

By letter dated April 11, 2017, and received by the Office of Zoning and Administrative Hearings (OZAH) on April 13, 2017, Ms. Weiser requested that the Hearing Examiner approve a minor amendment of the conditional use by administratively modifying Condition No. 4, to change the afternoon limit on play time from 4 p.m. to 5 p.m. (Exhibit 69).

Requests to amend a conditional use are governed by Zoning Ordinance §59.7.3.1.K. Whether an amendment request is characterized as one for a major amendment or for a minor amendment is significant because a *major amendment* application must “*follow[] the same procedures, must meet the same criteria, and must satisfy the same requirements as the original conditional use application . . .*” Zoning Ordinance §59.7.3.1.K.1.b. However, an application for a *minor amendment* need not go through those extensive procedures. Rather, “. . . *it may be approved administratively by the Hearing Examiner.*” Zoning Ordinance §59.7.3.1.K.2.a.

Zoning Ordinance Section 59.7.3.1.K.2.a defines minor amendments:

A minor amendment to a conditional use is one that does not change the nature, character, or intensity of the conditional use to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected, when considered in combination with the underlying conditional use.

On April 24, 2017, after discussing the legal and factual issues surrounding this request, the Hearing Examiner issued an Order (Exhibit 70) granting the minor amendment to the conditional use and changing Condition 4 to read:

4. Outside play time may not start prior to 9:00 a.m. and may not extend beyond 5:00 p.m. Outdoor play shall be limited to no more than 4 hours per child, per day.

As required by Zoning Ordinance §59.7.3.1.K.2.b., the Hearing Examiner issued a notice of his order specifying that any party may request a public hearing on the Hearing Examiner's action within 15 days after this decision is issued. On May 5, 2017, Mr. Webster and his wife, Karen, timely filed an objection (Exhibit 71). There were no other objectors.

The Hearing Examiner communicated with the Applicant and the Websters to determine an appropriate hearing date and to inquire whether the parties wished time to see if they could work out their differences. Exhibits 72-76. The Websters ultimately indicated that mediation would not be effective, and they asked that the 4 PM outdoor play deadline be maintained. Exhibit 77(a). In an email dated May 17, 2017, the Applicant stated that, in view of the Websters' opposition, she would withdraw her application for a minor amendment and would adhere to the 4 PM outdoor play deadline. Exhibit 77(b). On May 24, 2017, Applicant filed a formal request to withdraw her application for a minor amendment (Exhibit 80).

Although the Zoning Ordinance does not specify a procedure for withdrawal of a request for a minor amendment after it has been granted administratively and objected to, Zoning Ordinance §59.7.3.1.K.2.b. does specify that if an objection and a request for hearing is received, “the Hearing Examiner must suspend his administrative amendment and conduct a public hearing to consider whether the amendment substantially changes the nature, character, or intensity of the conditional use or its effect on the immediate neighborhood.”

Thus, it is clear that the filing of the objection and request for a hearing automatically triggers a suspension of the administrative amendment and the calendaring of a hearing. In this case, the need for a suspension of the amendment and a hearing has been mooted by the Applicant's request to withdraw her application for the minor amendment.

There is no reason to deny the Applicant's withdrawal request since allowing the withdrawal and vacating the Hearing Examiner's administrative grant of the modification will leave the parties to this dispute in the same position they were in before the Applicant filed her modification request (*i.e.*, with a 4 PM limit on outdoor play). Similarly, allowing the withdrawal and vacating the administrative grant of the minor modification will moot the need for a hearing on the issue of whether a minor modification would be appropriate in this case.

Thus, instead of suspending his order granting the minor modification, the Hearing Examiner must vacate it, as moot, and dismiss the application for a minor modification as withdrawn. This Order does both.

ORDER

Based on the foregoing, it is, this 26th day of May, 2017:

ORDERED: That the Applicant's May 24, 2017 request to withdraw her April 13, 2017, application for a minor amendment to the subject conditional use is hereby **GRANTED**; and, it is

FURTHER ORDERED: That the Hearing Examiner's Order of April 24, 2017, administratively granting a minor amendment to Conditional Use 16-07, allowing outdoor play to continue until 5 p.m., is hereby **VACATED**; and, it is

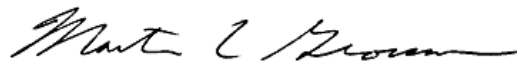
FURTHER ORDERED: That Condition 4 of this conditional use is restored to the language approved by the Board of Appeals Resolution of July 20, 2016, as follows:

"4. Outside play time may not start prior to 9:00 a.m. and may not extend beyond 4:00 p.m. Outdoor play shall be limited to no more than 4 hours per child, per day."

and, it is

FURTHER ORDERED: That the conditional use remains subject to all terms and conditions imposed in connection with the its approval by the Board of Appeals; and, it is

FURTHER ORDERED: That the April 13, 2017 application for a minor amendment to the subject conditional use is hereby dismissed, as withdrawn.



Martin L. Grossman
Hearing Examiner

NOTICES TO:

Parties of record (Hannah Weiser, Leah Hanlon, Robin Rice, Mr. and Mrs. Webster)
All parties entitled to notice at the time of the original filing
Current abutting and confronting property owners
Barbara Jay, Executive Director
Montgomery County Board of Appeals
Kathleen Reilly, Planning Department
Planning Board
Local Civic Associations
Ehsan Motazed, Department of Permitting Services
Alexandre A. Espinosa, Director, Finance Department