

OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
Stella B. Werner Council Office Building
Rockville, Maryland 20850
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IN THE MATTER OF:
STEP ONE CHILDCARE
AIDIN HASANLOO
GROUP DAY CARE

Applicant

Mehdi Aminizade

Dan Keen

For the Application

OZAH Case No. CU 22-08

David Spiegel

Parue Rellan

Maggie Bree

John Bree

Celeste Murphy

Michele Rosenfeld, Esq.

Attorney for Ms. Murphy

Opposing the Application¹

Before: Andrea LeWinter, Hearing Examiner

HEARING EXAMINER'S REPORT AND DECISION

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¹ Multiple neighbors submitted written testimony in support and opposition. Only those who testified at the hearing become parties.

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I. STATEMENT OF THE CASE

On March 9, 2022, Aidin Hasanloo filed an application seeking approval of a conditional use to operate a Group Day Care for up to 12 children in the home belonging to her and her husband, Mehdi Aminizade, at 8801 Hempstead Avenue, Bethesda, MD. Exhibit 1. Planning Staff of the Montgomery County Planning Department (“Staff”) confirmed the applicant’s interest in the property through the application intake checklist (Exhibit 2) and also reviewed a record plat, (Exhibit 17) which identifies the property as Lot 2, Block 16 of the Bradmoor Subdivision, Tax Identification number 07-00588654. The subject property is in the R-60 zone. Exhibit 18, p. 2. Since 2019 through the present day, the applicant has run a Family Day Care, called Step One Childcare, for up to eight (8) children in the home, which is permissible as a matter of right within the R-60 zone. Exhibit 18, p. 3; §59-3.1.6.² A conditional use is required for the facility to expand to up to 12 children in the R-60 zone (*i.e.*, a Group Day Care). *See, Zoning Ordinance* §59-3.4.4.D (9-12 persons).

The Planning Board met on June 9, 2022 and following a presentation by Staff, recommend approval. Exhibit 62. The applicant was present to address questions, which the Planning Board did not have. *Id.* During the Office of Zoning and Administrative Hearings (“OZAH”) hearing, opposition witnesses Ms. Celeste Murphy and Mr. David Spiegel raised concerns that they had not received notice and were not aware of the Planning Board hearing and so were unable to appear. T. 74, 193.

OZAH initially scheduled a public hearing for July 11, 2022, by notice issued on June 16, 2022 but not mailed until June 18, 2022. Exhibit 19. On July 6, 2022, a neighbor, Ms. Murphy, requested postponement of the hearing, noting her failure to receive timely notice. *Id.* The

² All citations in this Decision are to the 2014 Zoning Ordinance for Montgomery County, adopted September 30, 2014 (Ordinance No. 17-52), as amended.

scheduled hearing commenced on July 11, 2022, and the Hearing Examiner immediately granted the continuance request, issuing on July 18, 2022 a Notice of Hearing Rescheduling to August 11, 2022. Exhibit 20. This notice specifically identified the applicant's request for a parking waiver, which had been referenced in the Staff Report issued on May 27, 2022. Exhibit 18, p. 1.

Between July 8, 2022 and the close of the record on August 21, 2022, numerous letters in opposition and support were submitted to OZAH as well as a series of signed petition letters in opposition. Exhibit 22. The letters and testimony are discussed in Part II. D. of this Report and Decision.

The public hearing proceeded as scheduled on August 11, 2022. The applicant's husband, Mr. Aminizade, testified and argued in support of the application. Ms. Murphy presented an opposition case, calling herself and six (6) witnesses, including Mr. John Gill, a real estate broker, T. 108, and Mr. James Benston, an expert real estate appraiser, T. 169. An additional four (4) witness, all neighbors, David Spiegel, Parue Rellan, Maggie Breen and John Bree testified in opposition. Another neighbor, Mr. Dan Keen, testified in support.

The record remained open for ten days following the close of the hearing to allow the preparation of the transcript. T. 232. It was reopened on September 23, 2022 to allow admission of the Planning Board recommendation and then closed on September 23, 2022.

For the reasons set forth in this Decision, the Hearing Examiner denies the conditional use application.

II. FACTUAL BACKGROUND

A. The Subject Property

Staff described the subject property as located at 8801 Hempstead Avenue in Bethesda, MD otherwise known as Lot 2, Block 16 of the Bradmoor Subdivision, improved with a detached

single-family dwelling. Exhibit 18, p. 3-4. The lot is 6,880 square foot and rectangular located on the east side of Hempstead Avenue, approximately 130 feet south of its intersection with Greentree Road. Inside the dwelling are two (2) daycare playrooms and a napping room. *Id.* The rear yard of the property is enclosed by a 6-foot-tall fence, which serves as an outdoor play space for the daycare. *Id.* The property has an attached garage and 9-foot-wide driveway, which may accommodate two vehicles. *Id.* On-street parking is permissible on both sides of Hempstead Avenue adjacent to the property, but this parking is limited to two-hours on weekdays. *Id.* Staff provided the following aerial photographs of the property, *Id.*:



Vicinity Surrounding the Site



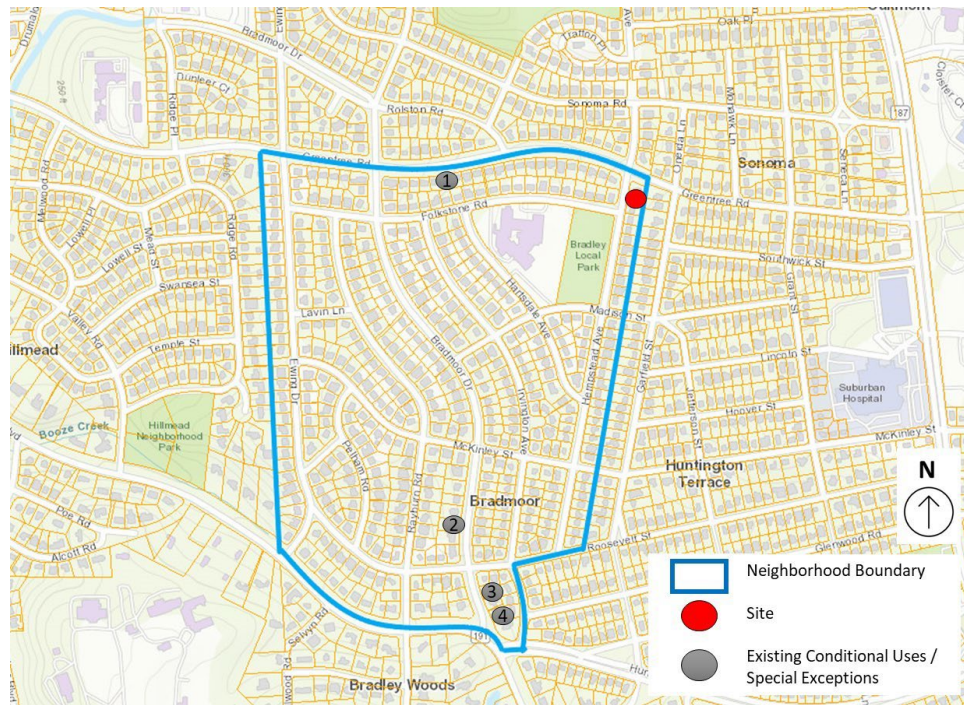
Aerial photograph of the Subject Site (outlined in red)

The site is accessed directly from Hempstead Avenue. Exhibit 18, p. 7. Pedestrians may use an established buffered sidewalk along both sides of Hempstead Avenue. *Id.* Bus transit is provided approximately 130 feet north of the site on Greentree Road through the Montgomery County RideOn Route 47, which provides service between the Bethesda Metrorail Station and the Rockville Metrorail station all days of the week. *Id.*

B. Surrounding Neighborhood

To ensure that the area that will be most directly impacted by the proposed use is appropriately examined, it is critical to define and delineate the surrounding neighborhood.

Staff proposed defining the boundaries of the surrounding neighborhood as “the Bradmoor neighborhood ..., which is generally bounded by Greentree Road to the north; Bradley Boulevard and Huntington Terrace to the south; Garfield Street to the east; and by Ewing Drive to the west ... composed of detached houses in the R-60 Zone,” as outlined in the map below in blue.



Staff Defined Neighborhood

Opposition witness Murphy, however, disputed the Staff's delineation, explaining that Staff excluded her property, which abuts the back of the subject property backyard-to-backyard, and excluded other adjoining properties because the eastern boundary of the Staff proposed neighborhood, in contrast to the northern, southern, and western boundaries defined by Staff, is located between adjoining homes as opposed to following a roadway. T. 64-66, Exhibit 33. She proposed a different definition, drawn in red overlaying the blue boundary proposed by Staff and admitted as Exhibit 33, pictured below.

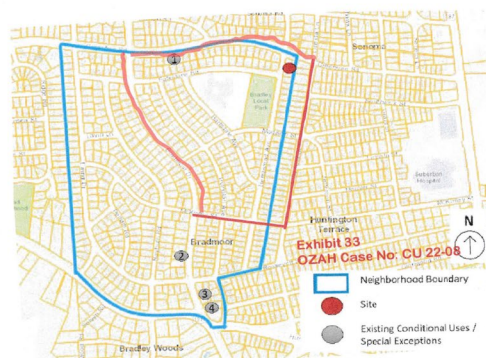


Exhibit 33: Celeste Murphy's Proposed Neighborhood Definition

The Hearing Examiner agrees with Ms. Murphy's proposed definition of the neighborhood, outlined in Exhibit 33, as homes abutting the back of the subject property will clearly be impacted by noise and visual changes caused by the proposed use, and adopts Exhibit 33 as the boundary of the impacted neighborhood.

Staff identified four approved special exceptions within the neighborhood, Exhibit 18, p. 5:

1. S2037: Accessory apartment located at 5910 Greentree Road.
2. S2358: Accessory apartment located at 8506 Bradmoor Drive.

