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I. STATEMENT OF THE CASE

On March 30, 2015, the Applicant, Heritage Care, Inc., (Heritage or Applicant) filed an application seeking approval of a conditional use to operate a Child Day Care Center for up to 40 children at 4011 Randolph Road, Silver Spring, Maryland. It will be housed in a building leased by NMS Healthcare of Silver Spring, LLC (NMS).¹ The balance of the building is used as a nursing home operated by NMS, authorized by a special exception originally approved in 1964, which has been modified several times since its inception. Exhibits 20(a)-(e), 21. The application requests a waiver of 23 parking spaces from the minimum number required (i.e., 90 spaces).

The Office of Zoning and Administrative Hearings (OZAH) scheduled a public hearing to be held on July 24, 2015 (Exhibit 29), which was postponed to October 9, 2015, at Heritage's request. Exhibits 33, 40.

Staff of the Montgomery County Planning Department (Technical Staff or Staff) issued a report recommending approval of the application subject to eleven conditions. Staff recommended approval of the reduced number of parking spaces, finding that there were 71 parking spaces on the site and noting that the daycare needed only 6 spaces. Ex. 41, p. 14. Based on the Staff Report, the Planning Board recommended approval of the application, as well as the reduction of parking spaces, subject to the same conditions recommended by Staff and adding the following condition:

12. Truck deliveries for the day care center may not occur before 6:30 a.m.

Exhibit 42. In response to concerns expressed at the Planning Board hearing that recent tree trimming along the property line had increased noise impacts from the property, the Planning

¹ The record reflects that NMS leases the building from an entity entitled "Randolph Road, LLC." The Applicant submitted a sublease between NMS and the Applicant to use the premises in this application, consented to by the landlord, Randolph Road, LLC. Exhibit 22.

Board requested the Hearing Examiner to “evaluate the implications of the tree trimming in relation to noise impact and require the appropriate mitigation.” *Id.*

After a review of the file prior to the public hearing, the Hearing Examiner realized that a revised site plan, showing parking spaces, had not been submitted to OZAH. By e-mail dated October 8, 2015, the Hearing Examiner requested the Applicant to submit the revised plan showing parking spaces. Exhibit 43. This was submitted, but upon review, the plan showed only 67 parking spaces and did not show which spaces were to be reserved for drop-off and pick-up (as Heritage proposed.) Exhibits 46, 48. At the public hearing, the Hearing Examiner asked the Heritage to mark the locations for the two reserved drop-off and pick-up spaces. The director of the proposed daycare did not appear at the public hearing and her representative could not answer how she intended to enforce the staggered times for drop-off and pick-up recommended by Staff. T. 24-25. The Hearing Examiner left the record open until October 29, 2015 for Staff to comment on the revised plan and for Ms. Kristin Bayly, the proposed director, to state how she intended to enforce the staggered times for drop-off and pick-up.

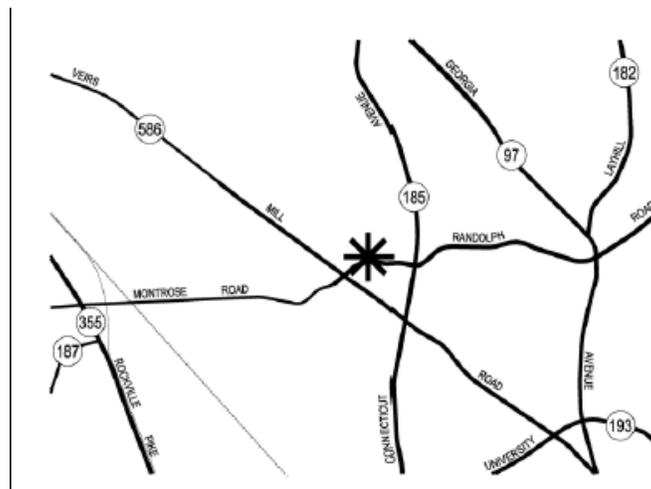
The Hearing Examiner referred the plan back to Staff to determine (1) how many spaces were on-site, (2) whether the locations of the reserved drop-off and pick-up spaces were acceptable, and (3) to show the ADA accessible and bicycle spaces. She also asked Staff to comment on whether they still approved the waiver of the minimum parking requirements with 67 spaces proposed. Exhibit 50. Heritage submitted a revised site plan on October 12, 2015, and Staff submitted its comments on October 19, 2015, indicating that the proposed location of the reserved spaces did not meet zoning requirements. Exhibit 53. Heritage submitted its statement responsive to enforcement of staggered drop-off and pick-up times. Exhibit 54.

The Applicant submitted another revision to the site plan, showing different locations for the spaces reserved for drop-off and pick-up. Exhibit 52. The Hearing Examiner submitted this site plan to Staff for its review. Exhibit 56(a). Staff commended that the site plan was acceptable and continued to recommend approval of alternative compliance with the parking requirements. Because the site plan submitted was not certified by an engineer, as required by Maryland law, the Hearing Examiner asked the Heritage to have the site plan certified and resubmitted.² Ex. 64. Heritage submitted an 8.5” x 11” site plan, and the Hearing Examiner requested it to file a larger version of the plan. Exhibit 68. Heritage did submit the larger version on November 12, 2015, and the Hearing Examiner issued an order re-opening and immediately closing the record solely to receive the certified site plan. Exhibit 69.

II. FACTUAL BACKGROUND

A. The Subject Property

The subject property consists of 1.9 acres of land located at 4011 Randolph Road, approximately midway between Connecticut Avenue (Md. 185) and Veirs Mill Road (Md. 586). A vicinity map from the Staff Report (Exhibit 41) shows its general location:



² Maryland law provides that, “[a] public body may not accept any engineering plan, specification, or report unless the document is endorsed as required under subsection (a) of this section.” **Get citation for surveyors**

Located at the intersection of Randolph Road and Colie Drive, the property is improved with a two-story nursing home and associated parking first approved by special exception in the mid-1960s. The special exception was amended in 1987 to permit a facility for elderly day care for up to 25 individuals. Exhibit 29(d). This number was increased to 35 individuals in 1993. Exhibit 20(e). Heritage proposes to use the space formerly used for day care for the elderly for child care.

Staff advises that the property slopes approximately 24 feet downwards from east to west; the building itself is centered in the middle of the site, with parking at both the east and west ends of the property. An aerial photograph from the Staff Report is shown below (Exhibit 41):



The perimeter of the property along Colie Drive is lined with mature deciduous trees. Deciduous trees bi-sect the drive aisles in the eastern parking area, and a mix of evergreens and other trees border the eastern and northern perimeter. An existing fence runs along the northern property lines (adjacent to the rear yards of homes along Ilford Road), also with a mix of deciduous and evergreen trees. T. 39-40. A circular drive provides access to the portion of the site to be used

by the child day care. Photos of the front of the building along Colie Drive (submitted by Heritage), are shown below (Exhibit 44(a)(i), (iii), (vii)):



