

OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
Stella B. Werner Council Office Building
Rockville, Maryland 20850
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IN THE MATTER OF: *

LILIAN FLORES d/b/a *

KIDS CORNER DAY CARE *

Applicant *

Lilian Flores *

Francisco Romero *

For the Application * OZAH Case No. CU 17-08

Milton Lee *

Confronting Neighbor *

Commenting on the Application *

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 November 23, 2016, the Applicant, Lilian Flores, filed an application seeking approval of a conditional use to operate a Group Day Care for up to 12 children in her home at 3800 Littleton Street in Silver Spring. Her joint ownership of the property with her husband, Francisco Romero, is established by the Maryland Real Property Records (Exhibit 20) showing an SDAT Tax Account Number of 13-91244128. Mr. Romero filed a letter consenting to this application (Exhibit 21). The Applicant currently runs a Family Day Care (Kids Corner Day Care) for up to eight children in her home, and wishes to expand to 12 children.

The Subject Site is Lot 1, Block 90 of the Connecticut Avenue Estates Subdivision, and it is zoned R-60, as evidenced by the official zoning map of the area (Exhibit 5). A conditional use is required for a child care facility for 9 to 12 children in the R-60 Zone (*i.e.*, a Group Day Care), pursuant to Zoning Ordinance §59-3.4.4.D (9-12 persons).¹

The Office of Zoning and Administrative Hearings (OZAH) scheduled a public hearing to be held on March 10, 2017, by notice issued on January 30, 2017 (Exhibit 24). The Technical Staff of the Montgomery County Planning Department (Technical Staff or Staff) issued a report on February 6, 2017, recommending approval of the application, subject to six conditions. Exhibit 27. The Planning Board met on February 16, 2017, and voted unanimously (4-0) to recommend approval with the conditions recommended by Staff, but with a change to recommended Condition 5 to allow a wooden board-on-board fence, instead of vinyl, and elimination of recommended Condition 6, which had called for a bicycle parking space. Instead, the Planning Board recommended that the bicycle parking space requirement be waived under Zoning Ordinance §59.6.2.10. These recommendations are contained in the Chair's letter of

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

February 23, 2017. Exhibit 28. Technical Staff's report was supplemented on February 21, 2017, by email responses from Staff to some questions raised by the Hearing Examiner. Exhibit 29.

The application is supported by letters from parents of three children currently using the day care. Exhibits 14, 15 and 16. There were no letters filed in opposition.

The public hearing proceeded as scheduled on March 10, 2017. The Applicant testified, as did her husband, Francisco Romero. At the beginning of the hearing, the Applicant indicated that she accepted the findings of Technical Staff report and email supplement (Exhibits 27 and 29) as part of her evidence in the case and accepted the conditions proposed by Technical Staff, as amended by the Planning Board. Tr. 8-9. There was no opposition testimony, but a confronting neighbor, Milton Lee, testified as to a couple of concerns he had. Tr. 18-24. The record was scheduled to close on March 20, 2017, upon receipt of the hearing transcript.

No additional filings were made, except for the transcript, and the record closed, as scheduled, on March 20, 2017.

For the reasons set forth 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

Technical Staff described the subject site as follows (Exhibit 27, p. 2):

The Subject Site is Lot 1, Block 90 of the Connecticut Avenue Estates Subdivision, located at 3800 Littleton Street, Silver Spring. The lot contains 7,054 square feet with a one-story, single-unit detached house that serves as both a residence and the location for Kids Corner Home day care, an existing day care for eight children. . . . The dwelling was built in 1956. The Site is a corner lot with frontage on the south side of Littleton Street and the west side of Connecticut Avenue service road. There is an approximately four-foot wide concrete sidewalk along each side of the Site's Littleton Street and the west side of the Connecticut Avenue frontages.

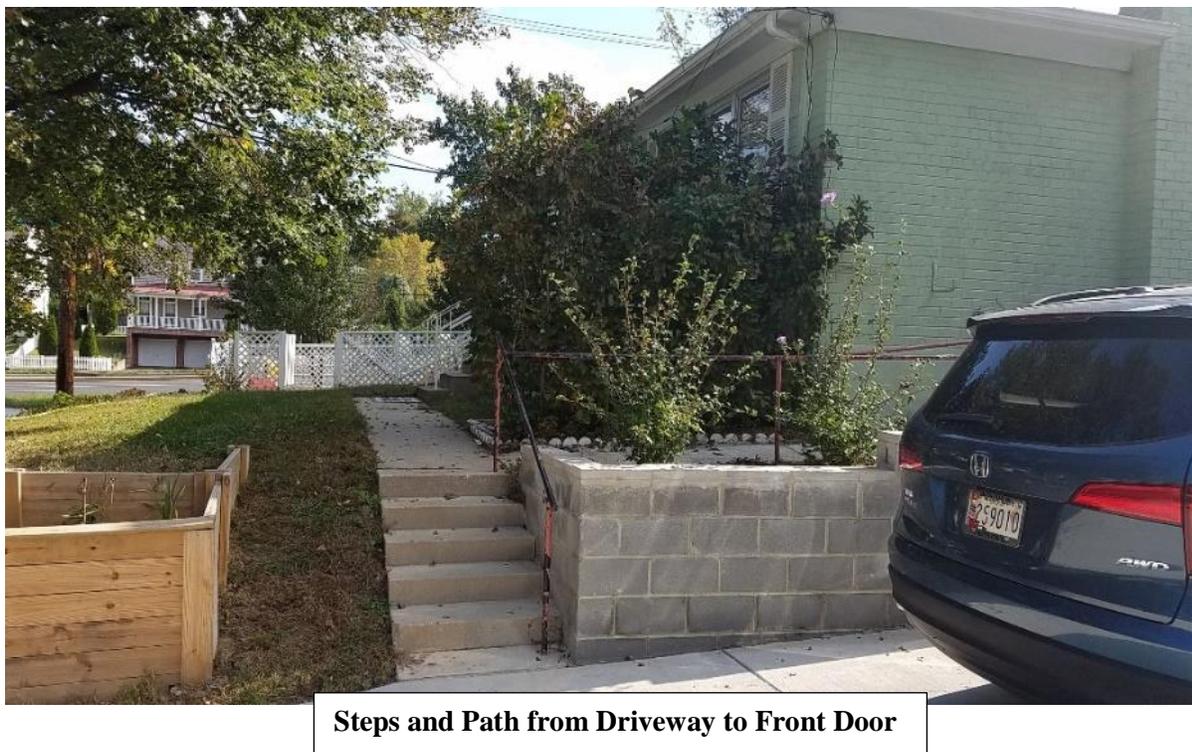
The Site has an existing double-wide concrete driveway on the northwest side of the house with space to park four vehicles. The driveway extends from the Littleton Street public right-of-way into the front and side yard of the Site. Five concrete steps from the driveway lead up to a concrete sidewalk and a second set of steps up to the front entrance of the house. This is the main entrance into the house with a covered porch and one exterior light fixture at the front door. A second light fixture is located on the driveway side at an entrance to the basement. South of the driveway are two accessory structures; a covered patio and a shed.

