30 P.M. to 6:15 P.M. There will be five staff members besides the Applicant, who lives on-site. The staff will either park on the side streets, Lone Oak Drive and Kirkwood Road, or use public transportation. There is a Metro bus stop near the Subject Site for the J2 and J3 buses, which provide service to the Bethesda and Silver Spring Metro stations.

The Applicant expanded on this formula in her Statement of Operations (Exhibit 6)):

My plan is to have the new room be a preschool room for children ages two and up, and the existing space will be an infant room. Based on child care regulations, I will

have eleven children in the preschool room at most. This complies with the 35 square feet per child regulation by child care regulations. I will have an infant/toddler room with at most nine children. I will need a total of five employees, if I am at full capacity. I plan to have two in the preschool room and three in the infant/toddler room. I will serve as the owner/director. I will implement the same policies, curriculum, and quality level that I have done in my existing child care. I would like to adjust my hours to be between 7:30 am and 6:30 pm. . . . I also think staying open an extra half hour may accommodate parents that work past 5 pm. As mentioned in my traffic statement, both staffing patterns and the child pickups and drop offs will be staggered. I will also be adding spaces to my driveway to accommodate the extra children and staff.

Ms. Hanlon specified in her “Traffic Statement” (Exhibit 7) how she planned to stagger the arrivals and departures of the children:

I keep attendance records with the time in and out for all children (8) on a daily basis. If I get approved for twenty children, there will be four staff. One will arrive at 7:30, one at 8:00, one at 8:30, and one at 8:45. One staff member will leave at 5:00 pm, one will leave at 5:30 pm, one at 6 pm, and one at 6:30 pm.

Children will arrive between 7:30 am and 10:00 am. I anticipate that five will come between 7:30 and 8. Between 8:00 and 8:30, five will come. Between 8:30 and 9:00 five will come and the other five will come between 9:30 and 10:00. Typical drop offs last between five and ten minutes. I do not anticipate more than three drop offs taking place at the same time.

For child pick ups, they will begin as early as 3:30 pm and end at 6:30 pm. I anticipate four children will get picked up between 3:30 pm and 4:00 pm. Five children will get picked up between 4:30 pm and 5 pm. Five children will get picked up between 5 pm and 5:30 pm. Three children will get picked up between 5:30 pm and 6 pm. The remaining three will get picked up between 6:00 pm and 6:30 pm. Pick up typically takes between five and ten minutes. I do not anticipate more than four pick ups in the same fifteen minute window.

Old Georgetown Rd is typically a busy road with a lot of commuter traffic. These pickups and drop offs should not impact traffic in a noticeable manner. . . .

The Applicant testified that her non-resident staff can park on Lone Oak Drive or Kingswood Road, to the north and south of the site, where there are no limits to parking. Tr. 39-40. The potential impacts of the expanded operations on the neighborhood and the transportation system will be discussed in Part III of this Report and Decision.

### **D. Community Response**

The application is supported by Ms. Hanlon's next-door neighbors (Tom and Phyllis Winterburn), whose daughter actually worked in the facility, and by another neighbor, Ann Atalla, whose child attended the facility for two years. Exhibits 26 and 27. Ms. Atalla indicated that there is a growing need for child care in the area, and the subject child care facility was well run. Moreover, the business has no noticeable effect on traffic and does not present any noise issues. Exhibit 26. The Winterburns also noted that traffic has not been a problem and they do not anticipate that added drop-offs and pickups will create any issues. They pointed out, as well, that the additional fencing will improve the outdoor appearance of the neighborhood. Exhibit 27. Letters of support were also filed by other users of the child care. Exhibits 31(e)(1) – (6). There has been no opposition to the application.

### **III. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

A conditional use is a zoning device that authorizes certain uses provided that pre-set legislative standards are met. Pre-set legislative standards are both specific and general. General standards are those findings that must be made for all conditional uses. *Zoning Ordinance*, §59.7.3.1.E. Specific standards are those which apply to the particular use requested, in this case, a child day care center for up to 20 children. *Zoning Ordinance* §59.3.4.4.E.

Weighing all the testimony and evidence of record under the “preponderance of the evidence” standard specified in *Zoning Ordinance* §59.7.1.1, the Hearing Examiner concludes that the conditional use proposed in this application, as governed by the conditions imposed in Part IV of this Report and Decision, would satisfy all of the specific and general requirements for the use.

### **A. Necessary Findings (Section 59.7.3.1.E.)**

The general findings necessary to approve a conditional use are found in Section 59.7.3.1.E of the Zoning Ordinance. Standards pertinent to this review, and the Hearing Examiner's conclusions for each finding, are set forth below:<sup>3</sup>

#### ***E. Necessary Findings***

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

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

Conclusion: Technical Staff advises that there are no previous land use approvals applicable to the property. Exhibit 35, p. 9. The existing 8-child facility is allowed by right. Therefore, the Hearing Examiner finds that this standard is inapplicable to the subject application.

*b. satisfies the requirements of the zone, use standards under Article 59-3, and applicable general requirements under Article 59-6;*

Conclusion: This subsection requires an analysis of the standards of the R-60 Zone contained in Article 59-4; the use standards for Child Day Care Centers for 13 to 30 Persons contained in Article 59-3; and the applicable development standards contained in Article 59-6. Each of these Articles is discussed below in separate sections of this Report and Decision (Parts III.B, C, and D, respectively). Based on the analysis contained in those discussions, the Hearing Examiner finds, as did Technical Staff (Exhibit 35, p. 9), that the application satisfies the requirements of Articles 59-3, 59-4 and 59-6.

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

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<sup>3</sup> Although §59.7.3.1.E. contains six subsections (E.1. through E.6.), only subsections 59.7.3.1.E.1., E.2. and E.3. contain provisions that apply to this application. Section 59.7.3.1.E.1. contains seven subparts, a. through g.

