

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

IN THE MATTER OF:
DAMARIS TOVAR
Applicant

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OZAH Case No. CU 17-10

Before: Lynn Robeson Hannan, Hearing Examiner

HEARING EXAMINER'S REPORT AND DECISION
ADMINISTRATIVELY APPROVING MINOR MODIFICATION

I. FACTUAL BACKGROUND

On April 14, 2017, the Hearing Examiner approved a conditional use application permitting Damaris Tovar (Applicant or Ms. Tovar) to operate a group daycare for up to 12 children under §59.3.4.4.D. of the Zoning Ordinance at 6015 Johnson Avenue, Bethesda, Maryland. The subject property is described as Lot 9 in the Ayrlawn Subdivision and is zoned R-60. Exhibit 18.

In her original Report, the Hearing Examiner found (*Hearing Examiner's Report and Decision*, August 14, 2017, p. 23).

The property has a one-car garage and up to two spaces in the driveway. Staff confirms that there are up to four on-street parking spaces abutting the property (two along Johnson Avenue and two along Ewing Drive). Four of the spaces, the two in the driveway and the two on Johnson Avenue, are used for parent drop-off and pick up rather than for non-resident employee parking. Exhibit 27, p. 2; Exhibit 10. Staff advises that employees do not park at the site because they are dropped off and picked up by car. Ms. Tovar testified that her husband generally leaves at 5:30 a.m., thus leaving a space in the driveway for parent drop-off as well.

Ms. Tovar has requested a waiver of three spaces for the non-resident employees so that the on-site and on-street parking is available for parent drop-off and pick-

up. Exhibit 27, p. 5. She is also requesting a waiver of the requirement for one on-site bicycle space. *Id.*

The Hearing Examiner concluded that the use had two non-inherent physical characteristics (*Hearing Examiner's Report*, p. 23):

Based on Mr. Neuman's testimony at the public hearing, the Hearing Examiner finds that there are two non-inherent physical site characteristics. The first is the property's location at the beginning of the block terminating at the entrance to North Bethesda Middle School. This location causes a steady stream of bus traffic along Johnson Avenue at the same time that drop-off and pick-up are occurring for the daycare. Additional buses use Johnson Avenue to access Wyngate Elementary School to the north. The narrow width of Johnson Avenue, which does not permit two-way traffic, is also a factor. The Hearing Examiner finds persuasive Mr. Neuman's testimony that drop-off for the day care, combined with school bus traffic, makes it difficult and unsafe to negotiate the exit from his driveway in the morning.

The Hearing Examiner found that the non-inherent physical characteristics did not warrant denial. Instead, she imposed Condition No. 4.d., prohibiting parking along Johnson Avenue during peak bus travel times. The full list of approved conditions is below (*Hearing Examiner's Report*, pp. 30-31):

1. The day care facility is limited to up to 12 children and 3 non-resident employees.
2. The hours of operation are Monday through Friday from 6:45 a.m. to 6:00 p.m.
3. Outside play time may not start prior to 9:00 a.m. and may not extend beyond 5:00 p.m.
4. The Applicant must enter into an agreement with each parent and to specify assigned arrival and departure times that must be staggered into separate groups. Parent arrival and departure must at all times meet the following requirements:
 - a. Group A (up to 5 cars) 6:45 a.m. – 8:00 a.m.; 4:00 p.m. – 4:30 p.m.
 - b. Group B (up to 5 cars) 8:30 a.m. to 9:00 a.m.; 4:30 p.m. to 5:00 p.m.
 - c. Group C (up to 5 cars) 9:00 a.m. to 9:30 a.m.; 5:00 p.m. – 6:00 p.m.
Morning drop-off may extend beyond 9:30 a.m., but must not begin

- before 6:45 a.m.; afternoon pick-up may begin before 4:00 p.m. but must not extend beyond 6:00 p.m.
- d. No parent drop-off is permitted on Johnson Avenue on weekdays between 7:15 a.m. and 8:45 a.m.
5. The Applicant must keep a copy of the license plate number of all vehicles permitted to drop-off and pick-up children and employees and must provide this information to inspectors from the Department of Permitting Services upon their request.
 6. The Applicant must not erect a sign on the subject site.
 7. 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.
 8. 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.
 9. The Applicant must maintain the grounds in a clean condition, free from debris, on a daily basis. Toys which are designed to be kept outdoors are not considered debris.
 10. 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.

