

OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS

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IN THE MATTER OF:

MARTHA B. GUDELSKY CHILD

DEVELOPMENT CENTER, INC.

Applicant

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OZAH Case No. CU 20-08

Before: Lynn Robeson Hannan, Hearing Examiner

ORDER ADMINISTRATIVELY APPROVING A MINOR AMENDMENT

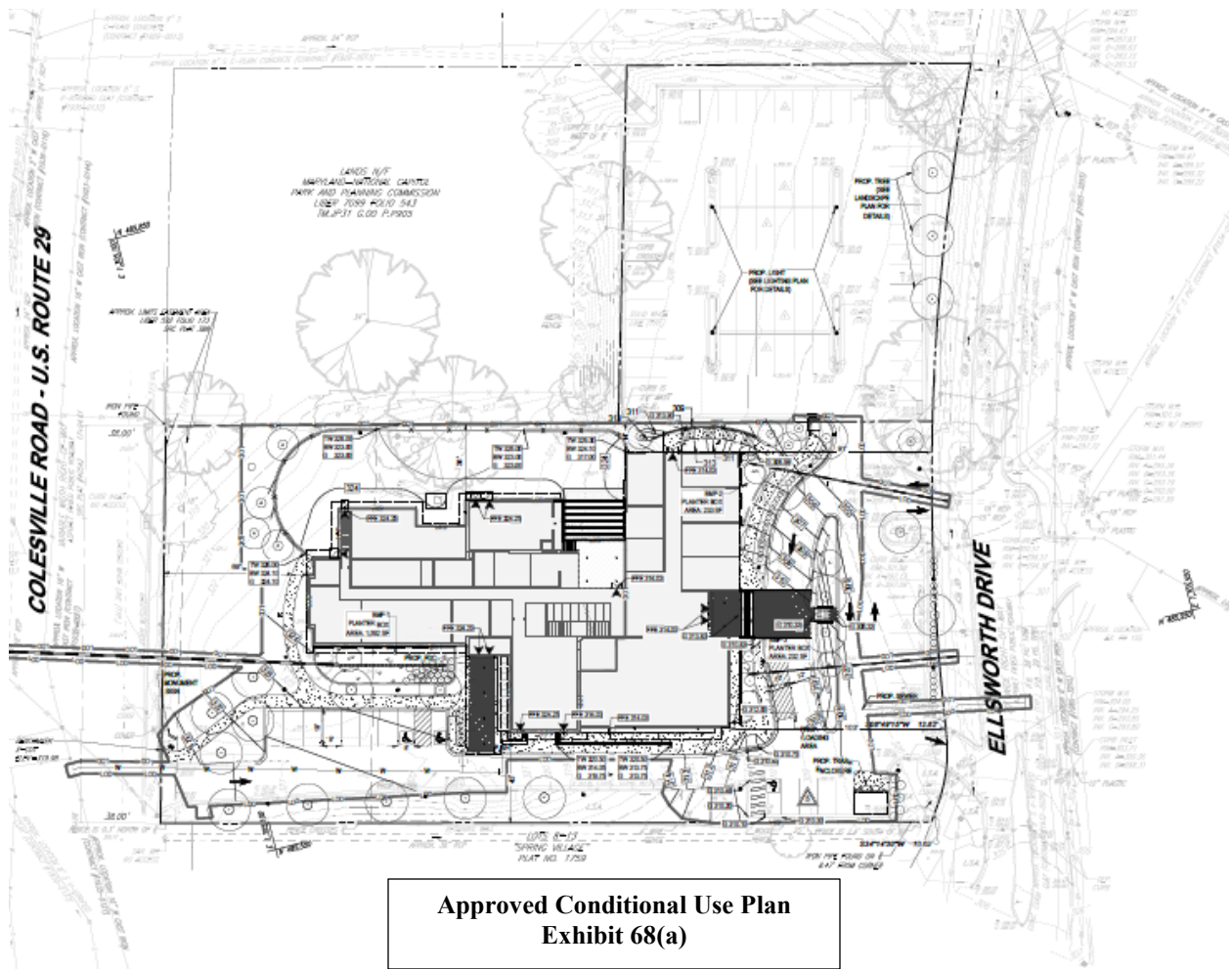
I. BACKGROUND

On November 24, 2020, the Hearing Examiner approved a conditional use filed by the Applicant, Martha B. Gudelsky Child Development Center, Inc. (Applicant or MBGCDC), to operate a child day care center on properties located at 8901 and 8907 Colesville Road, Silver Spring, Maryland. These properties are more particularly described as Parcels P959 and P953 in Subdivision 0001 and 0051 (Tax Account Nos. 13-00971462 and 13-00972821) and are zoned R-60. The subject property is improved with the former Silver Spring library. *Hearing Examiner's Report and Decision*, CU 20-08 (November 24, 2020) (HE Report). The Applicant now requests a minor amendment to the conditional use plan approved in 2020.

The approved conditional use (from 2020) permitted a 12,090 square-foot addition on the eastern side of the existing building for a child day care center with up to 180 children and 60 staff. This would have brought the total floor area of the center to 30,671 square feet. The approved conditional use permitted a 6,752 square-foot play area located northwest of the existing building and the proposed addition, adjacent to the Ellsworth Urban Park. HE Report, p. 7. For convenience, the approved conditional use plan (Exhibit 68(a)) is reproduced on the next page.

With the conditional use, the Hearing Examiner also approved a waiver from the maximum illumination levels required by §59.6.4.4.E of the Zoning Ordinance the following five waivers from parking regulations application (HE Report, p. 54):

- a. A waiver reducing the number of on-site parking spaces required by §59.6.2.4 from 93 to 89;
- b. A waiver reducing the minimum side setbacks for a parking area required by §59.6.2.5.K.2 to the extent shown on the Conditional Use Plan (Exhibit 68(a));



- c. A waiver from the requirement of §59.6.2.9.C.1 to have landscaped islands in the parking area to the extent shown on the on the Conditional Use Plan (Exhibit 68(a)) and Landscape Plan (Exhibit 84);
- d. A waiver from the required tree canopy in a parking area under §59.6.2.9.C.2 to the extent shown on the Conditional Use Plan (Exhibit 68(a)) and Landscape Plan (Exhibit 84);
