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Before: Kathleen Byrne, Hearing Examiner

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Case No. CU 20-08 (Objection to
Minor Amendment)

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I. STATEMENT OF THE CASE

On February 9, 2022, the Applicant requested a minor amendment to the conditional use for a child day care center (for up to 180 children) granted on November 24, 2020. Due to increases in construction costs, the Applicant now seeks to eliminate the proposed addition and modify other related site conditions. *Exhibit 87*. On May 10, 2022, after reviewing questions from the Hearing Examiner and receiving additional information from the Applicant, Staff of the Montgomery County Planning Department (Planning Staff or Staff) advised that the application was a minor amendment. *Exhibit 97*. The Hearing Examiner on June 23, 2022, administratively approved the minor amendment request and amended certain conditions previously set forth in the November 24, 2020 decision.

OZAH received an objection to the administrative approval on July 7, 2022. *Exhibit 100*. The objection stated the removal of the addition that “would have largely or totally screened noise from the project’s designated play and activity areas ... [that] without mitigation the impact of up to 180 children ... will interfere with sleep and other activities ... significantly change the effects of the project on the immediate neighborhood.” *Exhibit 100*.

On July 18, 2022, OZAH issued notice of a public hearing to be held on August 25, 2022, to determine whether the amendment should be considered as a “minor” or a “major” amendment. During the August 25, 2022 hearing, Mr. Howard Gruenspecht, the objector, presented testimony and evidence supporting his contention that the application Hearing Examiner should not have considered this a “minor” amendment. The Applicant, represented by counsel, presented testimony and evidence through the following 3 witnesses: Myrna Peralta, CEO of CentroNia; Jennifer Lyon, Mosley Architects; Christopher Karner, Polysonics asserting the grant of the minor amendment was proper.

II. FACTUAL BACKGROUND

A. Original Conditional Use Approval

On November 24, 2020, the Hearing Examiner granted a conditional use to operate a child Day Care Center for up to 180 children at the subject property along with certain waivers and under certain conditions. The Hearing Examiner granted the following waivers to parking (*Hearing Examiner's Report and Decision, 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 granted the following illumination waiver under the standards of §59.6.8.1 of the Zoning Ordinance (*Hearing Examiner's Report and Decision, p. 54*):

- a. A waiver from the maximum illumination levels required by §59.6.4.4.E of the Zoning Ordinance.

Conditions imposed on the conditional use approval included the following (*Hearing Examiner's Report, pp. 55 and 56*):

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 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.

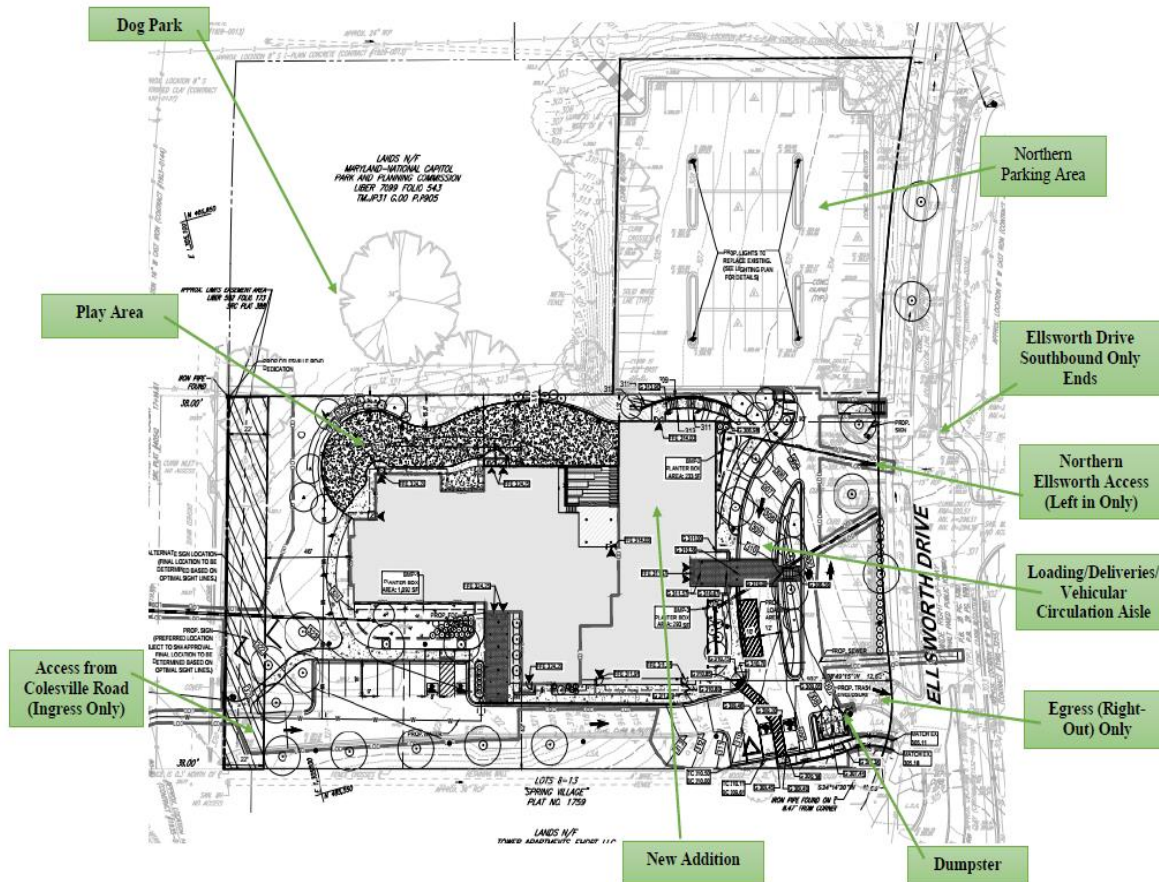
A photograph of the subject property, from the Staff Report (Exhibit 38), is shown on the following page.