Conclusion: The subject property lies within the geographic area covered by the 1992 Approved and Adopted North Bethesda/Garrett Park Master Plan. As noted by Technical Staff (Exhibit 35, pp. 13-14), the Master Plan does not specifically discuss the subject site, but it supports having more child day care centers in the area. Staff quotes two sentences in this regard:

In general, the Plan endorses provision of child day care, group homes, elder day care, and nursing homes. (Plan p. 38.)

The Plan supports the provision of day care centers at Metro stations in the planning area and encourages the provision of child day care facilities at other appropriate locations. (Plan p. 245.)

Staff concludes that the area is appropriate for a day care center because there are no other child day care centers in the area and the subject site can accommodate the use. The Hearing Examiner agrees. The proposed use satisfies the five guidelines for special exceptions specified in the Master Plan (pp. 37-38):

1. Avoid excessive concentration of special exception and other nonresidential land uses along major highway corridors. . . .
2. Avoid over-concentration of commercial service or office-type special exception uses in residential communities. . . .
3. Protect major highway corridors and residential communities from incompatible design of special exception uses. . . .
4. Support special exception uses that contribute to the housing objectives of this Plan. . . .
5. Support special exception uses that contribute to the service objectives of the Plan.

The needs and objectives related to child day care and the elderly are discussed in the Community Facilities Chapter. In general, the Plan endorses provision of child day care, group homes, elder day care, and nursing homes.

There is one area of concern raised by the Master Plan affecting this proposal – front yard parking. The Master Plan (at p. 38) recommends that “Front yard parking should be avoided

because of its commercial appearance; however, in situations where side or rear yard parking is not available, front yard parking should be allowed only if it can be comprehensively landscaped and screened.”

Applicant’s attorney argues (Exhibit 31, p. 4):

In this case it is clear that additional side and rear parking is not available on Ms. Hanlon’s lot. The rear of her lot is currently used as “outdoor play space” for the daycare, a necessity for daycare facilities. One side of the home already has limited side parking. The other side of the home would require a second entrance to Old Georgetown Road, or even more pavement in the front of the home, in order to allow additional side parking. Since additional side and rear parking is not available, front yard parking should be allowed “if it can be comprehensively landscaped and screened.” As can be seen from the attached Site and Landscape Plans, Ms. Hanlon will be installing a fence in the front of the yard to screen the additional front yard parking. Further, two fences and some landscaping already exist on both sides of her property to screen the additional parking from her neighbors. The new parking spaces will be “comprehensively landscaped and screened.”

Technical Staff does not disagree (Exhibit 35, pp. 13-14):

The proposed parking facility will be expanded in the front yard by approximately 700 square feet because the existing parking facility on the south side of the Subject Site is not large enough to accommodate the additional three spaces needed to meet the day care center’s needs. Parking on the north side of the Subject Site would require more extensive paving and a second access would need to be created on Old Georgetown Road. The rear yard is the location of the day care’s play area. On-street parking is prohibited on Old Georgetown Road.

The proposal is for a minimal expansion of an existing parking area to allow the day care center adequate parking spaces and safe circulation for turnaround movement to enter and exit the Subject Site. A vehicle exiting the Subject Site will be able to back out of the site and turnaround using the driveway apron that the Subject Site shares with the adjacent 9911 Old Georgetown Road neighbor. The driveway apron is located in the public right-of-way in front of the two properties.

The Master Plan requires landscaping and screening for a front yard parking facility. The landscape plan for the project shows that there will be grass and a small tree located on the parking facility’s north side and a board-on-board fencing on the south and front sides. The proposal includes measures to reduce the impact of having a front yard parking facility and requests review under the Alternative Compliance section to excuse not having a landscaping perimeter around the parking facility. The proposal also includes removing the 450 square feet of paving being used as parking area in the public right-of-way.

Staff is satisfied that this improvement and screening will allow for the proposal to be in conformance with the Master Plan.

The Hearing Examiner agrees. “Alternative Compliance,” as permitted in §59.6.8.1 and discussed below in connection with the requirements of Article 59-6, is appropriate to allow the proposed additional screening for the parking area. Technical Staff accepts the use of “Alternative Compliance,” for the parking area in the front of the home, but not for the rear yard. See email exchange in Exhibit 49. That issue will also be discussed below in connection with Article 59-6 requirements. Suffice it to say, at this point, that all the evidence supports the conclusion that the proposed use “substantially conforms with the recommendations of the applicable Master Plan.”

***d. is harmonious with and will not alter the character of the surrounding neighborhood in a manner inconsistent with the plan;***

Conclusion: Technical Staff found that the proposed use meets this standard (Exhibit 35, p. 14):

The proposal is harmonious with, and will not alter the character of, the surrounding neighborhood in a manner inconsistent with the Master Plan, which supports having a day care use in the area. As discussed above, the Master Plan permits front yard parking as long as it is properly screened and landscaped. The proposal includes adequate screening and landscaping if the parking perimeter requirement is reviewed under the Alternative Compliance section of the Zoning Ordinance.

The Hearing Examiner notes that the proposed use “*is harmonious with and will not alter the character of the surrounding neighborhood*” because it will remain a single-family, detached residence in a neighborhood of single-family, detached residences, and no external modifications to the structure or the lighting are planned. Applicant introduced an extensive photographic record demonstrating that the front yard configuration planned for this use is not unusual for the neighborhood along Old Georgetown Road. Exhibit 31(d).

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

Conclusion: Staff confirmed that there are no other approved conditional uses in the Staff-defined neighborhood (which is even more inclusive than the Hearing Examiner defined neighborhood). Thus, the Hearing Examiner finds that this standard has been met.

***f. will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage, and other public facilities. If an approved adequate public facilities test is currently valid and the impact of the conditional use is equal to or less than what was approved, a new adequate public facilities test is not required. If an adequate public facilities test is required and:***

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

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

Conclusion: The application does not require approval of a preliminary plan of subdivision.

Exhibit 35, p. 15. Therefore, the Hearing Examiner must determine whether the proposed development will be served by adequate public services and facilities. Technical Staff determined that “There are adequate public services and facilities on the site.” Exhibit 35, p. 15.