3. S979: Accessory apartment located at 8405 Bradmoor Drive.
4. S1150: Accessory Apartment located at 8401 Bradmoor Drive.

The site is located within the *1990 Bethesda-Chevy Chase Master Plan* (“Master Plan”) area. Exhibit 18, p. 13. The Master Plan does not mention the subject property but does provide guidance on preferred conditional uses, specifically supporting conditional uses that are community-serving, which includes child day care, and that do not detract from the residential character of the neighborhood. *Id.* Additionally, the Master Plan notes that conditional uses that require a resident to dwell in the home, like the proposed Group Day Care, are desirable. *Id.*

C. Proposed Use

The applicant seeks approval of a conditional use to expand a current Family Day Care for up to 8 children into a Group Day Care for up to 12 children in the residence of 8801 Hempstead Avenue, Bethesda. As Staff explained, “The proposed Group Day Care will occupy the same space in the home as the existing Family Day Care. No physical alteration of the existing site or facility are proposed... The current hours of operation are Monday through Friday from 7:00 a.m. to 6:00 p.m. and are not proposed to change The proposed 12-child Group Day Care will be operated by two (2) resident-staff and one (1) non-resident staff. Parent drop-off and pick-up times are staggered from 7:00 a.m. to 9:00 a.m. and 4:00 p.m. to 6:00 p.m. respectively. The applicant has no existing or proposed signage included as part of this Application.” Exhibit 18, p. 6. Staff provided the following photographs of the front and back of the existing site (on the following page).



Front view of the Site looking northeast from Hempstead Avenue.



Rear yard outdoor play space

The are no existing or master-planned bicycle facilities within the vicinity of the site. Exhibit 18, p. 7. No bicycle parking is required on-site for the residential or Group Day Care uses. *Id.* A witness for the opposition, Mr. Fried, testified that there is a Washington Area Bicyclist Association trail that feeds through Hempstead Avenue adding to traffic congestion. T. 144-45.

1. Site Plan and Landscape (Play Yard Screening) Plan

As stated, the applicant currently runs a residential family day care for up to eight (8) children. The site has already been outfitted to accommodate the children including with a fenced-

in backyard. See picture page 9; Exhibits 9 and 15. According to the Existing Conditions Plan, if the conditional use is granted, the applicant does not propose to make any changes to the residence or the backyard. Exhibits 9 and 10.

On cross-examination, Mr. Aminizade acknowledged an additional structure in his backyard, a greenhouse, that did not appear in the plans provided to Staff or OZAH by the applicant. Exhibit 39; T. 36. Witnesses for the opposition, Ms. Murphy and Mr. Benston, testified to existing noise concerns regarding the permitted residential day care and that the greenhouse amplified the sound by concentrating it toward Ms. Murphy's property, which abuts the backyard of the proposed site. T. 76, 174, 214.

2. Parking for the Residence and the Day Care

The subject site has two parking spaces, one in the garage and one in the driveway, and both may be used by the residents. Under the Zoning Code, Group Day Care uses are required to provide one (1) additional space for every non-residential employee. §59.6.2.4. The application proposes one (1) non-resident employee, which will require one (1) additional parking space. The ordinance allows for the use of on-street spaces that abut the site to conform with the minimum parking requirements. §59.6.2.4.B. As Staff highlighted, this is not an option for the applicant due to the posted 2-hour parking restriction on Hempstead Avenue during the daycare's proposed operational hours. Exhibit 18, p. 7. The applicant requested a parking waiver in accordance with Section 59.6.2.10 to allow the one (1) on-street parking space for the non-resident employee to be accommodated on an adjacent street, Folkstone Road, which has no posted parking restrictions and is located within eyesight of the site. *Id.* Staff supported the requested parking waiver. *Id.* Witnesses for the opposition, Ms. Laura Horseley and Mr. Faruk Khan, who live on Folkstone Road just off Hempstead Avenue (Ms. Horseley lives on the

corner with an address technically on Hempstead Avenue), T. 85, 117-118, testified that the parking on Folkstone Road is noticeably constrained. T. 98, 119-120.

Parents and guardians picking up and dropping off children at the existing family day care may park on Hempstead Avenue directly in front of the site. Exhibit 18, p. 7. Although parking is restricted on Hempstead Avenue along the site frontage (between Greentree Road and Madison Street) to a maximum of two hours between 9:00 a.m. and 5:00 p.m., Mondays through Fridays, Staff concluded that parents can easily make use of the on-street parking without exceeding the posted restrictions with the submitted dwell time analysis of current operations. *Id.* Thus, Staff found that the site meets the minimum parking requirements with respect to clients for both the Family and proposed Group Day Care uses as parking is available on-site and on the adjacent residential streets and the required parking spaces for the residential use are provided on-site in the garage and the driveway. *Id.*

Extensive testimony of those in opposition, however, disputed the actual availability and proper utilization of parking by day care parents. T. 86-87, 90, 98, 124-26, 147-48, 159-61, 172-73, 192, 194, 208-09, 217-18; Exhibit 41. Neighbors described limited parking on Hempstead Avenue and adjacent streets, forcing day care parents to double parking or park in the driveway apron of the site, blocking traffic and creating a safety hazard. See *Id.*

3. Site Lighting and Signage

The lighting on the site will remain unchanged if the application is approved. Exhibit 18, p. 13. There is no signage on the site, and none has been sought in this application. *Id.*

4. Internal Physical Arrangements for Site Operations

The existing residential day care operates within the applicant's home and no change is anticipated with the growth from up to eight (8) to up to 12 children, as depicted in the Floor Plans. Exhibit 10.

