

The Board considered the Hearing Examiner's Report and Decision, along with the request for oral argument and the opposition thereto, at its September 7, 2016, Worksession. Evan V. Goitein, Esquire, appeared with Ms. Weiser on her behalf. Mr. Webster and his wife, Karen Webster, appeared pro se.

In his letter requesting oral argument, Mr. Webster indicated that he had concerns regarding lighting, damaged evergreen screening, daycare management and contact information. See Exhibit 66. At the Board's September 7, 2016, Worksession, Mr. Webster stated that he was seeking oral argument about the location of the daycare sign, a typographical error in the Hearing Examiner's Report and Decision for address of his own special exception accessory apartment (S-1804), the evergreen screening between his property and the subject property, and the management of outdoor playtime at the daycare. Pursuant to Section 59-7.3.1.F.1.c.iii of the Zoning Ordinance, the Board "may, in its discretion, grant or deny an oral argument request." On a motion by John H. Pentecost, Vice Chair, seconded by Stanley B. Boyd, the Board voted unanimously to hear oral argument about the limited daycare management issue of outdoor playtime, after noting that compliance issues with the evergreen screening were an enforcement matter, that the typographical error was not an issue for oral argument and could be addressed in any decision issued by the Board, and that Mr. Webster had not raised the location of the sign in his request for oral argument.¹

Mr. Webster stated that as shown in some of the photographs contained in the Hearing Examiner's Report and Decision, his rear deck is located 50 feet from the shared property line. He argued that at 10,000 square feet, his lot and Ms. Weiser's lot are small. He and his wife argued that if this conditional use were granted, they would be subjected to noise all day; they asked that outdoor playtime be limited to one hour in the morning and one hour in the afternoon, with all outdoor play ending by 3 p.m., and cited the suggestions made by Robin Rice during the hearing before the Hearing Examiner in support of their suggestion. See the Hearing Examiner's Report and Decision, at page 20. In response to a Board question asking where Ms. Rice had suggested a one-hour per morning and afternoon limitation, Mr. Webster clarified that he and his wife were requesting that. Mrs. Webster asserted that Ms. Weiser had stated that it would be great to have all of the children outside for one play period, citing page 57 of the hearing Transcript; Ms. Weiser immediately asserted that that statement was taken out of context, and clarified that it was said in the course of discussing whether it would be better to limit the amount of playtime or the number of children allowed outside at any one time, indicating that she had expressed a preference for limiting the number of children outside at any one time.

Ms. Weiser stated that her current child care license allows her to care for up to 8 children in her home as a limited use, that she is seeking a license for up to 12 children, and that her conditional use, if granted, would allow her to care for up to 15 children. Her attorney noted that Montgomery County Child Care licensing requires outdoor play, and that Ms. Weiser's current license for 8 children has no restrictions on outdoor playtime.

¹ Counsel for Ms. Weiser indicated that Ms. Weiser had received proper permits from the County's Department of Permitting Services for the daycare sign.

He urged the Board not to impose more stringent restrictions than those proposed by the Hearing Examiner, suggesting that these were small children, which in and of itself limits noise, stating that the children were generally not outside for more than 3 hours a day, and noting that even the back yard of this property is already encumbered by significant road noise from Fernwood Road. Counsel went on to argue that there was no evidence in the record that noise from the children would be a problem. He stated that outdoor playtime was discussed at length during the hearing, and that Ms. Weiser had voiced a preference for a restriction on the number of children outdoors rather than a restriction on the hours the children could be outdoors. He argued that after thoroughly considering the evidence, the Hearing Examiner proposed limiting the number of children outside at any one time to 10, between the hours of 9 a.m. and 5 p.m. Counsel argued that these were appropriate limits placed on this use by the Hearing Examiner after extensive consideration of the record. Ms. Weiser noted that similar limits were placed on her sister's conditional use for a child day care center located less than two miles from hers, which was granted in 2015. Ms. Weiser's attorney noted that evidence about her sister's use was presented to the Hearing Examiner. When asked by a Board member why one hour of outdoor playtime was not sufficient, Ms. Weiser explained that licensing requires outdoor play at least two times a day, and encourages more. She stated that the children in her care are generally outside for one to one and a half hours in the morning and afternoon. She expressed concern about the potential for enforcement issues arising out of her personal use of her yard with her family. Her attorney explained that one hour in the morning and one hour in the afternoon, particularly before 3 p.m., may not work because of weather-related issues, or simply because a child who takes a nap after lunch may not wake up in time to go outside before 3 p.m.; he requested that if the Board were inclined to impose further time restrictions, that an aggregate time restriction be considered.

When asked by a Board member why he chose 3 p.m. for his suggested end of outdoor play, Mr. Webster stated that 3 p.m. appeared to work with the schedule Ms. Weiser has posted on her website, and would give his wife and him time to use their deck.

The Board finds that the record compiled by the Hearing Examiner is thorough and exhaustive, and that the Hearing Examiner's Report and Decision contains clear and detailed conditions of approval. The Board finds that no further argument is necessary, except as already recounted, for it to be able to render a decision on this application. With respect to outdoor playtime, which was the subject of oral argument, the Board finds that the concerns of the Websters and Ms. Weiser can be adequately addressed by the inclusion of a revised condition #4, set forth below. Thus the Board adopts the Hearing Examiner's Report and Decision, with the modifications to condition #4 set forth herein and correction of the address listed for S-1804 on page 9 of that Report and Decision to read "9203" Fernwood Road instead of "9204" Fernwood Road, and **grants** the proposed conditional use, subject to the following conditions:

1. The day care facility is limited to 15 non-resident children in the Applicant's care and 4 non-resident employees on site at any one time. A five-minute overlap is allowed in staff presence on the site so that children are always fully attended when there is a

changeover in staff. All children must be under the direct supervision of a staff member at all times.

