

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

IN THE MATTER OF: *

JAWAIRIA IQBAL *

Applicant *

Jawairia Iqbal *

For the Application *

*

Before: Kathleen Byrne, Hearing Examiner

HEARING EXAMINER'S REPORT AND DECISION

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I. STATEMENT OF THE CASE

On August 2, 2022, the Applicant, Jawairia Iqbal filed an application seeking approval of a conditional use to operate a Group Day Care for up to 18 children at 108 East Melbourne Ave, Silver Spring, Maryland ("Subject Property" or "Property"). Exhibit 1. The subject property is described as Highland View Sec 3 & Adj. Parcel, Lot 8, Block B, (Plat #1278, 1278). The property is located in the Brookside Forest subdivision within the geographic area covered by the 2000 East Silver Spring Master Plan ("Master Plan" or "Plan"). The property is zoned R-60 and the tax account number is 13-01011522). Exhibit 12. The property owners, Fauzia Iqbal and Iqbal Ahmed, ("Owners" or "Owner"), submitted a letter consenting to the application. Exhibit 10. The Applicant and property owners submitted Affidavits of Compliance. The Applicant submitted an Affidavit of Posting. Exhibit 20.

Applicant resides on the property and operates the existing twelve-child day care. A daycare has been operated at the subject property since 2008. In February of 2020 the Applicant filed an application with the Planning Department to expand the then existing-by right Family Day care use for up to eight (8) children at the subject property to a Group Day Care use for up to 12 students. Exhibit 17. The Planning Board voted in favor of the application by a unanimous vote on June 4, 2020. The Hearing Examiner held a public hearing on the application on June 29, 2020. The Applicant presented her case and no other

witnesses in support or opposition testified at the hearing. The Hearing Examiner approved the expansion with conditions issuing a final report and decision on August 11, 2020.

Exhibit 17.

The Applicant continues to reside in the property and continues to operate the previously approved 12-child day care. The Applicant now seeks to expand the existing 12-child day care to a Day Care Center for up to 18 children. A Group Day Care Center for between 13 and 30 children must be approved as a conditional use under §§59-3.4.4 and 7.3.1 of the Montgomery County Zoning Ordinance. On October 25, 2022, the Office of Zoning and Administrative Hearings (“OZAH”) issued a Corrected Notice of Public Hearing scheduling the hearing for Monday, November 28, 2022. Exhibit 19. On October 21, 2022, the staff of the Montgomery County Planning Department (“Planning Staff” or “Staff”) issued a report recommending approval of the proposed conditional use expanding the existing child day care subject to certain conditions. Exhibit 17. By letter dated November 4, 2022, Planning Board conveyed to OZAH that it recommended approval of the proposed expansion of the conditional use subject to the conditions imposed by Planning Staff and also recommended two additional conditions. Exhibit 18.

The public hearing proceeded as scheduled on Monday, November 28, 2022.¹ The Applicant, Jawairia Iqbal, appeared *pro se* and testified in support of her application. No additional witnesses appeared at the hearing to testify either in support or in opposition of the conditional use application. After hearing the evidence presented, the Hearing Officer

¹ Due to the COVID-19 pandemic and restricted access to county offices for safety reasons, the public hearing was held remotely via Microsoft Teams. A link and phone number for the public to join the hearing were published on OZAH's website. Hearing exhibits were also published on OZAH's website prior to the hearing to permit the public to participate.

held the record open for a period of 10 days to receive the transcript. OZAH received the transcript on December 7, 2022 and the Hearing Officer closed the record on December 7, 2022.

For the following reasons, the Hearing Examiner approves the conditional use application subject to the conditions listed in Part IV of this Report and Decision.

II. FACTUAL BACKGROUND

A. The Subject Property

The subject property is located at 108 E. Melbourne Avenue in Silver Spring, otherwise known as Lot 8, Block B of the Brookside Forest Subdivision. Exhibit 17, pg. 4. The Staff Report describes the property as follows:

The Site is improved with a detached house The Group Day Care use occupies three (3) rooms on the first floor of the house (approximately 750 square feet). The Applicant proposes expanding the daycare use to one (1) additional room on the first floor (for a total of 1,306.98 square feet)...The 8,494 square-foot lot is located on the northwest corner of the intersection of E. Melbourne Avenue and Walden Road. The Property has one driveway located on Walden Road that is approximately 25 feet wide and 32 feet long that has space for up to four (4) cars. A concrete walkway connects the entrance of the day care on the east side of the house, accessed from Walden Road. An unenclosed porch covers the entrance on the west side of the house with an additional walkway to E. Melbourne Avenue.

Exhibit 17, pg. 5.

The exterior property contains seasonal landscaped beds are located along the walkway to the day care and in front of the house and two (2) residential-type lighting fixtures in the front and a covered, unenclosed porch outside the entrance to the day care. E. Melbourne Avenue is a Secondary Residential Road, 26 feet in width and permits on-street unrestricted parking on both sides providing ample parking capacity for parents dropping-off or picking-up children, as well as on-site parking for the proposed one (1) non-resident staff and the members of the household.

The property includes an outdoor play area in the rear yard of the house enclosed by fencing approximately 4.5 feet in height along the west side of the Property and approximately 6.5 feet in height along the rear and east side of the Property. A partially enclosed porch also provides screening of the backyard play area from view from E. Melbourne Avenue. The majority of the play area surface is mulch and other natural soft surface with a variety of playground equipment installed. Exhibit 17, pgs. 5-6.