5. Operations

As stated, the applicant proposes to expand an existing residential Family Day Care of up to eight (8) children to a Group Day Care accommodating up to 12 children in the existing residence on site with no physical alterations. Exhibit 18, p. 6. The hours of operation are proposed to be from Monday through Friday from 7:00 a.m. to 6:00 p.m., with child drop off and pick up staggered in the two hours after opening and before closing. *Id.* The facility will be operated by two (2) residential and one (1) non-residential staff. *Id.* During direct testimony, Mr. Aminizade explained that, with expansion in the number of children, regulations will prohibit having all of the day care children outside at the same time, so outdoor play will be staggered with two groups of no more than eight (8) children each in the outside yard at one time. T. 29.

D. Community Response

This application generated numerous letters from neighbors, including 113 from individuals opposed and four (4) from supporters.

The opposition, both through signed letters submitted to OZAH and testimony, communicated concerns about traffic and parking, primarily in terms of increased safety risks to drivers, pedestrians, and bicyclists in the neighborhood due to increased number of day care parents parking and dropping or picking up children, but also in terms of availability of parking spaces for neighborhood residents. Exhibit 23 and Testimonies of Celeste Murphy, Laura Horseley, Faruk Khan, Kenny Fried, David Spiegel, Parue Rellan, Maggie Bree and John Bree.

Ms. Murphy, through expert witnesses Mr. Benston and Mr. Gill, and Mr. Spiegel raised concerns about the impact of the proposed use on neighborhood property values. T. 109-114, 174-176, 196.

In regard to Ms. Murphy's own property, she testified to concerns about sound nuisance, asserting that the noise generated by children playing in the yard abutting her own, as a result of volume, duration, and topography, negatively impacted both her ability to enjoy her property and her property value. T. 71-73, 75-76, 80-83, 172-174. She testified that the addition of up to four (4) children would substantively increase the disruption. T. 72-74.

Neighbor Mr. Keen submitted a signed letter and testified in support of the application, asserting that other neighbors' complaints about parking and traffic issues were overblown and "hyperbole." T. 220. He does not believe the addition of four (4) children will adversely impact the neighborhood. *Id.* Other letters of support also said that the addition of four (4) children would not have a measurable impact on the community and that additional childcare options were greatly needed in the community. Exhibit 22.

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 are those which apply to the particular use requested, in this case, a Group Day Care for up to 12 children. *Zoning Ordinance* §59.3.4.4.D.

Weighing all the testimony and evidence of record under the "preponderance of the evidence" standard specified in *Zoning Ordinance* §59.7.1.1, the Hearing Examiner concludes that the conditional use proposed in this application does not satisfy the specific and general requirements for the use.

A. Necessary Findings (Section 59.7.3.1.E.)

The general findings necessary to approve a conditional use are found in Section 59.7.3.1.E of the Zoning Ordinance. Standards pertinent to this review, and the Hearing Examiner's conclusions for each finding, are set forth below:³

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: Staff advises that there are no previously approved conditional uses associated with this site. Exhibit 18, p.10. Therefore, the Hearing Examiner finds that this standard is inapplicable to the subject application.

- 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;***⁴

Conclusion: This subsection requires an analysis of the standards of the R-60 Zone contained in Article 59-4; the use standards for Group Day Care for 9-12 children contained in Article 59-3; and the applicable development standards contained in Article 59-6. Each of these Articles is discussed below in separate sections of this Report and Decision (Parts III.B, C, and D, respectively). Based on the analysis contained in those discussions, the Hearing Examiner finds that the application meets the requirements of Articles 59-3 and 59-4 but fails to comply with the requirements of Section 2 of Article 59-6.

³ 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 arguably apply to this application. Section 59.7.3.1.E.1. contains seven subparts, a. through g.

⁴ The underlined language was added by the Council when the 2014 Zoning Ordinance was amended effective December 21, 2015, in ZTA 15-09 (Ordinance No. 18-08, adopted December 1, 2015).

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

As stated, the subject property is located within the *1990 Bethesda-Chevy Chase Master Plan* (“Master Plan”) area, which does not directly address the property but generally supports community-serving conditional uses, including child day cares that are resident-operated, if they do not detract from the residential character of the neighborhood. Exhibit 18, p.13.