View from Randolph Road at Intersection with Colie Drive

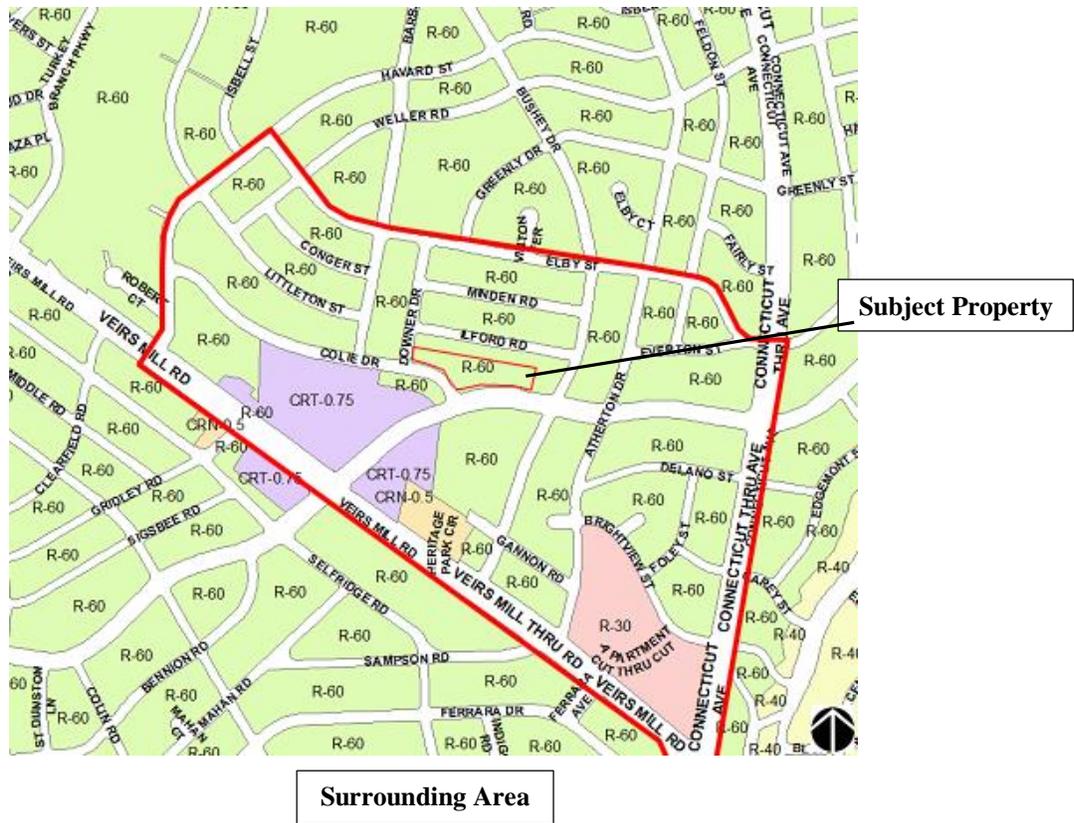


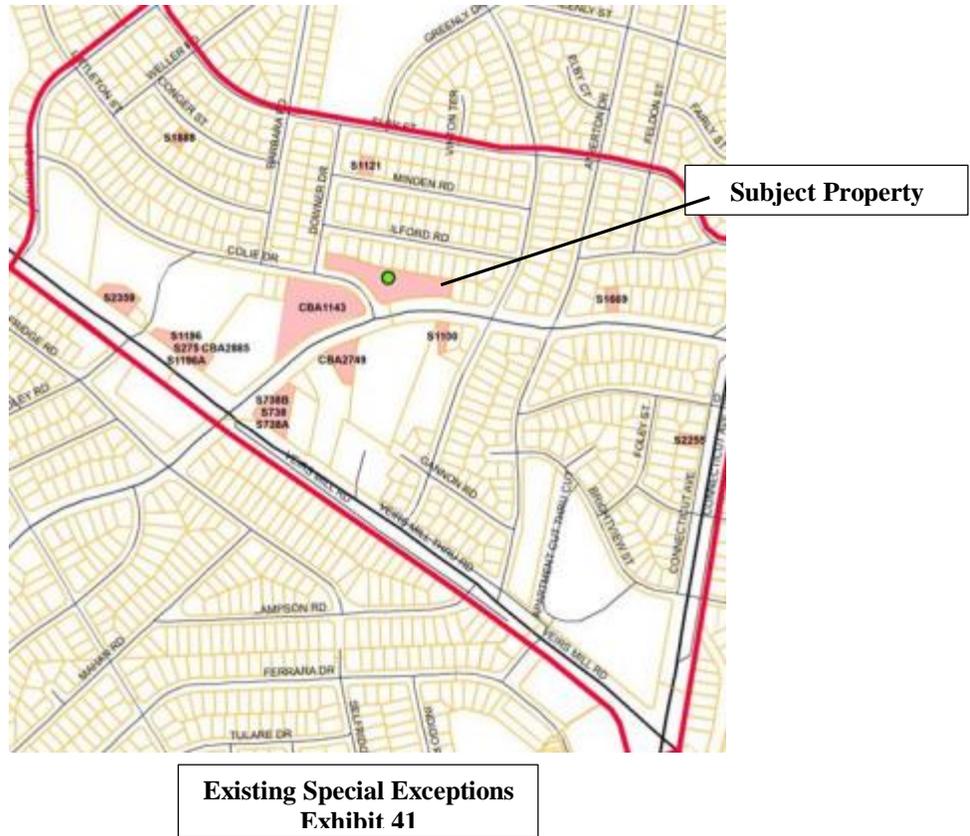
View Looking West on Colie Drive

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). The proposed use must not impact the character of the defined neighborhood.

Staff defines the neighborhood boundaries as Elby Street to the north, Connecticut Avenue to the east, Veirs Mill Road to the south, and Harvard Street to the west. Exhibit 41, p. 3. Staff notes that there are eleven special exceptions in the defined area, including three gas stations, four accessory apartments, two drive-thru restaurants, a home hair salon, and the nursing/elderly daycare on the subject property. *Id.* A map of the surrounding area as well as the location of the special exceptions, both included in the Staff Report, are shown on the following page (Exhibit 41, p. 4.)