- e. A waiver from the parking lot screening requirements of §59.6.2.9.C.3 to the extent shown on the Conditional Use Plan (Exhibit 68(a)) and Landscape Plan (Exhibit 84).

The Hearing Examiner approved the application subject to 21 conditionals of approval (*Id.*, pp. 54-55):

1. Physical improvements to the subject property are limited to those shown on the Applicant's Conditional Use Site Plan (Exhibit 68(a)), Landscape Plan (Exhibit 84), and Lighting Plan (Exhibit 16).
2. The Group Day Care must be limited to a maximum total GFA of 31,000 square feet, a maximum of 180 children at any one time and a maximum of 60 staff persons at any one time.
3. The hours of operation for child day care are limited to 7:00 a.m. to 6:00 p.m. (exclusive of staff/teacher arrival before 7:00 a.m.) Hours for community, parental engagement, and teacher training activities are limited to Monday through Friday from 6:00 p.m. to 9:00 p.m. and Saturday from 10:00 a.m. to 4:00 p.m.
4. Drop-off and pick-ups between 7:00 a.m. and 10:00 a.m. and 4:00 p.m. to 6:00 p.m. are limited to 70 vehicles in any one hour. The Applicant must maintain records of the number of vehicles and children dropped off during each hour. The Applicant must make these records available to the Department of Permitting Services upon request.
5. The parking area closest to Colesville Road (in the southwestern portion of the property) must be reserved for visitors and teachers.
6. No vehicles may queue within the public right-of-way on Colesville Road while accessing the the subject property.
7. The Applicant must participate financially for the approved traffic signal redesign at Colesville Road and Dale Drive, as determined by MCDOT's letter dated August 31, 2020.
8. The Applicant must provide bicycle parking spaces in the following configuration:
 - a. Four short-term spaces will be inverted-U racks or equivalent to be disturbed evenly near the main building entrances.
 - b. Five long-term spaces must be provided inside the building at the ground floor in a secured room.
9. Trash pick-up must be limited to the hours between 9:00 a.m. and 3:00 p.m.;
10. The Applicant may allow limited public or community use of portions of the facility when it does not conflict with any conditions of approval or operation of the day care center.
11. The Applicant must install five-foot wide sidewalks along the Ellsworth Drive frontage.