There is no evidence in the record to dispute that conclusion. By its nature, the proposed

use, within an existing single-family residence, will not create additional burdens for schools, police and fire protection, water, sanitary sewer and storm drainage. Thus, the single area of increased demand on public facilities will be on transportation services. Technical Staff analyzed that impact in accordance with Local Area Transportation Review (LATR) and Transportation Policy Area Review (TPAR), as set forth in Exhibit 35, pp. 6-9 and Attachment 6. With regard to LATR, Staff stated (Exhibit 35, p. 8):

The Applicant submitted a traffic statement describing the proposed operation for 20 children. The non-residential employees who drive are proposed to park their vehicles on Lone Oak Drive or Kingswood Road. It is anticipated that three non-residential employees will commute by bus, although as a worst case scenario, all non-residential employees are assumed to drive their own vehicles. The tables below show the traffic projections generated by the expanded day care center during the weekday morning peak-period (6:30 to 9:30 a.m.) and the evening peak-period (4:00 P.M. to 7:00 P.M.):

AM Time/ Type of Trip	7:15	7:30	7:45	8:00	8:15	8:30	8:45	9:00	9:15	9:30	9:45
Staff	1	1	0	0	0	0	1	1	0	1	0
Parents	0	4	6	6	4	6	4	4	2	2	2
Both	1	5	6	6	4	6	5	5	2	3	2
Highest AM Peak-Hour	22					Total Vehicle Trips					

PM Time/ Type of Trip	3:45	4:00	4:15	4:30	4:45	5:00	5:15	5:30	5:45	6:00	6:15	6:30
Staff	0	0	1	0	0	0	0	1	1	1	0	1
Parents	4	0	0	4	6	4	6	2	4	2	2	0
Both	4	0	1	4	6	4	6	3	5	3	2	1
Highest PM Peak-Hour	20					Total Vehicle Trips						

Technical Staff concluded (Exhibit 35, p. 9):

A traffic study was not required to satisfy the LATR test because the proposed expansion generates fewer than 30 total peak-hour trips within the weekday morning and evening peak periods.

As to Transportation Policy Area Review, Technical Staff found that “a TPAR payment of the transportation impact tax will not be required because the square footage of the existing single-family residential unit will not be expanded to accommodate the increase in the number of children in the child care center.” Exhibit 35, Attachment 6, p. 4.

In sum, both LATR and TAPR are satisfied in this case, and the Hearing Examiner finds that the proposed development will be served by adequate public services and facilities.

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

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

Conclusion: This standard requires consideration of the inherent and non-inherent adverse effects of the proposed use, at the proposed location, on nearby properties and the general neighborhood. *Inherent adverse effects* are “adverse effects created by physical or operational characteristics of a conditional use necessarily associated with a particular use, regardless of its physical size or scale of operations.” Zoning Ordinance, §59.1.4.2. *Non-inherent adverse effects* are “adverse effects created by physical or operational characteristics of a conditional use not necessarily associated with the particular use or created by an unusual characteristic of the site.” *Id.* As specified in §59.7.3.1.E.1.g., quoted above, non-inherent adverse effects in the listed categories, alone or in conjunction with inherent effects in those categories, are a sufficient basis to deny a conditional use. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception.

Analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a child care facility. Characteristics of the proposed use that are consistent with the characteristics thus identified will be considered inherent adverse effects. Physical and operational characteristics of the proposed use that are not consistent with the characteristics identified *or* adverse effects created by unusual site conditions, will be considered non-inherent adverse effects. The inherent and non-inherent effects then must be analyzed, in the context of the subject property and the general neighborhood, to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. Exhibit 35, p. 15. Staff also determined that the following physical and operational characteristics are necessarily associated with (*i.e.*, are inherent in) a child day care facility: (1) vehicular trips to and from the site; (2) outdoor play areas; (3) noise generated by children; (4) drop-off and pick-up areas; and (5) lighting.

Staff analyzed the potential impacts on the neighborhood as follows (Exhibit 35, pp. 15-16):

The proposed conditional use will generate fewer than thirty new trips so it will not significantly impact traffic. The Applicant proposes to continue using the rear yard as an outdoor play area but will add more equipment to it. The play area is adequate and the Applicant will limit the amount of children outside to no more than ten at a time. The infant group will be outside between 9:00 A.M to 10:00 A.M. and again from 12:00 P.M. to 1:00 P.M. The older children will be outside between 10:00 A.M to 11:00 A.M. and again between 4:00 P.M. to 5:00 P.M. The scheduled play times are during hours when many in the neighborhood will likely not be in their residences so the noise generated from the ten children playing outside will have little negative impact on nearby neighbors. The drop-off and pick-up area will be the expanded parking lot but it will be screened with a four-foot tall fence.

Lighting and landscaping on the property are adequate. The lighting for the day care center is the existing lighting on the Subject Site. The lighting is located beside the front entrance to the house, the front entrance to the basement, and the rear entrance to the day care. All are 60 watts and do not intrude on neighboring properties.

A large red maple tree will be removed and an alternative compliance is being requested to be excused from not having a planting area around the parking facility's perimeter. However, the four-foot fence will provide screening.

Based on this analysis, Staff concluded that “the proposal will not have any non-inherent effects at this location.” Exhibit 35, p. 16.

The Hearing Examiner does not agree with Staff's conclusion that there are no non-inherent effects or site characteristics at this location. There is no evidence in this record demonstrating that a child care facility for up to 20 is necessarily associated with a single-family home in the R-60 Zone, which can have lot sizes as small as 6,000 square feet. The very fact that “Alternative Compliance” is needed to satisfy the screening requirements for the needed parking suggests that the site conditions are not inherent in this type of facility. Moreover, the need for a fence in the front yard of a single-family residence to provide screening cannot be said to be necessarily associated with a child care facility.