Hearing Examiner's Report, p. 31.

On June 17, 2021, Ms. Tovar submitted a request for a minor modification to amend Condition No. 4 (above) to permit drop-offs between 8:00 and 8:30 a.m. during to provide more flexibility for parents' schedules. The Hearing Examiner referred this request to Staff of the Montgomery County Planning Department (Planning Staff or Staff), who concluded that the amendment was minor. The Hearing Examiner approved the request administratively on August 20, 2021, because it did not change the prohibition on parking during peak bus travel. No one

objected to the administrative approval. The amendment modified Condition No. 4 of the original approval as follows (*Hearing Examiner's Report on Minor Amendment*, August 20, 2021, p. 3):

4. The Applicant must enter into an agreement with each parent and to specify assigned arrival and departure times that must be staggered into separate groups. Parent arrival and departure must at all times meet the following requirements:

- a. Group A (up to 5 cars) 6:45 a.m. – 8:30 a.m.; 4:00 p.m. – 4:30 p.m.
- b. Group B (up to 5 cars) 8:30 a.m. to 9:00 a.m.; 4:30 p.m. to 5:00 p.m.
- c. Group C (up to 5 cars) 9:00 a.m. to 9:30 a.m.; 5:00 p.m. – 6:00 p.m. Morning drop-off may extend beyond 9:30 a.m., but must not begin before 6:45 a.m.; afternoon pick-up may begin before 4:00 p.m. but must not extend beyond 6:00 p.m.
- d. No parent drop-off is permitted on Johnson Avenue on weekdays between 7:15 a.m. and 8:45 a.m.

No one objected to the administrative approval.

On October 26, 2021, Ms. Tovar submitted a second request for a minor amendment, again seeking to modify Condition No. 4. She states:

Many of our current parents are essential personnel and they have recently expressed difficulties balancing their start time at work, with the current groups drop off times. We are therefore requesting a minor adjustment to the drop off times which would allow us to provide reasonable accommodations to the families we serve. We are hopeful that the proposed time slots are permissible and are deemed a minor modification. Our proposal is below:

1. Group A (up to 5 cars) 6:45 a.m. – 8:00 a.m.; 4:00 p.m. – 4:30 p.m.
2. Group B (up to 5 cars) 8:00 a.m. – 8:30 a.m.; 4:30 p.m. to 5:00 p.m.
3. Group C (up to 5 cars) 8:30 a.m. to 9:30 a.m.; 5:00 p.m. – 6:00 p.m.

To accommodate concerns from the neighborhood, and to avoid peak school travels, we will ensure that parents adhere to all outlined conditions. Parents will be required to use the driveway, or the two spaces on Ewing Drive, and no drop-offs will be allowed on Johnson Avenue between 7:15 a.m. and 8:45 a.m. We think that this small adjustment allows us to continue to provide our essential services to all our families.

The Hearing Examiner referred this request to Planning Staff for analysis and recommendation on whether the request was a “minor amendment” as defined in the Zoning Ordinance. Staff replied in the affirmative:

Here’s our evaluation:

- The daycare is approved for up to 12 children and 3 non-resident employees.
- The enrollment and staffing is not proposed to change.
- The Applicant proposes to slightly shift the previously approved staggered arrival schedule.

Proposed staggered schedule:

Trip Generation Estimate		Peak Travel Hour	
Students	Total Trips (in/out)	AM 8:00 – 9:00 AM	PM 4:00- 5:00 PM
10	20	20	20
Staff	Total Trips (in/out)		
3	3	3	3
Total		23	23

This table assumes that the non-residential staff all arrive during the peak morning hour and all leave during the peak evening hour and that all students are driven in individual cars (no siblings). The schedule demonstrates that fewer than 50 person trips are generated during either of the peak travel hours and therefore no further analysis is necessary.

