

OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS  
FOR MONTGOMERY COUNTY, MARYLAND

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PETITION OF DEREJE ZEWDU \*  
AND FEKERTE DESALEGN \*  
for a special exception for a child daycare \*  
center for up to 30 children on \*  
property located at 921 Northwest \*  
Drive, Silver Spring, Maryland 20901 \*

\*\*\*\*\*

Dereje Zewdu \*  
Mojes Kassa \*

David L. Gardner, Esquire \*  
Attorney for the Petitioner \*

For the Petition \*

\*\*\*\*\*

Special Exception No. 13-02

Wilma Johnson \*  
Michael Berry \*  
Jo Ann Berry \*  
Eleanor Lauderdale \*

In Opposition to the Petition \*

\*\*\*\*\*

Before: Lynn A. Robeson, Hearing Examiner

HEARING EXAMINER'S OPINION AND DECISION

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## I. STATEMENT OF THE CASE

Petition S.E. 13-02, filed on May 6, 2013, requests a special exception to operate a child day care center for up to 30 children.<sup>1</sup> The facility would be located in an existing one-family, detached home at 921 Northwest Drive, Silver Spring, Maryland, in the R-90 Zone.

Under the provisions of the Zoning Ordinance, §59-G-1.12, the Hearing Examiner is authorized to hear and decide this type of petition. The Office of Zoning and Administrative Hearings issued a notice that the public hearing would be held before the Hearing Examiner on September 26, 2013. Exhibit 23. At the request of the Petitioners, the Hearing Examiner postponed this hearing until December 19, 2013. Exhibits 44, 45. On October 21, 2013, the Petitioners amended their petition, notice of which was issued by the Hearing Examiner on October 25, 2013. Exhibits 47, 48. The Technical Staff of the Maryland-National Capital Park and Planning Commission reviewed the petition and, in a report dated November 21, 2013, recommended approval with conditions (Exhibit 50), including a condition limiting the maximum enrollment to 24 children.<sup>2</sup>

The Montgomery County Planning Board (Planning Board) recommended approval of the petition, but agreed with the Petitioner that the maximum enrollment should be 30 children. The Planning Board also modified Technical Staff's recommended conditions as described in Part II.C of this Decision and Opinion.

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<sup>1</sup> A "child day care center" is one of three types of "child day care facilities" defined in Zoning Ordinance §59-A-2.1. The other two are "family day care homes" for up to 8 children and "group day care homes" for up to 12 children. A "child day care center" is defined in §59-A-2.1 as:

- a. a dwelling in which child day care services are provided and the provider is not a resident and does not meet the requirements for a non-resident provider of a family day care home or a group day care home, or;
- b. a building in which child day care services are provided:
  - 1) for 13 or more children, or;
  - 2) which exceed the staffing limits of a family day care home, or a group day care home, or;
  - 3) for 24 hours a day provided that they are in conformance with state and local regulations.

<sup>2</sup> The Technical Staff report is frequently quoted and paraphrased herein.

Along with the Planning Board's recommendation, Technical Staff forwarded amendments to its Staff Report and a revised arrival/departure schedule for employees and parents. Exhibits 55, 59. This amended Staff Report included a finding that a sixth parking space is *not* recommended for a parking area to be located on the eastern portion of the site. Exhibits 59 (b).