In her original report, the Hearing Examiner discussed both inherent and non-inherent impacts for the proposed child Day Care Center in the original decision. *Exhibit 86, p. 35*. Specifically referring to Planning Staff's report that "noise generated by children" is an inherent impact of a child Day Care center and specific to this child Day Care center, the Hearing Examiner found that, "potential noise issues associated with the use are addressed by the strategic placement of the play area, which is adjacent to the dog park and also located behind the building where it is



Aerial View of Subject Property
Exhibit 86, pg.8

shielded from adjacent residents to the south and east.” *Id. p. 36.* In addition, the Hearing Examiner referred to Mr. Fox’s testimony that the “distance and the intervening building will attenuate noise from the playground ... the play area is shielded from Ellsworth Drive by the new addition ... because the playground is “tucked away” behind the building and the dog park, and due to the distance to the nearest homes noise impacts from the playground will be so minimal...” Relying on the evidence presented, the Hearing Examiner concluded no non-inherent adverse impacts were associated with this use as conditioned. *Id. p. 58.* Regarding the inherent impact of noise from the play area, the Hearing Examiner concluded that “based on Staff’s review and Mr. Fox’s testimony, noise from the play area will be attenuated by the building addition and distance from neighboring residential homes.” *Id. p. 37.* The Hearing Examiner placed no conditions on the location or use of the play area in the final report and decision. The approved conditional use plan (Exhibit 68(a)) is shown on the next page.



CU20-08 Final Site Plan, Annotated
Hearing Examiner's Final Report and Decision
Ex. 86 pg. 13

B. Proposed Amendment

On February 10, 2022, the Applicant submitted a request for a Minor Amendment of the previously approved conditional use child Day Care Center. *Exhibit 87*. The Applicant initially proposed to construct a two-story addition on the eastern side of the building, along with associated site modifications, but stated as a “result of rising construction costs, in order to conform with the Project’s construction budget,” the Applicant eliminated the two story addition and now proposes to largely keep the existing building and site improvements as they currently exist, re-designing

and reconfiguring the existing interior “to meet the programmatic needs of the approved Center.”

Id. The Applicant states that the exterior of the building and site improvements will largely remain unchanged from their existing conditions. *Id.* In addition, Applicant proposes no changes to the approved enrollment capacity, hours of operation, or conditions of approval. *Id.*

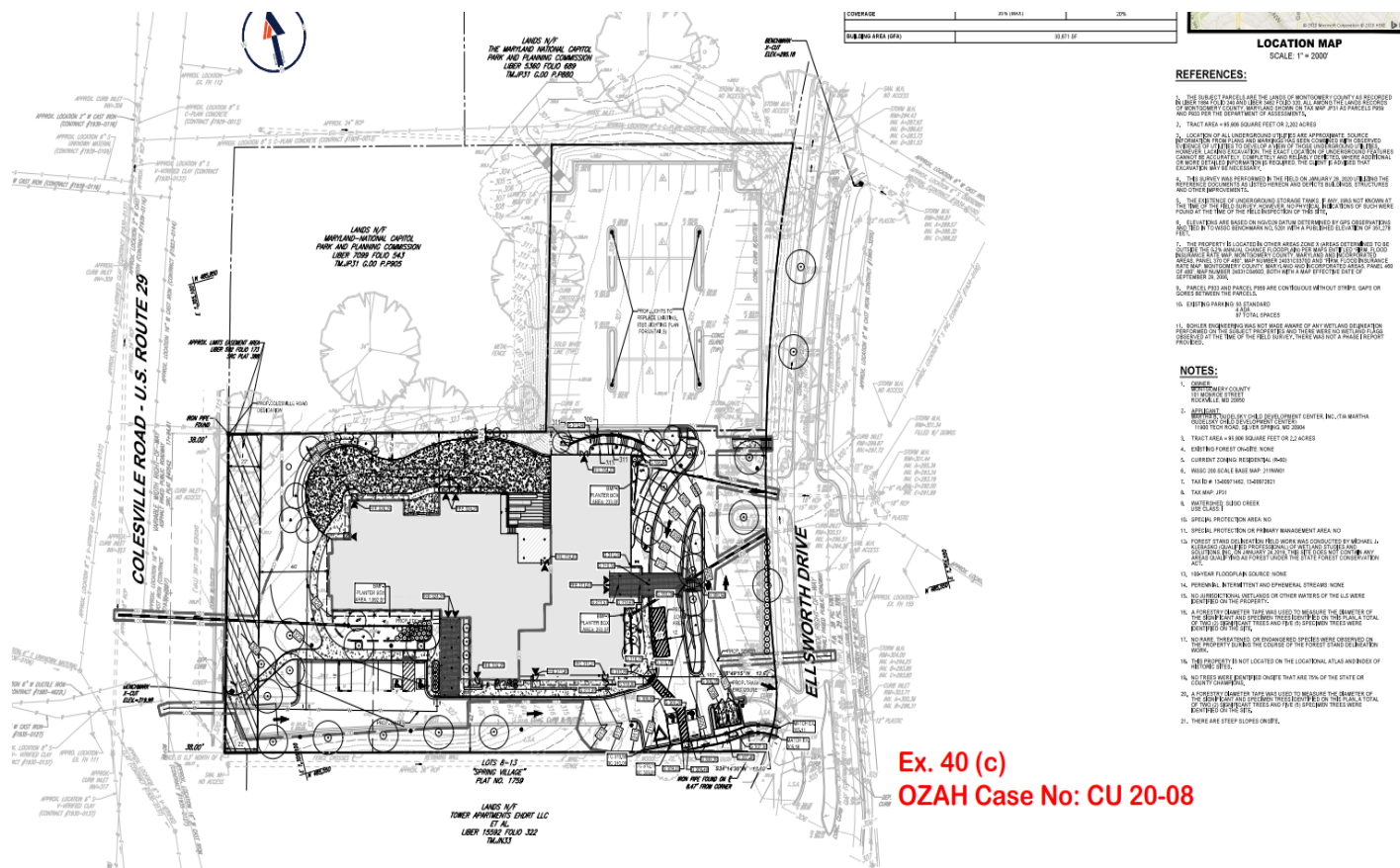
Applicant’s specific modifications are as follows:

1. Elimination of proposed building addition. As discussed above, 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, while 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 bicycles 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.