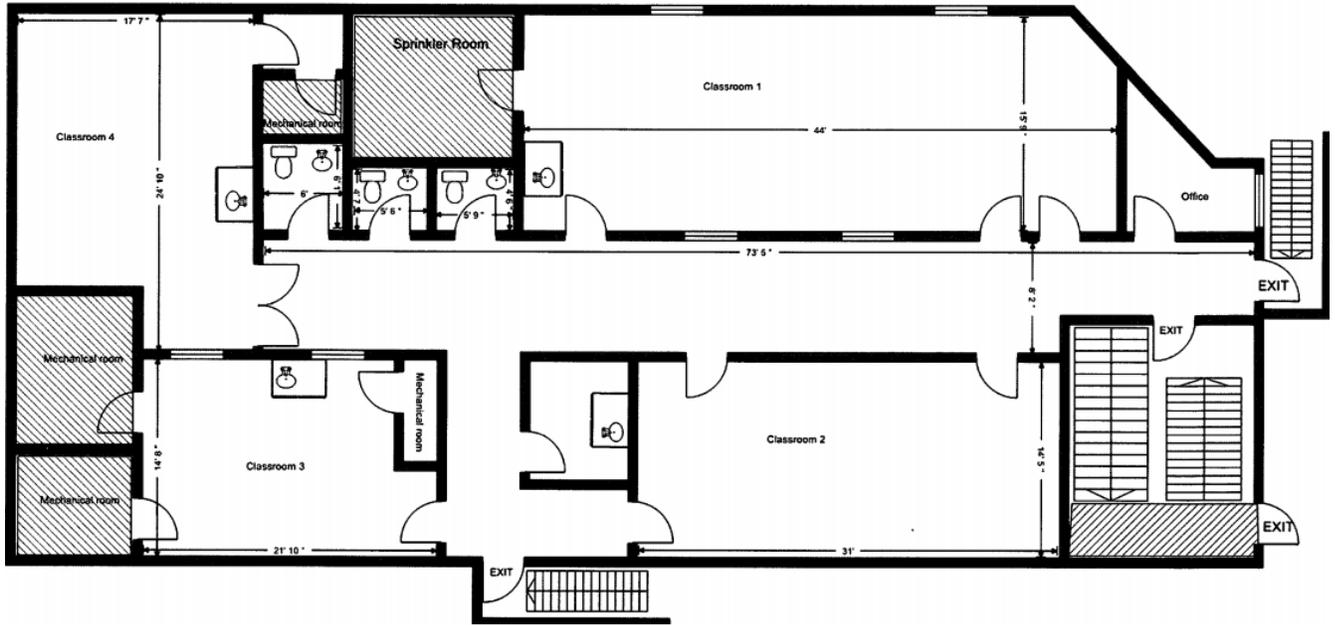




Staff does not characterize the surrounding area in its report, however, based on the photographs and evidence submitted, the Hearing Examiner characterizes the surrounding area as primarily consisting of single-family detached homes in the R-60 Zone to the north and east, with some non-residential or mixed residential/commercial zoning along Veirs Mill Road to the south.

C. Proposed Use

Heritage Care, Inc. proposes to operate a child day care for 40 children in approximately 1,910 square feet of space in the lower level of the nursing home. The space was formerly occupied by the elderly day care, which is being abandoned. The space is divided into four classrooms, restrooms, and a small office, as shown on the floor plan submitted by the Applicant (Exhibit 12, on the following page.)



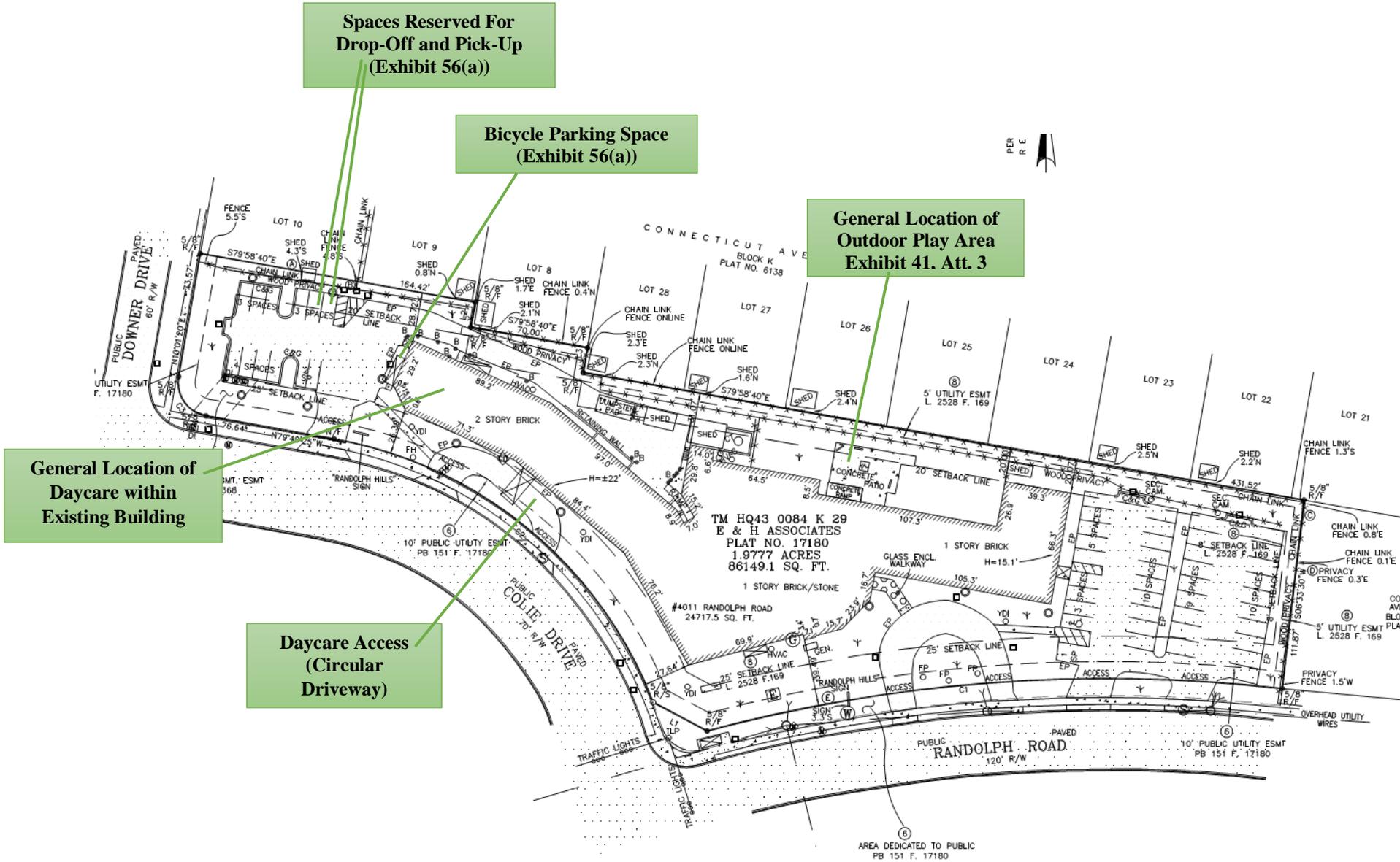
1. Site Plan, Access, On-Site Parking and Drop-off and Pick-up Areas

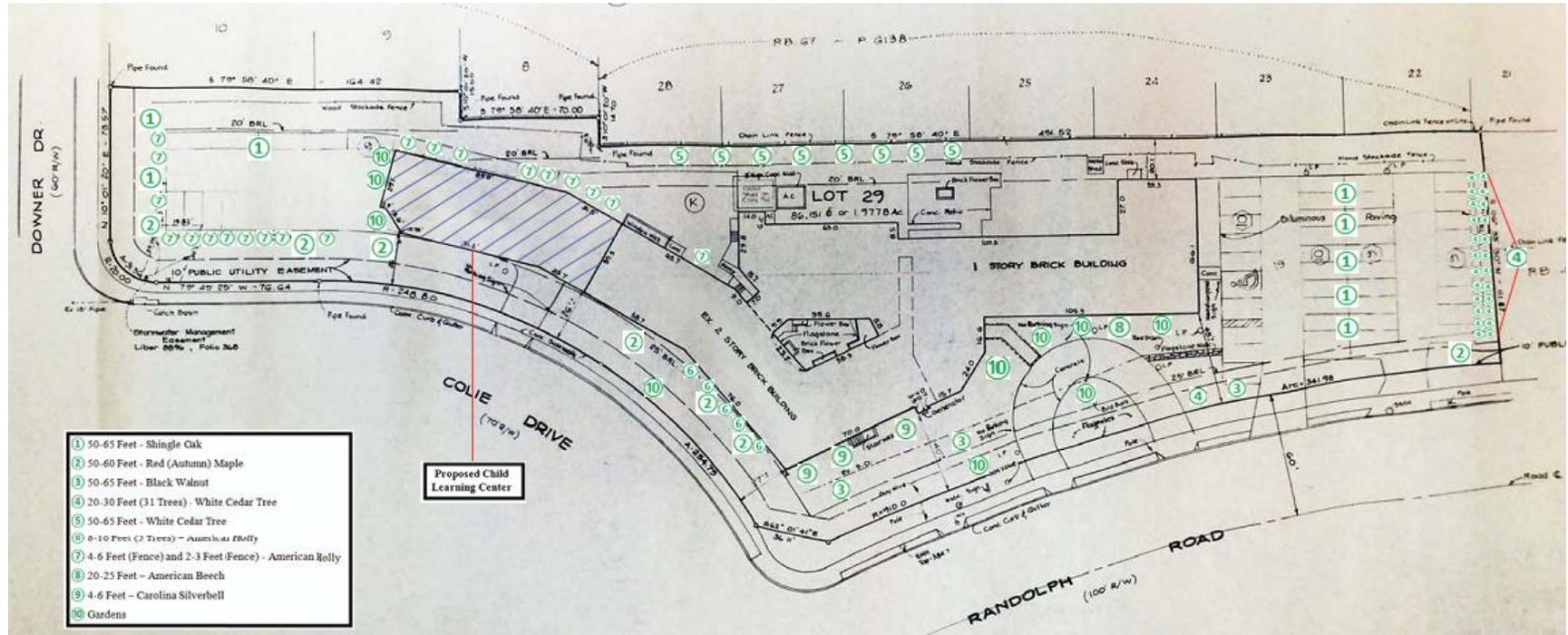
The final site plan reproduced on the next page (Exhibit 65 (8.5" x 11" version)) shows the details of the proposed use, including the proposed site access and the location for drop-off and pick-up of children. Employees of the daycare will not be permitted to park on-site, as discussed below. The Applicant does not propose any external changes to the existing building. Exhibit 41, p. 7.