2. The hours of operation are Monday through Friday from 7:00 a.m. to 7:00 p.m.
3. No more than 10 children are permitted to play outdoors at any one time.
4. Outside play time may not start prior to 9:00 a.m. and may not extend beyond 4:00 p.m. Outdoor play shall be limited to no more than 4 hours per child, per day.
5. Four on-site parking spaces must be provided for non-resident employees.
6. The Applicant must supplement the existing landscaping along the northern lot line in the front yard with three additional shrubs.
7. The Applicant must provide one long-term weather-protected bicycle parking space on site. The bicycle parking space may be located in Applicant's garage.
8. The Applicant shall enter into an agreement with each parent to specify an assigned arrival and departure time for each child so that no more than two vehicles are:
 - a. arriving within any 15-minute time period between 7:00 a.m. and 10:00 a.m., or
 - b. departing within any 15-minute time period between 4:15 p.m. and 7:00 p.m.The agreement shall also require that all vehicles exiting the site are limited to a right turn only onto Fernwood Road during the hours of operation for the child day care facility.
9. The Applicant must construct and maintain a hard surface pedestrian path between the parking area and the entrance to the child day care center located at the rear of the existing dwelling unit, as shown on the final site plan.
10. The Applicant must install low-level lighting along the new pedestrian path to ensure safe pedestrian movements on site.
11. The Applicant must install a gate in the existing fence to connect the proposed pedestrian path to the entrance of the conditional use.
12. The Applicant must upgrade the existing driveway as follows:
 - a. Widen both driveway access points to a standard 20-foot width.
 - b. Widen the driveway, between the northern driveway access point and garage, to a minimum width of 18 feet to accommodate two standard (8.5' x 18') parking spaces.
 - c. Widen the semi-circular portion of the driveway to a minimum width of 18 feet to accommodate two seven-foot wide parallel parking spaces along the east side of the circular driveway and one 10-foot wide travel/ loading lane along western side of the driveway.
 - d. Mark each individual parking and loading space to provide for orderly and safe on-site vehicular movements. Full striping of the spaces is not required in order to maintain a residential appearance. A pavement marking color similar to the driveway color

may be used, as long as it is clearly visible to the person parking in the space and to others viewing it next to the space.

13. The existing driveway must be signed and restricted to one-way (counter-clockwise movement) operation where traffic enters the site via the southern driveway entrance (inbound right-turn only) and exits the site via the northern driveway entrance (outbound right turn only). Driveway signage must be approved by the Montgomery County Department of Permitting Services.

14. Before erecting any permanent sign, the Applicant must obtain approval from the Montgomery County Department of Transportation (MCDOT) and the Sign Review Board of the Department of Permitting Services (DPS) in order to get a sign permit. If a permit is obtained, the Applicant must file a copy of the permit with the Board of Appeals.

15. The Applicant must make written inquiry to the Department of Permitting Services (DPS) as to whether DPS requires a permit for erosion, sediment control and stormwater management for the type of land disturbance activity proposed for this conditional use. If DPS indicates that such a permit is required, the Applicant must obtain such a permit prior to conducting the land-disturbing activity.

16. The Applicant must comply with and satisfy all applicable State and County requirements for operating a Child Day Care Center, and correct any deficiencies found in any government inspection.

17. Children must be accompanied by an adult to and from the child-care entrance.

18. The Applicant shall not use a public address system of any kind outside the building, nor shall any amplified music be played outside the building.

19. The Applicant shall maintain the grounds in a clean condition, free from debris, on a daily basis.

20. The Applicant must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the conditional use premises and operate the conditional use as granted herein. The Applicant shall at all times ensure that the conditional use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

21. Waivers of the following provisions of Division 6.2 are hereby granted pursuant to Zoning Ordinance §59.6.2.10:


- from Section 59.6.2.5.D.1, modifying the requirement for striping and marking of off-street parking spaces to instead require marking in accordance with Condition No. 12.d, above;

- from Section 59.6.2.5 K 2.b. reducing the minimum side yard setback along the northern lot line for the parking facility to 7 feet, instead of 16 feet; and
- from Section 59.6.2.9.B.1.a., b., and c., allowing the parking lot landscaping to be in accordance with the revised landscape and lighting plan (Exhibit 48(b)).

22. The Applicant shall be bound by all of her testimony and exhibits of record, and by the testimony of her witnesses identified in the July 8, 2016, Report and Decision issued by the Office of Zoning and Administrative Hearings.

On a motion by Stanley B. Boyd, seconded by John H. Pentecost, Vice Chair, with Carolyn J. Shawaker, Chair, Edwin S. Rosado, and Bruce Goldensohn in agreement:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled petition.



Carolyn J. Shawaker, Chair
Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 21st day of September, 2016.



Barbara Jay
Executive Director

NOTE:

See Section 59-7.3.1.I.1 of the Zoning Ordinance regarding the twenty-four month period within which a conditional use granted by the Hearing Examiner or the Board must be exercised.

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion. Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure. It is each party's responsibility to participate in the Circuit Court action to protect their respective interests. In short, as a party you have a right to protect your interests in this matter by participating in the Circuit Court proceedings, and this right is unaffected by any participation by the County.