The subject project is not subject to the requirement to submit a Forest Conservation Plan under Article II of Chapter 22A. The Site contains no streams or stream buffers, wetlands or wetland buffers, 100-year floodplains, hydraulically adjacent steep slopes, or known occurrences of Rare, Threatened and Endangered species. Exhibit 17, pg. 13.

See various photographs of the property from the Staff Report on the following pages.



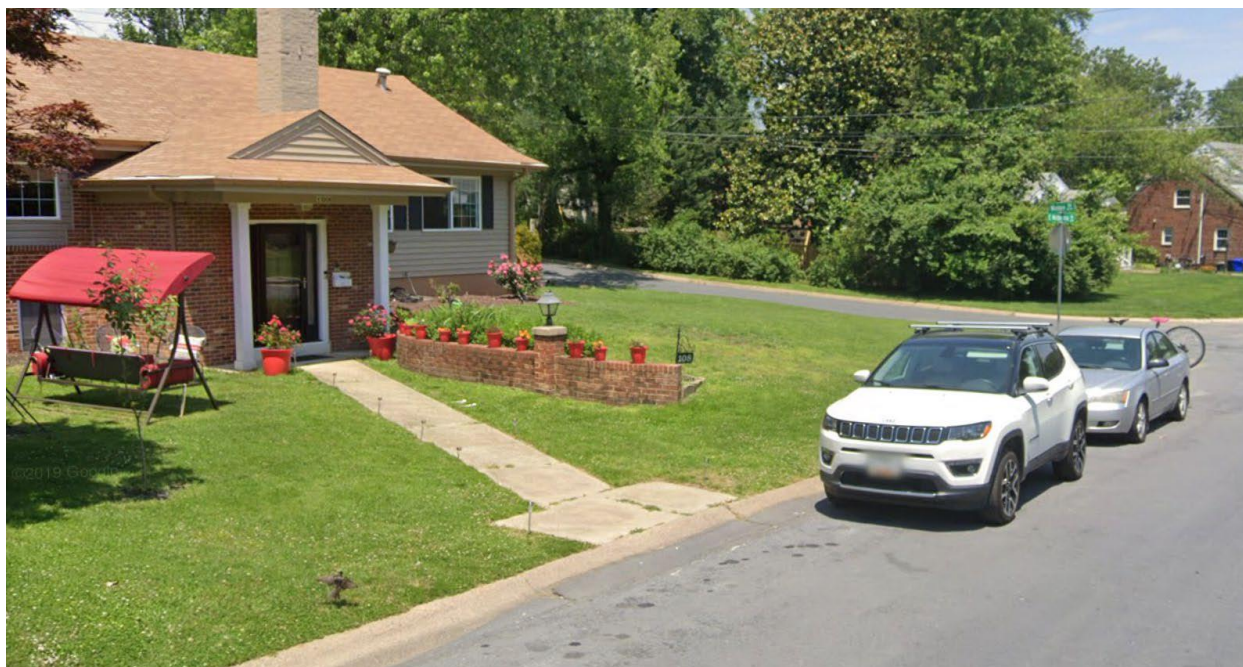
Staff Report – Aerial Photograph
Exhibit 17 – pg. 6



Staff Report – Parking Configuration
Exhibit 17, pg. 11



Staff Report – NW Corner E. Melbourne & Walden Rd
Exhibit 17, pg. 10



Staff Report – N. Side of E. Melbourne Ave
Exhibit 17, pg. 10



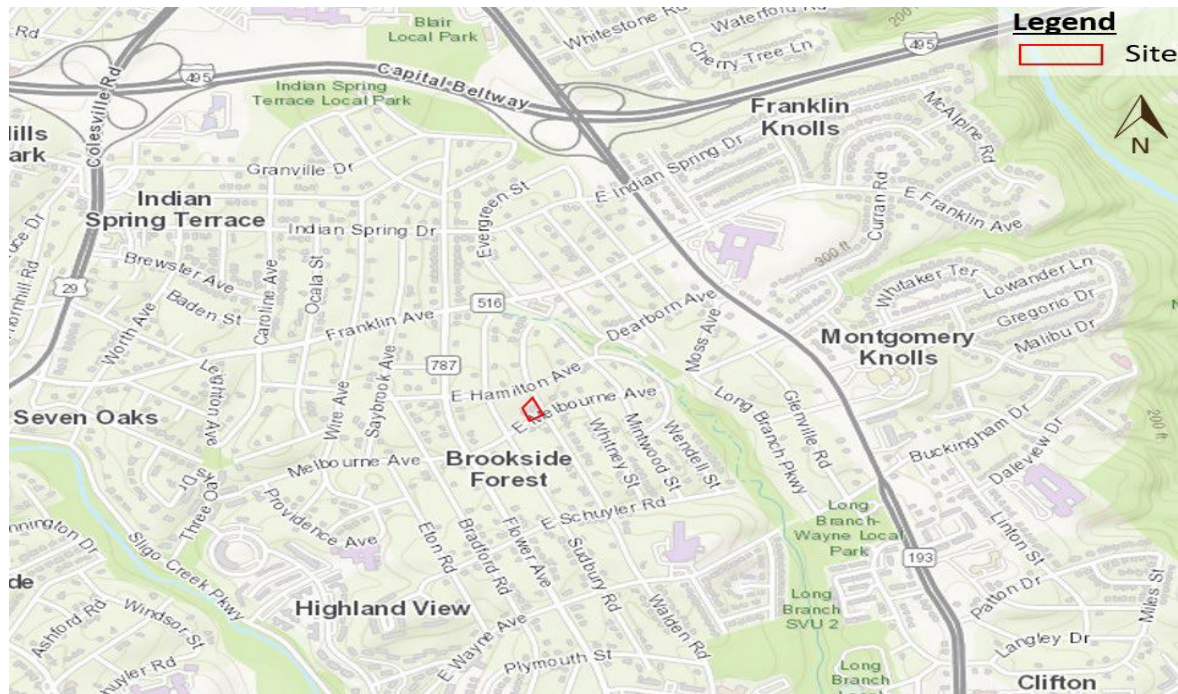
Staff Report – W. Side Walden Road – Daycare Entrance
Exhibit 17, pg. 11