2. Site Landscaping, Lighting and Signage

Heritage does not propose any changes to the existing landscaping on the site. This consists of mature trees along Colie Drive (pictured on pages 7-8 of this Report), gardens and a variety of trees along Randolph Road, mature trees along the eastern property line and in the eastern parking lot, and a wooden fence and mix of trees along the northern property line. A copy of the Applicant's landscape plan is shown on the following page.

Because the existing landscaping does not comply with current landscaping requirements (see, *Zoning Ordinance*, §59-6.5.3), the Hearing Examiner requested Staff to provide a justification for alternative compliance under Section 59-6.8. Staff did so, but advised that it





Landscape Plan
Exhibit 14

believed the landscaping was grandfathered under Section 59-7.7.1.A of the Code as part of an approved “site design” because of the prior special exception approvals for the nursing home and elderly day care. That section states:

A legal structure or site design existing on October 30, 2014 that does not meet the zoning standards on or after October 30, 2014 is conforming and may be continued, renovated, repaired, or reconstructed if the floor area, height, and footprint of the structure is not increased, except as provided for in Section 7.7.1.C for structures in Commercial/Residential, Employment or Industrial zones, or Section 7.7.1.D.5 for structures in Residential Detached zones.

The Zoning Ordinance defines the term “site design” to include “landforms, driveways, parking areas, roads, sidewalks, trails, paths, plantings, walls or fences, water features, recreation areas and facilities, lighting, public art, or other external elements” existing “between and around structures that give shape to patterns of activity, circulation, and form.” Because the term specifically includes “plantings,” the Hearing Examiner agrees with Technical Staff that it would include the landscaping approved in the prior special exceptions. In addition to the plantings shown on the landscape plan, a wooden fence runs along almost the entire length of the rear (northern) property line. T. 39-40; Exhibit 68. A photograph of the fence submitted by the Applicant (Exhibit 19(h)) is shown below:



No modifications to the existing lighting or signage are proposed. Existing lighting consists of mounted light fixtures near the building entrances and post lighting around the parking area and pedestrian paths. Exhibit 41, p. 7.

3. Proposed Operations

The daycare facility will occupy 1,910 square feet of space in the lower level of the existing nursing home. The location of the facility within the building is marked on the landscape plan shown on page 13 of this Report. Heritage proposes to have up to 40 children between 6 weeks to 5 years old, distributed among the four classrooms. One classroom will have infants, two rooms will have toddlers and one will be for preschool children.

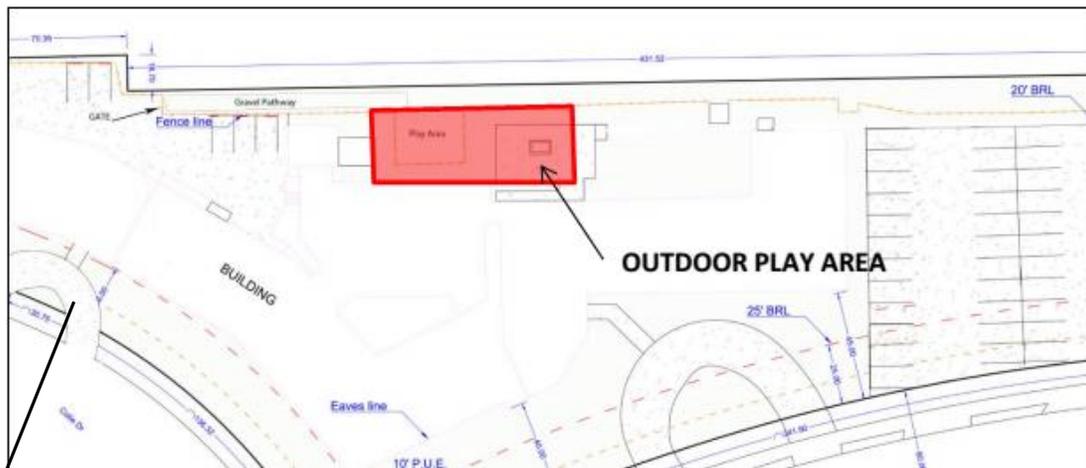
Proposed hours of operation are Monday through Friday, 6:45 a.m. to 6:00 p.m. No weekend hours are proposed. According to the Applicant's Statement of Operations, drop-off and pick-up of children will be limited to five children during a 15-minute interval to distribute the trips throughout the day. Ms. Kristen Bayly, who will direct the center, submitted a statement confirming that this requirement will be enforced through the center's contract with parents, which:

...shall provide a clause outlining our pick-up and drop-off policy and setting a clear time period when acceptable for picking up and dropping off depending on the child in question. Under this policy, parents shall be allowed two warnings if they do not adhere to the pick-up/drop-off policy. If after two warnings, they again fail to adhere to the schedule set forth in the policy, their child will be removed from further participation in our daycare.

Exhibit 54(a). The facility will have a maximum of 14 staff members, seven of which will arrive between 6:45 a.m. and 7:00 a.m. and leave between 3:00 p.m. and 3:15 p.m. Another group of seven will arrive between 2:45 p.m. and 3:00 p.m. and leave between 6:00 p.m. and 6:30 p.m. While Heritage initially proposed that one of the reserved parking spaces for drop-off and pick-up be located in the circular access drive (T. 28), Planning Staff indicated this area does not meet Zoning Ordinance requirements for parking spaces. Exhibit 53. The Applicant revised the site

plan to show that the reserved spaces for parent drop-off and pick-up will be located in the western parking lot. Exhibit 56(a).