12. The Applicant must widen the existing sidewalk where necessary along the Colesville Road frontage to achieve a minimum width of five feet, without removal or relocation of the existing utility pole.
13. The Applicant must comply with Section 69.6.2.3.D of the Zoning Ordinance for Car Share Spaces.
14. The Applicant must obtain approval of a Preliminary Plan of Subdivision per Chapter 50 of the Montgomery County Code.
15. The Applicant must make available a minimum of 12 assigned parking spaces for use by the adjacent Ellsworth Urban Park during non-drop-off and pick-up hours and holidays.
16. Non-native invasive vegetation that could be a health or safety concern must be removed prior to commencement of operation of the day care center.
17. The Applicant must obtain a Park Permit for impacts to Park Trees caused by the Applicant's construction.
18. The Applicant must comply with all Maryland State and Montgomery County licensure requirements and standards for the operation of a Day Care Center and must correct any deficiencies found in any government inspection.
19. The Applicant shall not use a public address system of any kind outside the building, nor shall any amplified music be played outside the buildings.
20. The Applicant must submit applications to the Department of Permitting Services (DPS) and obtain a variance from the Sign Review Board where necessary, for approval of all proposed signs for the day care center. The Applicant must file a copy of all sign permits with OZAH.
21. 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.

II. MINOR AMENDMENT

1. Applicant's Proposal

On February 9, 2022, MBGCDC filed an application for a minor amendment to the original conditional use approval, seeking to eliminate the 12,090 square foot addition proposed due to an increase in construction costs. Exhibit 87. MBGCDC filed an Amended Statement of Justification that summarizes the modifications (Exhibit 92, pp. 1-2):

1. **Elimination of proposed building addition...**the Petitioner is no longer proposing to construct a building addition. Rather, the Petitioner is seeking to maintain the existing building footprint. The Center will continue to serve a maximum of 180 students, which conforms with the agreement between the County and Petitioner requiring a minimum enrollment of 120 students. Furthermore, the Center will continue to provide a minimum of 450 square feet of general community space, which will allow for community use of this facility during off-hours when the space is not needed for the Petitioner's early childcare and education use (in conformance with Condition No. 10).
2. **Associated reconfiguration of parking and loading.** The parking and loading will be reconfigured on parcel P959 to more closely align with the existing site design will still accommodating ADA parking and access improvements (including the previously approved ADA pedestrian path leading into the site from Ellsworth Drive), the trash enclosure previously approved in the southeast corner of the site, necessary space for loading, and stormwater management facilities. The parking on parcel P933 will continue to remain unchanged.
3. **Parking Waiver No Longer Necessary for Number of Spaces.** The Hearing Examiner previously approved a waiver of four parking spaces. With the elimination of the proposed building addition, the project will provide a total of 94 parking spaces on-site, well in excess of the 63 spaces required by the Zoning Ordinance. As such, the Minor Amendment seeks to vacate the parking waiver previously approved.
4. **Modification to landscaping.** To align with the new project scope, the Petitioner has modified the landscape design to more closely conform with existing conditions, while still incorporating certain landscaping enhancements along Ellsworth Drive and the site entrance off Colesville Road.
5. **Relocation of short-term bicycle racks.** The Project will continue to provide a minimum of four short-term bicycle parking spaces on-site. The bicycle racks will be relocated a minimum distance as a result of the above-

described site modifications, but will continue to be evenly distributed near the main building entrances, as required by Condition No. 8 of the underlying approval.

6. **Modifications to building architecture.** The existing building architecture will remain unchanged from its existing condition, with the exception of cantilevered canopies that are proposed over the building entrances and access points along the eastern façade. These canopies are building mounted and will provide protection from the elements for students and staff when accessing the site.

MBGCDC also requests “reconfirmation” of the waivers for lighting and parking lot screening, landscaping and setbacks and the waiver from the illumination standard for conditional uses that were approved originally. *Id.*

2. Revised Plans

MBGCDC submitted revised plans reflecting the amendment, including an architectural elevation, a conditional use plan marked to show the areas of change, a conditional use plan, landscape plan, and photometric plan. The amended architectural elevation, conditional use and landscape plans are shown on the following pages.