Staff Report – Rear Yard/Playground
Exhibit 17, pg. 11

B. Surrounding Neighborhood

The Staff concluded that the subject property Neighborhood be defined as follows:
bounded by Franklin Road to the north; E. Schuyler Road to the south; Mintwood Road and Upper Long Branch Neighborhood Park to the east; and by Flower Avenue to the west. Exhibit 17, pg. 5. The Neighborhood consists of detached houses in the R-60 Zone. Staff identified two (2) approved conditional uses/special exceptions within the defined neighborhood: 1) S64: A non-resident medical practitioner's office (dentist) at 9417 Flower Avenue and 2) S1190: Accessory Apartment, located at 9320 Walden Road. The Applicant described the neighborhood as suburban in character. T. 11. Aerial photos/maps of the neighborhood shown on the following page.



Staff Report – Vicinity Map
Exhibit 17, pg. 5



Staff Report – Neighborhood
Exhibit 17, pg 6.

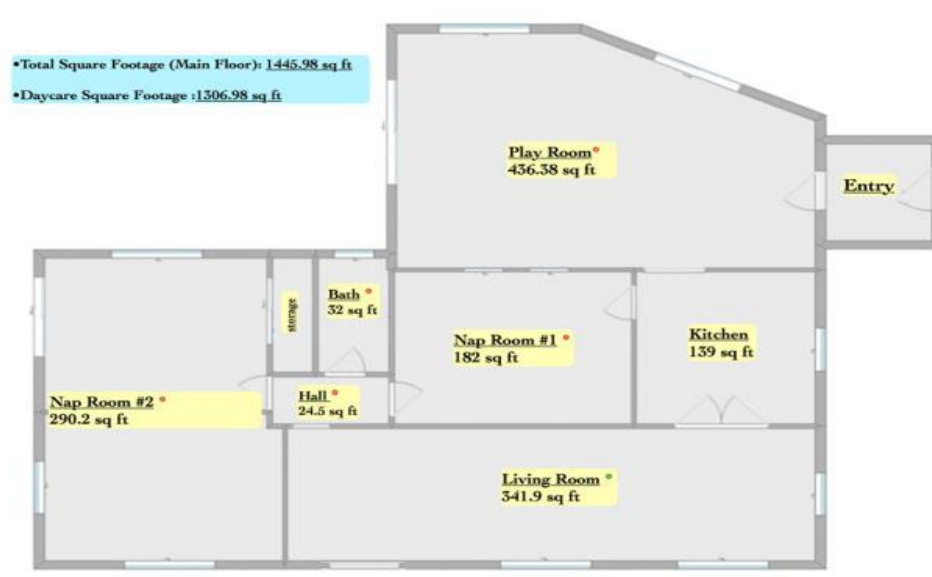
C. Proposed Use

The Applicant proposing expansion of the existing Group Day Care use for a maximum of 18 children and one (1) non-resident employee, if required. The Applicant wishes to increase the current daycare on the Site by six (6) children. The day care has been operating on the main level of the existing home for over 10 years and in the summer of 2020, the Applicant was approved for a request to expand the family day care of up to eight (8) children to 12 total. Exhibit 17, pg. 8.

1. Site, Parking, Landscape, and Lighting Plans and Signage.

The Applicant does not propose any major modifications to the indoor or outdoor day care space. The Applicant and four (4) other family members live on the Property and currently

all day care staff live at the property. T. 11, 14. One (1) non-resident employee may be hired for the proposed day care expansion. Exhibit 17, pg. 9. The existing day care occupies three (3) rooms on the first floor of the house (approximately 750 square feet). The Applicant proposes expanding the day care use to one (1) additional room on the first floor (for a total of 1,306.98 square feet). Exhibit 17, pgs. 8-9. See floor plan on next page.



Staff Report – Floor Plan
Exhibit 17, pg. 9

There are a total of eight (7) parking spaces available for the Site. This includes four (4) tandem parking spaces in the existing driveway on Walden Road and up to three (3) on-street spaces available along the front of the home on E. Melbourne Avenue. Exhibit 17, pg. 9, T. 11-14. An additional parking space in a driveway to be constructed by the Applicant on E. Melbourne Avenue, if required. T. 11-14. In the event this 8th driveway is required, it will be 8.5 feet in width and 18 feet in length and will be designed in such a way that it will uphold the

residential character of the neighborhood while meeting the minimum design standards for a perpendicular parking space. Exhibit 17, pg. 9.

This Project is not subject to the requirement to submit a Forest Conservation Plan nor impacts any “champion trees”, no changes to the existing landscape are proposed. Exhibit 17, pgs. 13. As no exterior changes are proposed, no lighting plan was submitted for consideration, nor is one required. The Applicant has no existing or proposed signage included as part of this Application. Exhibit 17, pgs. 9, 13.