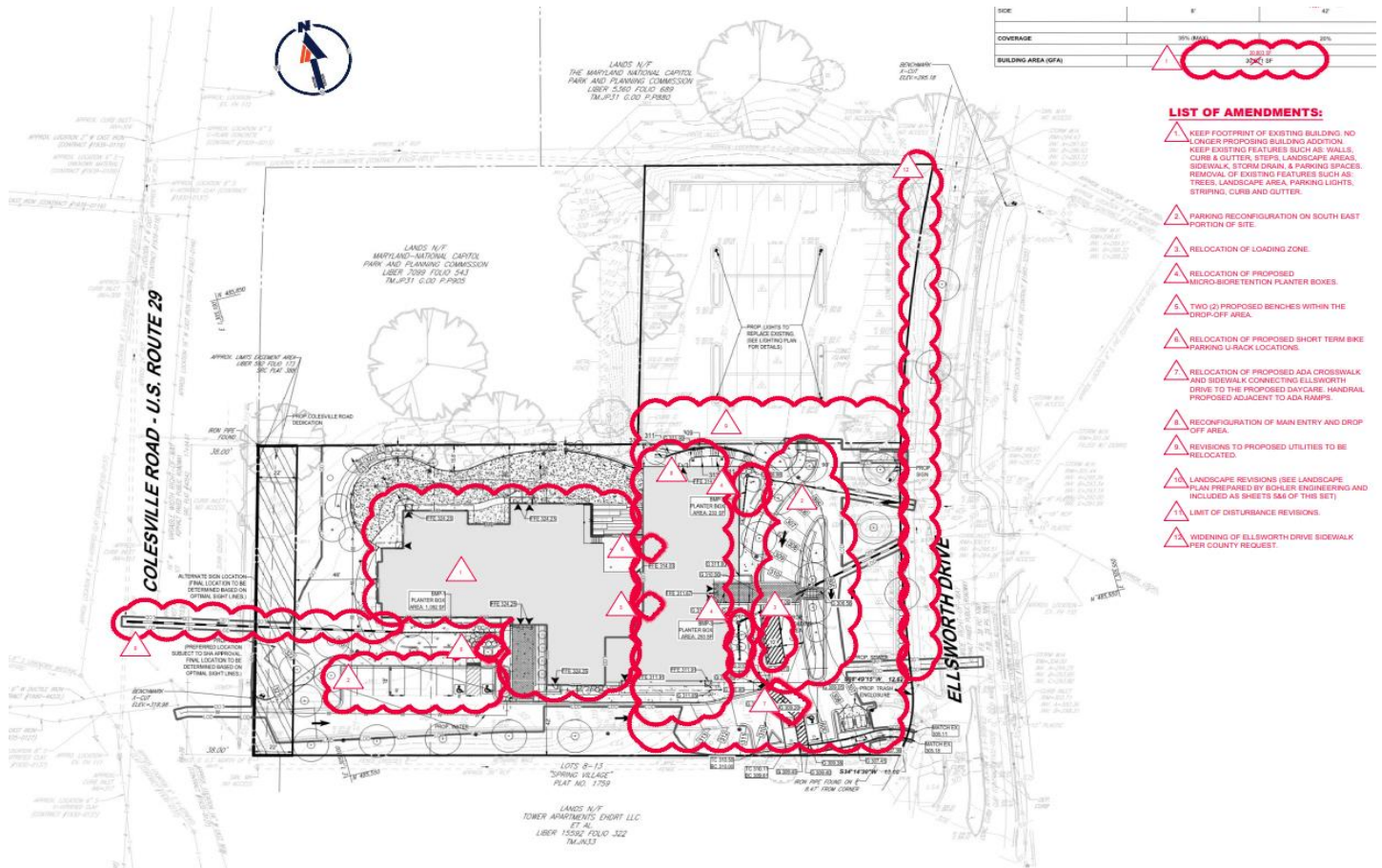
6. Modifications to building architecture. The existing building architecture will remain unchanged from its existing condition, with the exception of cantilevered canopies that are proposed over the building entrances and access points along the eastern façade. These canopies are building mounted and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

Id.

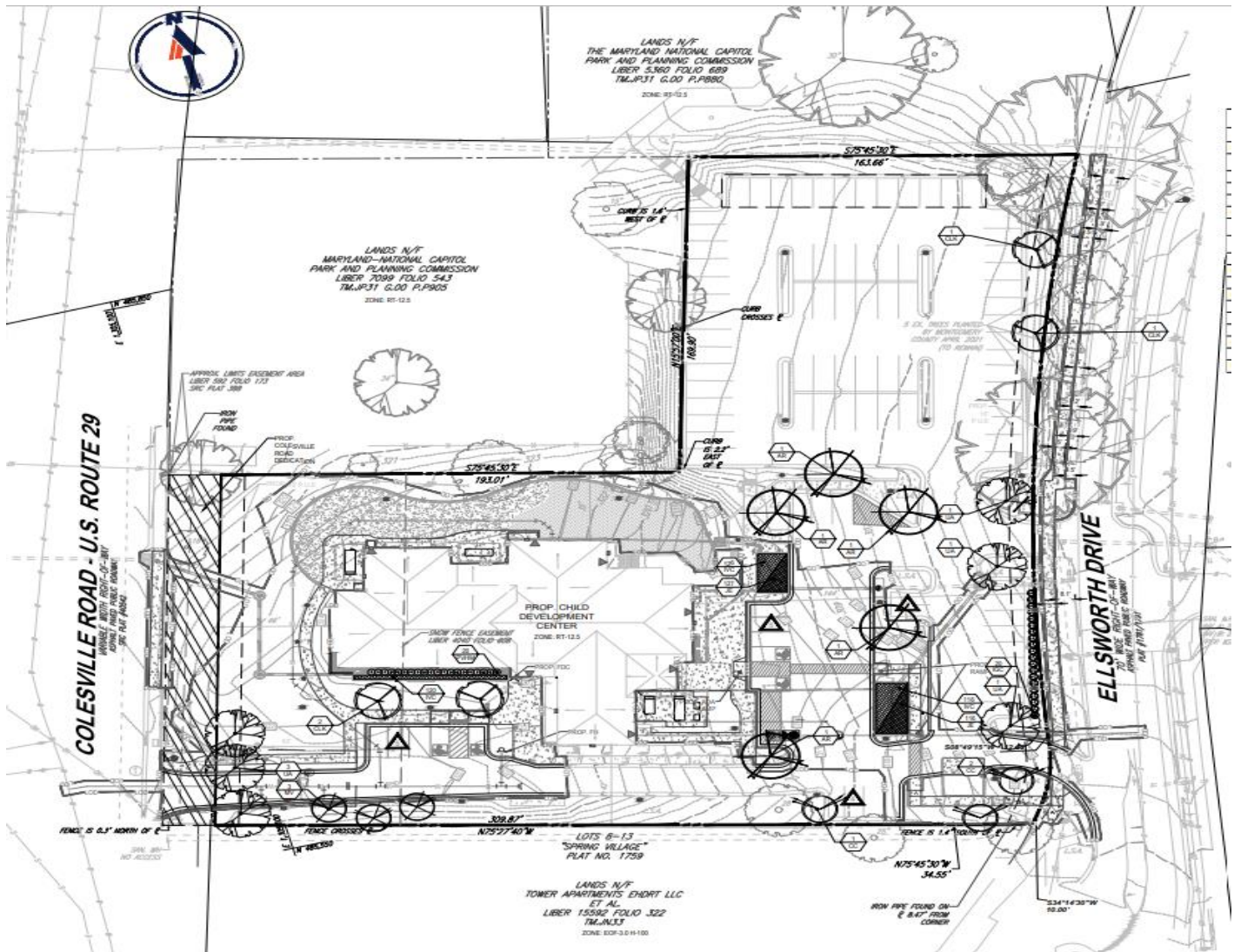
Excerpts from the original conditional use plan proposed (Exhibit 40) are shown below and the amended site plan on the following pages (Exhibit 93):