An outdoor play area (56' x 17'6") is located on the north and east sides of the house, and is enclosed by a four-foot, two-inch high lattice-pattern wood fence with a gate located at the northwest side of the house, near the main entrance. The rear yard is approximately 20 feet deep from the back of the wall to the rear property line. The Site is landscaped with mature trees and shrubs. Most of the trees and shrubs are along the rear property line. The abutting residential lot to the south has a driveway and a single-unit detached house facing the Connecticut Avenue service road. To the west is an existing one-story, single-unit house with driveway frontage on Littleton Street.

Staff provided an aerial photograph of the site (Exhibit 27, p. 3):

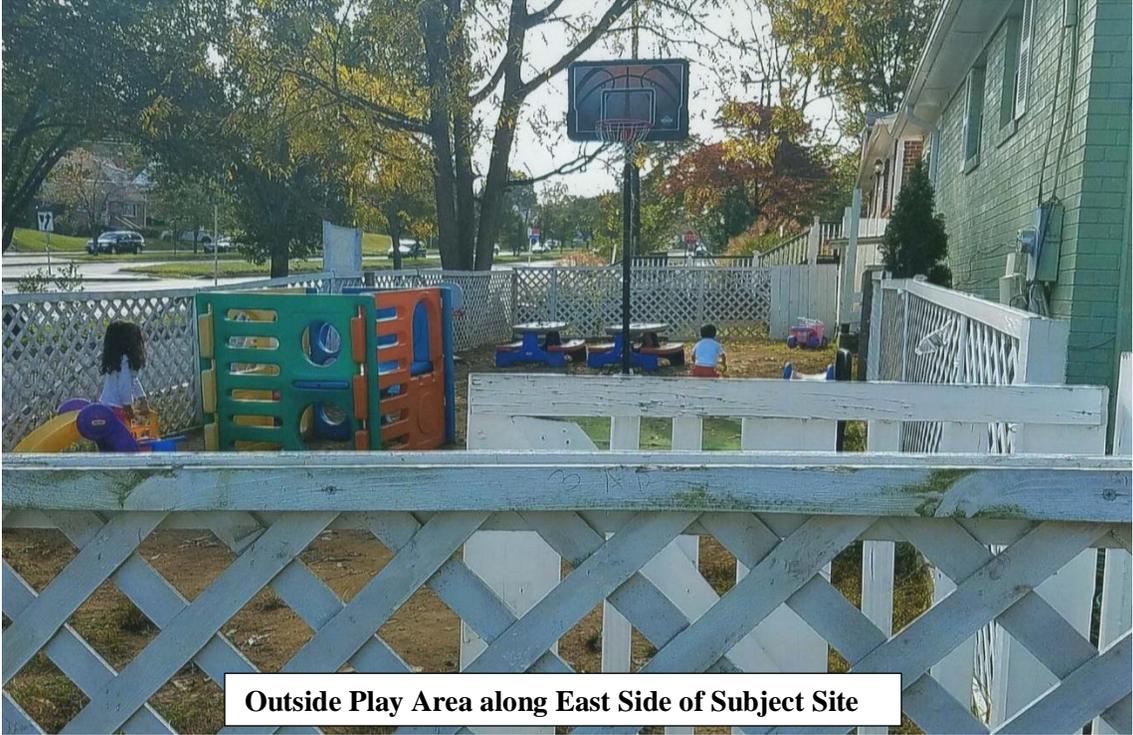


Photographs provided by the Applicant depict the subject site as it presently exists (from Exhibit 17):





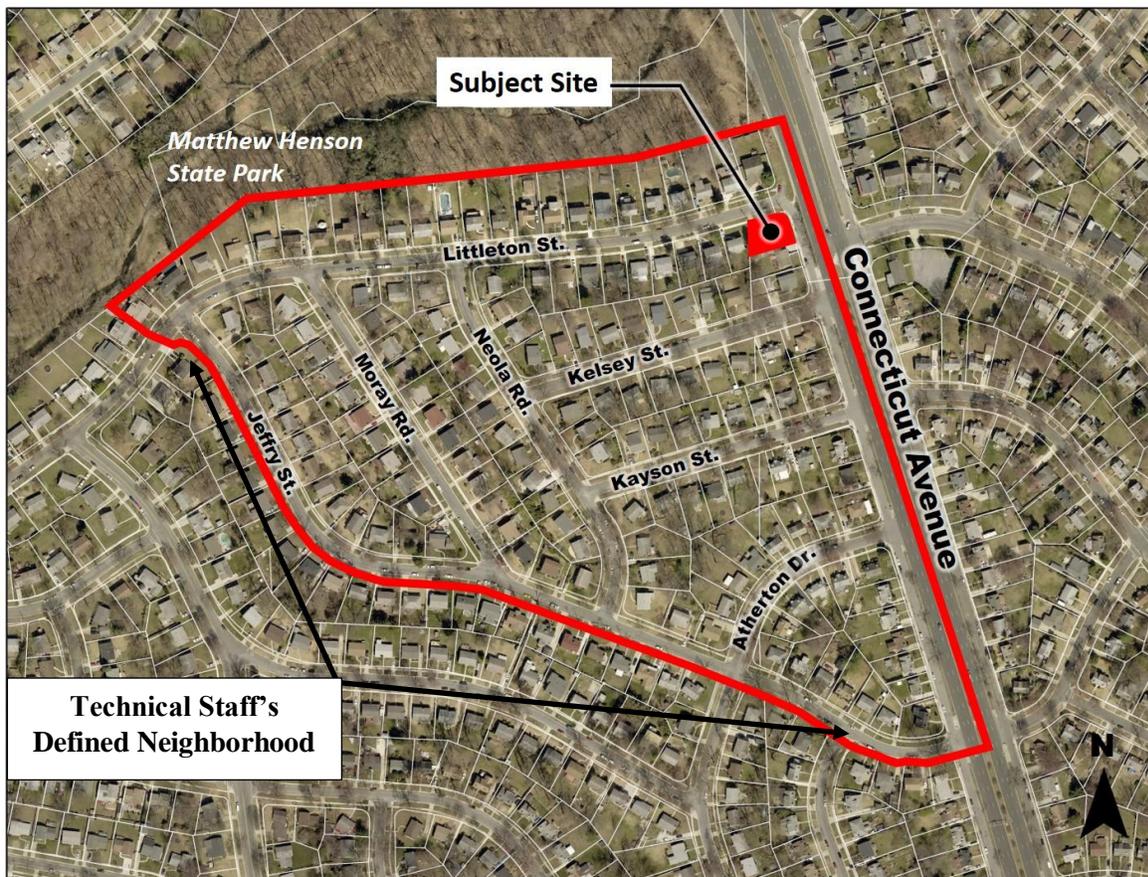
Driveway (parking for 4 cars for residents and employees)