3. Staff Recommendation

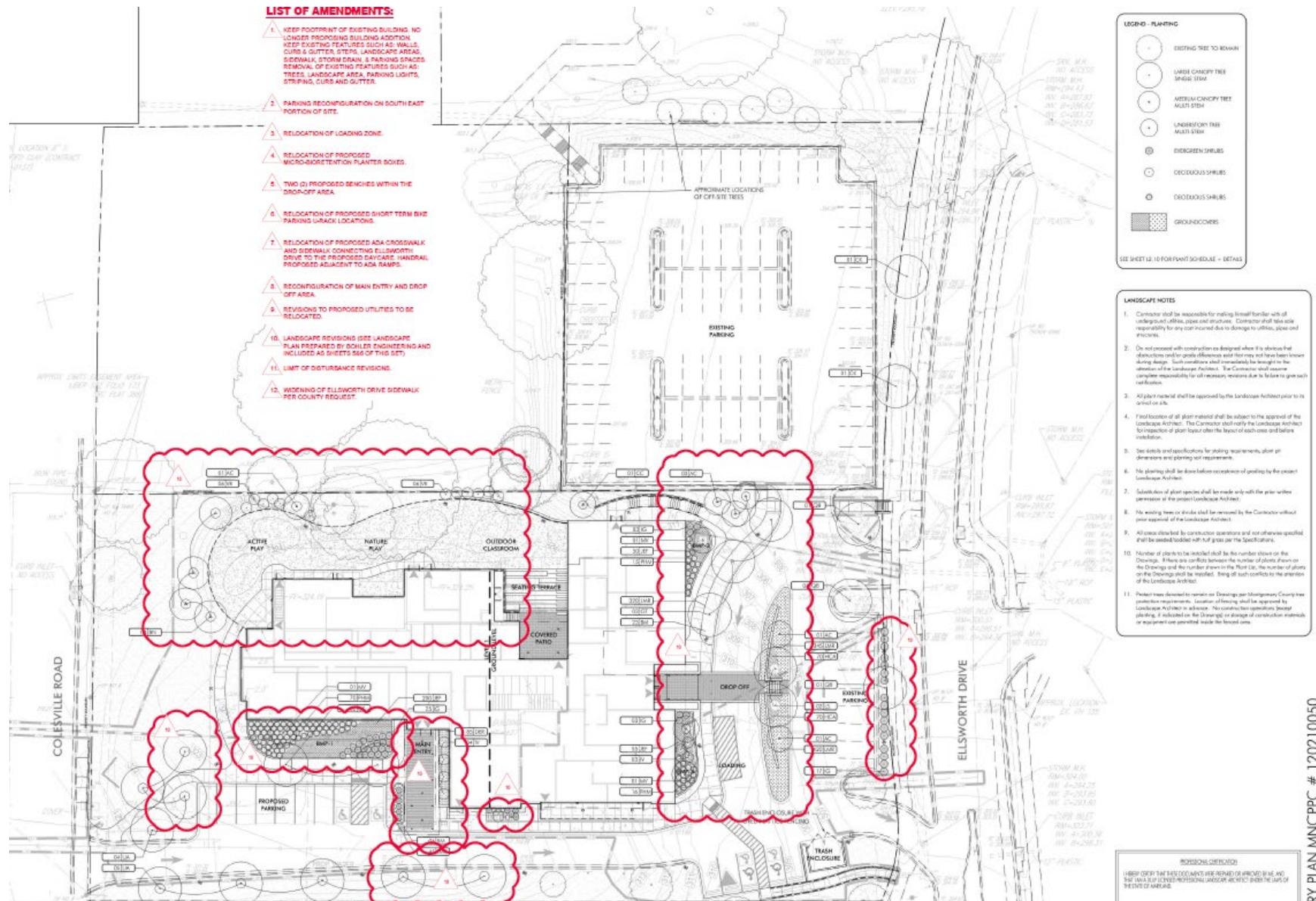
The Hearing Examiner referred the modification request to Planning Staff for a recommendation on whether they considered the modification to be major or minor under §59.7.3.1.K. of the Zoning Ordinance (described below). Planning Staff requested the Applicant to submit additional plans and a revised Statement of Justification. The Applicant did so and Staff concluded (Exhibit 97):

Staff has concluded our review of the proposed changes to Conditional use No. 20-08 and we have determined that since the intensity of the use will not increase and after confirming with other reviewing agencies, a minor amendment is appropriate.