However, these observations do not mean that the conditional use must be denied. This particular site is on a major road (Old Georgetown), and added traffic along such a route is much less likely to adversely affect the neighbors. According to the review by Technical Staff, the cars entering and exiting the site will also not create a safety problem. As stated by Technical Staff (Exhibit 35, pp. 6-7),

Vehicles entering and leaving the site's driveway should have adequate site [*sic*]<sup>4</sup> distance because it is located on a straight segment of Old Georgetown Road and the distance between the edge of the paved travel way and right-of-way line is approximately 35 feet even if a parking lot buffer is provided along the property. . . .

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<sup>4</sup> Technical Staff clearly meant to say “sight distance,” not “site distance.”

There are signalized intersections along Old Georgetown Road to the north of the Subject Site, at Lone Oak Drive (west leg) at Manor Oak Way intersection, and to the south of the Subject Site, at the T-intersection with Kingswood Road. These traffic signals allow for gaps in traffic flow for parents to safely enter and exit the Subject Site's driveway.

Furthermore, a four-foot tall fence in the front yard in this location is not as likely to be a visual issue as it might be if the site were located further inside the neighborhood, as demonstrated by some of the photographs included in Exhibit 31(d), where other front yard fences can be seen along Old Georgetown Road.

Finally the support from Applicant's neighbors (Exhibits 26 and 27) and the lack of any opposition to this proposal are evidence that the expansion of this child care facility at this location is not likely to have undue adverse effects on the neighborhood in any of the categories listed in §59.7.3.1.E.1.g (*i.e.*, the use, peaceful enjoyment, economic value or development potential of abutting and confronting properties or the general neighborhood; traffic, noise, odors, dust, illumination, or a lack of parking; or the health, safety, or welfare of neighboring residents, visitors, or employees).

Based on the entire record, the Hearing Examiner finds that, with the conditions imposed in Part IV of this Report and Decision, the proposed use will not cause undue harm to the neighborhood as a result of non-inherent adverse effects alone or the combination of inherent and non-inherent adverse effects in any of the categories listed in §59.7.3.1.E.1.g.

2. *Any structure to be constructed, reconstructed, or altered under a conditional use in a Residential Detached zone must be compatible with the character of the residential neighborhood.*

Conclusion: As observed by Technical Staff (Exhibit 35, p. 16), the proposal is for a day care center in an existing house; it will not construct, reconstruct, or alter the outside appearance of the house. The expansion of the basement for the day care center will not change the building

footprint of the house, and there is already a six-foot, board-on-board fence enclosing the rear yard. Thus, the only structural change is the proposed four-foot tall, board-on-board privacy fence to screen the parking facility. The fence will be a residential privacy fence, and there is a similar board-on-board privacy fence on the neighboring property next to the subject site. The Hearing Examiner therefore agrees with Staff's conclusion that the proposed fence to screen the parking area will be compatible with the neighborhood.

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

Conclusion: The application satisfies all specific requirements for the conditional use, and as discussed above, the proposed use will be compatible with the neighborhood. The Hearing Examiner concludes that, with the conditions imposed in Part IV of this Report and Decision, the conditional use should be approved.

#### **B. Development Standards of the Zone (Article 59.4)**

In order to approve a conditional use, the Hearing Examiner must find that the application meets the development standards of the zone where the use will be located – in this case, the R-60 Zone. Development standards for the R-60 Zone are contained §59.4.4.9.B of the Zoning Ordinance. Staff compared the minimum development standards of the R-60 Zone to those provided by the application in a Table included in the Staff Report (Exhibit 35, p. 10), reproduced on the following page. Only the portion of the Table that pertains to the standards of the R-60 Zone under Article 59-4 is reproduced in this section. The remainder of the Table concerns development standards set forth in Article 59-6, and those standards will be discussed on Section III.D. of this Report and Decision.

<b>Development Standards</b>	<b>Required/Permitted</b>	<b>Proposed</b>
Minimum Lot Area: (Section 59.4.4.9.B.1)	6,000 sq. ft.	9,787 sq. ft.
Minimum Lot Width at Front Building Line (59-C-1.322)	60 feet	±88 feet
Minimum Lot Width at Front Lot Line (Section 59.4.4.9.B.1)	25 feet	±106.86 feet
Maximum Density (Section 59.4.4.9.B.1, 7.26 units/acre)	1.63 units (7.26 dwelling units/acre)	1 unit
Maximum Lot Coverage (Section 59.4.4.9.B.1)	35 percent	±22.7%
Minimum Front Setback (Section 59.4.4.9.B.2)	25 feet	±30 feet
Minimum Side Street Setback (Section 59.4.4.9.B.2)	15 feet	NA
Minimum Side Setback (Section 59.4.4.9.B.2)	8 feet	8 feet
Minimum Sum of Side Setbacks (Section 59.4.4.9.B.2)	18 feet	±21 feet
Minimum Rear Setbacks	20 feet	±80 feet
Maximum Height	30 feet	±18 feet

Conclusion: As can be seen from the above Table, the proposed use more than meets all the development standards of the R-60 Zone, as provided in Zoning Ordinance §59.4.4.9.B.

**C. Use Standards for a Child Day Care Center for 13 to 30 Persons (Section 59.3.4.4.E.2.)**

The specific use standards for approval of a Child Day Care Center for 13 to 30 Persons are set out in Section 59.3.4.4.E.2. of the Zoning Ordinance. Standards applicable to this application are:

***2. Use Standards***

***Where a Day Care Center (13-30 Persons) is allowed as a conditional use, it may be permitted by the Hearing Examiner under Section 7.3.1, Conditional Use, and the following standards:***

***a. The facility must not be located in a townhouse or duplex building type.***

Conclusion: This proposal is for a day care center in a single-family, detached house, and is therefore compliant.

***b. An adequate area for the discharge and pick up of children is provided.***

Conclusion: Conditions provided in Part IV of the Report and Decision prohibit residents and staff from occupying the four parking spots designated for pick-up and drop-off of children during the relevant periods, and require staggered pick-up and drop-off times for the children so that there will be no more than six vehicle arrivals per hour. With those conditions, Technical Staff determined that the proposed four-space parking area is adequate for the discharge and pick-up of up to 20 children. There is no evidence to the contrary, and the Hearing Examiner so finds.