2. Operations & Drop-off/Pick-up

The day care will continue the same operating hours of Monday through Friday from 7:30 am to 5:30 pm and continue to care for children ages 4 months up to 4 years with a staff of up to 5 individuals all of whom will live on site. Exhibit 17, pgs. 8-9. The day care will follow MCPS holiday and snow event schedule. Exhibit 7, pg. 9. The day care follows a regular daily scheduling including breakfast, indoor activity time, teacher lead activities, outside time for up to two hours weather depending, lunch, nap time, quiet time, and group activities. Exhibit 7, pgs. 8-9.

Most of the children are from the neighborhood and many are siblings. Exhibit 7, pg. 9. Most parents walk to drop off and pick up their children and only 2-3 parents maximum will be driving. Parents' cars will be parked in the driveway which can hold 3-4 cars or parents can park on the curb. *Id.* Currently 100% of the children are from the neighborhood and there has been a 2-year 10 person waiting that includes 3 siblings of existing day care students. T. 12, 25.

The Applicant proposes staggered drop off and pick up times for children. Specifically, 2 to 3 children every 15 minutes for drop off between 7:30 am and 9:00 am with 2 to 5 children

traveling by car and then again 2 to 4 children every 15 minutes for pick up between 4:00 pm and 5:30 pm with 2 to 5 children traveling by car. Exhibit 14, pg. 5; T. 17-20.

D. Community Response

There is no opposition to the conditional use application in the record. No letters of support or opposition were received by Planning or OZAH Staff. No individuals appeared during the hearing to testify in opposition of the proposed conditional use.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A conditional use is a zoning device that authorizes certain uses provided that pre-set legislative standards are met. Pre-set legislative standards are both specific and general. General standards are those findings that must be made for almost all conditional uses. Zoning Ordinance §59-7.3.1.E. Specific standards for the particular use requested, in this case, a Group Day Care for between 13 and 30 children. Zoning Ordinance §59-3.4.4.E. An applicant must prove that the use proposed meets all specific and general standards by a preponderance of the evidence. The Hearing Examiner concludes that Applicant has done so in this case, with the conditions of approval included in Part IV of this Report.

A. Necessary Findings (§59-7.3.1. E)

The relevant standards and the Hearing Examiner's findings for each standard are discussed below.² For discussion purposes, the general standards may be grouped into four main areas:

1. Substantial Conformance with the Master Plan;

² Although §59.7.3.1.E. contains six subsections (E.1. through E.6.), only subsections 59.7.3.1.E.1., E.2. and E.3. contain provisions that apply to this application. Section 59.7.3.1.E.1. contains seven subparts, a. through g.

2. Adequate Public Services and Facilities;
3. No Undue Harm from Non-Inherent Adverse Effects; and
4. Compatibility with the Neighborhood

E. Necessary Findings

1. To approve a conditional use application, the Hearing Examiner must find that the proposed development:

a. satisfies any applicable previous approval on the subject site or, if not, that the previous approval must be amended;

Conclusion: A conditional use for a day care of up to 12 children was previously granted on June 29, 2020. Exhibit 17, p. 7. Granting this conditional use for a day care of up to 18 children will replace this prior approved used.

b. satisfies the requirements of the zone, use standards under Article 59.3, and to the extent the Hearing Examiner finds necessary to ensure compatibility, meets applicable general requirements under Article 59.6;

Conclusion: This subsection requires review of the development standards of the R-60 Zone contained in Article 59.4; the use standards for a Day Care Facility contained in Article 59.3; and the applicable development standards contained in Article 59.6. Each of these Articles is discussed below in Parts III.B, C, and D, of this Report, respectively. For the reasons explained there, the Hearing Examiner finds that the application satisfies these requirements.

1. Substantial Conformance with the Master Plan

c. substantially conforms with the recommendations of the applicable master plan;

The Property is within the boundary of the 2000 East Silver Spring Master Plan (Master Plan) and overall, the Application is in conformance with the Master Plan. Exhibit 17, pg. 18. Per Staff the Master Plan does not specifically address the Property, but general recommendations

related to residential character and neighborhood compatibility are relevant to this Application.

Exhibit 17, pg. 18. The Plan identifies one of the generalized planning goals to ‘preserve existing residential character, encourage neighborhood reinvestment, and enhance the quality of life through East Silver Spring.’ *Id.* The Plan also recognizes that the R-60 zone allows certain uses in addition to single family residential that would be considered compatible *Id.*

Staff concluded that the proposed modest expansion of the existing group day care is compatible with the neighborhood and therefore in substantial conformance with the Master Plan. *Id.*

Conclusion: Based on this record, the Hearing Examiner agrees that the group day care for up to 18 children substantially conforms to the recommendations of the Master Plan. The use preserves the residential character of the neighborhood and also enhances the quality of life throughout East Silver Spring by providing a needed service that is compatible with the neighborhood.

d) is harmonious with and will not alter the character of the surrounding neighborhood in a manner inconsistent with the plan;

Staff determined that “the proposal is harmonious with, and will not alter the character of, the surrounding neighborhood.” Exhibit 17, pg. 19. Staff noted no physical changes or major modifications to the indoor or outdoor day care space are planned and the hours of operation will remain the same. Exhibit 17, pg. 9. In addition, the Applicant testified that the daycare at this location has been in existence since 2008 and she believes the expansion will not alter the character of the surrounding neighborhood. T. 17-18.

Conclusion: Based on this record, the Hearing Examiner agrees with Staff and the Applicant and finds that the proposed expansion of the existing day care use is harmonious with and will

not alter the character of the surrounding neighborhood in a manner inconsistent with the Master Plan.

e) will not, when evaluated in conjunction with existing and approved conditional uses in any neighboring Residential Detached zone, increase the number, intensity, or scope of conditional uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area; a conditional use application that substantially conforms with the recommendations of a master plan does not alter the nature of an area;

Staff identified two (2) approved conditional uses within the neighborhood as defined by Staff.