An outdoor play area is located in the lawn along the rear (northern) property line. Consisting of approximately 2,000 square feet, it is enclosed with a 6-foot wooden privacy fence on all sides. Outdoor playtimes will be for two hours in the morning and two hours in the afternoon; each classroom will have 30 minutes of outdoor exercise in the morning and 30 minutes in the afternoon. Staff recommended a condition of approval requiring that outdoor play in the morning occur after 9:00 a.m. The location of the outdoor play area is shown in an illustration from the Technical Staff Report (Exhibit 41, Attachment 3) below:



**Daycare
Entrance**



4. Parking

There are currently 67 parking spaces on-site for both the nursing home and the proposed daycare. Staff calculated that a total of 90 vehicle parking spaces and 1 bicycle parking space are required for the combined uses, as shown on the table from the Staff Report on the next page (Exhibit 41, p. 14.)

6.2.4.B. Vehicle Parking Spaces				
Residential Care Facility	112 beds	0.75 per bed	84	90
Day Care Center	1,910 SF	3.0 per 1,000 SF	6	
6.2.4.C. Bicycle Parking Spaces				
Residential Care Facility	112 beds	0.25 per Dwelling Unit	0	1
Day Care Center	1,910 SF	1.0 per 5,000 SF	1	

Because there are only 67 on-site parking spaces, the Applicant requests a waiver of 23 spaces from the maximum number required. Mr. Ryan Boughner, NMS’ property manager, believes that the waiver is justified based on a survey performed by the nursing home. In the summer of 2015, they surveyed the employees of each department on how they travelled to and from work. The survey indicates that the highest number of employees are on the day shift, which goes between 6:00 a.m. and 3:00 p.m. That shift has a total of 26 employees, a significant number of whom do not drive to work independently, but take transit, walk, or carpool. T. 11-12. Nor does the daytime nursing home shift conflict with the peak hour trips for the daycare. Exhibit 41, Attachment 7. NMS Healthcare has a policy that dedicates parking spaces close to the entrance of the building for visitors or family members of residents.

Heritage agrees to a condition of approval requiring daycare employees to park on the street. Mr. Boughner testified that there are 11 on-street parking spaces on Colie Drive. According to him, there are no congestion problems currently at the property and there are always available spots for parking. He visits the site about five or six times a month since the property was sold in

November, 2013, and observes that there are usually about 10 parking spaces available on-site when he visits. T. 14-16.

Heritage summarized the reasons for its request, including the results of the 2015 survey, in its application, which is included in the Staff Report (Exhibit 41, Attachment 7):

Reasons Parking will be adequate

- 7am-3pm: Largest staffed shift at Nursing Home
 - Maintenance: 1; staff, Drives and Parks next to the loading dock.
 - Nursing: 6; staff, 50% Drive 50% use public transportation
 - Nursing Aids: 10; 80% Use public transportation 20% are dropped off.
 - Dietary: 4; all use public transportation.
 - Rehabilitation: 10; 6 live nearby and walk, 5 carpool from sister facility in Hyattsville. 1 public transportation.
 - House keeping: 5; 6 use public transportation and 1 is dropped off.
 - Administration: 6; 90% are 9am-5pm, all Drive but use street parking only per company's policy.
- 5 staff from Learning Center at Hyattsville will carpool to go to center at Randolph road.
- Majority of the staff arrive before 6am and leave at 3pm
- Administration staff leave at 5pm
- Peak hours for visitors are between 11am-2pm and 7pm-9pm.
- Parking policy for Learning Center is in place so employees are not allowed to park at the nursing home; they can only use street parking.

Staff recommended approval of the parking reduction requested as an alternative method of compliance under Section 69-6.8.1.³ Staff's recommendation is discussed in more detail in Part III.D.2 of this report, below.

D. Community Response

Mr. Jason Fabritz, whose property backs up to the subject property's northern (rear) property line, appeared to express concern about the impacts of noise from the proposed use. He testified that he had experienced problems when trucks make deliveries to the loading area during

³ Staff's initial recommendation was based on the assumption that there were 71 parking spaces. It confirmed, however, that their recommendation did not change under the revised site plan showing 67 spaces. Exhibit 58.

quiet hours. He is concerned about the potential for this problem to worsen once the daycare begins to operate. In the recent past, they have been woken as early as 4:30 a.m. by the caution beeper emitted by the delivery vehicles backing into the loading dock. According to him, “[s]ince this sound is designed to be an alarmed [sic], it’s not surprising it has the effect of one.” T. 30. He is worried that deliveries will occur even earlier when the daycare is operating to avoid conflicts with drop-off traffic. *Id.*

According to Mr. Fabritz, staff of the Planning Department communicated these concerns to Heritage Care and the NMS administrative team. NMS restricted deliveries before 8:00 a.m. and this has been a “wonderful relief.” T. 30. The only remaining problem is to apply this same restriction to trash removal trucks. T. 30. Mr. Boughner agreed to a condition requiring truck deliveries to occur after 8:00 a.m. T. 32.

Mr. Fabritz also feels that parking on Downer Drive should not be encouraged because, even though on-street parking is permitted there, it is a narrow street. It serves three streets leading onto to Colie Drive, which in turn leads to Randolph Road. T. 32.

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 40 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:⁴

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: This property is subject to the special exception for the nursing home as well as an approved preliminary plan for a 105-bed nursing home and elderly daycare for up to 25 people. After approval of the preliminary plan, the Board of Appeals examined the adequacy of public facilities for the increase to the existing number of nursing home beds as well as the 35 elderly daycare clients. Because Staff concluded that the proposed child day care *reduces* the number of peak hour trips, it concluded that the proposal is consistent with prior approvals. Exhibit 41, p. 10. Staff recommended that the Applicant revise its preliminary plan approval to reflect the current special exception use, although it did not recommend new testing for the adequacy of facilities.

Because the proposed use does *not* comply with the former elderly day care special exception and because trips from that use are credited toward the Local Area Transportation Review (LATR) requirements for this use, the Hearing Examiner recommends a condition requiring approval of the Board of Appeals to revoke or abandon the former special exception for

⁴ 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.

elderly day care (BOA Case No. S-367-A) prior to issuance of a use and occupancy permit for the proposed child daycare.

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 over 30 Persons contained in Article 59-3; and the applicable development standards contained in Article 59-6. Each of these is discussed below in separate sections (Parts III B, C, and D of this Report). Based on the analysis contained in those discussions, the Hearing Examiner finds, as did Technical Staff (Exhibits 41, 58), 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;

Conclusion: The subject property lies within the geographic area covered by the *1989 Master Plan for the Communities of Kensington-Wheaton* (Master Plan or Plan.) In order to achieve its goal to stabilize and protect existing residential areas, the Plan recommended re-confirming all existing zoning, except for specific parcels, within the planning area, including the R-60 Zoning for the subject property. *Plan*, p. 40. Staff advises that the Master Plan does not specifically discuss the subject site, but points out that the Plan recommends promoting “greater day care opportunities through appropriate land use recommendations and other policies.” *Plan*, p. 139; Exhibit 41, p. 19. Because the site was formerly used as an elderly daycare facility, Staff concluded (Exhibit 41, p. 19):

The proposed 40-child day care use will meet the Master Plan’s recommendations for providing child day care facilities in appropriate locations. As described...the proposed use is located on a major thoroughfare and close to a major intersection that provides transit service and access to area residents without impacting the interior blocks of single-family detached houses.

The Hearing Examiner agrees that the proposed use complies with the Master Plan, both because (1) it is permitted by special exception in the R-60 Zone, (2) for the reasons stated by Staff (above) and (3) because there will be no external changes on the subject property.