***c. The number of parking spaces under Division 6.2 may be reduced if the applicant demonstrates that the full number of spaces is not necessary because:***

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

Conclusion: Not Applicable. The proposal does not request a parking space reduction.

***d. For a Family Day Care where the provider is not a resident and cannot meet the non-resident provider requirement, screening under Division 6.5 is not required.***

Conclusion: Not Applicable. The proposal is for a Day Care Center, not a Family Day Care.

***e. In the AR zone this use may be prohibited under Section 3.1.5, Transferable Development Rights.***

Conclusion: Not Applicable. The subject site is in the R-60 Zone.

Conclusion: In sum, the application satisfies all of the use standards in Code §59.3.4.4.E.2.

**D. General Development Standards (Article 59.6)**

Article 59.6 sets the general requirements for site access, parking, screening, landscaping, lighting, and signs. The applicable requirements, and whether the use meets these requirements, are discussed below.

**1. Site Access Standards**

The vehicular access to the subject site is the existing shared driveway from Old Georgetown Road between the subject site and the adjacent neighbor at 9911 Old Georgetown Road. Exhibit 35, p. 6.

Conclusion: Zoning Ordinance Division 59.6.1. governs Site Access; however, by its own terms, as stated in §59.6.1.2., Division 59.6.1 does not apply to development in single-family residential zones, such as the R-60 Zone involved in this case.

**2. Parking Spaces Required, Parking Setbacks and Parking Lot Screening**

The standards for the number of parking spaces required, parking setbacks and parking lot screening are governed by Division 6.2 of the Zoning Ordinance. The applicable standards are referenced in the bottom half of the Table on page 10 of the Staff report (Exhibit 35):

<b>Parking Requirement (Section 59.6.2.4)</b>	Day care: 4 (3/1000 sq. ft.) Dwelling: 2	Day care: 4 Dwelling: 2
<b>Minimum Parking Setbacks</b>		
Minimum Parking Side Setback (Section 59.6.2.5.K.2)	16 feet	0*
Minimum Sum of Parking Side Setback (Section 59.6.2.5.K.2)	36 feet	±55 feet
Minimum Rear Setback (Section 59.6.2.5.K.2)**	20 feet**	±80 feet
Minimum Parking Front Setback (Section 59.6.2.9)	8 feet	0*
Minimum Planting Area around Parking Perimeter (Section 59.6.2.9)	8 feet	0*

\*The Applicant is requesting to be reviewed under the Alternative Compliance section of the Zoning Ordinance

\*\* The Hearing Examiner has corrected Staff’s Table regarding the Code citation and required rear setback.

***a. Number of Parking Spaces Required by Section 59.6.2.4***

As can be seen from the above Table, Section 59.6.2.4 of the Zoning Ordinance requires a total of 6 parking spaces for the subject site (2 spaces for the single-family dwelling unit and 4 for the child-care facility). The parking for a Day Care Center is calculated by applying the specified baseline minimum of 3 spaces per 1,000 square feet of gross floor area to the actual gross floor area planned for the use.

Conclusion: After the Applicant completes the expansion of her basement floor area, she will have a gross floor area of 1,250 square feet. Applying the baseline minimum to the enlarged area calls for a total of 3.75 parking spaces, which rounds up to 4 spaces. The Applicant complies by providing 4 on-site parking spaces for the conditional use and 2 for the residence.

***b. Parking Setbacks, Screening and Landscaping***

Applicable parking lot setbacks and landscaping to screen the parking area are specified in two sections, Zoning Ordinance §59.6.2.5.K.2 and §59.6.2.9.B. Those requirements and Applicant's compliance are referenced in the above table. As can be seen there, the Applicant is requesting that the proposed parking facility's front and side setbacks and screening/landscaping requirements be reviewed under Section 59.6.8.1 of the Zoning Ordinance, which allows "Alternative Compliance" under specified circumstances.

Section 59.6.8.1 provides:

*The applicable deciding body may approve an alternative method of compliance with any requirement of Division 6.1 through Division 6.6 if it determines there are unique site or development constraints, such as grade, visibility, an existing building or structure, an easement, a utility line, or use restrictions that preclude safe or efficient development under the requirements of the applicable Division and the alternative design will:*

- A. satisfy the intent of the applicable Division;*
- B. modify the applicable functional results or performance standards the minimal amount necessary to accommodate the constraints;*

- C. provide necessary mitigation alleviating any adverse impacts; and*
- D. be in the public interest.*

In his May 7, 2015 letter to Technical Staff (Exhibit 31), Applicant's attorney justified the proposed fence along the front of the subject property, abutting Old Georgetown Road, in order to help shield the proposed new parking spaces from public view:

. . . This fence at the front of her property, as well as the existing fences on both sides of Ms. Hanlon's property (abutting both neighbors' properties), satisfy the screening requirements contained in Section 6.2.9(B)(1)(b) of the Montgomery County Zoning Ordinance.

While the new parking spaces may not meet "the minimum specified parking setback under Article 59-4," as required by Section 6.2.9(B)(1)(a), we request that the Hearing Examiner allow an Alternate Method of Compliance for the setback issues in accordance with Section 6.8.1 of the Zoning Ordinance . . .

In this case, Ms. Hanlon's driveway is already existing, and the new parking spaces are toward the middle of her property and do not in any way reduce the setback (or lack thereof) that exists between her property and her neighbors' properties. Her existing driveway cannot be moved and the new design, as shown in the Site Plan, satisfies the parking requirements in Section 6.2.4(B) and modifies the look of the current driveway in the minimal amount necessary to accommodate the constraints. Further, the installation of the new fence at the front of her property and the two existing fences on the sides of her property provide mitigation to alleviate any adverse impacts from the new parking spaces. Lastly, as will be discussed below, the allowance of Child Care Centers is encouraged by the Master Plan and is within the public interest.