Those uses include a home medical practice and an accessory apartment. Approval of the expansion of the daycare will result in an increase in the number of conditional uses in the Staff-defined Neighborhood. However, Staff believes that the proposed day care expansion will not affect the area adversely or alter the area's predominantly residential nature. Exhibit 17, pg. 19.

As stated previously in this report and decision both the Staff Report and the Applicant's testimony identify the fact that the existing day care has been operating on the Site since 2008 and that that the Site can accommodate the proposed increase of six (6) children. *Id.*, T. 18. In addition, the Applicant is not proposing any physical changes to the building, with the exception of a possible new driveway to provide additional off-street parking for the day care use if needed in the future. *Id.*, T. 22.

Conclusion: The Hearing Examiner agrees that the proposed conditional use will not increase the number, intensity or scope of conditional uses sufficiently to affect the area adversely. She has already found that the project conforms to the Sector Plan. The exterior of the building remains unchanged and the conditional use does not alter the nature of single-family residential uses in the area. For reasons stated in Part III.A.4 of this Report below, she agrees with Staff that the project will be compatible with the surrounding area.

2. Adequate Public Services and Facilities

f) will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage, and other public facilities. If an approved adequate public facilities test is currently valid and the impact of the conditional use is equal to or less than what was approved, a new adequate public facilities test is not required. If an adequate public facilities test is required and:

- i. if a preliminary subdivision plan is not filed concurrently or required subsequently, the Hearing Examiner must find that the proposed development will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage, or**
- ii. if a preliminary subdivision plan is filed concurrently or required subsequently, the Planning Board must find that the proposed development will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage, and**

The Staff Report states that there are adequate public services and facilities to serve the proposed use schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage.

In addition, a Preliminary Plan of Subdivision is not required because the Site is already a recorded lot (Plat 1278). Exhibit 17, pg. 18.

Conclusion: The Hearing Examiner is not required to make a finding regarding the adequacy of public services and facilities in this case because a Preliminary Plan of Subdivision is not required for this conditional use due to the fact that the site is already a recorded lot. With that said, the Staff reviewed the transportation plan for the area and the traffic impacts of the proposed Application. The Staff Report stated as follows:

The Site contains five (5) off-street parking spaces, and three (3) on-street parking spaces are available on E. Melbourne Avenue along the Property frontage, which exceed the total minimum needed for the Site which is six (6) parking spaces. As discussed in the earlier findings, the Site meets the minimum parking requirements for the residence (2) and the Day Care Center (4) with the existing driveway, proposed driveway, and on-street parking on E. Melbourne Avenue. The staggered schedule ensures that no more than eight (8) vehicles will arrive on

the Site within a 30-minute period and can be accommodated with the three (3) on-street parking spaces along the Melbourne Avenue frontage and two (2) off-street parking spaces in the Site driveway.

Local Area Transportation Review

Table 2: Trip Generation for the Proposed Use

	Morning Peak Period			Evening Peak Period		
	In	Out	Total	In	Out	Total
Students	18	18	36	18	18	36
Employees	1	0	1	0	1	1
Total	19	18	37	18	19	37

Source: Transportation Exemption Statement Provided by the Applicant July 29, 2022, modified by staff

Exhibit 17, pg. 19.

Staff used a conservative measure to determine traffic trips, i.e., no child walking, no child riding together and no staggered trips to determine that the use would generate 37 total trips. *Id.* at 20.

The Applicant stated many of the children who attend the daycare are siblings, several live close enough to walk and proposed a staggered drop off and pick up schedule. T. 19, 20, and 25. The 2020-2024 Growth and Infrastructure Policy states a transportation study is not required to satisfy the local Area Transportation Review because the proposed Day Care Center generates fewer than 50 person-trips during the weekday morning or evening peak hours. Exhibit 17, pg. 20.

3. No Undue Harm from Non-Inherent Adverse Effects

g. will not cause undue harm to the neighborhood as a result of a non-inherent adverse effect alone or the combination of an inherent and a non-inherent adverse effect in any of the following categories:

- i. the use, peaceful enjoyment, economic value or development potential of abutting and confronting properties or the general neighborhood;*
- ii. traffic, noise, odors, dust, illumination, or a lack of parking; or*
- iii. the health, safety, or welfare of neighboring residents, visitors, or employees.*

Conclusion: This standard requires consideration of the inherent and non-inherent adverse effects of the proposed use on the surrounding area. Inherent adverse effects are “adverse effects created by physical or operational characteristics of a conditional use necessarily associated with a particular use, regardless of its physical size or scale of operations.” *Zoning Ordinance*, §1.4.2. Inherent adverse effects, alone, do not justify the denial of a conditional use. Non-inherent adverse effects are “adverse effects created by physical or operational characteristics of a conditional use not necessarily associated with the particular use or created by an unusual characteristic of the site.” *Id.* Non-inherent adverse effects may be a basis to deny a conditional use, alone or in combination with inherent effects, if they cause “undue” harm to properties in the surrounding area.