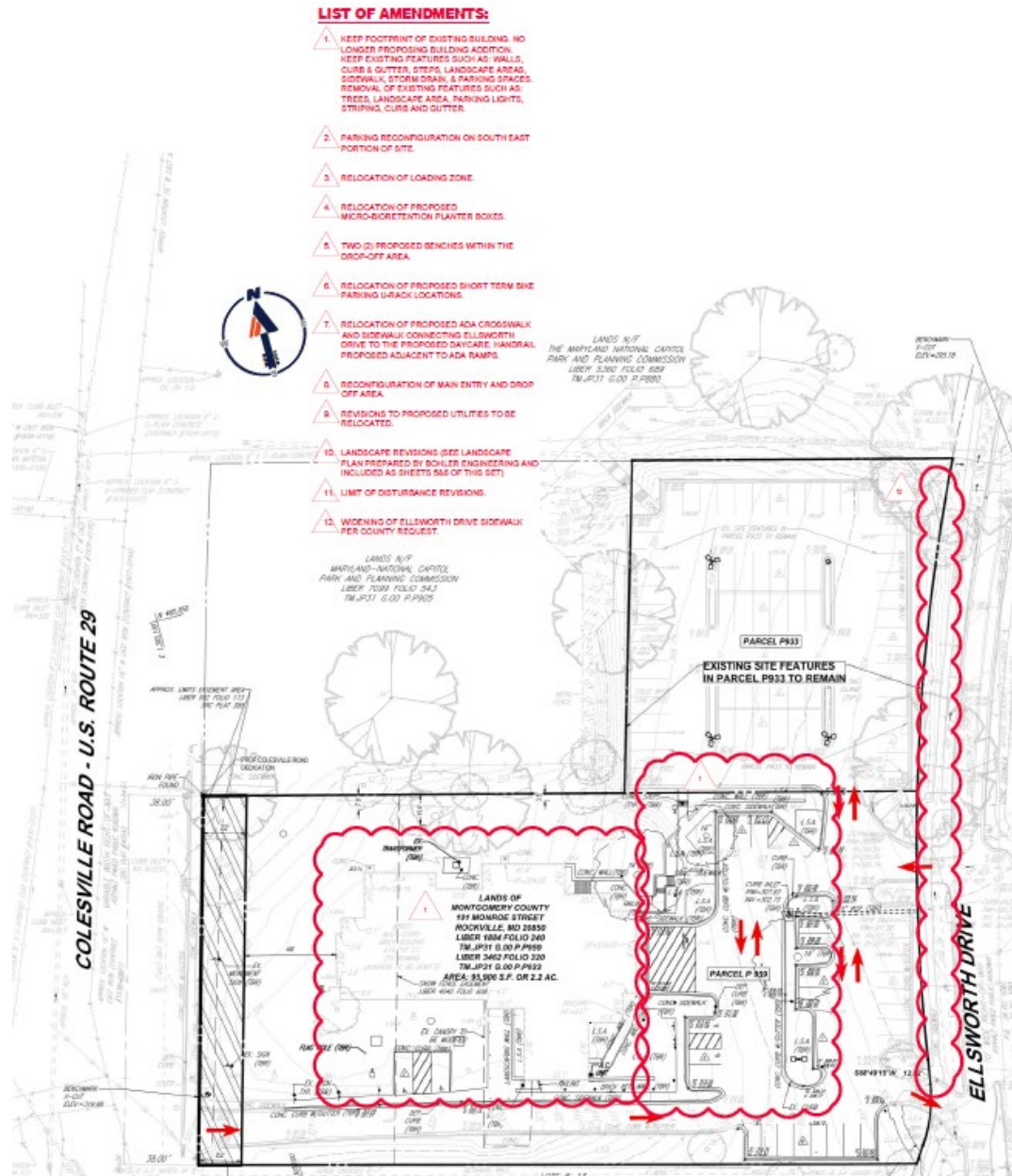
III. GOVERNING LAW

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.

