

OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
Stella B. Werner Council Office Building
Rockville, Maryland 20850
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IN THE MATTER OF:
SAMINA ALI ZAI, d/b/a
SMART-ED EARLY LEARNING CENTER
Conditional Use Holder

Samina Ali Zai
Nea Maloo

Jude Wikramanayake, Esquire
Attorney for the Applicant

For the Application

Before: Martin L. Grossman, Hearing Examiner
Director, Office of Zoning and Administrative Hearings

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OZAH Case No. CU 15-08

**HEARING EXAMINER’S ORDER GRANTING THE CONDITIONAL USE HOLDER’S
REQUEST FOR A ONE-YEAR EXTENSION OF THE TIME TO IMPLEMENT THE
CONDITIONAL USE**

I. BACKGROUND

This case has a somewhat complicated background. The final chapter began when Ms. Samina Ali Zai applied for a conditional use to operate a child Day Care Center for over 30 persons pursuant to Zoning Ordinance §59.3.4.4.F.¹ The subject property is Parcel N120, in the White Oak Gardens Apartments, located at 11624 Lockwood Drive, in Units T-1, T-2 and T-3, and in an adjoining building, 11628 Lockwood Drive, in Units T-2 and T-3, Silver Spring, Maryland 20904. The property’s Tax Account Number is 05-00277577 (Exhibits 26 and 97), and it is owned by 72 Barrow Street Realty, which had authorized the conditional use application through its agent, Scott Fixell (Exhibits 17 and 24). The subject site is in the R-20 Zone (Exhibit 7), and a conditional use is required for a child care facility for 9 or more children in that zone.

The conditional use holder, Samina Ali Zai, was, at the time she applied for a conditional use, operating a child Day Care Center (Smart-Ed Early Learning Center) consisting of four apartment units in the two aforementioned adjoining buildings, 11624 Lockwood Drive (Units T-1, T-2 and T-3) and 11628 Lockwood Drive (Unit T-2). Units T-1, T-2 and T-3 at 11624 Lockwood Drive had a total of 53 children; and the Unit T-2 located in 11628 Lockwood Drive served an additional 20 children.

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.

The previous operator of the Day Care Center was Kamini Wayal, under the name of “ABC Scholar.” Ms. Wayal operated her Day Care Center under two special exceptions – S-82, granted by the Board of Appeals, governing operations at 11624 Lockwood Drive;² and SE 03-4, granted by the Office of Zoning and Administrative Hearings (OZAH), governing operations at 11628 Lockwood Drive.

On November 18, 2012, Ms. Ali Zai purchased the child care business from Ms. Wayal. Exhibit 18. On April 8, 2015, the Ms. Ali Zai filed the subject conditional use application (CU 15-08) for permission to operate a Day Care Center in the additional site of Unit T-3 at 11628 Lockwood Drive (Exhibit 1). A notice was issued on April 14, 2015, scheduling a hearing for August 6, 2015 (Exhibit 28).

On May 14, 2015, the Applicant requested that the Board of Appeals transfer Special Exception S-82 from ABC Scholar to Smart-Ed Early Learning Center (Exhibit 42(e)), with the previous special exception holder, Ms. Wayal, consenting to the transfer (Exhibit 42(f)). The Board of Appeals issued a Resolution transferring Special Exception S-82 to Ms. Ali Zai, effective June 23, 2015 (Exhibit 43(a)).

After an exchange of emails among the Applicant’s attorney, OZAH’s Director, the Executive Director of the Board of Appeals, the Planning Department and the Department of Permitting Services, it was agreed that the best way to evaluate the new request for expansion of the operations and to regulate the overall operations of the combined day care facility was for the Applicant to amend her application in CU 15-08 to request that all the day care operations be consolidated under a new conditional use application. A new OZAH hearing date was set, with the understanding that the then existing special exceptions S-82 and SE 03-4 would be revoked, as abandoned, if the new combined conditional use were approved, consolidating all operations under the single conditional use. Exhibits 44 to 68. On February 5, 2016, the Applicant moved to amend her application (Exhibits 69 and 85), and on February 9, 2016, the amended application (Exhibit 70) was accepted for filing by OZAH.

The public hearing proceeded as scheduled on June 24, 2016. The Applicant testified, as did her architect, Nea Maloo. No opposition witnesses appeared at the hearing, and there have been no opposition submissions in this case. Eight parents of children served by the Applicant’s Day Care Center filed letters of support for the facility (Exhibit 20(a) – (h)).

On August 2, 2016, the Hearing Examiner approved the conditional use, subject to 17 conditions, for the reasons set forth at length in his Report and Decision. Approval of the conditional use application increased the number of children permitted by 20, for a total of 93, with the additional children to be located in Unit T-3, at 11628 Lockwood Drive. The addition of Unit T-3 at 11628 Lockwood Drive would also bring to five the total number of apartment units in the subject site. The proposed child Day Care Center would operate as one unified facility located in

² The Child Care use in 11624 Lockwood Drive actually predates the grant of S-82 on 6/7/72. It existed under various operators per special exceptions CBA-2315 (12/21/67) and CBA-2710 (12/18/69). See Exhibits 41 and 101, p. 6.

the five apartments, and thus would include all of the units in the existing special exceptions S-82 and SE 03-4, as well as the new Unit T-3 at 11628 Lockwood Drive. Exhibit 70.