Outside Play Area along East Side of Subject Site

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 the houses on the north side of Littleton Street to the north; Connecticut Avenue to the east; and Jeffry Street to the south and west.” Exhibit 27, p. 3. It is depicted in an aerial photograph provided by Technical Staff (Exhibit 27, p. 4):



While Staff could have defined the neighborhood more narrowly, the Hearing Examiner accepts Technical Staff definition of the neighborhood. As can be seen in the above aerial

photograph and noted by Staff, the neighborhood is composed of single-family, detached homes in the R-60 Zone. Technical Staff further describes the neighborhood in Exhibit 27, p. 3:

The Connecticut Avenue Estates Subdivision is an established single-unit residential neighborhood with houses built in the 1950's. The neighborhood has a grid pattern street network with secondary residential streets terminating in 'T' intersections. Connecticut Avenue is a major highway corridor along predominantly residential uses. . . . Two special exceptions are inside the Staff-designated neighborhood (at the northwest edge) and both are accessory apartments:

- S-2209 located at 3913 Littleton Street and was approved on March 1, 1996; and
- S-936 located at 3916 Littleton Street with no record of the date of approval.

A third special exception, one block outside of the staff-defined neighborhood, is CBA-521, an eight-child day care in a residence at 3905 Joliet Street approved on May 15, 1957.

Littleton Street is a two-way residential street with on-street parking on both sides. The Connecticut Avenue service road is also a two-way residential street with on-street parking on the west side.

C. Proposed Use

The Applicant seeks approval of a conditional use to expand her current Family Day Care for up to 8 children into a Group Day Care for up to 12 children in her home at 3800 Littleton Street in Silver Spring. As explained in Applicant's supporting information (Exhibit 2):

I am currently licensed by the Office of Child Care in operation since May 2014, to take care of 6 children and my own 2 children under the age of 6 years, I provide Care on my own residency located at 3800 Littleton Street, Silver Spring MD, 20906. The Child Care currently counts with 2 staff member including myself and I might need to hire an extra staff member. With the growing need and demand for high quality child care in my neighborhood, I am considering the expansion of my Home daycare to be able serve more families in need of quality day care. I am participating programs as Maryland Excels, Maryland Child Care Provider Credential, and I am in the process of getting NAFCC accredited. As part of the requirement for the expansion I am requesting a Conditional Use Permit to expand my existing daycare to Large Family Child Care to be able to take care of 9 to 12 children including my own 2 children under the age of 6 years old. The current and proposed hours of operation are Monday through Friday from 7:00 AM to 6:00 PM.

in Part IV of this Report and Decision requiring that the play area be surrounded by a six-foot high, wooden, board-on-board fence.

2. Parking for the Residence and the Day Care

The subject site has four parking spaces in its widened driveway. The Applicant indicated in her supporting information (Exhibit 8) that two of the spaces will be allocated for the residents and one for a non-resident employee. One of the driveway spaces will be vacant during drop-off and pickup times. Additional space for drop-off and pickup is available on Littleton Street, in front of the subject site, and one non-resident employee can also park on the street. Zoning Ordinance §59.6.2.4.B. expressly permits parking spaces for Group Day Care employees to be provided on the street abutting the site. As reported by Technical Staff (Exhibit 27, p. 6), on-street parking spaces are available on Littleton Street, and there is no sight-distance problem for parking in front of the house on Littleton Street because of the residential speed limit in the neighborhood and the low number of vehicle trips. Staff also found that “Motorists should be able to safely maneuver by pulling into and out of the driveway spaces.” Exhibit 27, p. 6. Technical Staff concluded, “The parking requirement is satisfied by the existing driveway that accommodates four parked vehicles and additional on-street parking on Littleton Street.” Exhibit 27, p. 8.

Based on this evidence, the Hearing Examiner finds that there is sufficient room for parking in the immediate neighborhood of the subject site to accommodate both the non-resident employees and the drop-off and pickup operations of the proposed Group Day Care.

3. Site Landscaping, Lighting and Signage

The landscaping and lighting on the site will remain unchanged if the application is approved. They are described by Technical Staff (Exhibit 27, p. 2):

. . . [There is] one exterior light fixture at the front door. A second light fixture is located on the driveway side at an entrance to the basement. . . . The Site is landscaped with mature trees and shrubs. Most of the trees and shrubs are along the rear property line. . . .

There is no need for additional landscaping since the outdoor play area will be enclosed by a six-foot high, wooden, board-on-board fence, and the play area abuts the Connecticut Avenue Service Road, not any other single-family residence.

Technical Staff confirmed in response to a question from the Hearing Examiner that there is no signage on the site, and none has been sought in this application. Exhibit 29. Therefore, a condition is imposed in Part IV of this Report and Decision prohibiting any signage.