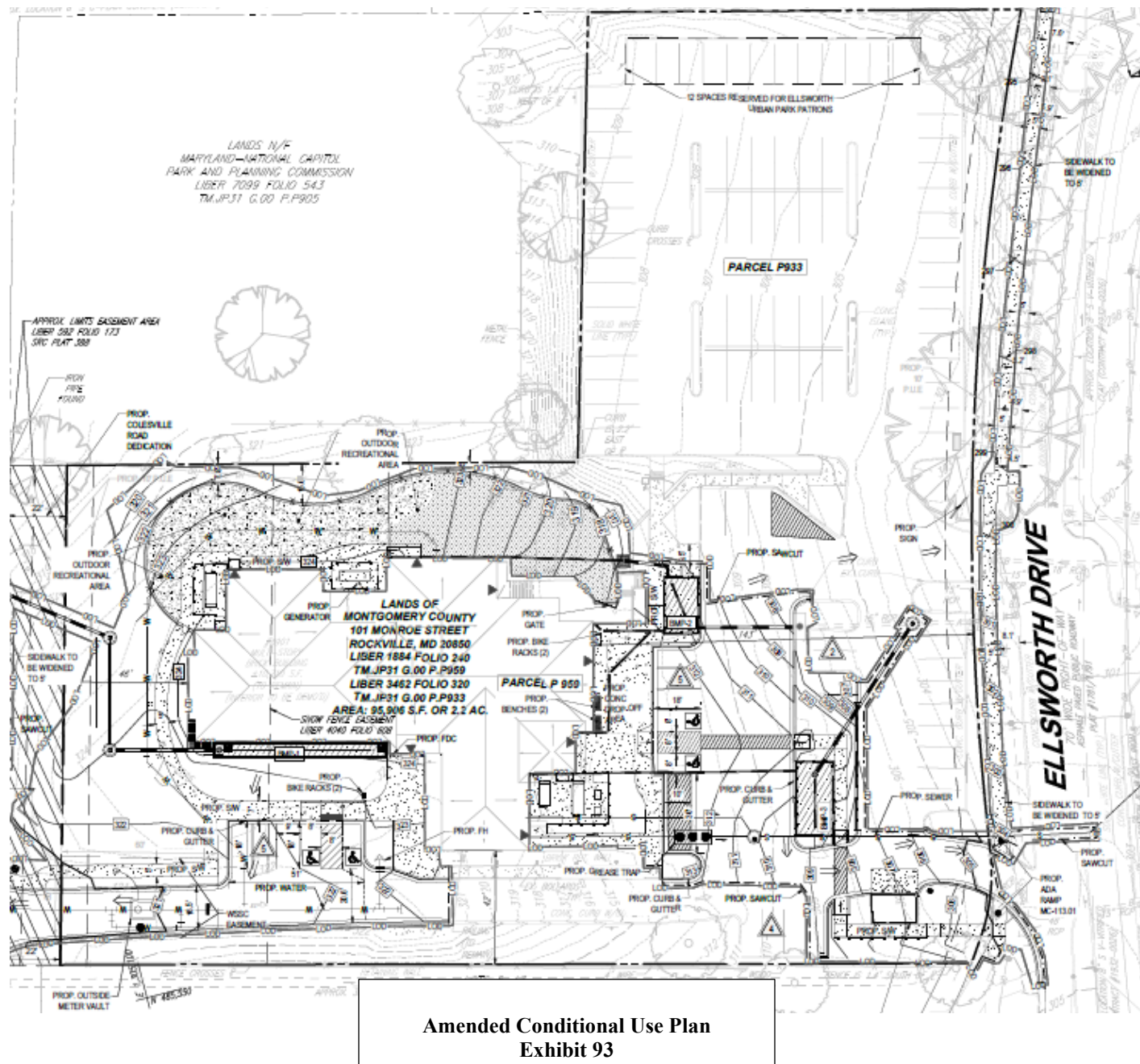




Conditional Use Plan
(Areas ~~Accommodated~~ Shown in Red)
(Areas ~~Amended~~ Shown in Red)
Exhibit 93



Conditional Use Plan
(Areas Amended Shown in Red)
Exhibit 93





Zoning Ordinance Section 59.7.3.1.K. also defines major and minor amendments:

§59.7.3.1.K.1.a. A major amendment to a conditional use is one that 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.