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 because there will be no external physical changes to the property. The Hearing Examiner characterized the neighborhood as primarily consisting of low- to medium-single family detached homes, with non-residential or mixed commercial/residential uses along major highways to the south.

The Hearing Examiner notes that the reduced on-site parking (less than what would normally be required), is one operational aspect of the use that could impact the surrounding neighborhood. The Hearing Examiner concludes, however, that Heritage has demonstrated that both the nursing home and the proposed child daycare are able to operate with the existing number of spaces without adversely affecting the neighborhood, for the reasons discussed later in this Report.

Mr. Fabritz expressed concern that truck deliveries would be forced to come earlier in the morning to avoid conflicts with parent drop-offs for the daycare, creating noise impacts for the homes along Ilford Road. Heritage has addressed this concern by agreeing to a condition of approval requiring truck deliveries to occur after 8:00 a.m. With this condition, and others recommended in Part IV of the Report, the Hearing Examiner finds that the proposed use will not alter the existing residential character of the surrounding neighborhood.

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: There are eleven special exceptions in the neighborhood, including the nursing home on the subject property. Staff found that this would not intensify or increase the scope of special exceptions in the neighborhood because it replaces the existing special exception for the elderly daycare. Staff also found that the “intensity and character of the activity and associated traffic impacts will not adversely affect the area.” Exhibit 41, p. 19.

The Hearing Examiner agrees with Staff, provided that Heritage abandons the existing daycare special exception. *See, Zoning Ordinance, §59-7.3.1.L.* With this condition of approval, she concludes 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...

Conclusion: The property is a recorded lot and thus the Hearing Examiner makes the determination as to whether public facilities are adequate.⁵ Exhibit 41, p. 14. The Subdivision Staging Policy (Council Resolution 17-601) determines whether roadway capacity is adequate, which are implemented through the Planning Board's Guidelines for Local Area Transportation Review (LATR) and Transportation Policy Area Review (TPAR). Applications that are expected to generate fewer than 30 trips during peak hours are exempt from LATR review, but must submit a "Traffic Exemption Statement" to demonstrate that the number generated by the proposal will be under a 30-trip maximum. *Guidelines*, p. 3.

Heritage submitted a Traffic Statement (Exhibit 41, Attachment 5, on the next page) listing the expected traffic during the morning and evening peak hours. Staff accepted this Traffic Statement, but recommended a condition requiring Heritage to "provide parental agreements for all children to the Hearing Examiner indicating a schedule of staggered drop-off and pick-up of children (up to 5 children in any 15-minute period) to distribute the vehicular trips to/from the site for safety and keep the maximum weekday peak-hour trips below 30." Exhibit 41, p. 2. Heritage did not provide a copy of the parental agreement at the public hearing, although Ms. Bayly did provide following statement:

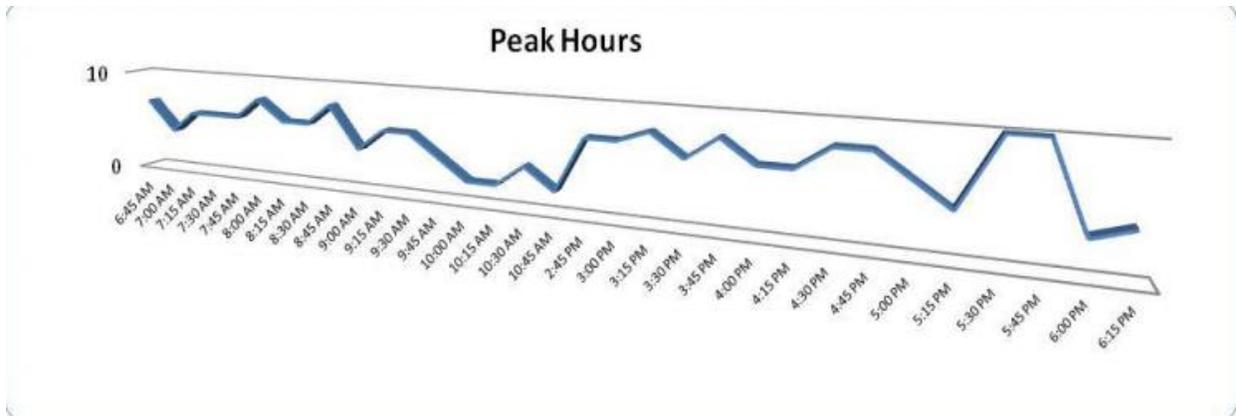
It is my understanding that, should this daycare become operational, it will be subject to the condition that children be dropped off and picked up at the site with no greater frequency than 5 children every 15 minutes during pick-up and drop-off times. We intend to enforce this condition through our daycare contract, which shall provide a clause outlining our pick-up and drop-off policy and setting a clear time period acceptable for picking up and dropping off depending on the child in question. Under this policy, parents shall be allowed two warnings if they do not adhere to the pick-up/drop-off policy. If after two warnings, they again fail to adhere to the schedule set forth in the policy, their child will be removed from further participation in our daycare.

⁵ If any party requests oral argument before the Board of Appeals, the Board will make the final determination in the case.

The proposed Child Learning Center will have the following number of visits during the day:

Time From	Time To	Description	Number of visits/trips*
6:45 AM	7:00 AM	7 Staff members arrive to the center	7
7:00 AM	7:15 AM	2 Kids Drop off	4
7:15 AM	7:30 AM	3 Kids Drop off	6
7:30 AM	7:45 AM	3 Kids Drop off	6
7:45 AM	8:00 AM	3 Kids Drop off	6
8:00 AM	8:15 AM	4 Kids Drop off	8
8:15 AM	8:30 AM	3 Kids Drop off	6
8:30 AM	8:45 AM	3 Kids Drop off	6
8:45 AM	9:00 AM	4 Kids Drop off	8
9:00 AM	9:15 AM	2 Kids Drop off	4
9:15 AM	9:30 AM	3 Kids Drop off	6
9:30 AM	9:45 AM	3 Kids Drop off	6
9:45 AM	10:00 AM	2 Kids Drop off	4
10:00 AM	10:15 AM	1 Kid Drop off	2
10:15 AM	10:30 AM	1 Kid Drop off	2
10:30 AM	10:45 AM	2 Kids Pick Up	4
10:45 AM	11:00 AM	1 Kid Drop off	2
2:45 PM	3:00 PM	7 Staff members arrive to the center	7
3:00 PM	3:15 PM	7 Staff members leave the center	7
3:15 PM	3:30 PM	3 Kids Pick UP	8
3:30 PM	3:45 PM	3 Kids Pick UP	6
3:45 PM	4:00 PM	5 Kids Pick UP	8
4:00 PM	4:15 PM	3 Kids Pick UP	6
4:15 PM	4:30 PM	3 Kids Pick UP	6
4:30 PM	4:45 PM	4 Kids Pick UP	8
4:45 PM	5:00 PM	4 Kids Pick UP	8
5:00 PM	5:15 PM	3 Kids Pick UP	6
5:15 PM	5:30 PM	2 Kids Pick UP	4
5:30 PM	5:45 PM	5 Kids Pick UP	10
5:45 PM	6:00 PM	5 Kids Pick UP	10
6:00 PM	6:15 PM	3 Staff members leave the center	3
6:15 PM	6:30 PM	4 Staff members leave the center	4
Total Number of visits/trips:			188