Staff concluded that the following physical and operational characteristics are inherent to a Day Care Center: (1) vehicular trips to and from the Site; (2) outdoor play areas; (3) noise generated by children; (4) drop-off and pick-up areas; and (5) lighting. Exhibit 17, p. 29. The Hearing Examiner agrees with Staff's list of inherent adverse characteristic of this use. Staff determined that adequate parking and drop-off/pick-up areas existed on-site and adjacent to the Property and that staggering drop-off and pick-up times will minimize impacts to the neighborhood. In addition, Staff found the play area to be adequate and while children playing outside is an inherent characteristic of a daycare and it is not expected to adversely impact the surrounding residential neighborhood. Staff also found the existing lighting and landscaping on the Site to be adequate, residential in nature and will not intrude on neighboring properties. *Id.* The applicant testified that she did not believe the proposed use would cause any adverse impacts on the neighborhood. T. 19-20. The Hearing Examiner agrees with Staff and testimony presented by

the witness that the project does not result in undue adverse effects requiring denial of this application.

As stated above non-inherent adverse effects may result from the “physical or operational characteristics of a conditional use not necessarily associated with the particular use or created by an unusual characteristic of the site”. Staff determined that the proposal use will not have any non-inherent adverse effects and pointed out the fact that the Property is a corner lot, with two frontages creating an advantage for pick-up and drop off. Exhibit 17, pg. 30. The Hearing Officer agrees with Staff that there are no non-inherent adverse effects from the proposed development and concludes that proposed use will not cause undue harm to the neighborhood from either non-inherent adverse effects or a combination of inherent or non-inherent adverse effects.

4. Compatibility with the Neighborhood

Several sections of the Zoning Ordinance require a proposed conditional use be compatible with the character of the surrounding neighborhood.

Section 59.7.3.1.E.1 includes the standards of approval below:

d. is harmonious with and will not alter the character of the surrounding neighborhood in a manner inconsistent with the [master] plan.

Section 59.7.3.2.E.2 contains an additional requirement for conditional uses in single-family detached zones:

2. Any structure to be constructed, reconstructed, or altered under a conditional use in a Residential Detached zone must be compatible with the character of the residential neighborhood.

Conclusion: The Applicant does not propose any alteration or expansion of the existing structure with this application. In the event the Applicant may need to expand the driveway in the future, it will be designed in such a way as to be compatible with the residential character of the surrounding neighborhood. In light of the fact that no construction is proposed with the application, the Hearing Examiner finds this standard is not applicable.

Section 59.7.3.1.E.3. The fact that a proposed use satisfies all specific requirements to approve a conditional use does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require conditional use approval.

Conclusion: The application satisfies all specific requirements for the conditional use, and with the conditions imposed, meets the standards required for approval.

B. Development Standards of the Zone (Article 59-4)

In order to approve a conditional use, the Hearing Examiner must find that the application meets the development standards of the R-60 Zone, contained in Article 59.4 of the Zoning Ordinance. Per Staff, the subject property will continue to comply with the development standards for the R-60 Zone in place when the dwelling was constructed. Exhibit 17, pg. 16. Staff included the Table that appears on the next page in the Staff Report, which provides a summary of the required development standards.

Table 1: Conditional Use Development and Parking Standards (R-60)

Development Standard Section 59.4.4.9.B	Permitted/ Required	Existing/Proposed ¹
Minimum Lot Area	6,000 sq. ft.	8,494 sq. ft.
Minimum Lot Width at Front Building Line	60 feet	76 feet
Minimum Lot Width at Front Lot Line	25 feet	58 feet
Maximum Density	1 unit (7.26 dwelling units/acre)	1 unit
Maximum Lot Coverage	35 percent	20.5 percent
Minimum Front Setback (E. Melbourne Avenue)	25 feet	20 feet ²
Minimum Side Street Setback (Walden Road)	15 feet	27 feet
Minimum Side Setback	8 feet	8 feet
Minimum Rear Setback	20 feet	20 feet
Maximum Height	30 feet	25 feet
Vehicle Parking Requirement (Section 59.6.2.4.B)	Day Care Center: 4 (3 per 1,000 square feet of GFA) ³ Dwelling: 2 Total: 6	4 spaces in driveway on Walden Road. 1 space in proposed driveway on E. Melbourne Avenue Additional parking permitted and available on E. Melbourne Avenue frontage (3 spaces) ⁴ . Total: 8

¹With the exception of the proposed driveway, there are no changes to the exterior of the existing home are proposed with the Application.

²The lot was recorded in 1948 and is conforming under Section 59.7.7.1.A. (pursuant to Section 59.B-5.3 in the Zoning Ordinance in effect prior to October 30, 2014). The porch vestibule extends approximately 5-feet into the front setback, which was permitted by MCDPS.

³Section 59-6.2.4.A. If the proposed intensity of the use is less than the metric in the tables in Subsections B and C, the baseline minimum is calculated using a fraction of that metric.

⁴Section 3.4.4.E.2.c.i states that for Day Care Centers proposing up to 30 persons, the number of parking spaces required under Division 6.2. may be reduced if the applicant demonstrates that the full number of spaces is not necessary because existing parking spaces are available on the abutting property or on the street abutting the site that will satisfy the number of spaces required.

Exhibit 17, pg. 16.

SDAT property records demonstrate that the house was built in 1948. *Id.* at 16-17. Section 59.7.7.1.A.1 states, “A legal structure or site design existing on October 30, 2014 that does not meet the zoning standards on or after October 30, 2014 is conforming and may be continued, renovated, repaired, or reconstructed if the floor area, height, and footprint of the structure are

not increased...”; which means the existing condition of the lot is in conformance with the Zoning Ordinance. *Id.*

Conclusion: Nothing contradicts Staff's assessment of the subject property's compliance with the development standards of the Zone. The Hearing Examiner finds that the proposed facility complies with the standards of the R-60 Zone.