Technical Staff discusses this issue on pages 11-12 of the Staff report (Exhibit 35):

The proposed parking facility is an expansion of an existing parking area. The Applicant is requesting that it be reviewed under the Alternative Compliance section because it does not comply with Section 6.2.5, parking setback requirement, and Section 6.2.9 parking setback and landscaping requirements. According to Section 6.2.5, the minimum required side setback for a conditional use parking facility is 16 feet. The existing parking area was built up to the property line on the south side, so it is within the side setback. Section 6.2.9 requires an 8-foot wide minimum setback along the perimeter of the parking area. The existing parking area does not have a front setback as it extends past the front yard property line and into the public right-of-way along Old Georgetown Road. Without a setback in the front and sides, the proposal is unable to comply with the Section 6.2.9 requirement for a setback along its perimeter.

Staff finds that the proposed facility will address the four criteria of this section as follows:

- A. It will meet the intent of Sections 6.2.5 and 6.2.9 (to reduce the impact of a commercial parking facility on the surrounding residential neighbors) by removing existing pavement at the front of the property, and providing a new fence and plantings along the property's frontage to enhance its appearance and screen the new parking facility from the surrounding properties
- B. It will modify the existing parking facility (constructed prior to the Applicant's ownership of the Subject Site) in the minimal amount necessary to achieve the required parking spaces for the proposed day care center. The Applicant is expanding the existing parking facility by 700 square feet rather than removing it entirely and reconstructing it to comply with Section 6.2.5 and Section 6.2.9 requirements.
- C. It will provide necessary mitigation to alleviate the adverse impacts it may cause to surrounding neighbors by removing the existing pavement in the public right of way, and installing a four-foot tall fence, along the Subject Site's front boundary, which will screen the proposed parking facility. The Applicant already has a 6-foot tall board-on-board privacy fence along the side property line that screens the parking facility from the neighboring property.
- D. The proposed facility will be in the public interest by providing a desired use supported by the Master Plan and by providing a service which is in demand in the area.

Staff finds that, with the proposed improvements, the parking facility complies with the Alternative Compliance section.

Conclusion: The Hearing Examiner agrees with Technical Staff's analysis and conclusion, and hereby finds that Alternative Compliance under Zoning Ordinance §59.6.8.1. is appropriate for determining setbacks and landscaping/screening for the parking area for the reasons stated by Staff and quoted above. Based on that analysis, the Hearing Examiner finds that Applicant's proposed setbacks and landscaping/screening for the parking area are compliant with Division 6.2 of the Zoning Ordinance.

### **3. Site Landscaping, Screening and Lighting**

Standards for site landscaping and lighting are set forth in Division 6.4 of the Zoning Ordinance, and the standards for screening are set forth in Division 6.5. The stated intent of

Division 6.4 is “to preserve property values, preserve and strengthen the character of communities, and improve water and air quality.” §59.6.4.1. The stated intent of Division 6.5 is “to ensure appropriate screening between different building types and uses.” Zoning Ordinance §59.6.5.1. These site screening and landscaping requirements are in addition to those that apply to screening and landscaping of parking facilities discussed above.

***a. Lighting***

The issue of lighting is easily disposed of because, by its own terms, Division 6.4 does not apply to existing, unmodified lighting. §59.6.4.2. provides:

*Division 6.4 applies to landscaping required under this Chapter, the installation of any new outdoor lighting fixture, and the replacement of any existing outdoor fixture. Replacement of a fixture means to change the fixture type or to change the mounting height or location of the fixture. [Emphasis added.]*

Conclusion: As previously noted, there will be no new lighting or modified lighting on the subject site. Tr. 25. Thus, the provisions of Division 6.4 regarding lighting do not apply to this case. That is not to say that lighting on the subject site is unregulated. As discussed above, Zoning Ordinance §59.7.3.1.E.1.d. requires a finding that the proposed use will be harmonious with the surrounding neighborhood and §59.7.3.1.E.1.g.ii. requires a finding that the proposed use will not cause undue harm to the neighborhood due to “illumination,” among other factors. Those findings were made in Part III.A. of this Report and Decision, and reflect Technical Staff’s finding that the lighting will “. . . not intrude on neighboring properties.” Exhibit 35, p. 16.

***b. Site Screening and Landscaping***

The issues of site landscaping and screening in the rear and side yards are more complicated than the lighting issues. The provisions of Division 6.4 are mostly general and definitional; however, the provisions of Division 6.5 are very specific. Zoning Ordinance §59.6.5.2.B. provides:

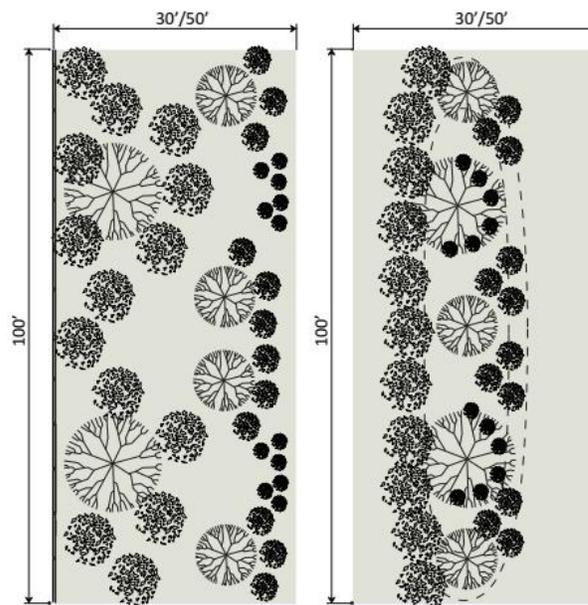
*In the Agricultural, Rural Residential, and Residential Detached zones, a conditional use in any building type must provide screening under Section 6.5.3 if the subject lot abuts property in an Agricultural, Rural Residential, or Residential Detached zone that is vacant or improved with an agricultural or residential use.*

1. *The conditional use standards under Article 59-3 may exempt the development from this requirement.*
2. *The Hearing Examiner may increase the amount of screening required for conditional use approval under Section 7.3.1. [Emphasis added.]*