The hearing was convened, as scheduled, on December 19, 2013. At the public hearing, the Petitioners submitted a revised site plan showing 6 parking spaces in the front yard facing New Hampshire Avenue rather than the five spaces reviewed by the Planning Board. Exhibit 61. The Hearing Examiner left the record open until January 6, 2014, to permit Technical Staff and individuals opposing the application to review the site plan submitted at the public hearing, and to obtain additional information on certain non-residential uses along New Hampshire Avenue from Technical Staff, Staff to the Board of Appeals, and the Montgomery County Department of Permitting Services (DPS). Both Technical Staff and Staff to the Board of Appeals responded before the close of the record, although DPS did not. Exhibits 80, 84. The Hearing Examiner extended the record until January 16, 2014, for DPS to respond. Exhibit 85. DPS responded on January 7, 2014. In a letter dated January 16, 2014, the Petitioners withdrew their request for approval of the site plan submitted at the public hearing (Exhibit 61), and requested approval of the site plan (Exhibit 57) reviewed by the Planning Board. Exhibit 88. The Hearing Examiner re-opened solely to admit an e-mail dated January 19, 2014, from Mr. Michael Berry, the adjacent neighbor who appeared at the hearing that included an attachment containing further comments. The record closed finally on January 24, 2014.

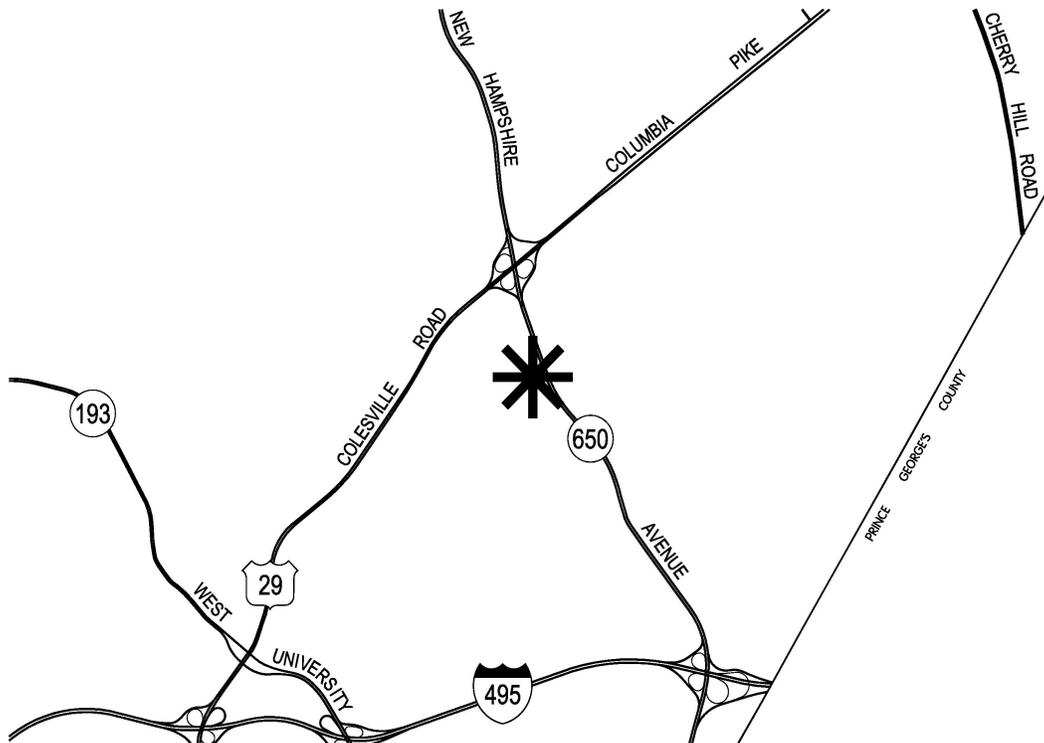
Based on a thorough review of the entire record, the Hearing Examiner concludes that the special exception should be denied because it does not conform to the recommendations of the

*1997 White Oak Master Plan*, that non-inherent on-site conditions justify denial of the use, that the intensity of the use is incompatible with the surrounding neighborhood, and that Petitioners have failed to demonstrate that site circulation and traffic safety will not be impaired.

## II. FACTUAL BACKGROUND

### A. Subject Property

The proposed child day care center would operate in an existing, single-family detached home at 921 Northwest Drive, Silver Spring, Maryland, located in the southwest quadrant of the intersection of New Hampshire Avenue and Northwest Drive. A map of the general vicinity included in the Staff Report (Exhibit 59(c)), is below:



The property's legal description is part of Lot 11, Block A, Burnt Mills Estates subdivision, and consists of approximately 12,445 feet in the R-90 Zone. Exhibit 59(c), p. 1.