Traffic Statement
Exhibit 41, Attachment 5



**Exhibit 41,
Attachment 5**

Staff reports that the child daycare will generate fewer trips than the former daycare for the elderly. A comparison of the trips generated by the use proposed here with the elderly daycare is included in the Staff Report (Exhibit 41, p. 9):

Table 1: Peak-Hour Trips		
Land Use	Weekday Peak-Hour Trips Primary Trips (Total Trips)	
	Morning	Evening
Approved 112-Bed Nursing Home Facility	16 (16)	25 (25)
Approved 35-Person Elderly Day Care Facility/3 staff	10 (29)	10 (29)
Total Existing Weekday Peak-Hour Trips	26 (45)	35 (54)
Proposed Child Day Care 40 children/7 staff	9 (29)	8 (29)
Total Proposed Weekday Peak-Hour Trips	25 (45)	35 (54)
<i>Net Reduction in Weekday Peak-Hour trips</i>	<i>-1 (0)</i>	<i>-2 (0)</i>

Staff explains that “primary trips” are those that are new or diverted from elsewhere. The total peak hour trips include “pass-by” trips, which are trips that are already on major roadways in the vicinity, but divert to drop-off or pick-up children. *Id.* Staff concluded that because the use will generate fewer than 30 peak-hour trips (dependent on the staggered schedule), it is exempt from LATR.

To ensure the staggering of drop-off and pick-up times are met, the Hearing Examiner recommends the following condition of approval:

Parent drop-off and pick-up times shall be staggered so that no more than five vehicles may drop-off or pick-up children within a 15-minute interval. The Applicant shall require each parent to adhere to its scheduled time in its parent contract, in the manner described in Exhibit 54(a).

Because the use will be entirely within an existing building, the Transportation Policy Area review test is not applicable.

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.

Staff 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. Exhibit 41, p. 20. Staff concluded that there was no non-inherent adverse impact from the proposed special exception:

There are no adverse traffic impacts that would result from the proposed special exception. Outdoor play area is adequate and the Applicant will limit the number of children outside as Staff recommends. Outdoor play for the four groups will be staggered in 30-minute increments for two hours in the morning and two hours in the afternoon. The Applicant will use the existing semi-circular driveway along Colie Drive and the existing parking lot on the west for drop-off and pick-up. The driveway along Colie Drive and the existing parking lot on the west for drop-off and pick-up. The driveway is adjacent to a covered entrance to the building and a sidewalk that connects to the exterior stair entrance fronting the parking lot. The parking lot will have two signed parking spaces reserved for discharge and pick-up as a condition of approval. The lighting on the property will not be modified and is adequate and consistent with the residential character of the neighborhood. The site is well-landscaped and a six-foot high fence surrounds the play area.

Based on this analysis, Staff concluded “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. The existing property does not have the minimum number of parking spaces required for the use, thus necessitating several conditions of approval, and site requires coordination between the operations of two special exceptions.

However, these observations do not mean that the conditional use must be denied. The transportation survey of nursing home Staff, the availability of on-street parking on Colie Drive, and the condition requiring staggered arrivals, will ensure that traffic to and from the facility will not adversely impact the neighborhood. In addition, on-street parking spaces are available to serve the daycare, and two spots will be reserved for parent drop-off and pick-up in the western parking lot. Further, the survey performed by NMS demonstrates that many nursing home staff do not drive their individual cars to work, thus consistently leaving open spaces in the parking lots.

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: Heritage does not proposed any external modifications to the site, so this is inapplicable.

- 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 41, p. 11), reproduced below:

Table 2: Development Standards

Residential Zone (R-60) Section 4.4.9.	Permitted/ Required	Existing/ Proposed
B.1. Lot and Density		
Min. lot area (sf)	6,000	86,118
Min. lot width at front bldg line (ft)	25	±341
Min. lot width at front lot line (ft)	25	383
Max. density (units/ac)	7.26	0
Max. lot coverage (%)	35	28
B.2. Placement Principle Building Setback		
Min. front setback (ft)	25	40
Min. side street setback (ft)	25	26
Min. side setback (ft)	8	126
Min. sum of side setbacks (ft)	18	264
Min. rear setback (ft)	20	20
B.2. Placement Accessory Building Setback		
Min. front setback (ft)	60	n/a
Min. side street setback (ft)	25	n/a
Min. side setback (ft)	5	n/a
Min. rear setback (ft)	10	20
B.3. Building Height		
Max. height of principal bldg (ft)	30	18
Max. height of accessory structure (ft)	20	9

Conclusion: As can be seen from the above, the proposed use 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 over 30 Persons (Section 59.3.4.4.F.2.b)

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.F.2,b of the Zoning Ordinance. Standards applicable to this application are:

(i) All required parking must be behind the front building line; however, required parking may be located between the structure and the street where the Hearing Examiner finds that such parking is safe, not detrimental to the neighborhood, accessible, and compatible with surrounding properties.

Conclusion: Staff advises that the all of the parking in the western or lower parking lot is behind the building line, but eleven spaces in the western parking area extend into the front building line. It recommended retaining these spaces because they have been established for many years, NMS has recently made operational improvements to the parking lot for safety, existing landscaping is adequate, and removal would increase the parking deficit:

Removing the eleven parking spaces encroaching into the front building setback will make the overall property deficient in meeting the parking requirements of the current Zoning Ordinance...This parking lot safely accommodates vehicles and pedestrians, is landscaped, and has a planted median and tall hedges. These features enhance the compatibility of the lot with the residential character of the neighborhood. Nursing home staff frequently patrols the parking lot to ensure cars are parked in assigned spaces and circulation remains adequate and efficient. Staff recommends that the Hearing Examiner find the parking is safe and not detrimental to the neighborhood, accessible, and compatible with the surrounding properties.

The Hearing Examiner finds that the mature trees within the parking area and landscaping and mature trees along Randolph Road and Colie Drive sufficiently screen the parking area and maintain the existing residential character of the neighborhood. Any benefit from removing the eleven spaces in the front building setback is outweighed by further reducing parking in a site that

is already constrained. The Hearing Examiner agrees with Staff that the parking is safe, not detrimental to the neighborhood, accessible, and compatible with the surrounding area.

ii. An adequate area for the discharge and pick-up of children is provided.

Conclusion: There are two areas for discharge and pick-up of children—the circular driveway and two spaces reserved for this purpose in the western parking area. Discharge and pick-up is limited to five parents in 15-minute intervals. Based on this evidence, the Hearing Examiner finds that the areas proposed for pick-up and drop-off of children are adequate to serve the proposed use.

iii. The Hearing Examiner may limit the number of children outside at any one time.

Conclusion: Staff recommended that the maximum number of children outside at any one time be limited to 10 because the play area is adjacent to residential lots and the existing nursing home. It advises that playtimes will be a total of two hours in the morning and two hours in the afternoon, divided into four groups for 30 minutes each beginning and that outdoor play times will not begin until 9:00 a.m. Heritage has agreed to the limitation recommended by Staff, and having no evidence to the contrary, the Hearing Examiner adopts this recommended condition.

iv. In the RE-2, RE-2C, RE-1, R-200, R-90, R-60, and R-40 zones, the Day Care Center (Over 30 Persons) must be located on a site containing a minimum of 500 square feet of land area per person. The Hearing Examiner may reduce the area requirement to less than 500 square feet, but not less than 250 square feet, per person where it finds that:

- (a) the facility will predominately serve persons of an age range that requires limited outdoor activity space;***
- (b) the additional density will not adversely affect adjacent properties; and***
- (c) additional traffic generated by the additional density will not adversely affect the surrounding streets.***

Conclusion: The site is within the R-60 Zone, and therefore must have at least 20,000 square feet of land area. Staff deducted the square footage of the existing building from the total area of the site (because it is not devoted to the daycare use), resulting in an area of 62,004, well above the minimum amount required. The Hearing Examiner finds that this standard has been met.

v. The Hearing Examiner may limit the number of people allowed for overnight care.