Ex. 40 (c)
OZAH Case No: CU 20-08



Redline of Original Approved Site Plan
Ex. 93, pg. 3



Amended Site Plan – Landscape View
Ex. 93 – pg. 6

C. Arguments of the Parties

In a letter dated July 5, 2022, Howard Gruenspecht, a neighbor to the subject property, submitted an opposition to the classification of the modification request as a minor amendment asserting the proposed changes constitute a major amendment. *Exhibit 100*. During his opening statement Mr. Gruenspecht identified four points that he believes that the modification as submitted is a major amendment in nature, not minor. Those points were as follows: 1) the

language of the Zoning and Noise Control ordinances limits noise from the subject property; 2) elimination of the proposed building addition will intensify noise impacts from the use, 3) the amendment creates a substantial adverse impact on the immediate neighborhood due to increased noise, specifically the noise impacts from the proposed outdoor playground because the addition will no longer attenuate noise, and 4) the statements and conclusions in the order of June 23, 2022 granting the minor amendment should be reconsidered in light of the full record and provisions of the Zoning Ordinance. *T. 19-21.*

1. Impact of Amendment on Noise Levels

Mr. Gruenspecht focuses on both the Zoning Ordinance and the Noise Ordinance to argue the amendment is major and not minor. He points to the “Necessary Findings” Section 59.7.3.1.E., subsections 1.e and 1.g of the Zoning Ordinance, arguing that the Hearing Examiner should find that the proposed amendment will cause undue harm to the neighborhood in several listed categories, which include the use and peaceful enjoyment of abutting and confronting properties and of the general neighborhood. He believes that the Zoning Ordinance’s reference to sound impacts encompass a more than just noise that would constitute a violation of the Noise Ordinance. *T. 33-34.*

Mr. Gruenspecht argues that the Applicant and Staff incorrectly rely on the fact that, because the physical structure is scaled back, the use is not intensified. He believes that the reduction of the physical structure is “likely to substantially raise the intensity of the use of the indoor play area, which based on the record in the case, is the most important measure of intensity for assessing neighborhood noise impacts.” *T. 39.* He further argues the reduction in building’s gross floor area and removal of the indoor play area increases the intensity of the use outside the

building and will lead to additional outdoor time for the children. *T. 40-41.* He disagrees with Staff that reducing the size of the structure means that amendment's impact is minor. *T. 42.*

Mr. Gruenspecht referred to the County Noise Ordinance itself stating that the Code refers not only to noise violations but also noise disturbances. The reference to noise disturbance, he argues, means that a violation above the listed decibel in the Noise Ordinance is not required to constitute a disturbance. Section 31B.5(c) defines noise disturbance as:

- 1) unpleasant, annoying, offensive, loud, or obnoxious;
- 2) unusual for the time of day or location where it is produced or heard; or
- 3) detrimental to the health, comfort, or safety of any individual or to the reasonable enjoyment of property or the lawful conduct of business because of the loudness, duration, or character of the noise.

T. 35. See also Montgomery Cnty. Code, § 31.B-2.

During the original public hearing in this case, the Applicant's expert in engineering opined that the distance and intervening building will attenuate noise from the playground and that the addition would shield the play area from Ellsworth Drive, which is some 200 feet away. *Exhibit 111, pp.100-101.* According to the witness, because the playground is "tucked away" behind the building and the dog park, and due to the distance to the nearest homes, noise impacts from the playground will be minimal and because of this testimony the Hearing Examiner did not limit the number of children that could be on the playground at any one time. *Exhibit 86, pp. 36-37.* Mr. Gruenspecht states that because his home is at or above playground grade, he does not receive the benefit of the playground's elevated geography and that without the building addition the noise impacts will now be much greater in light of the witness's prior testimony and that the building addition was the reason the Hearing Examiner did not limit the number of children that could be outside on the play area. *T. 48-49.*

Mr. Gruenspecht argues that the removal of the addition, which would have largely or totally screened noise from the play area and without noise mitigation will significantly change the effects to the immediate neighborhood. *Exhibit 100*. During the hearing Mr. Gruenspecht referred to the Hearing Examiner's original decision, pages 35 to 37 and the transcript of the prior hearing, Exhibit 111, pages 101 to 102. *T. 44-48*.

At this hearing, the Applicant's witness Christopher Karner, employed with Polysonics Acoustics and Sound Technology, was qualified as an expert in noise and acoustics. *T. 137-138*. Mr. Karner testified to site conditions and Exhibit 112 which included discussion of the County noise ordinance, existing sounds at the site, sound testing from a similar daycare, conclusions reached and application of those conclusions to the subject property. *T. 138-156*. He opined on the basic principles of noise and how it travels as well as provided detailed testimony on the specifics of noise to be generated from the play area as identified on the amended plan without the addition. *T. 140-153*. Mr. Karner testified that "all the noise levels that we showed calculated out to the houses are well below the 65 limit." *T. 153*. During cross examination, Mr. Gruenspecht asked Mr. Karner specifically "do you think a 30 foot high... building would have a significant ability to act as a barrier to sound reaching the other side of the building" and also "how much of a reduction you get" *T. 160-161*. Mr. Karner answered that it was a complicated question and not one easy to answer but that the "general assumption is that about 10 dB of reduction if there is a building ... that completely blocks the line of sight plus a little bit, and the noise is loud enough to go over it." *T. 161*.