4. Internal Physical Arrangements for Site Operations

The existing Family Day Care operates on the first floor of the Applicant's home, as depicted on the Site Plan (Exhibit 10), reproduced on page 9, above. It is described in the Applicant's supporting information (Exhibit 8):

The children come in by the front door, the Daycare area is in the first floor of the house and the room used are the living room which is indoor playing and learning area, the bathroom access is through a hallway at the left hand side of the learning area, the eating area is located in the middle of the house, the napping area is located in room # 4, located in the back and if school age kids are enrolled, the table in the dining room is available for the kids to do home works.

The proposed Group Day Care facility will occupy the same space as the existing day care facility.

5. Operations

Proposed operations were summarized by Technical Staff (Exhibit 27, p. 4):

The Applicant, Lilian Flores, is requesting to expand the existing eight-child day care facility that she operates from her residence to a group day care facility for up to 12 children. Since 2014, the Applicant has operated a licensed child day care for six children including two of her own, all under six-years of age, at the Site. The Applicant and a non-resident employee staff the existing day care. If the conditional use is approved, Ms. Flores will likely hire a second non-resident

employee. The proposed hours of operation will remain the same as the operating hours of the existing day care: Monday through Friday from 7:00 a.m. to 6:00 p.m. No physical alterations or renovations are proposed to the existing house. The proposed day care facility will operate as currently located on the first floor of the Applicant's residence . . . The Applicant and the non-resident staff member currently park their vehicles in the driveway at the Subject Site and propose to continue to do so as part of the conditional use. The Applicant has submitted a staggered schedule of drop-off and pick-up times so that all parents do not arrive/depart at the same time Outdoor play activity times are scheduled twice a day at 10:30 a.m. - 11:45 a.m., and 4:15 p.m. - 5:30 p.m.

As discussed by Staff, the parent drop-off and pick-up times will be staggered from 7:10 a.m. to 9:30 a.m. and from 4:20 p.m. to 5:45 p.m. Since two of the children are her own, only 10 children will have to be dropped off and picked up. The Applicant provided a schedule for that process with 10 children in her supporting information (Exhibit 3, pp. 7-8):

Planned Drop-off and Pick up Schedule [with children's names redacted]:

7:00 Owner/provider Clock in.
 7:10 AM Child 1, 1 girl has 8 months (2/19/16), DROP-OFF.
 7:20 AM Child 2, , DROP-OFF.
 7:30 AM Child 3, 1 girl has 1 year and 10 months (12/19/14), DROP-OFF
 7:40 AM Child 4, , DROP-OFF.
 7:40 AM Child 5, , DROP-OFF.
 8:00 AM Child 6 and 7 (siblings) 1 girl has 3 years and 5 months (5/31/13) and 1 boy has 1 year and 11 months (11/3/14) DROP-OFF.
 8:15 AM Child 8, , DROP-OFF.
 8:30 AM Staff Member 1 Clock in.
 8:45 AM Child 9, 1 boy has 2 years and 5 months (5/3/14) DROP-OFF
 9:00 AM Staff Member 2 Clock in.
 9:30 AM, Child 10, DROP-OFF
 4:20PM Child 1, 1 girl has 8 months (2/19/16) PICK UP.
 4:30PM Child 7, PICK UP.
 4:40PM Child 8, PICK UP.
 4:50PM Child 9, PICK UP.
 5:00 Child 6 and 7, 1 girl has 3 years and 5 months (5/31/13) and 1 boy has 1 year and 11 months (11/3/14) PICK UP
 5:10 PM, Staff member 1 Clock out
 5:20 PM, child 2 , PICK UP
 5:30 Child 3, 1 girl has 1 year and 10 months (12/19/14) PICK UP.
 5:45 Child 9, 1 boy has 2 years and 5 months (5/3/14) PICK UP.
 6:00 PM Provider and Staff Member 2 Clock out.

Technical Staff proposed a condition specifying staggered arrivals (Exhibit 27, p. 2):

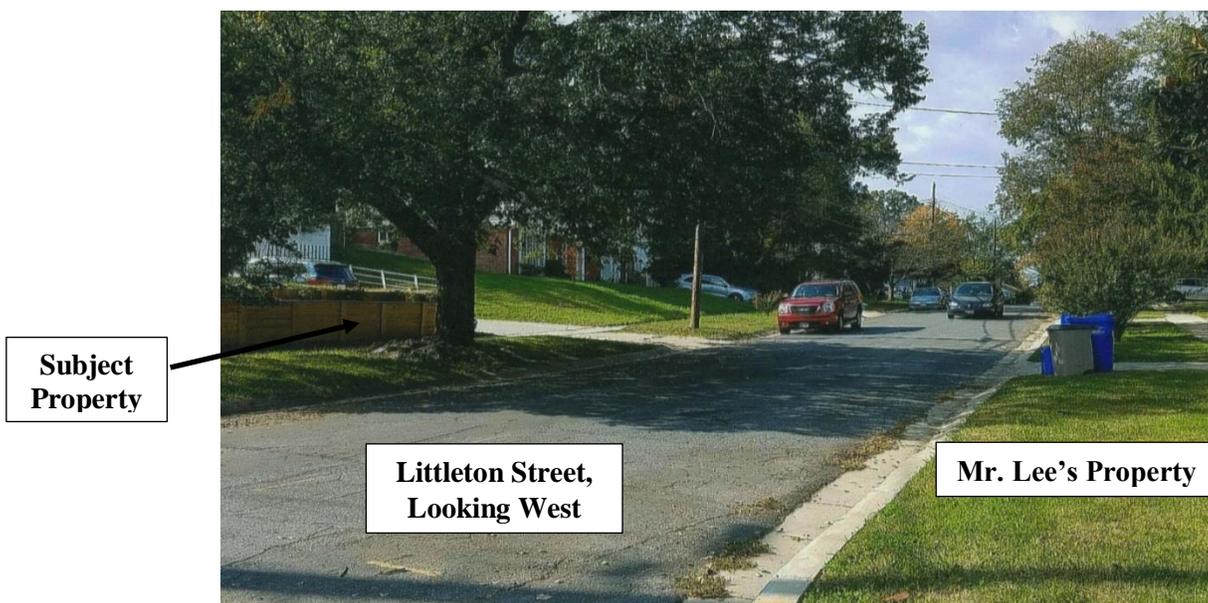
The Applicant must schedule staggered drop-off and pick-up of children with no more than four vehicles entering and exiting the site every 30 minutes during these designated times.