Turning to the requirements of Section 6.5.3., referenced in the above-quoted section, the subject site is covered by Subsection 6.5.3.C.7., which provides:

*7. General Building with a Non-Industrial Use; Conditional Use in the Agricultural, Rural Residential, or Residential Detached Zones; and Conditional Use in a Detached House or Duplex in Any Other Zone*

	Option A	Option B
<b>Dimensions (min)</b>		
Depth	8'	12'
<b>Planting and Screening Requirements</b>		
Trees (minimum per 100')		
Canopy	2	2
Understory or Evergreen	2	4
Shrubs (minimum per 100')		
Large	6	8
Medium	8	12
Small	8	--
Wall, Fence or Berm (min)	4' fence or wall	--



As is apparent, Section 6.5.3.C.7. gives two options, but within those options, the minimums are strictly prescribed by numbers and sizes of trees and shrubs. A four-foot tall fence (or greater) is allowed under Option A, but Technical Staff opined that the provision does not allow the fence to substitute for the required trees and shrubs, even if it is a six-foot tall, board-on-board fence that will screen the site and will obscure any of the shrubs behind it. As stated by Staff, “The landscaping requirements within the option are cumulative.” Exhibit 45.

In response, Applicant requested that the rear and side yard landscaping and screening be evaluated under the “Alternative Compliance” provision (§6.8.1) discussed and quoted in the previous section of this Report and Decision. Mr. Abrams’ email included a lengthy justification for applying the Alternative Compliance methodology to this case. Exhibit 46. Technical Staff responded, disagreeing with Applicant and asserting that the Alternative Compliance Methodology should not be applied in this case because it does not, in Staff’s opinion, satisfy the criterion of “. . . *unique site or development constraints, such as grade, visibility, an existing building or structure, an easement, a utility line, or use restrictions that preclude safe or efficient development under the requirements of the applicable Division . . .*” Exhibit 47.

Staff’s response elicited a further email exchange on the subject, as contained in Exhibit 49. In sum, Technical Staff’s position is that it is just following the specific language of the Zoning Ordinance, and Applicant’s position is that Staff is interpreting the Code contrary to its stated intent “*to ensure appropriate screening . . .*” (§59.6.5.1.), and is instead requiring the Applicant to do a useless thing – to add shrubs that would serve no purpose because they would be hidden by the existing six-foot tall board-on-board fence.

Conclusion: Although the Hearing Examiner appreciates Technical Staff’s effort to ensure compliance with the language of the new Zoning Ordinance, he concludes that Applicant’s

argument is more persuasive – the intent of the site screening and landscaping provisions could not have been to require applicants to plant additional shrubs that would not add to the actual screening because they would be obscured by the existing six-foot tall board-on-board fence. As pointed out by Applicant’s counsel, the intent of Division 6.5 is “*to ensure appropriate screening*” (§59.6.5.1), not to require the addition of bushes that would provide no screening.

It is true that, usually in statutory construction, specific language governs over general language (*Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-385) (1992); however legislation should never be interpreted so as to compel “absurd results.” *Public Citizen v. U.S. Dept. of Justice*, 491 U.S. 440, 453-454, 109 S.Ct. 2558, 2566-2567 (1989). As the Supreme Court stated in the *Public Citizen* case, 491 U.S. at 454,

Where the literal reading of a statutory term would “compel an odd result,” *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 509, 109 S.Ct. 1981, 1984, 104 L.Ed.2d 557 (1989), we must search for other evidence of congressional intent to lend the term its proper scope. [citing also, *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 and 472 (1892).]

Since interpreting Section 59.6.5.3.C.7. as Staff has would lead to the “absurd result” of compelling the applicant to add shrubs for screening even though they could not be seen from outside the property and therefore could not provide any screening, the Hearing Examiner finds that such an interpretation is contrary to the stated intent of Division 6.5 of the Zoning Ordinance.

Moreover, aside from the questioned language of Section 59.6.5.3.C.7., Technical Staff had found that the subject site was “well-landscaped” (Exhibit 35, p. 2) and that “. . . landscaping on the property [was] adequate” (Exhibit 35. P. 16). This conclusion is not surprising because we are talking in this case about a proposed child care use within a single-family detached dwelling and its back yard. None of the children could possibly be seen by the neighbors over

the existing six-foot tall board-on-board fence. The only reasonable conclusion is that the screening proposed for this use is adequate. Therefore, the Hearing Examiner finds that the site landscaping and screening, which include existing trees, shrubs and an existing six-foot tall board-on-board fence, meet the requirements of Division 6.5 of the Zoning Ordinance.

A few additional words should be said about the application of Alternative Compliance methods to evaluating site landscaping and screening, in accordance with Zoning Ordinance §59.6.8.1. As mentioned above, Technical Staff could not agree to apply the Alternative Compliance methodology because it found that the circumstances did not satisfy the statutory criterion of “. . . unique site or development constraints, such as grade, visibility, an existing building or structure, an easement, a utility line, or use restrictions that preclude safe or efficient development under the requirements of the applicable Division . . .” Exhibit 47. The Hearing Examiner disagrees with Staff on this point. The existing six-foot tall board-on-board fence qualifies as a development constraint (an existing structure) that would preclude efficient development under the requirements of Section 6.5.3.C.7., if that section is interpreted as requiring additional shrubs that could not actually be seen behind the fence. The alternative design proposed would satisfy the four criteria listed in the Section 6.8.1:

- A. It would satisfy the intent of the Division 6.5 for the reasons outlined above;
- B. It would modify the applicable functional results the minimal amount necessary to accommodate the constraints by maintaining a complete visual barrier to screen the activities in the back yard, in addition to existing trees and bushes called for in the section;
- C. It would provide necessary mitigation alleviating any adverse impacts for the same reasons indicated in answer to criterion “B”; and
- D. be in the public interest by providing an additional child care facility as called for in the Master Plan.