The corner lot abuts both Northwest Drive on the northern property boundary and the New Hampshire Avenue service road along the eastern property boundary. As a result, it has two front yards, one along those road frontages. Exhibit 59(c), p. 7. Technical Staff advises that the property is flat, except for a four to six-foot rise from the service road. There are no sidewalks along the Northwest Drive, although existing on-site parking/access is from a driveway leading from Northwest Drive. As discussed later in this Decision and Opinion, a portion of the existing driveway is actually located on the adjacent property to the west. An aerial photograph of the property included in the Technical Staff Report (below), shows the western property boundary in relation to the existing driveway.<sup>3</sup> Exhibit 59(c).

Photographs of the property's frontage on the service road and on Northwest Drive, taken



Figure 1: Site Aerial

<sup>3</sup> Many of the diagrams in the case were submitted with the north arrow facing the bottom of the page; others are reproduced with the north toward the top of the page. To ensure that this Decision and Opinion is understandable, the Hearing Examiner has included north arrows in this Decision and Opinion where they are not included in the original exhibits or the directions are otherwise unclear.

by Technical Staff (Exhibit 59(c), Attachment 2), are shown below:



Figure 6: New Hampshire Avenue Service Road (looking north)



**Northwest Drive (looking West)**

The Petitioners were unaware of that the driveway was located on the neighboring property until review of this petition. According to Mr. Zewdu, the original record plat showed

the area containing the existing driveway as part of the subject property; subsequently, a small triangular piece was conveyed to the former owner of the property to the west (917 Northwest Drive). T. 22, 116-117. Other photographs of the property submitted by the Petitioners are below and on the following page (Exhibit 62(a) and (b)):



**Exhibit 62(a)**

Technical Staff advises that no parking is permitted along Northwest Drive, although testimony from neighbors at the public hearing indicated that there are no signs prohibiting parking along that road. Exhibit 59(c), p. 5. Staff submitted e-mail correspondence between Staff and representatives of the Montgomery County Department of Transportation (MCDOT). Representatives of MCDOT state that a 1973 order prohibits parking along Northwest Drive, although they acknowledge that there are no signs to this effect. Exhibit 54. Neighbors testified that individuals regularly park along Northwest Drive since the FDA located directly across New Hampshire Avenue. T. 181. The Hearing Examiner finds that parking is legally prohibited, but people do park along Northwest Drive due to the lack of signs.



**Photograph of Rear Yard  
Exhibit 62**

**B. Surrounding Area**

The boundaries of the surrounding area are defined in order to measure the compatibility of the proposed use with properties that it will directly impact. Technical Staff defined the neighborhood boundaries by Lockwood Drive to the north and west, McCeney Avenue and Burnt Mills Avenue to the south and west, and the Food and Drug Administration to the east across New Hampshire Avenue, as shown a map from the Technical Staff Report (Exhibit 59(c), p. 6), on the following page.

A major issue in this case is the impact of the proposed facility on the character of the surrounding neighborhood and whether the addition of another commercial use along New Hampshire Avenue complies with the Master Plan. Neighbors contend that the combination of special exceptions, the proposed use, as well as other existing non-residential uses do not fulfill the goals of the Master Plan and adversely impact the character of the surrounding area.