The Hearing Examiner adopted that condition, but added the proviso that “The Applicant must require written parental agreements so indicating for all children arriving by vehicle.”

The potential impacts of the proposed operations on the neighborhood and the transportation system will be further discussed in Part III of this Report and Decision.

D. Community Response

The application is supported by letters from parents of three children currently using the day care. Exhibits 15 and 16. There is no opposition, but Applicant’s confronting neighbor, Milton Lee, testified regarding his concerns. Tr. 18-24. He does not oppose the application, but he mentioned two concerns – that trash sometimes overflows the Applicant’s receptacles, and that “They had a previous client that on more than one occasion was parking not just in front of their house but on top of our property, on the grass.” Tr. 18. The location of Mr. Lee’s property relative to the subject site can be seen on the following photograph from Exhibit 17:



Mr. Lee indicated that he spoke to the Applicant about the parking issue, and that “she addressed it.” However, he wants to make sure that he has an avenue of redress if it reoccurs. With regard to the trash, Mr. Lee testified that he and his wife have had to pick up trash from the child care operation which had blown around the neighborhood when not properly secured. Tr. 19-20.

As the Hearing Examiner explained at the hearing, the Applicant is not responsible if an error is made by the trash collectors, but the Applicant is responsible for providing adequate trash receptacles to handle trash from their child care operations and for securing them properly. Tr. 21.

To address both of Mr. Lee’s concerns, the Hearing Examiner has imposed a condition in Part IV of the Report and Decision, which provides:

The Applicant must ensure that she has provided adequate trash receptacles for her trash relating to the use and that they are properly secured when placed on the street for collection. She must also ensure that her clients and employees do not park on the grass of the neighbors’ properties.

As with the other conditions imposed by the Hearing Examiner, this condition can be enforced by the Department of Permitting Services.

In sum, the evidence is that the proposed use, as conditioned by the Hearing Examiner, will address the concerns expressed by the confronting neighbor.

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 almost 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 Group Day Care for up to 12 children. *Zoning Ordinance* §59.3.4.4.D.

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:²

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 previously approved conditional uses associated with this site. Exhibit 27, p. 7. 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 to the extent the Hearing Examiner finds necessary to ensure compatibility, meets applicable general requirements under Article 59-6,³

² 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 arguably apply to this application. Section 59.7.3.1.E.1. contains seven subparts, a. through g.

³ The underlined language was added by the Council when the 2014 Zoning Ordinance was amended effective December 21, 2015, in ZTA 15-09 (Ordinance No. 18-08, adopted December 1, 2015).

Conclusion: This subsection requires an analysis of the standards of the R-60 Zone contained in Article 59-4; the use standards for Group Day Care for 9 to 12 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 27, p. 12), 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;

The subject property lies within the geographic area covered by the 1989 *Master Plan for the Communities of Kensington-Wheaton*. The Master Plan does not specifically discuss the subject site, but it supports having more child day care facilities in the area. As explained by Technical Staff (Exhibit 27, pp. 5-6):

The Site falls within the 1989 *Master Plan for the Communities of Kensington-Wheaton* . . . It has two main objectives related to the Plan's residential areas:

- (1) to protect and stabilize the extent, location, and character of existing residential and commercial land uses; and
- (2) to maintain the well-established low-to-medium-density residential character which prevails over most of the planning area (page 40).

The Master Plan does not discuss the Site in terms of specific land use recommendations, however; it has a Child Day Care Facilities section (pages 137-140) that suggests a need for additional child day care facilities and opportunities as having been identified in the Plan area. This section has an objective "to promote greater day care opportunities through appropriate land use recommendations and associated policies." And this section has two policies, one of which is relevant to this application that states: "Support efforts to utilize County zoning and development plan review processes to promote greater day care opportunities."

The Applicant's proposal conforms to the general recommendations, objective and policies of the Master Plan because it will be a continuation of the use of the house as a primary residence with a conditional use for a group day care facility operated from it Monday through Friday during weekdays. And, the proposed expansion of the existing day care facility will augment the Plan's stated policy.

Conclusion: There is no evidence in the record contrary to Technical Staff’s findings on this issue. Based on that fact and the language of the Master Plan, the Hearing Examiner concludes that the proposed conditional use substantially conforms with the recommendations of the applicable 1989 *Master Plan for the Communities of Kensington-Wheaton*, which seeks to provide adequate child care facilities in the area.

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 27, p. 9):

The proposal is harmonious with, and will not alter the character of the surrounding residential neighborhood in a manner inconsistent with the Master Plan. The Applicant’s residence has a well-maintained appearance and the expansion of the day care facility will not detract from the residential character of the neighborhood. The recommended six-foot high board-on-board . . . fence will be compatible with the residential neighborhood because a portion of the Applicant’s rear yard is enclosed by a six-foot high fence and the new fence around the outdoor play area will address screening/buffering for confronting properties.

The Hearing Examiner concludes 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; no external modifications to the home are planned; the only physical changes to the site will be the addition of a 6-foot high, board-on-board fence to screen the play area, and the only operational change will be the addition of 4 children and one employee to an existing day care. As noted above, it is consistent with the applicable Master Plan.

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: According to Technical Staff, the defined neighborhood contains two other special exceptions – both accessory apartments. Moreover (Exhibit 27, p. 10):

The expansion of the existing eight-child day care to a proposed 12-child day care will not result in an over-concentration of conditional uses in the area. The application substantially conforms with the recommendations of the Master Plan and the expanded day care use will not alter the nature of the predominantly residential character of the area.

The Hearing Examiner agrees with Technical Staff that the addition of the proposed 12-child Group Day Care will not result in an overconcentration of day care facilities (or other conditional uses) in the area. The proposed expansion of the existing Family Day Care into a Group Day care will not alter the residential nature of the area. A day care facility already exists in the home, and it will remain a single-family, detached home. Moreover, the provision in question also specifies that “*a conditional use application that substantially conforms with the recommendations of a master plan does not alter the nature of an area,*” and as noted above, the proposed use is consistent with the Master Plan. 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: According to Technical Staff, the application does not require approval of a preliminary plan of subdivision. Exhibit 27, p. 10. Therefore, the Hearing Examiner must determine whether the proposed development will be served by adequate public services and facilities. By its nature, a small child care facility operating within an existing single-family residence will not ordinarily create significant additional burdens for schools, police and fire protection, water, sanitary sewer and storm drainage.