Mr. Karner also testified that his review approached noise levels from both the noise ordinance and from the noise disturbance, which is why he measured background noise levels at the subject property. *T. 149*. His report concludes that individuals outdoors at Mr. Gruenspecht's

location would experience noise from the play area would be 46 dBA (below speech levels) and 38 dBA (equal to soft stereo levels) when indoors. When questioned about the minor amendment standard, “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”, he stated, “I would not consider a 3 dB increase over background noise to be substantial” and will not cause any adverse effects. *T. 154-155.* During Ms. Harris’s cross-examination of Mr. Gruenspecht, Mr. Gruenspecht stated he was not an expert on noise, nor did he hire his own noise expert. *T. 62-63.* Excerpts from the County’s Noise Ordinance and Polysonics’ acoustical evaluation are shown below and on the following pages (Exhibit 112):

Noise Control Ordinance – Chapter 31B – Noise Control

Exhibit 112
OZAH Case No: CU 20-08

Sec. 31B-5. Noise level and noise disturbance violations.

(a) Maximum allowable noise levels.

- (1) Except as otherwise provided in Sections 31B-6(a) and 31B-8, a person must not cause or permit noise levels that exceed the following levels:

<i>Maximum Allowable Noise Levels (dBA) for Receiving Noise Areas</i>		
	<i>Daytime</i>	<i>Nighttime</i>
Non-residential noise area	67	62
Residential noise area	65	55

- (2) A person must not cause or permit the emission of a prominent discrete tone or impulsive noise that exceeds a level, at the location on a receiving property where noise from the source is greatest, that is 5 dBA lower than the level set in paragraph (1) for the applicable noise area and time.
- (3) Sound that crosses between residential and non-residential noise areas must not exceed the levels set in paragraph (1) for residential noise areas.

(b) Noise disturbance. A person must not cause or permit noise that creates a noise disturbance.

County Noise Ordinance - Chart
Ex. 112 pg. 1

Calculated Noise Levels

Existing Playground Noise Levels (at 5’):

- 83 dBA max event
- 75 dBA average event

Extrapolated to 331’:

- $20 \cdot \log(5'/331') = 36$ dB reduction

Outdoor Playground Noise Levels at 331’:

- 46 dBA max event
 - Moderate: Below speech levels
- 38 dBA average event
 - Faint: Equal to soft stereo music in residence

Indoor Playground Noise Levels at 331’:

- 26 dBA max event
 - Faint: Below residential noise level
- 18 dBA average event
 - Very faint: Equal to whisper

Polysonics Calculations re: Noise
Anticipated Noise Levels
Ex. 112 pg. 6

Conclusions

Montgomery County Noise Code:

- Daycare noise levels well below 65 dBA daytime limit

Background Noise Comparison:

- Silver Spring background noise between 46 to 59 dBA
- Max event equal (46 dBA) to background noise
- Average event 8 dB less (38 dBA) than background noise

Conclusions:

- Children at playground may rarely be audible at exterior of residence, but never at interior.
- Noise levels equal to or below existing noise levels would not constitute a noise disturbance.

Polysonics Conclusions re: Noise Impact
Ex. 112 pg. 7

During his cross examination of the Applicant’s noise expert Mr. Karner, Mr. Gruenspecht asked about noise disturbances. Mr. Karner opined that a noise disturbance would be different depending on the noise and the location, but agreed that a “noise disturbance” could occur without violating the County Noise Ordinance (Chapter 31B of the County Code), but he could not say what Montgomery County would consider a noise disturbance. *T. 158-159.* Mr. Gruenspecht also

questioned Mr. Karner's methodology for placing the noise meter 5 feet from the fence line of the play area at the Takoma Park location; arguing that this measurement point was incorrect and as such produced a reading result that would be less than it should be if he had taken the reading from the center of the playground, which he believes calls into question the accuracy of Mr. Karner's findings. *T. 172-184; 201-202.*

2. Expansion of Play Area

In addition, Mr. Gruenspecht points out that the amended site plan clearly shows the play area footprint was expanded and has moved closer to Ellsworth Drive and his home. *T. 53.* This play area expansion, he argues, proves the amendment increases the intensity of the conditional use. During his cross examination of Ms. Lyon, Mr. Gruenspecht asked about the striped area on page 13 of Exhibit 86 of the site plan that did not exist on the original plan. Mr. Gruenspecht argued through his cross examination that an expansion of the play area extending the footprint closer to Ellsworth Drive is clearly shown on the amended site plan. *T. 114-125.*

In response, the Applicant submitted various exhibits and testimony from Ms. Peralta, President and CEO of CentroNia and Ms. Jennifer Lyon, an architect with Mosley Architects. Per the amended statement of justification due to rising construction costs, the construction of the two-story building addition, approved in connection with the underlying conditional use application is being eliminating and the interior of the existing building will be re-designed and reconfigured to meet the programmatic needs of the approved use keeping the exterior of the building and site improvements largely unchanged. *Exhibit 95.*