C. Use Standards for a Group Day Care for 13 to 30 Persons (§59-3.4.4.E)

The specific use standards for approval of a Group Day Care for 9 to 12 Persons are set out in §59-3.4.4.E. of the Zoning Ordinance. Standards applicable to this application are:

1. Defined:

Group Day Care (13-30 Persons) means a Day Care Facility for 13 to 30 people where staffing, operations, and structures comply with State and local regulations. A Day Care Center (13-30 Persons) includes a Family Day Care (Up to 8 Persons) and Group Day Care (9-12 Persons) where the provider is not a resident and cannot meet the non-resident provider requirement.

Conclusion: A condition of approval will require compliance with the State and local regulations regarding staffing, operations and structures for Day Care Facilities for 13 to 30 people as stated above. The use as proposed and conditioned meets these requirements.

2. Use Standards

Where a Day Care Center (13-30 Persons) is allowed as a conditional use, it may be permitted by the Hearing Examiner under Section 7.3.1, Conditional Use, and the following standards:

- a. The facility must not be located in a townhouse or duplex building type.*
- b. An adequate area for the discharge and pick up of children is provided.*
- c. The number of parking spaces under Division 6.2 may be reduced if the applicant demonstrates that the full number of spaces is not necessary because:*
 - i. existing parking spaces are available on abutting property or on the street abutting the site that will satisfy the number of spaces required; or*

ii. a reduced number of spaces would be sufficient to accommodate the proposed use without adversely affecting the surrounding area or creating safety problems.

d. For a Family Day Care where the provider is not a resident and cannot meet the non-resident provider requirement, screening under Division 6.5 is not required.

e. In the AR zone, this use may be prohibited under Section 3.1.5, Transferable Development Rights.

Conclusion: The Hearing Examiner finds that all of the limited use standards listed in the preceding paragraph are satisfied in this case, in that:

- a. The property is not located in a townhouse or duplex.
- b. An adequate area exists for the drop off and pick up of children.
- c. The subject property contains 4 off street parking spaces and 3 on street parking spaces. The required minimum number of spaces (6) is met.
- d. The Applicant is the provider and lives at and is a resident of the subject property.
- e. The subject property is not in the AR zone.

Furthermore, as discussed in Part III.A., above, the application meets the "necessary findings" required by §59-7.3.1

D. General Development Standards (Article 59-6)

Article 59.6 sets the general requirements for site access, parking, screening, landscaping, lighting, and signs. These requirements need be satisfied only “to the extent the Hearing Examiner finds necessary to ensure compatibility.” *Zoning Ordinance*, §59.7.3.1.E.1.b. However, most of these requirements do not apply to the Application for the subject property.

1. Site Access Standards

Conclusion: Zoning Ordinance Division 59.6.1 governs “Site Access;” however, by its own terms, as stated in §59.6.1.2., Division 59.6.1 does not apply to development in single-family residential zones, such as the R-60 Zone involved in this case.

2. *Parking Spaces Required, Parking Facility Design and Parking Lot Screening*

Conclusion: The standards for the number of parking spaces required, parking facility design and parking facility screening are governed by Division 6.2 of the Zoning Ordinance. However, because the subject site is a detached home and does not have an on-site parking facility for 5 or more parking spaces, the Code sections pertaining to parking facility design and screening do not apply in this case. *See Zoning Ordinance §§59.6.2.5.A.1 and 59.6.2.9.A.3.*

The required number of vehicular parking spaces is established by Zoning Ordinance §59.6.2.4., and is summarized in the last line and the footnote of Staff Table 1 (Exhibit 17, p. 16). It is reproduced on Page 22 of this Report and Decision.

Per Table 1, Section 59.6.2.4 of the Zoning Ordinance requires a total of 6 vehicle parking spaces for the subject site (2 spaces for the single-family dwelling and 4 for the Day Care Center), but Zoning Ordinance §59.6.2.4.B. expressly permits parking spaces for Day Care Center to be provided on the street abutting the site to satisfy this requirement. As discussed in Part II.C.2. of this Report and Decision, the proposed Group Day Care also needs an area where parents can safely drop off and pick up children. The subject site has four parking spaces in its driveway. There are also three street spaces available in front of the Applicant's home on E. Melbourne Avenue. A total of 7 parking spaces is available at the subject property. The Applicant proposed and Staff recommended requiring staggered drop-offs and pickups. Staff concluded that the existing parking to be provided would be adequate for the use.

Zoning Ordinance §59. 6.2.4.C identifies uses required to provide bicycle parking. Per this section, only Day Care Centers greater than 5,000 square feet GFA are required to provide a certain amount of bicycle parking. The portion of the property used for the Day Care Center is 1,306.98 square feet, well below the 5,000 square foot requirement for bicycle parking. No bicycle parking is required for the proposed use.

Based on this record, the Hearing Examiner finds that there is sufficient room for parking on the driveway and on the street abutting the subject site to accommodate the resident's parking and the drop-off and pickup operations of the proposed Group Day Care.

3. *Site Landscaping, Screening and Lighting*

Standards for site lighting are set forth in Division 6.4 of the Zoning Ordinance, and the standards for landscaping and screening are mainly set forth in Division 6.5.

a. Lighting

Zoning Ordinance §59.6.4.4.E. provides:

E. Conditional Uses

Outdoor lighting for a conditional use must be directed, shielded, or screened to ensure that the illumination is 0.1 footcandles or less at any lot line that abuts a lot with a detached house building type, not located in a Commercial/Residential or Employment zone.

By its own terms (in §59.6.4.2), Division 6.4 does not apply to existing, unmodified lighting:

Division 6.4 applies to landscaping required under this Chapter, the installation of any new outdoor lighting fixture, and the replacement of any existing outdoor fixture. Replacement of a fixture means to change the fixture type or to change the mounting height or location of the fixture.