There is no dispute that the proposed use is community-serving and resident-operated. Staff found the proposed use to be a modest expansion of an existing use that will not negatively impact the character of the neighborhood. Exhibit 18, p. 13. Neighbors in opposition, however, convincingly explained that the Staff-defined neighborhood was incomplete and would not capture the full range of the use’s impact. T. 64-66. Opposition testified that the existing use has already detracted from the neighborhood by compromising vehicular and pedestrian safety with improper parking and car queuing, T. 86-90, 119-120, 144, 148, 152, 159-51, 192, 194, 208, 217-18; Exhibits 29, 37, 41 and creating a sound nuisance for the properties abutting the subject property in the back, T. 71-74, such that an extension of the existing use will unequivocally negatively impact the character of the neighborhood by further stressing safety and exacerbating noise disturbance. T. 159-161. Specifically, Ms. Murphy testified that the sound produced by the day care children will create an unacceptable level of nuisance for her property, diminishing her ability to enjoy her property, T. 71-74, and Mr. Benston and Mr. Gill testified it will also decrease her property’s resale value as well as the values of other homes adjacent to the subject property. T. 109-114, 174-176.

In terms of Master-Planned Roadways and Bikeways, Hempstead Avenue is classified as a secondary residential street, per Section 4931(m) with a master-planned right-of way of 60 feet (Section 49-32(d)(4)). Exhibit 18, p. 13. Per Plat 4010, recorded on March 24, 1955, the full 60-

feet has been dedicated to public right-of-way. *Id.* Per the *2018 Bicycle Master Plan*, there are no designated bikeways master planned along the subject property frontage. *Id.* However, as Mr. Fried testified, the Washington Area Bicyclist Association trail feeds through Hempstead Avenue adding to traffic congestion. T. 144-45.

The pedestrian network on Hempstead Avenue is established by the existing four (4)-foot sidewalks with an eight (8)-foot lawn panel. Exhibit 18, p. 13. Staff report that this equates to a Pedestrian Level of Comfort Score (“PLOC”) along the site frontage of “very comfortable,” per the Planning Department’s PLOC evaluation methodology. *Id.* However, numerous witnesses testified that current clients of the day care park in the subject property’s driveway apron blocking the sidewalk, double park, or exit cars in the middle of the street, creating safety hazards for both those exiting their vehicles and pedestrians and vehicles accessing the area. T. 97-99, 124-26, 144, 148, 152, 159-61, 194, 208, 217-18; Exhibit 41.

Conclusion: Because a master plan criterion is that the proposed use not detract from the character of the neighborhood, and multiple sources report that the existing use is creating traffic safety and noise problems in a highly utilized area, the Hearing Examiner finds that the proposed conditional use will exacerbate existing unsafe conditions and will not conform with the recommendations of the applicable master plan.

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

Conclusion: Because no changes are proposed to the property, Staff found that the proposed use meets this standard. Exhibit 18, p. 11. The Hearing Examiner agrees as the proposed use will remain a single-family, detached residence in a neighborhood of single-family, detached residences and no external modifications to the home are planned.

- 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;*

Conclusion: Utilizing Staff's definition of the neighborhood, there are four other conditional uses in the vicinity, all accessory apartments. Exhibit 18, p. 7. Even if the modified definition of the neighborhood adopted by the Hearing Examiner extends the number of conditional uses and even accounting for the Hearing Examiner's finding that this particular proposed use does not substantially conform with the recommendations of the master plan, the Hearing Examiner finds that the application meets this standard as the proposed conditional use will not result in an overconcentration of day care facilities or of conditional uses in the area.

- 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*

According to Staff, the application does not require approval of a preliminary plan of subdivision. Exhibit 18, p. 12. Therefore, the Hearing Examiner must determine whether the proposed development will be served by adequate public services and facilities. By its nature, a small childcare facility operating within an existing single-family residence will not ordinarily

create significant additional burdens for schools, police and fire protection, water, sanitary sewer, and storm drainage. The only public facilities issue the proposed use may impact, therefore, is transportation facilities.

Staff concluded that the demand would not be significant, *Id.*, but the opposition expressed significant concerns about additional traffic and the impact on safety and parking in the neighborhood. T. 79-80, 97-99, 124-26, 160-61, 194, 208-210. Staff found that under the *2021-24 Growth and Infrastructure Policy*, a transportation impact study was not required to satisfy the Local Area Transportation Review (LATR) because the proposed use is estimated to generate fewer than 50 person-trips during the weekday morning and evening peak hours. *Id.* The applicant estimated that, even if all of the children and staff arrive and depart during peak hours and each child was driven individually (no sibling groups), the highest number of trips would be 25, which will not notably impact roadway and transportation infrastructure. Exhibit 12; Exhibit 18, p. 12-13. Opposition did object to the trip estimates provided by the applicant and the applicant admitted to having no expertise in the area of trip measurement, T. 38-39, but OZAH customarily accepts lay person assessments when the proposed use is indisputably small scale. The Hearing Examiner has no reason to doubt that no LATR review is required.