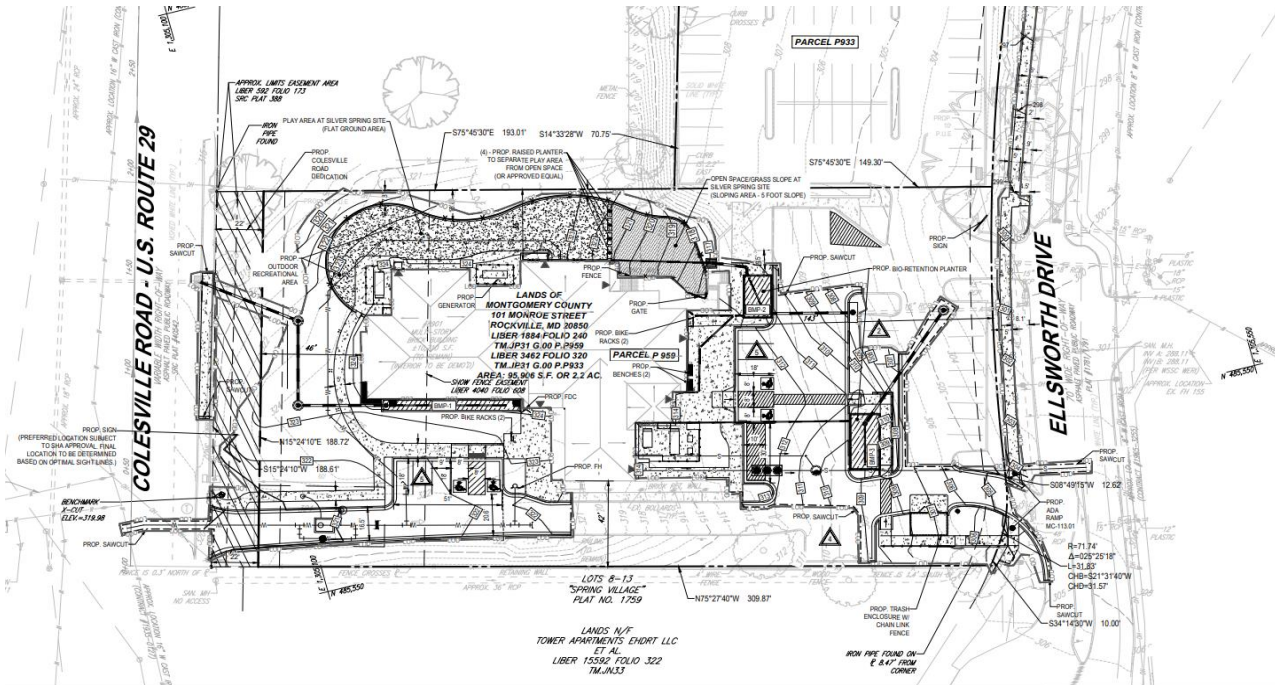
Ms. Peralta testified that the use, number of children enrolled and the designated community space in the building both previously approved by the Hearing Examiner's 2020 decision would remain the same under the proposed amendment. *T. 80-81.* She went on to state

that every space inside the existing building, except for quality of classroom space, has been reduced and/or redesigned including the community space, offices, training facilities, etc. to make sure the Center kept sufficient indoor space for the children. *T. 81-82.* Regarding outdoor times for the children, Mrs. Peralta stated that children were never outside before 9:30 am, could be outside as late as 5:30 p.m., and that the removal of the addition in no way altered the operation of the playground from what was originally proposed. *T. p. 84.*

Ms. Lyon testified to the site conditions and the amended site plan and was qualified as an expert in the field of architecture. *T. 100.* She stated no change to the footprint of the outdoor play area was made. *T. 125.* The amended plan shows a 5-foot sloped area in the front of the playground not shown on the originally approved plan. *T. 101, 113-121.* Ms. Lyon's testified that the play area footprint did not change, but the sloped area not shown on the original approved site plan constituted an existing condition that was better classified as open space than play area. *T. 120-121.* In response to the confusion over whether the play area was expanded, the Hearing Examiner requested an updated site plan showing a barrier between the slope and the original play area footprint. The Applicant complied with this requested and the revised conditional use plan is shown on the next page.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The primary argument of the opposition is that the Hearing Examiner cannot approve the minor amendment to the conditional use because the removal of the previously approved addition changes nature, character and intensity of the previously approved conditional use because noise from the play area will have a substantial adverse impact on the surrounding area.



A. Governing Law

An objection to administrative approval of a minor amendment is limited to the specific modification. Section 7.3.1.K. of the Zoning Ordinance governs amendments to conditional uses and places them into either a “major amendment” or “minor amendment” category. Section 7.3.1.K.1(a) – Major Amendment - states as follows: “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.” Section 7.3.1.K.2(a) – Minor Amendment – in part, states as follows: “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.

Mr. Gruenspecht's sole objection to characterizing the amendment as "minor" is his belief that it will increase noise from the play area to the extent that it will have a substantial adverse effect on the surrounding area. He does not challenge any other aspect of the amendment.

B. Analysis and Opinion

Upon review of the entire record, the Hearing Examiner finds that the amendment is minor and will *not* cause a substantial adverse impact by increasing noise levels in the surrounding area.

1. Increase in Children Playing Outside

The Hearing Examiner does not agree with Mr. Gruenspecht that eliminating the addition will significantly increase sound levels in the surrounding area. Per Ms. Peralta's testimony the day care center will accommodate the originally approved number of students, the community room space is being reduced from 900 sq. ft. to 450, instead of 8 classrooms they will have 4 or 5, and instead of separate conference rooms and training rooms, the existing building will now have more multi-use space, but the quality of classroom programming will remain the same. *T. 79, 81, 91, and 93.* Ms. Peralta stated CentroNia has been a childcare provider for 35 years and that the "schedule is the same whether we have 10,000 sq. ft. or 50,000 sq. ft. *T. 79, 93.* She went on to describe the classroom, structure and outdoor times, specifically pointing out that "we sort of cut and looked at office spaces and our training facilities ... the things that are not in the classrooms themselves in order to make sure we had sufficient indoor space when necessary for our children." *T. 81-82.*

Mr. Gruenspecht argues the reduction in square footage per child results in an indoor intensification of the use that will lead to more children outside. Ms. Peralta's testimony refutes this assertion. The Hearing Examiner agrees with Mr. Gruenspecht, that in certain circumstances, a reduction in square footage could lead to the intensification of a particular use. However, the

Hearing Examiner find Ms. Peralta's testimony to be persuasive, such that in this instance the elimination of the addition will not force more children outside. She is the President and CEO of CentroNia, an organization with over 35 years of experience in childcare. The Hearing Officer believes her testimony when she says the team made space sacrifices in other areas to make sure the quality of the classroom experience for the children would be preserved to still accommodate the original planned number of children. In addition, a multi-purpose room still exists within the existing building, while smaller than previously approved, this room still provides an indoor area for the children, other than their individual classrooms. Due to Ms. Peralta's experience in the childcare industry, her discussion of the steps taken to reconfigure the existing space and testimony regarding planned operations in general, the Hearing Examiner finds that reduction in the size of the center will not increase noise by forcing more children into the outside play area.