So long as the Applicant continues to comply with all other conditions of approval per the [Hearing Examiner’s Decision dated April 14, 2017](#), this does appear to be a minor amendment that Planning staff would support.

II. FINDINGS AND CONCLUSIONS

The Zoning Ordinance defines a “minor modification” to an approved conditional use as 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.” *Zoning Ordinance*, §59.7.3.1.K.2.a. A major amendment to a conditional use, on the other hand, “changes 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.” *Id.*, §59.7.3.1.K.1.a.

The Hearing Examiner finds that the second modification to Condition No. 4 proposed by Ms. Tovar falls within the definition of a “minor” modification that may be approved administratively. It is clear from the Hearing Examiner’s Report that the primary purposes of the restrictions on drop-offs were to ensure compliance with the County’s LATR Guidelines and to allow the neighbor across the street to exit his driveway during peak bus travel time.

The Hearing Examiner agrees with Planning Staff that the changes proposed by this amendment will not impact the exemption from a full traffic study under the LATR Guidelines.

Ms. Tovar’s proposed minor modification only seeks to adjust the parent drop-off and pick-up times. It does not propose to change the restriction on parking along Johnson Avenue during school peak hours. Like the previous minor amendment, it continues to address the Hearing Examiner’s primary concern in her original decision while at the same time permitting the Applicant more flexibility to address the varied parent schedules. For this reason, the Hearing Examiner finds that the proposed modification does not “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,” and therefore is a minor modification that may be approved administratively.

III. ORDER

Based on the foregoing and review of the record of this case, it is hereby

ORDERED, that the request for a minor amendment to Conditional Use No. CU 17-10, permitting modifications to Condition No. 4 in the Hearing Examiner's Report be, and hereby is, administratively **APPROVED**, and it is further

ORDERED, that this minor modification supersedes the minor modification granted on August 20, 2021, and it is further

ORDERED, that Condition No. 4 of the Hearing Examiner's decision dated is hereby modified as follows:

4. The Applicant must enter into an agreement with each parent and to specify assigned arrival and departure times that must be staggered into separate groups. Parent arrival and departure must at all times meet the following requirements:

- a. Group A (up to 5 cars) 6:45 a.m. – 8:00 a.m.; 4:00 p.m. – 4:30 p.m.
- b. Group B (up to 5 cars) 8:00 a.m. – 8:30 a.m.; 4:30 p.m. to 5:00 p.m.
- c. Group C (up to 5 cars) 8:30 a.m. to 9:30 a.m.; 5:00 p.m. – 6:00 p.m.
- d. No parent drop-off is permitted on Johnson Avenue on weekdays between 7:15 a.m. and 8:45 a.m.

and it is further,

ORDERED, that this amendment and the continued use of the conditional use are subject to all terms and conditions imposed in connection with the initial approval, except as specifically amended by the Hearing Examiner in this Opinion and Order.

Issued this 1st day of February 2022.



Lynn Robeson Hannan
Hearing Examiner

NOTICE

Under Section 59.7.3.1.K.2.b. of the Zoning Ordinance, any party may request a public hearing on whether the proposed modification is major or minor within 15 days after this decision is issued. The request for public hearing must be in writing and must specify the reason for the request and the nature of the objection or relief desired. If a request for a 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. If the Hearing Examiner determines that such impacts are likely, then the amendment application must be treated as a major amendment application. A decision of the Hearing Examiner may be appealed based on the Hearing Examiner's record to the Board of Appeals.

COPIES TO:

Damaris Tovar, Applicant
Barbara Jay, Executive Director
Montgomery County Board of Appeals
Stephanie Dickel, Planning Department
Victor Salazar, Department of Permitting Services
Barbara Cox, Department of Permitting Services
Michael Coveyou, Acting Director, Finance Department
Cliff Royalty, Esquire, Associate County Attorney
Current abutting and confronting property owners
All parties entitled to notice at the time of the original filing:
Abutting and Confronting Property Owners (or a condominium's council of unit owners or renters, if applicable)
Civic, Renters' and Homeowners' Associations within a half mile of the site
Any Municipality within a half mile of the site