Conclusion: As discussed in Part II.C.3. of this Report and Decision, the house has residential type exterior lighting. No new lighting is planned for this conditional use, and therefore the

Hearing Examiner finds that the requirements of Division 6.4, regarding lighting, do not apply. Nevertheless, as observed by Technical Staff, "The existing lighting is residential in nature and will not cause any unreasonable glare on neighboring properties." Exhibit 17, p.18.

b. Site Screening and Landscaping

Conclusion: Although some provisions in this portion of the Zoning Ordinance contain very specific screening requirements, the review of site landscaping and screening for conditional uses in single-family, detached homes is limited to an assessment of compatibility. *Zoning Ordinance §59.6.5.2.B*. This language is reinforced by Section 59.7.3.1.E.1.b., under which the Hearing Examiner need only find that the proposed use meets applicable general requirements under Article 59-6 "to the extent the Hearing Examiner finds necessary to ensure compatibility..." With regard to screening and landscaping, Staff observed that the existing landscaping was adequate for the proposal. Exhibit 18, pg. 20.

With no evidence to the contrary, the Hearing Examiner finds that the existing landscaping will be adequate to ensure compatibility with the neighborhood, and thus will meet the requirements of the Zoning Ordinance.

4. Signage

Conclusion: The use of signage is governed by Zoning Ordinance Division 6.7. *Zoning Ordinance §59.6.7.8.A* sets the standards for signs in Residential Zones. No sign has been proposed for the subject conditional use. Exhibit 17, pg. 18. Although the Applicant has not proposed any signage for the site, the Hearing Examiner imposed a condition in Part IV of this Report and Decision requiring any future signage to comport with the requirements of Zoning

Ordinance §59.6.7.8.A and prohibits the Applicant from posting a sign on the property unless it is first approved by the Department of Permitting Services (DPS) and a permit is obtained.

IV. CONCLUSION AND DECISION

As set forth above, the application meets all the standards for approval in Articles 59.3, 59.4, 59.6 and 59.7 of the Zoning Ordinance. Based on the foregoing findings and conclusions and a thorough review of the entire record, the application of Jawairia Iqbal (CU2023-01), for a conditional use under §59-3.4.4.E. of the Zoning Ordinance, to operate a Day Care for between 13 and 30 children at 108 E. Melbourne Avenue, Silver Spring, MD, tax account number is 13-01011522, is hereby *GRANTED*, subject to the following conditions:

1. The use is limited to a Day Care Center with up to 18 children and one (1) non-resident employee.
2. The hours of operation are limited to Monday through Friday, 7:00 AM to 5:30 PM, which is consistent with the current hours of operation.
3. No outdoor play in the rear yard prior to 9:00 am.
4. No more than 8 children may play outdoors at any one time.
5. The Applicant must provide four (4) total on-site parking spaces which includes the four (4) existing off-street parking spaces in the existing driveway on Walden Road.
6. The Applicant must schedule staggered drop-off and pick-up of children with a maximum of eight (8) vehicles dropping off or picking up children during any 30-minute period
7. After a period of 6 months of operation, if the number of vehicles for drop off or pick up exceeds the maximum of eight (8) in any 30-minute period more than 3 times in one week, the Applicant must install one (1) additional off-street parking space in the proposed new driveway to be accessed from E. Melbourne Avenue Site that measures a minimum width of 8.5 feet and a minimum length of 18 feet.
8. Visitors (excluding parents enrolled in the daycare) shall be instructed to visit the Site outside peak travel times, which are as follows: a. 7:00 AM – 9:00 AM b. 4:30 PM – 5:30 PM.

9. Prior to issuance of the use and occupancy permit the Applicant must receive approval from the Department of Permitting Services Fire and Rescue on required plans and interior modifications, as needed.
10. Any future signage installed by the Applicant must comport with the requirements of Zoning Ordinance §59.6.7.8.A. The Applicant is prohibited from posting a sign on the property unless it is first approved by the Department of Permitting Services (DPS) and a permit is obtained.
11. Applicant must comply with all local and State laws and regulations regarding staffing, operations and structures for Day Care Facilities for 13 to 30 people.

Issued this 3th day of January 2023.



Kathleen E. 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/>

PLEASE NOTE THE FOLLOWING BOARD OF APPEALS FILING REQUIREMENTS DURING THE COVID-19 PANDEMIC:

The Board of Appeals website sets forth these procedures for filing documents:

Because remote operations may not always allow us to promptly date-stamp incoming U.S. Mail, until further notice, all time-sensitive filings (administrative appeals, appeals of conditional use decisions/requests for oral argument, requests for public hearings on administrative modifications, requests for reconsideration, etc.) should be sent via email to BOA@montgomerycountymd.gov, and will be considered to have been filed on the date and time shown on your email. In addition, you also need to send a hard copy of your request, with any required filing fee, via U.S. Mail, to the Board's 100 Maryland Avenue address (above). Board staff will acknowledge receipt of your request and will contact you regarding scheduling.

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 OF DECISION TO BE SENT TO:

Jawairia Iqbal, Applicant
Barbara Jay, Executive Director, Montgomery County Board of Appeals
Robert Kronenberg, Deputy Director, Planning Department
Katherine Mencarini, Planning Department
Greg Nichols, Manager, Department of Permitting Services
Victor Salazar, Department of Permitting Services
Michael Coveyou, Director, Finance Department
Cliff Royalty, Esquire, Associate County Attorney