2. Need for Building Addition to Attenuate Noise

The crux of the opposition's argument is that the removal of the building addition will lead to intensification of noise from the play area that will cause the neighborhood to suffer substantial adverse effects. The opposition justified this position by referring to the Applicant's architect expert witness testimony during the original conditional use hearing and the Hearing Officer's reliance on that testimony in granting the original conditional use approval. T. 44-48. The opposition's justification is 100% understandable given the fact that when asked about noise attenuation from the playground the Applicant's expert specifically stated, "the addition would be the largest attenuating factor in that, the addition of vegetation." *Exhibit 111, p. 102.*

While the original architect's testimony did also state the grade change, vegetation, etc. would also reduce the sound from traveling, the fact remains that a statement was made that the addition itself was the most important factor in blocking the noise. The Applicant did not hire a

noise expert for the original conditional use application nor did the Applicant submit a noise analysis with its minor amendment application. Considering this prior testimony, the question remains, does the removal of the building addition then intensify the play area noise to create a substantial adverse effect on the neighborhood? Upon review of all the evidence presented, the Hearing Examiner finds that the increase in noise from the play area will not cause the neighborhood to suffer substantial adverse effects.

The Applicant presented expert testimony from an expert in acoustics to specifically address the noise generated from the play area under the amended site plan. Expert testimony is meant to assist the trier of fact to understand the evidence or to determine a fact in issue.¹ An expert's testimony is admitted "because it is based on his special knowledge derived not only from his own experience, but also from the experiments and reasoning of others, communicated by personal association or through books or other sources."²

The Hearing Examiner found Mr. Karner's testimony and presentation to be very informative and reliable. The opposition did not provide any expert testimony to counter that of Mr. Karner, but instead relied on cross-examination of Mr. Karner to cast doubt on his techniques and recommendations. Specifically, the opposition questioned the validity of his noise measuring point at the Takoma Park day care as being outside the play area instead of from the center of play area. Mr. Karner's response that noise emanates from the entire playground area and that measuring from the center of the playground might disrupt the results because the children may notice the microphone to be a valid reason for selecting the measurement point and that the conclusions reached using this measurement to be sound. *T. 176*. The Hearing Officer does not

¹ *Levitas v. Christian*, 454 Md. 233, 245 (citing *Roy v. Dackman*, 445 Md. 23, 41 (2015) and *Radman v. Harold*, 279 Md. 167, 169, 367 A.2d 472 (1977)).

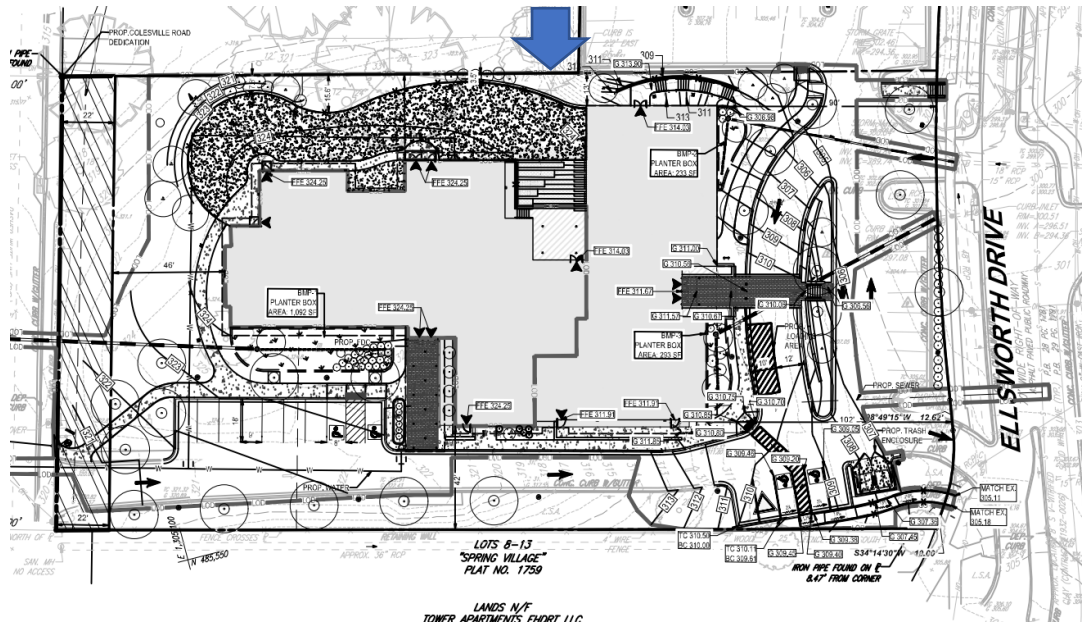
² *Id.* (quoting, *Radman v. Harold*, 279 Md. 167, 169, 367 A.2d 472 (1977)).

find the opposition's reference to Mr. Karner's recommendations for the Darcy Hotel helpful or on point. Per the testimony, Mr. Karner's work for the Darcy Hotel centered on the construction of a plexiglass enclosure to provide sound reduction, not a "wall" over which sound could travel. *T. 161-163.* The comparison of the Darcy Hotel plexiglass enclosure as an event space to the removal of an addition where sound can travel freely over at the subject day care center mounts to a comparison of "apples" to "oranges" and is not helpful or instructive.

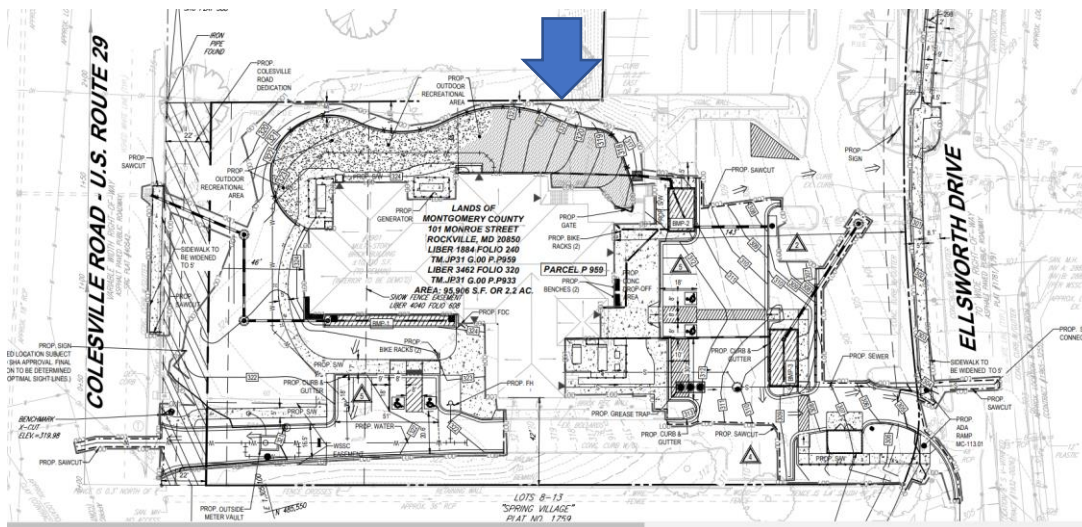
What was helpful and instructive was Mr. Karner's explanation on the calculated noise levels generated from the play area without the building addition and his explanation of sound level perception. Mr. Karner concluded that the minor modification as submitted, removing the building addition, would create a 3 dB increase in noise and that 3 dB increase would not cause a substantial effect. *T. 154-155.* The Hearing Officer finds enough factual basis to support Mr. Karner's testing methods and his explanation to be reliable. Relying on his testimony and conclusions, the Hearing Examiner finds that that the maximum sound generated from the play area will neither create a noise violation nor a noise disturbance. The removal of the building addition will not create an intensity increase in noise such that it will cause a substantial adverse impact on the surrounding neighborhood.