Moreover, the expert analysis by Technical Staff did not find significant impacts on transportation facilities from the proposed conditional use. Technical Staff analyzed that impact in accordance with Local Area Transportation Review (LATR) and Transportation Policy Area Review (TPAR), as set forth in Exhibit 27, pp. 6-7:

Local Area Transportation Review

The proposed use would generate up to two new, and nine total, peak-hour trips during the weekday morning peak-period, and up to two new, and nine total, peak-hour trips during the evening peak-period. Therefore, a Traffic Study is not required to satisfy the Local Area Transportation Review (LATR) test because the proposed day care generates fewer than 30 total peak-hour trips within the weekday morning (6:30 to 9:30 a.m.) and evening (4:00 to 7:00 p.m.) peak periods.

Transportation Policy Area Review

As an adequate public facilities test for an application filed before January 1, 2017, the Applicant is subject to the 2012-2016 Subdivision Staging Policy. The Transportation Policy Area Review (TPAR) test would typically be satisfied by paying 25 percent of the transportation impact tax for the additional square footage located in the Kensington-Wheaton Policy Area. The applicable roadway test for this policy area is adequate, and the transit test is inadequate. . . . [but a] TPAR payment will not be required because the square footage of the existing single-unit

residential dwelling will not be expanded to accommodate the increase in the number of children in the group child day care.

The Applicant also addressed the impact on transportation facilities in her supporting information, where she provided a schedule for drop-offs and pickups of children (Exhibit 3, pp. 7-8). That schedule is reproduced on page 12 of this Report and Decision. As discussed in Part II.C.5 of this Report and Decision, and as required by a conditions imposed in Part IV, she will have contractual arrangements with her clients to ensure staggered arrivals and pick-up times, which will reduce any additional burdens on the transportation system.

With regard to environmental facilities, Technical Staff found that “the Conditional Use complies with all applicable environmental guidelines and regulations as recommended.” Exhibit 27, p. 7.

Technical Staff concluded that “The Site is served by adequate public services and facilities.” Exhibit 27, p. 10. Based on this record, the Hearing Examiner finds that the proposed development will be served by adequate public services and facilities. LATR standards have been met, and the addition of four children and one employee to the facility will not unduly burden local 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, inherent adverse effects, alone, are not a sufficient basis for denial of a conditional use. However, 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. Nevertheless, the existence of a non-inherent adverse effect does not mean that an application for a conditional use must be denied. Rather, it means that it can result in denial if the Hearing Examiner finds that such a non-inherent adverse effect, either alone or in combination with inherent adverse effects, creates “undue harm to the neighborhood” in any of the categories listed in Zoning Ordinance §59.7.3.1.E.1.g.

Analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a Group Day 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 surrounding

neighborhood, to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

In analyzing potential adverse effects, Technical Staff considered the size, scale, scope, light, noise, traffic and environmental effects of the proposed use. Staff determined that the following physical and operational characteristics are necessarily associated with (*i.e.*, are inherent in) a Group Day Care facility (Exhibit 27, p. 11): (1) vehicle trips to and from the site; (2) the outdoor play area; and (3) the drop-off and pick-up area. The Hearing Examiner agrees with that listing of inherent characteristics of a Group Day Care, but would add two other inherent characteristics: (4) noise generated by children; and (5) lighting.

Staff then examined the characteristics of the proposed use (Exhibit 27, p. 11):

. . . [T]he proposal will not significantly impact traffic in the neighborhood. The existing driveway will provide adequate drop-off and pick-up to the Site. No additional play equipment or an expansion of the existing play area is proposed. The size of the play area is adequate for toddler to six-year-old children. Outdoor play activity times are scheduled twice a day at 10:30 a.m. - 11:45 a.m., and 4:15 p.m. - 5:30 p.m. Because the outdoor play area is located on a corner lot, only one confronting property (to the south) may be impacted by noise generated from the children. A new six-foot high board-on-board . . . [wood]⁴ fence will minimize noise from the Site to adjacent properties, and it will create a private and safe outdoor play area for the children that is not visible from Connecticut Avenue. The drop-off and pick-up times will be limited to be staggered with no more than four vehicles at the Site every 30 minutes during these designated times, so that the parents do not all arrive/depart at the same time.

Staff concluded, “No non-inherent effects from this proposal have been identified.”

Exhibit 27, p. 11.

The Hearing Examiner agrees with Staff’s conclusion in this regard. While any Group Day Care may have some adverse effects on the neighbors (*e.g.*, from the noise of outdoor play and additional traffic), there is no characteristic of the proposed use or the site that would

⁴ The Hearing Examiner has replaced Technical Staff’s mention of a “vinyl” fence with the “wood” fence recommended by the Planning Board. Exhibit 28.

differentiate the effects from this proposed Group Day Care from any other such facility. Thus, the Hearing Examiner finds no non-inherent adverse effects.

Moreover, the only concerns raised by a single neighbor (unsecured trash and parking on his grass) can be, and have been, addressed by conditions imposed by the Hearing Examiner in Part IV of this Report and Decision.

The Hearing Examiner finds that the proposed Group Day Care for no more than 12 children, as limited by the conditions imposed in Part IV of this Report and Decision, will not cause undue harm to the neighborhood as a result of 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 27, p. 11), “No renovation or addition to the existing residence is proposed; the existing structure will continue to be compatible with the character of the surrounding neighborhood.” The only structural change allowed in this case will be the erection of a six-foot tall, board-on-board fence around the side yard play area to screen the child care’s outdoor activities from the neighbors and for the safety of the children. The fence will not change the residential character of the neighborhood. The Hearing Examiner therefore agrees with Staff’s conclusion that the proposed alterations to the site 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 27, p. 8), and reproduced below. 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 (regarding parking), and those standards will be discussed in Section III.D. of this Report and Decision.

Development Standards	Required/Permitted	Proposed
Minimum Lot Area: (Section 59.4.4.9.B.1)	6,000 sq. ft.	7,054 sq. ft.
Maximum Density (Section 59.4.4.9.B.1)	1.63 units (7.26 dwelling units/acre)	1 unit
Maximum Lot Coverage (Section 59.4.4.9.B.1)	35 percent	Less than 35%
Minimum Front Setback (Section 59.4.4.9.B.2)	25 feet	Greater than 25 feet
Minimum Side Street Setback (Section 59.4.4.9.B.2)	25 feet	Greater than 25 feet
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	18 feet
Minimum Rear Setbacks	20 feet	20 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., and the Hearing Examiner so finds.