§59.7.3.1.K.2.a. 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.

IV. OPINION

MBGCDC states that the amendment is minor because it is, “merely seeking to amend the existing Conditional Use, to scale back the physical intensity and to maintain the long-standing existing conditions on the Property.”

The Hearing Examiner agrees with the Applicant and Planning Staff that the amendment is minor and is governed by §59.7.3.1.K.2.a of the Zoning Ordinance. The bulk of the changes requested merely retain the library’s existing structure as it has existed in the neighborhood for many years. At the same time, it increases the number of parking spaces to serve the use and bolsters the existing landscaping on the site.

While the amendment retains the same number of students originally approved, the Applicant has indicated that it can operate within the existing building and meet programmatic needs. It now provides more than enough parking spaces for the child day care center, continues to offer a space for the community to meet, and reserves 12 parking spaces for people using Ellsworth Urban Park.

While the configuration of the existing structure will largely remain unchanged, a review of the landscape plan indicates that understory trees will supplement the existing landscaping along Ellsworth Avenue. Shade trees (red maple, yellowwood, and elm) will supplement the existing landscaping between Ellsworth Avenue and the building, and the landscape plans continues to include shrubs along the southern Ellsworth Avenue frontage to screen parking. Thus, new buffering and screening will be added to a setting that has existing in the neighborhood for many years.

Upon review of the original approval, the Hearing Examiner finds that the amendment does not affect any of the findings required by §59.7.3.1.E (Necessary Findings), §59.3.4.4.F (Limited Use Standards), or approval of the waivers. The Hearing Examiner initially approved the parking waivers because, “the existing parking area has been part of the character of the community for many years, the landscaping required would significantly reduce the amount of on-site parking, and the Applicant will provide additional landscaping to better screen existing conditions.” HE Report, pp. 48-49. The Applicant provides the same justification in the amendment and additional

screening is still proposed. Exhibit 95. The same is true for the waiver from the requirements of §59.6.4.4.E.(Illumination Levels for Conditional Use Outdoor Lighting).

Because the changes proposed by the Applicant reduce the building size, provide additional landscaping, and maintain the programmatic elements of the original approval, the Hearing Examiner determines that the proposed use is a minor amendment that will 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 may be administratively approved.

V. ORDER

Based upon the foregoing findings and opinion, it is this 23rd day of June, 2022,

ORDERED that the minor amendment to CU 20-08, Application of Martha B. Gudelsky Child Development Center for property located at 8901 and 8907 Colesville Road, Silver Spring, Maryland, be, and hereby is, approved, and it is further

ORDERED, that Conditions No. 1, 2, and 14 of the original approval (HE Report, pp. 55-56) are hereby modified as follows:

1. Physical improvements to the subject property are limited to those shown on the Applicant’s Conditional Use Site Plan, Landscape Plan, and Lighting Plan (Exhibit 93).
2. The Group Day Care must be limited to a maximum total GFA of 19,808 square feet, a maximum of 180 children at any one time and a maximum of 60 staff persons at any one time.
14. The Applicant must obtain approval of a Preliminary Plan of Subdivision per Chapter 50 of the Montgomery County Code.

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.



Lynn Robeson Hannan
Hearing Examiner

NOTICE OF RIGHT TO REQUEST HEARING

Under §59.7.3.1.K.2.b of the Zoning Ordinance, any party may request a public hearing on the Hearing Examiner's action 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 her administrative approval and conduct a public hearing to consider whether the amendment is a major amendment or a minor amendment under the Zoning Ordinance. A minor amendment is one that does not "substantially changes the nature, character, or intensity of the conditional use or its effect on the immediate neighborhood." A major amendment is one that does substantially change the nature, character, or intensity of the conditional use on the immediate neighborhood. If the Hearing Examiner determines, after an objection, that the impact will be major, then the application must be treated as a major amendment. A decision of the Hearing Examiner may be appealed based on the Hearing Examiner's record to the Board of Appeals.

COPIES TO:

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Stephanie Dickel, Planning Department
Michael Coveyou, Dir. Of Finance
Cliff Royalty, Esq., Office of the 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.