In sum, the Hearing Examiner concludes that it would be appropriate to apply the Alternative Compliance methodology to this case, and he finds, upon applying it, that the proposed site screening and landscaping satisfy the requirements of Article 59-6.<sup>5</sup>

#### **4. Signage**

The use of signage is governed by Division 6.7. Technical Staff did not address signage on the property. There is a small, freestanding, unilluminated sign along the frontage of the site, and it is depicted on page 12 of this Report and Decision. The Applicant testified that there would be no changes in the site sign, which she asserts is no larger than two square feet. Tr. 25-26. There is no contrary evidence in the record, and the sign appears from the photograph (Exhibit 43) to be approximately two square feet in size. Zoning Ordinance §59.6.7.8.A.1 sets the standards for signs in Residential Zones:

##### ***A. Base Sign Area***

*The maximum total area of all permanent signs on a lot or parcel in a Residential zone is 2 square feet, unless additional area is permitted under Division 6.7.*

##### ***1. Freestanding Sign***

- a. One freestanding sign is allowed.*
- b. The minimum setback for a sign is 5 feet from the property line.*
- c. The maximum height of the sign is 5 feet.*
- d. Illumination is prohibited.*

Conclusion: The Hearing Examiner finds that the existing sign is compatible with the neighborhood and appears to comply with the size, height and setback requirements of the Zoning Ordinance. It is not clear whether the sign qualifies for an exemption under Zoning Ordinance

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<sup>5</sup> It is worthy of note that the Planning Board has proposed a Zoning Text Amendment (ZTA 15-09) which would, in its latest Planning Board version (as modified on July 9, 2015), add additional flexibility to the application of the Alternative Compliance methodology. Under the Planning Board's latest proposal, if the deciding body finds that there is a "a use characteristic" that would preclude safe or efficient development under the requirements of the applicable Division, it may apply the Alternate Compliance methodology. The Hearing Examiner takes official notice of this pending proposal. In the subject case, the existing six-foot tall board-on-board fence would be such a "use characteristic" which would make it inefficient to develop the landscaping on the site in accordance with Division 6.5., thereby justifying using the "Alternative Compliance" methodology.

§59.6.7.3.A. To clarify this point, a condition is imposed in Part IV of this Report and Decision which will require the Applicant to obtain a permit from the Department of Permitting Services (DPS), if required to do so by DPS, and to file a copy of the permit with OZAH.

#### **IV. Conclusion and Decision**

As set forth above, the application meets all the standards for approval in Articles 59-3, 59-4, 59-6 and 59-7 of the Zoning Ordinance.

Based on the foregoing findings and conclusions and a thorough review of the entire record, the application of Leah Hanlon, d/b/a Lily Pads Child Care LLC (CU 15-02), for a conditional use under Section 59.3.4.4.E. of the Zoning Ordinance, to operate a child day care center for up to 20 children at 9913 Old Georgetown Road, Bethesda, Maryland, is hereby **GRANTED**, subject to the following conditions:

1. The Applicant shall be bound by all of her testimony and exhibits of record, and by the testimony of her witnesses and the representations of her counsel identified in this Report and Decision.
2. The proposed Child Day Care Center must be limited to 20 children, ranging in age from 6 weeks to 5 years. The Applicant may employ up to 5 non-resident staff members, in addition to herself.
3. The property must be enclosed with a four-foot tall board-on-board privacy fence in the front, and by a six-foot tall board-on-board fence on all other sides, except for vehicular and pedestrian entry points. Other Physical improvements are limited to those shown on the site plan (Exhibit 31(a)) and the Landscape Plan (Exhibit 31(b)).
4. The hours of operation are limited to Monday through Friday, 7:30 AM to 6:30 PM.
5. All children must be under the direct supervision of a staff member at all times. No more than 10 children shall be permitted to play outdoors at any one time. Outdoor play times must not start before 9:00 AM.
6. The Applicant must replace the pavement in the public right-of-way along Old Georgetown Road with vegetation planted to re-stabilize the disturbed area, subject to State Highway Administration approval.

7. The Applicant must obtain a permit for her site sign if required to do so by the Department of Permitting Services. A copy of the permit must be filed with OZAH.
8. Vehicular arrival and departure times for the children must be staggered, through contractual agreements between the Applicant and the parents, so that no more than six vehicles visit the site within any one-hour period to drop off or pick up children. In no event may a child be dropped off before the Applicant 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.
9. 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.
10. Non-resident Staff are prohibited from parking on-site between 7:30 AM and 10:00 AM and between 3:30 PM and 6:30 PM to ensure that the drop-off and pick-up areas are clear. Similarly, the residents of the subject site are prohibited from using the four day care center parking spaces during the day care center's hours of operation.
11. The Applicant must comply with and satisfy all applicable State and County requirements for operating a Child Day Care Center, and correct any deficiencies found in any government inspection.
12. Children must be accompanied by an adult to and from the child-care entrance.
13. The Applicant shall not use a public address system of any kind outside the building, nor shall any amplified music be played outside the building.
14. The Applicant shall maintain the grounds in a clean condition, free from debris, on a daily basis.
15. The Applicant 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 conditional use premises and operate the conditional use as granted herein. The Applicant shall at all times ensure that the conditional use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Issued this 17<sup>th</sup> day of September, 2015.



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Martin L. Grossman  
Hearing Examiner

### NOTICE OF RIGHT TO REQUEST ORAL ARGUMENT

Any party of record or aggrieved party may file a written request to present oral argument before the Board of Appeals, in writing, within 10 days after the Office of Zoning and Administrative Hearings issues the Hearing Examiner's report and decision. Any party of record or aggrieved party may, no later than 5 days after a request for oral argument is filed, file a written opposition or request to participate in oral argument.

Contact information for the Board of Appeals is listed below, and additional procedures are specified in Zoning Ordinance §59.7.3.1.F.1.c.

Montgomery County Board of Appeals  
100 Maryland Avenue, Room 217  
Rockville, MD 20850  
(240) 777-6600

#### COPIES TO:

Stanley D. Abrams, Esquire  
Leah Hanlon, Applicant  
Katherine Freeman, Executive Director  
Montgomery County Board of Appeals  
Crystal Myers, Planning Department