C. Use Standards for a Group Day Care for 9 to 12 Persons (Section 59.3.4.4.D.)

The specific use standards for approval of a Group Day Care for 9 to 12 Persons are set out in Section 59.3.4.4.D. of the Zoning Ordinance. Standards applicable to this application are:

1. Defined

Group Day Care (9-12 Persons) means a Day Care Facility for 9 to 12 people where staffing, operations, and structures comply with State and local regulations and the provider's own children under the age of 6 are counted towards the maximum number of people allowed.

Conclusion: The Applicant will be required to have staffing, operations, and structures compliant with State and local regulations. Since the Applicant's two children are under the age of 6, they count towards the maximum number of children allowed in the Group Day Care.

2. Use Standards

a. Where a Group Day Care (9-12 Persons) is allowed as a limited use, it must satisfy the following standards:

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

ii. In a detached house, the registrant is the provider and a resident. If the provider is not a resident, the provider may file a conditional use application for a Day Care Center (13-30 Persons) (see Section 3.4.4.E).

iii. In a detached house, no more than 3 non-resident staff members are on-site at any time.

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

Conclusion: The proposed Group Day Care may only be allowed as a conditional use, not a limited use, in the R-60 Zone, so the limited use provision is not applicable.

b. Where a Group Day Care (9-12 Persons) is allowed as a conditional use, it may be permitted by the Hearing Examiner under all limited use standards and Section 7.3.1, Conditional Use.

Conclusion: The Hearing Examiner finds that all of the limited use standards, incorporated into the conditional use standards, are satisfied in this case, in that:

- i) The facility is not located in a townhouse or duplex; it is in a detached, single-family home;
- ii) The Applicant is the provider and a resident;
- iii) No more than three non-resident staff members will be on-site at any time; and
- iv) The Subject Site is not located in the AR Zone.

Furthermore, as discussed in Part III.A., above, the general Conditional Use standards contained Zoning Ordinance §59.7.3.1 have been satisfied.

In sum, the Hearing Examiner finds that the application satisfies all of the use standards in Zoning Ordinance §59.3.4.4.D.

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

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 Facility Design and Parking Lot Screening

Conclusion: The standards for the number of parking spaces required, parking facility design and parking facility screening are governed by Division 6.2 of the Zoning Ordinance. However, because the subject site is a detached home and is not required to have 5 or more parking spaces, the Code sections pertaining to parking facility design and screening do not apply in this case.

See Zoning Ordinance §§59.6.2.5.A.1 and 59.6.2.9.A.3.

The required number of parking spaces is established by Zoning Ordinance §59.6.2.4., as summarized below:

Development Standards	Required/Permitted	Proposed
Vehicle Parking Requirement (Section 59.6.2.4.B)	Group Day Care: 2 (2 employees) Dwelling: 2 On-street parking allowed	Day Care: 2 driveway employee spaces (one vacant during drop-off and pickup) Dwelling: 2 driveway spaces
Bicycle Parking Requirement (Section 59.6.2.4.C)	Group Day Care: 1 Long-Term	Waived, per Section 59.6.2.10

As can be seen from the above Table, Section 59.6.2.4 of the Zoning Ordinance requires a total of 4 vehicle parking spaces for the subject site (2 spaces for the single-family dwelling and 2 for the child-care facility), but it allows on-street parking to satisfy this requirement. As discussed in Part II.C.2. of this Report and Decision, the proposed Group Day Care also needs an area where parents can safely drop off and pick up children.

The subject site has four parking spaces in its widened driveway. The Applicant indicated in her supporting information (Exhibit 8) that two of the spaces will be allocated for the residents and one for a non-resident employee. One of the driveway spaces will be vacant during drop-off and pickup times. Additional space for drop-off and pickup is available on Littleton Street, in front of the subject site, and one non-resident employee can also park on the street. Zoning Ordinance §59.6.2.4.B. expressly permits parking spaces for Group Day Care employees to be provided on the street abutting the site. As reported by Technical Staff (Exhibit 27, p. 6), on-street parking spaces are available on Littleton Street, and there is no sight-distance problem for parking in front of the house on Littleton Street because of the residential speed limit in the

neighborhood and the low number of vehicle trips. Staff also found that “Motorists should be able to safely maneuver by pulling into and out of the driveway spaces.” Exhibit 27, p. 6.

Technical Staff concluded, “The parking requirement is satisfied by the existing driveway that accommodates four parked vehicles and additional on-street parking on Littleton Street.”

Exhibit 27, p. 8.

Both Technical Staff and the Planning Board found that the subject use was unlikely to have any need for a bicycle parking space. Exhibit 28. For that reason, the requirement of Zoning Ordinance §59.6.2.4.C. for a long-term bicycle parking space is hereby waived pursuant to Zoning Ordinance §59.6.2.10, in accordance with the recommendation of the Planning Board.

Based on this evidence, the Hearing Examiner finds that there is sufficient room for parking on the site and in the neighborhood of the subject site to accommodate both the non-resident employees and the drop-off and pickup operations of the proposed Group Day Care.

3. Site Landscaping, Screening and Lighting

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

a. Lighting

Zoning Ordinance §59.6.4.4.E. provides:

E. Conditional Uses

Outdoor lighting for a conditional use must be directed, shielded, or screened to ensure that the illumination is 0.1 footcandles or less at any lot line that abuts a lot with a detached house building type, not located in a Commercial/Residential or Employment zone.

By its own terms (in §59.6.4.2), Division 6.4 does not apply to existing, unmodified lighting:

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 discussed in Part II.C.3. of this Report and Decision, there is one exterior light fixture at the front door, and a second light fixture is located on the driveway side at an entrance to the basement. No new lighting is planned for this conditional use, and therefore the Hearing Examiner finds that the requirements of Division 6.4, regarding lighting, do not apply.

b. Site Screening and Landscaping

Conclusion: Although some provisions in this portion of the Zoning Ordinance contain very specific screening requirements, the review of site landscaping and screening for conditional uses in single-family, detached homes is limited to an assessment of compatibility. Zoning Ordinance §59.6.5.2.B. This language is reinforced by Section 59.7.3.1.E.1.b., under which the Hearing Examiner need only find that the proposed use meets applicable general requirements under Article 59-6 “to the extent the Hearing Examiner finds necessary to ensure compatibility. . .”