Regardless, opposition raised concerns that without ready access to parking immediately adjacent to the subject property, from a parking and safety perspective the roadways are inadequate to handle day care customers as these customers have proven that they often park or idle their vehicles in unsafe locations. T. 97-99, 124-26, 144, 148, 152, 159-61, 194, 208, 217-18. Testimony established that the narrow, residential roadways are unduly congested due to the neighborhood school and highly-utilized park, with cars and buses frequently disregarding speed limits and

parking limitations. T. 64-66, 86-87, 90, 97-98, 124-26, 135-36, 147-48, 159-161, 172-73, 208-09. 217-18; Exhibits 29, 34, 37, and 44.

Conclusion: The Hearing Examiner finds that the proposed use will be served by adequate public facilities under the LATR Guidelines. However, compliance with these guidelines does not address the compatibility of traffic with the surrounding area. Testimony established that parking is limited on Hempstead Avenue and Folkstone Road and these streets already do not effectively handle the significant traffic generated by the neighborhood school and park, such that idling and double-parked vehicles pose a safety hazard for vehicles and pedestrians. Requiring day care customers to park on a different street, particularly if it is across the major thoroughfare of Greentree Road would be unenforceable and unrealistic, given customers will be transporting infants and toddlers. Exacerbating this already hazardous situation by adding in the transportation of four additional children will not conform to this conditional use standard. While the application may be exempt from LATR review, the evidence demonstrates that the proposed use will create safety problems in the area.

- 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.***

This standard requires consideration of the inherent and non-inherent adverse effects of the proposed use, at the proposed location, on nearby properties and the general neighborhood. *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, §59.1.4.2. *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.* As specified in §59.7.3.1.E.1.g., quoted above, non-inherent adverse effects in the listed categories, alone or in conjunction with inherent effects in those categories, are a sufficient basis to deny a conditional use. Inherent adverse effects, alone, are not a sufficient basis for denial of a conditional use.

Analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a Group Day Care facility. Characteristics of the proposed use that are consistent with the characteristics thus identified will be considered inherent adverse effects. Physical and operational characteristics of the proposed use that are not consistent with the characteristics identified or adverse effects created by unusual site conditions, will be considered non-inherent adverse effects. The inherent and non-inherent effects then must be analyzed, in the context of the subject property and the general neighborhood, to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Staff determined that the following physical and operational characteristics are necessarily associated with (*i.e.*, are inherent in) a Group Day Care facility: (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 18, p. 16. The Hearing Examiner agrees with this listing of inherent characteristics of a Group Day Care.

Staff concluded that “the proposal will not have any non-inherent effects at this location.” *Id.* The Hearing Examiner does not agree with Staff’s conclusion in this regard. First, testimony repeatedly established the non-inherent characteristics of limited access, a shortage of on-street

parking for neighboring residents, and traffic intensity on Hempstead Avenue and the surrounding residential streets, such that increasing the number of drop-offs and pick-ups poses a significant safety risk. T. 79-80, 97-99, 124-26, 161-62, 208-210, 217-18; Exhibits 29, 34, 37, and 44. Second, Staff's definition of the neighborhood excludes the homes that will be primarily impacted by the noise from children. Cf. Exhibit 18, p. 7 and Exhibit 33. Adopting the more appropriate delineation of the neighborhood proposed by Ms. Murphy, the Hearing Examiner must recognize that the non-inherent characteristics of topography and surrounding brick structures, which channel and amplify the inherent noise generated by day care children, will create a disproportionate impact on Ms. Murphy's property. T. 76, 81-83, 174, 214. The Hearing Examiner concludes that these characteristics constitute unusual site conditions, such that the effects on this particular neighborhood are not inherent in this type of use.

Nevertheless, the existence of non-inherent adverse effects does not mean that an application for a conditional use must be denied. Rather, it means that it can result in denial if the Hearing Examiner finds that such a non-inherent adverse effect, either alone or in combination with inherent adverse effects, creates "undue harm to the neighborhood" in any of the categories listed in Zoning Ordinance §59.7.3.1.E.1.g.

Conclusion: The Hearing Examiner finds that the combination of inherent and non-inherent adverse effects creates undue harm to the neighborhood under all three provisions of Section g: under g(i), negatively impacting the use, peaceful enjoyment, and economic value of abutting properties, in particular Ms. Murphy's property which will be further compromised in peaceful enjoyment and economic value due to the sounds of additional day care children playing the backyard adjacent to her property, likely for a longer period of time as the children will access the yard in two (2) instead of one (1) group; under g(ii), negatively impacting traffic and parking,

considering the existing high level of traffic and limited parking on Hempstead Avenue and the surrounding streets; and under g (iii), impacting the safety of neighboring residents and visitors, as day care customers double park or park in the driveway apron, compromising vehicular and pedestrian movement.

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 is not proposing to construct any new or alter any existing structures as part of the conditional use application. Thus, the applicant meets this standard.

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: As detailed, the proposed use is not compatible with the neighborhood.

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 zone where the use will be located, in this case the R-60 Zone. Development standards for the R-60 Zone are contained §59.4.4.9.B. of the Zoning Ordinance. Staff compared the minimum development standards of the R-60 Zone to those provided by the application in a Table provided in page 11 of Exhibit 18, which is reproduced below and on the following page. All measurements reflect existing conditions as no exterior changes are proposed. Exhibit 18, p. 11, footnote 2.