Condition 6 in the Hearing Examiner's decision of August 2, 2016, provides:

6. The Applicant must seek to revoke as abandoned all previously approved special exceptions for the existing use that are still valid. To accomplish this, prior to issuance of use and occupancy permit for the combined child Day Care Center, the Applicant must request that the Board of Appeals revoke the existing special exception S-82 on the subject site, as abandoned, and must request that OZAH revoke the existing special exception SE 03-4 on the subject site, as abandoned. If special exceptions CBA-2315 and CBA-2710 still exist, both of which were superseded by special exception S-82, they should be revoked as abandoned as well.

The conditional use holder, Samina Ali Zai, has not yet filed requests for revocation of the mentioned special exceptions with either OZAH or the Board of Appeals.

II. THE REQUEST TO EXTEND THE IMPLEMENTATION PERIOD OF THE CONDITIONAL USE FOR ONE YEAR

On September 14, 2018, apparently prompted by reminders from the Department of Permitting Services (Exhibit 109), Ms. Ali Zai filed a request with OZAH (Exhibit 110) to extend the implementation period of the conditional use for one year, since the statutory implementation period expired on August 2, 2018, under Zoning Ordinance §59.7.3.1.I.1.

Zoning Ordinance §59.7.3.1.I. provides:

Duration of Approval

- 1. A conditional use that is not established or has not obtained a building permit within 24 months from the date of the issuance of the decision or resolution expires, unless a longer period is established by the decision or resolution.*
- 2. After the decision, the Board of Appeals or the Hearing Examiner may extend the time limit for a conditional use to be established or obtain a building permit if the evidence of record establishes that drawing of architectural plans, preparation of the land, or other factors involved in the particular use will delay the start of construction or the establishment of the use beyond the period of validity. An individual extension must not exceed 12 months. If the Board of Appeals or the Hearing Examiner grants an extension, it must set a date by which the erection or alteration of the building must begin or the use must be established.*

* * *

In support of her request, Ms. Ali Zai stated (Exhibit 110):

I, owner and Director of Smart-Ed Early Learning Center am writing this to request for an extension of one year for the implementation of Conditional Use (CUI508). The approval of CU1508 was granted to my facility Smart-Ed Early Learning Center on August 2, 2016 and it expired on August 2, 2018. I am very keen to retain the Conditional Use (CUI508) however I need some more time to establish the use.

I am participating in Maryland EXCELS program. Maryland EXCELS gives child care programs and providers a road map to improve their services for young children and their families. I am striving towards achieving a higher rating of EXCELS which will benefit children and families participating in my program. Participation in EXCELS requires more trainings of staff, provision of wide range of equipment, assessment of children and evaluation of my program. The whole process of improving my services has taken more time than I had anticipated. Therefore I require more time to focus on implementation of Conditional Use (CUI508). I would be most obliged if my request for extension of one year to implement Conditional Use (CUI508) is approved.

III. OPINION AND ORDER

Zoning Ordinance §59.7.3.1.I.2, quoted above, provides criteria for granting an extension of the two-year time period for implementation specified in §59.7.3.1.I.1., also quoted above. The section does not prohibit such a request from being granted even if it is filed after expiration of the two-year period, as was this request. The Hearing Examiner finds that the late filing of this request does not prejudice any party in this case since there was no opposition to the granting of the conditional use. He therefore will act on the substance of the request, even though filed after the expiration of the conditional use grant.

The statutory provision does require a showing by the conditional use holder that “*factors involved in the particular use will delay the start of construction or the establishment of the use beyond the period of validity*.” Ms. Ali Zai has met this standard by stating that the delays in implementation of the conditional use have been occasioned by the need to further train staff, provide additional equipment and other efforts to achieve a high rating on the “Maryland EXCELS program.”

The Hearing Examiner takes official notice that Maryland EXCELS is a voluntary program for licensed child care and early education programs to assist in continuous quality improvement by meeting standards that exceed the state’s licensing requirements. The term “EXCELS” is an acronym for “Excellence Counts in Early Learning and School Age Care.” The program was initiated by the Maryland State Department of Education (MSDE) Division of Early Childhood Development, and it promotes quality by providing tool kits, work groups and training, and by awarding ratings to Child Care Centers and others. <https://www.marylandexcels.org/about-us/a-brief-history-of-maryland-excels/>.

The Hearing Examiner finds that the reason for Ms. Ali Zai's delay in implementing the conditional use is a legitimate basis for extending the implementation period for one year as requested by Ms. Ali Zai.

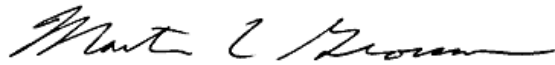
Therefore, it is, this 18th day of September, 2018,

ORDERED: That the record in CU 15-08, *Ali Zai Smart-Ed Early Learning Center*, is hereby re-opened to receive Ms. Samina Ali Zai's letter received on September 14, 2018, and related submissions; and it is

FURTHER ORDERED: That the Conditional Use Holder's request to extend the implementation period for CU 15-08 for one year from the date the conditional use expired is hereby GRANTED; and it is

FURTHER ORDERED: That the implementation period for CU 15-08, is hereby extended for a period of one year from the date of expiration. Since the conditional use expired on August 2, 2018, the implementation period is hereby extended until August 2, 2019; and it is

FURTHER ORDERED: That all the conditions imposed in the grant of the conditional use on August 2, 2016, shall remain in effect.



Martin L. Grossman
Hearing Examiner

Copies To:

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