3. Play Area Size

Mr. Gruenspecht correctly pointed out a discrepancy in the original approved site plan with the proposed play area identifying what appeared to be an expansion of the play area towards Ellsworth Drive. *T. 53.* However, Ms. Lyon testified multiple times that the play area remained exactly the same and the footprint did not expand. *T. 120-121, 125, 129.*



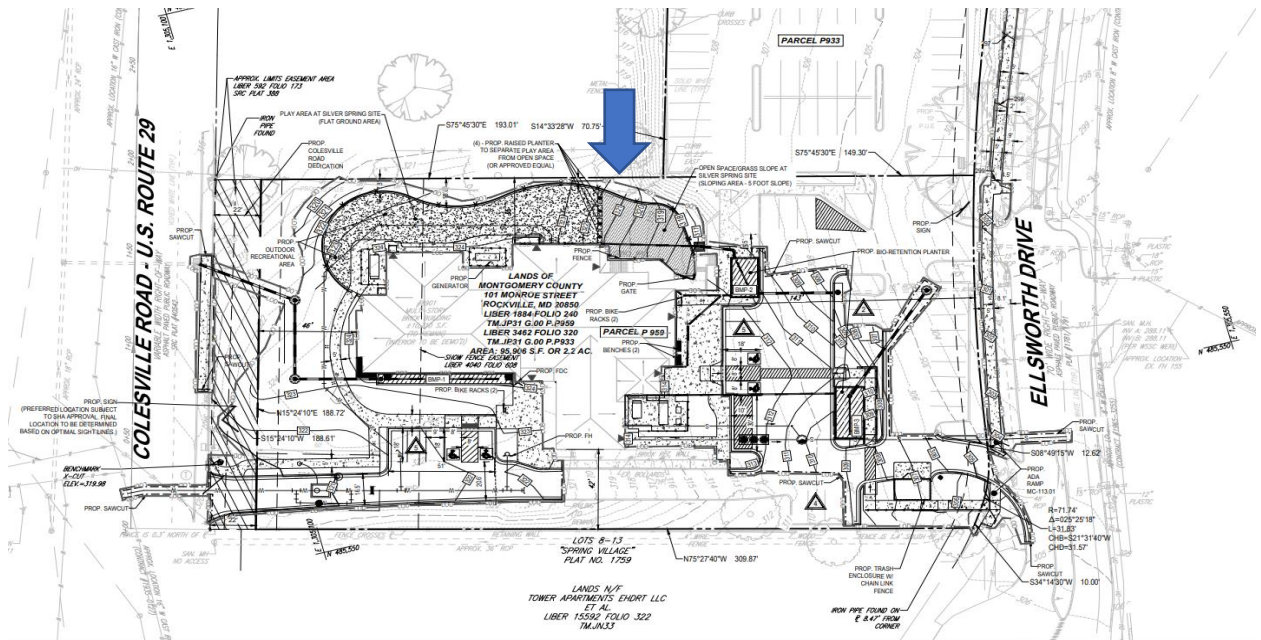
Original Site Plan Play Area – Ex. 40(c)



Amended Plan Play Area - Ex. 93 pg. 4

Upon close examination of the two plans, additional “play area” beyond the original boundary of the previously approved plan appears to exist. During the re-direct of Ms. Lyon, she identified the play area as follows, “the solid green area is the intended operational play area space for the children, with playground equipment. That’s their active space. This bright area to the right

is the sloping existing conditions of the ground that is open space.” *T. 127-129*. She further testified the sloping area will not be used as active play area. *Id.* Sometimes professionals when working in their chosen field use certain language or fail to distinguish certain things that to the lay person seems different from what was intended or fail to provide an important area of distinction. Ms. Lyon clearly stated the play area footprint did not increase, however what to her was a natural contour or “sloping” area and not an “active play area”, to the rest of us reading the plan clearly appeared to be an expansion of the play area. Upon further questioning and upon the Hearing Examiner’s request for a proper description of the play area vs. the open space, the play area site plan was updated to show its footprint remaining unchanged and planters situated to clearly delineate the active play area from the natural contours of the site.



Amended Site Plan depicting planter barrier
between play area and open space
Ex. 118

Upon further review of the original approved site plan, modified site plan and updated site plan with planters, the Hearing Officer believes Ms. Lyon’s testimony that the play area did not expand beyond the originally approved site plan. Planters will be installed to ensure no such

expansion into the “open space” and the natural contour of the site toward Ellsworth Drive. The Hearing Officer finds the original size and location of the play area did not expand, and therefore, there is no increased location intensity from play area.

IV. CONCLUSION AND DECISION

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, all development should conform to the amended conditional use site plan (Exhibit 118), 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 5th day of October, 2022.



Kathleen Byrne
Hearing Examiner

NOTICE OF RIGHT TO APPEAL

Any party of record may file a written request to appeal the Hearing Examiner’s Decision by requesting oral argument before the Board of Appeals, within 10 days issuance of 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.

Additional procedures are specified in Zoning Ordinance §59.7.3.1.f.1. Contact information for the Board of Appeals is:

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

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

If you have questions about how to file a request for oral argument, please contact Staff of the Board of Appeals.

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/>.

NOTIFICATION MEMORANDUM SENT TO:

Copies to:

Howard Gruenspecht
Patricia Harris, Esq.
Elizabeth C. Rogers, Esq.