Table 1: R-60 Zone Development Standards - Section 59.4.4.9.B – Requirements of the Zone

Section	Development Standard	Required/ Permitted	Existing
59.4.4.9.B.1	Minimum Lot Area	6,000 square feet	6,880 square feet
59.4.4.9.B.1	Minimum Lot Width at Front Building Line	60 feet	62.5 feet
59.4.4.9.B.1	Minimum Lot Width at Front Lot Line	25 feet	62.5 feet

59.4.4.9.B.1	Maximum Density	1 unit (7.26 dwelling units/acre)	1 unit
59.4.4.9.B.1	Maximum Lot Coverage	35 percent	1,644 square feet 23.9 percent
59.4.4.9.B.2	Minimum Front Setback	25 feet	28 feet
59.4.4.9.B.2	Minimum Side Street Setback	15 feet	N/A
59.4.4.9.B.2	Minimum Side Setback	8 feet	Northside – 10 feet Southside- 9 feet
59.4.4.9.B.2	Minimum Rear Setback	20 feet	40 feet
59.4.4.9.B.3	Maximum Height	30 feet	Existing home is 2 stories tall and is not more than 30 feet in height.

Conclusion: As the Table sets out, the proposed use more than meets all the development standards of the R-60 Zone, as provided in Zoning Ordinance §59.4.4.9.B. The Hearing Examiner finds that this standard is met.

C. Use Standards for Group Day Care for 9-12 Persons (Article 59-3; Section 59.3.4.4.D.)

The specific use standards for approval of a Group Day Care for 9-12 Persons are set out in Section 59.3.4.4.D. of the Zoning Ordinance. Standards applicable to this application are:

1. Defined

Group Day Care (9-12 Persons) means a Day Care Facility for 9-12 people where staffing, operations, and structures comply with State and local regulations and the provider's own children under the age of 6 are counted towards the maximum number of people allowed.

Conclusion: The Applicant will be required to have staffing, operations, and structures compliant with State and local regulations. At the hearing, Mr. Aminizade testified that his two children attend local public schools but his daughter will not turn five until February 2023, so she is included toward the maximum number of children allowed in the Group Day Care. T. 20-21.

2. Use Standards

a. Where a Group Day Care (9-12 Persons) is allowed as a limited use, it must satisfy the following standards:

i. The facility must not be located in a townhouse or duplex building type.

- ii. In a detached house, the registrant is the provider and a resident. If the provider is not a resident, the provider may file a conditional use application for a Day Care Center (13-30 Persons) (see Section 3.4.4.E).*
- iii. In a detached house, no more than 3 non-resident staff members are on-site at any time.*
- iv. In the AR zone, this use may be prohibited under Section 3.1.5, Transferable Development Rights.*

Conclusion: The proposed Group Day Care may only be allowed as a conditional use, not a limited use, in the R-60 Zone, so the limited use provision under Subsection 2.a is not applicable. However, the standards in Subsection 2.a. are incorporated into Subsection 2.b., below.

- b. Where a Group Day Care (9-12 Persons) is allowed as a conditional use, it may be permitted by the Hearing Examiner under all limited use standards and Section 7.3.1, Conditional Use.*

Conclusion: The Hearing Examiner finds that the limited use standards, incorporated into the conditional use standards, are satisfied in this case, as:

- i) The facility is not located in a townhouse or duplex, it is in a detached, single-family home;
- ii) The applicant is the provider and a resident;
- iii) No more than three non-resident staff members will be on-site at any time; and
- iv) The subject site is not located in the AR Zone.

Overall, the Hearing Examiner finds that the application satisfies all of the use standards in Zoning Ordinance §59.3.4.4.D.

D. General Development Standards (Article 59-6)

Article 59.6 sets the general requirements for site access, parking, screening, landscaping, lighting, and signs. The applicable requirements, and whether the use meets these requirements, are discussed below.

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

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 is not required to have a parking facility with five (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 total number of parking spaces as established by Zoning Ordinance §59.6.2.4. is three (3) -- two (2) spaces for the single-family dwelling and one (1) for the child-care facility, referenced in the Table below, excerpted from page 12 of the Staff report, Exhibit 18:

Section	Parking	Required Spaces	Proposed
59.6.2.4.B	Vehicle Parking Requirement	Residential: 2 Group Day Care: 1 (1 space per non-residential employee) Total: 3	2 existing resident spaces on-site 1 non-resident employee space on-street Total: 3

The subject property has only two spaces, but §59.6.2.4. allows for on-street parking to satisfy this requirement. Hempstead Avenue cannot provide the needed on-street parking because it is limited to two-hours. The applicant applied for a parking waiver to allow the non-resident employee to park on Folkstone Road.

Ms. Horseley and Mr. Khan, who respectively reside on the corner of Folkstone Road and Hempstead Avenue and on Folkstone Road just past the intersection with Hempstead Avenue, testified to limited parking on Folkstone Road. T. 85, 97-99, 119, 124-26. Mr. Aminizade responded that he had proposed to Staff the waiver alternative of allowing the non-resident employee to park on Hempstead Avenue past Greentree Road, where there is no two-hour limit

and that he was willing to revise his waiver request. T. 222-23.