Conclusion: Heritage does not propose to have overnight care, so this is not applicable.

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

Conclusion: This property is not within the AR Zone; this requirement is not applicable.

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

Site access standards apply only to properties in Residential Multi-Unit, Commercial/Residential, Employment, Industrial, and Floating zones. As the R-60 Zone Residential Detached zone, they do not apply to the subject property.

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

Division 6.2 of the Zoning Ordinance governs the standards for the number of parking spaces required, parking setbacks and parking lot screening.

a. Number of Parking Spaces Required by Section 59.6.2.4

Section 59.6.2.4 of the Zoning Ordinance requires a total of 90 parking spaces for both the nursing home and the child day care on the subject site. The Applicant provides 67 on-site spaces,

and requests the Hearing Examiner to approve an alternative method of compliance with the full number of spaces. Staff recommended approval of alternative compliance because (Exhibit 41, pp. 14-15):

...within the defined neighborhood boundary, a special exception for child day care does not currently exist and the use is specifically promoted by the Master Plan; the Applicant has demonstrated that visiting hours for the nursing home do not coincide with pick-up/drop-off times for the proposed child day care thus ensuring the availability of the parking spaces for the proposed use; increasing the number of parking spaces to the required amount will significantly impact the residential character of the neighborhood.

Section 59-6.8.1 permits the flexibility to implement an alternative method of complying with the regulations if there are unique site constraints and four standards are met:

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.*

Conclusion: The site is unique because it accommodates both a nursing home and a day care, and has done so for many years. The approval of both the elderly day care and nursing home special exceptions has been amended over the years, and the Board of Appeals found the on-site parking adequate for both uses. Exhibit 41, p. 14. The Hearing Examiner finds that the existing parking and building are unique site characteristics that preclude efficient development of both uses. Staff found that additional surface parking or structured parking would significantly alter the character

of the neighborhood and the Hearing Examiner agrees. Thus, the remaining inquiry involves whether the existing configuration of the parking lot meets the 4 standards of approval for alternative compliance.

The intent of that Division 59-6.2 is to “ensure that adequate parking is provided in a safe and efficient manner.” *Zoning Ordinance*, §59-6.2.1. Staff concluded the intent is met with 67 spaces (originally, Staff assumed 71 spaces, but later confirmed that the original analysis applied), because the largest employee shifts and visiting hours are outside of the peak times for the day care. The largest employee shift begins at 7:00 p.m. and ends at 3:00 p.m. Peak visiting hours are from 11:00 a.m. to 2:00 p.m. and 7:00 p.m. to 11:00 p.m. Staff also noted that the daycare will result in fewer peak hour trips and the present site has operated safely for a number of years. The Hearing Examiner agrees with Staff for the additional reasons that the nursing home survey shows that a significant number of employees walk, take public transit, or carpool to work and because of the available on-street parking on Colie Drive.

The second standard for approval requires an analysis of whether the deviation from the regulations is the minimum amount required to accomplish the intent of the parking regulations. Staff concluded that they felt that additional surface parking or structured parking would significantly impact the character of the area. The Hearing Examiner also finds that the bulk of the parking deficit is generated by the nursing home rather than the day care, which only requires 6 spaces. Heritage has demonstrated that the number of parking spaces is adequate for the nursing home, there are reserved spaces for drop-off and pick-up on-site, and employees will be required to parking on the street. For these reasons, the Hearing Examiner finds that the existing 67 on-site spaces are the minimum necessary deviation to accommodate both uses.

The third standard asks whether the Applicant can demonstrate there is sufficient mitigation to alleviate adverse impacts of allowing less than the amount of parking required. Staff concluded that the Applicant has done so through a condition requiring drop-off and pick-up of children to be limited to five in 15 minute intervals. The Hearing Examiner agrees and further finds that the availability of on-street parking and the condition requiring employees to park on-street also mitigates the impact of providing a lower number of parking spaces.

The final prong for approval of alternative compliance with the regulations requires analysis of whether the proposal is in the public interest. Staff determined it was because child daycare is a use recommended in the Master Plan and needed in the community. The Hearing Examiner agrees with this and so finds.

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.

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: Heritage proposed to utilize the existing site lighting for the proposed use and therefore, any additional standards of Division 6.4 are not required.

b. Site Screening and Landscaping

As previously noted, the Hearing Examiner agrees with Staff that the site screening and landscaping constitutes “site design” and is grandfathered under Section 59-7.7.1.A of the Zoning Ordinance.

c. Signage

Signage is governed by Division 6.7, which limits the size and placement of signs on the property as follows:

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: Heritage does not propose any new signs on the property (Exhibit 41, p. 18), therefore, this condition is not applicable.

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 Heritage Care, Inc., for a conditional use under Section 59.3.4.4.F. of the Zoning Ordinance, to operate a child day care center for up to 50 children at 4011 Randolph Road, Silver Spring, Maryland, is hereby **GRANTED**, subject to the following conditions:

1. The Applicant shall be bound by all of its testimony and exhibits of record, and by the testimony of witnesses and the representations of counsel identified in this Report and Decision.
2. The proposed Child Day Care Center must be limited to 40 children, ranging in age from 6 weeks to 5 years.

3. The daycare may have no more than seven employees on-site at any one time.
4. The property must at all times comply with the Site Plan (Exhibit 68) and Landscaping Plan (Exhibit 14).
5. The hours of operation are limited to Monday through Friday, 6:30 a.m. to 6:00 p.m.
6. No more than 10 children shall be permitted to play outdoors at any one time. Outdoor play times must not start before 9:00 a.m.
7. No truck deliveries shall arrive to the subject property before 8:00 a.m.
8. Prior to issuance of a Use and Occupancy Certificate for the proposed use, the Board of Appeals must approve a revocation or abandonment for the elderly day care special exception (S-367-A) that previously existing on the property.
9. Prior to issuance of a Use and Occupancy certificate for the proposed use, the Board of Appeals must approve a modification for the nursing home special exception (BA S-367-A, [S-367, CBA 1590]) to reflect the child daycare approved in this case.
10. Prior to release of a Use and Occupancy Certificate for the proposed use, the Applicant must amend the Preliminary Plan No. 119871500 to reflect the new use and limits granted by approval of this application.
11. Parent drop-off and pick-up times shall be staggered so that no more than five vehicles may drop-off or pick-up children within a 15-minute interval. The Applicant shall require each parent to adhere to its scheduled time in its parent contract, in the manner described in Exhibit 54(a).
12. Prior to release of a Use and Occupancy Certificate for the proposed use, the Applicant must reserve and mark the two spaces shown on Exhibit 56(a) for drop-off and pick-up from between 7:00 a.m. to 9:45 a.m. and 3:15 p.m. to 6:00 p.m.
13. Non-resident Staff are prohibited from parking on-site.
14. 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.
15. 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.
16. The Applicant shall maintain the grounds in a clean condition, free from debris, on a daily basis.

17. 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 14th day of December, 2015.



Lynn A. Robeson
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

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