According to Technical Staff (Exhibit 27, p. 2), the Site is landscaped with mature trees and shrubs, most of which are along the rear property line. Staff concluded that “with the replacement of the existing four-foot high lattice pattern wood fence [with a six-foot high board-on-board fence, the] proposed day care will be compatible with nearby properties.” Exhibit 27, p. 11. There is no evidence to the contrary in this record.

The Hearing Examiner therefore finds that the existing site landscaping and the proposed screening of a six-foot high board-on-board fence will ensure compatibility with the surrounding neighborhood and thus will meet the requirements of the Zoning Ordinance.

4. Signage

Conclusion: The use of signage is governed by Zoning Ordinance Division 6.7. Although Zoning Ordinance §59.6.7.8.A.1 sets the standards for signs in Residential Zones, no sign is proposed for the subject conditional use. Therefore, the Hearing Examiner has imposed a

condition in Part IV of this Report and Decision which will prohibit the Applicant from posting a sign on the property.

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. This is not an application to establish a new child care facility on the subject site; rather, it is an application to add 4 children to an already functioning child care facility on the site. While any daycare may have some adverse effects on the immediate neighbors in terms of noise and commotion during outdoor play, and traffic on arrival and pickup, those effects are inherent in the use.

As stated by Technical Staff (Exhibit 27, p. 12):

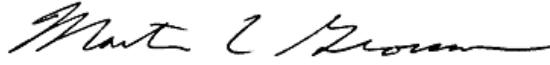
The proposed conditional use complies with the general conditions and standards for approval of a conditional use Group Day Care (9-12 Persons), subject to the recommended conditions of approval. The proposed conditional use is consistent with the objectives and recommendations of the Master Plan, will not alter the residential character of the surrounding neighborhood, and will not result in any unacceptable noise, traffic, or environmental impacts on surrounding properties. Staff recommends approval with conditions.

Based on the foregoing findings and conclusions and a thorough review of the entire record, the application of Lilian Flores (CU 17-08), for a conditional use under Section 59.3.4.4.D. of the Zoning Ordinance, to operate a Group Day Care for up to 12 children in her home at 3800 Littleton Street, Silver Spring, Maryland, is hereby **GRANTED**, subject to the following conditions:

1. The proposed Group Day Care must be limited to 12 children and two non-residential staff.
2. The Applicant must schedule staggered drop-off and pick-up of children with no more than four vehicles entering and exiting the site every 30 minutes during these designated times. The Applicant must require written parental agreements so indicating for all children arriving by vehicle.

3. The hours of operation are limited to Monday through Friday, 7:00 a.m. to 6:00 p.m.
4. Outdoor play time must not start prior to 9:00 a.m., and must end by 5:30 p.m.
5. The outdoor play area enclosure must be replaced entirely with a six-foot high board-on-board, wood fence prior to the start-up of the Group Day Care facility's operations.
6. All children must be under the direct supervision of a staff member at all times.
7. The Applicant must not erect a sign on the subject site.
8. The Applicant must ensure that she has provided adequate trash receptacles for her trash relating to the use and that they are properly secured when placed on the street for collection. She must also ensure that her clients and employees do not park on the grass of the neighbors' properties.
9. The Applicant must comply with and satisfy all applicable State and County requirements for operating a Group Day Care for children, and must correct any deficiencies found in any government inspection.
10. Children must be accompanied by an adult to and from the child-care entrance, and when drop-offs or pickups are made by vehicle outside of the Applicant's driveway, children must embark or disembark the vehicle from the curb side.
11. The Applicant must not use a public address system of any kind outside the building, and must not allow any amplified music to be played outside the building.
12. The Applicant must maintain the grounds in a clean condition, free from debris, on a daily basis.
13. 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, including the annual payment of conditional use administrative fees assessed by the Department of Permitting Services.
14. The requirement of Zoning Ordinance §59.6.2.4.C. for a long-term bicycle parking space is hereby waived pursuant to Zoning Ordinance §59.6.2.10, in accordance with the recommendation of the Planning Board.

Issued this 5th day of April, 2017.



Martin L. Grossman
Hearing Examiner

NOTICE OF RIGHT TO REQUEST ORAL ARGUMENT

Any party of record may file a written request to present an appeal and oral argument before the Board of Appeals, within 10 days after the Office of Zoning and Administrative Hearings issues the Hearing Examiner's Report and Decision. Any party of record may, no later than 5 days after a request for oral argument is filed, file a written opposition to it or request to participate in oral argument. If the Board of Appeals grants a request for oral argument, the argument must be limited to matters contained in the record compiled by the Hearing Examiner. A person requesting an appeal, or opposing it, must send a copy of that request or opposition to the Hearing Examiner, the Board of Appeals, and all parties of record before the Hearing Examiner.

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.

The Board of Appeals may be contacted at:

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

<http://www.montgomerycountymd.gov/boa/>

The Board of Appeals will consider your request for oral argument at a work session. Agendas for the Board's work sessions can be found on the Board's website and in the Board's office. You can also call the Board's office to see when the Board will consider your request. If your request for oral argument is granted, you will be notified by the Board of Appeals regarding the time and place for oral argument. Because decisions made by the Board are confined to the evidence of record before the Hearing Examiner, no new or additional evidence or witnesses will be considered. If your request for oral argument is denied, your case will likely be decided by the Board that same day, at the work session.

Parties requesting or opposing an appeal must not attempt to discuss this case with individual Board members because such *ex parte* communications are prohibited by law. If you have any questions regarding this procedure, please contact the Board of Appeals by calling 240-777-6600 or visiting its website: <http://www.montgomerycountymd.gov/boa/>.

NOTICES TO:

Lilian Flores, Applicant
Francisco Romero, Co-owner
Milton Lee, Confronting property owner
Barbara Jay, Executive Director
Montgomery County Board of Appeals
Lori Shirley, Planning Department
Ehsan Motazedi, Department of Permitting Services
Alexandre A. Espinosa, Director, Finance Department