As discussed in Part II.C.2. of this Decision, the proposed Group Day Care also needs an area where parents can safely drop off and pick up children. While Staff found that there was sufficient on-street parking to safely accommodate drop off and pick up, Exhibit 18, p. 7, numerous witnesses testified that the current conditions for drop off and pick up for the residential family day care pose a significant safety hazard with parents parking in the driveway apron of the subject property or double-parking on Hempstead Avenue. T. 86-90, 119-120, 144, 148, 152, 159-51, 192, 194, 208, 217-18; Exhibit 41. Witnesses raised concerns about increasing from up to eight (8) to up to 12 the number of parents dropping off and picking up on such a busy, residential roadway. T. 79-80, 97-99, 124-26, 161-62.

Conclusion: The Hearing Examiner finds that the vehicle parking requirements for the subject property residents can be accommodated at the subject site and, while Folkstone Road is not an appropriate site for a parking waiver, an alternative parking site within easy walking distance of the subject property can likely be located for the non-resident employee and a new waiver application submitted. However, the location of the subject property right off Greentree Road and just past the intersection with Folkstone Road, and the history of current day care parents' hazardous parking practices prevent the Hearing Examiner from finding that the subject property can provide the necessary safe parking for parent drop off and pick up. The property is located at a point of congestion for school and park traffic, including school bus traffic, such that inappropriate parking by day care parents creates safety hazards for the day care parents and children and for all vehicular and pedestrian traffic in the area. As stated, the parents have an established record of not complying with parking requirements; and there will be a continuing incentive to disobey parking requirements in the interest of speedy drop offs and pick-ups during

high-traffic peak times. There are no conditions that this Hearing Examiner can impose that can effectively control and police parents' future parking behavior. Thus, the Hearing Examiner concludes that the application cannot comply with this section of the Zoning Ordinance.

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. [Emphasis added.]

Conclusion: As discussed in Part II.C.3. of this Report and Decision, no new lighting is planned for this conditional use, and Staff found the existing lighting to be adequate and non-intrusive. Exhibit 18, p. 11. The Hearing Examiner agrees with Staff and concludes that lighting is compliant with this standard.

b. Site Screening and Landscaping

Conclusion: Although some provisions in this portion of the Zoning Ordinance contain very specific 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. . .”

Staff found the existing fencing in the rear and side yards provides sufficient screening between the proposed use and the adjacent homes. Exhibit 18, p. 12.

Conclusion: The Hearing Examiner finds that the existing fencing adequately screens the visual aspects of the use and meets this requirement of the Zoning Ordinance.

4. Signage

Conclusion: The use of signage is governed by Zoning Ordinance Division 6.7. Although Zoning Ordinance §59.6.7.8.A.1 sets the standards for signs in Residential Zones, no sign is proposed for the subject conditional use, so this standard is not applicable.

IV. CONCLUSION AND DECISION

As set forth above, while the application meets the standards of Articles 59-3 and 59-4, it does not comply with Article 59-6, Section 2 and necessary findings under subsections (c), (f), and (g) of §59.7.3.1.E. of the Zoning Ordinance.

Any day care facility will have inherent adverse effects on the immediate neighbors including noise and commotion during children’s outdoor play and traffic on arrival and pick up. However, due to the particular location of this proposed day care at an extremely busy vehicular and pedestrian intersection as well as at a topographical low point so that the backyard sounds amplify into adjacent backyards, there are also non-inherent effects, which, in combination with the inherent effects, are likely to cause undue impact on the surrounding neighborhood.

Based on the foregoing findings and conclusions and a thorough review of the entire record, the application of Aidin Hasanloo (CU 22-08), for a conditional use under Section 59.3.4.4.D. of the Zoning Ordinance, to operate a Group Day Care for up to 12 children in her home at 8801 Hempstead Avenue in Bethesda, Maryland, is hereby ***DENIED***.

Issued this 23rd day of September 2022.

A handwritten signature in black ink, appearing to read 'A J', is written over a horizontal line.

Andrea LeWinter
Hearing Examiner

NOTICE OF RIGHT TO REQUEST ORAL ARGUMENT

Any party of record may file a written request to present an appeal and oral argument before the Board of Appeals, within 10 days after the Office of Zoning and Administrative Hearings issues 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.

Contact information for the Board of Appeals is listed below, and additional procedures are specified in Zoning Ordinance §59.7.3.1.F.1.c., as amended by Zoning Text Amendment (ZTA) No. 16-16, adopted on February 7, 2017, by Ordinance No. 18-25, effective February 27, 2017. The procedural amendments to the Zoning Ordinance contained in ZTA No. 16-16 have not yet been codified, but you may view them on the Council's website at http://www.montgomerycountymd.gov/COUNCIL/Resources/Files/zta/2017/20170207_18-25.pdf

The Board of Appeals may be contacted at:

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

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

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/>.

NOTICES TO:

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