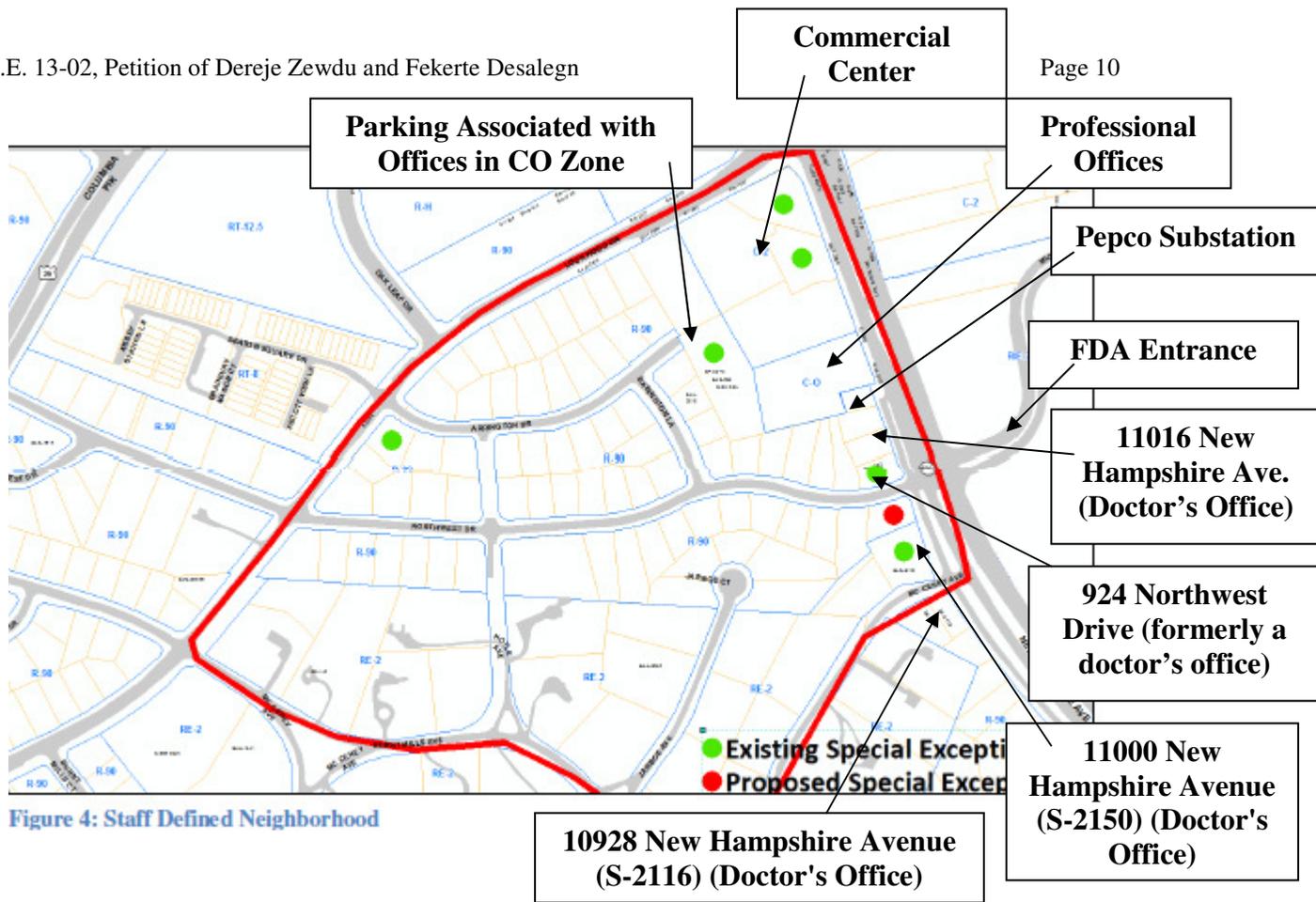


Figure 4: Staff Defined Neighborhood

For this reason, the Hearing Examiner will review the surrounding uses in some detail.

The green circles on the map from the Technical Staff Report (Exhibit 59(c), p. 6, above) mark existing special exceptions within the neighborhood that were identified by Staff. Two of these special exceptions are located within a commercial shopping center (located at the corner of Lockwood Drive and New Hampshire Avenue) and include a drive-in restaurant and an automobile filling station. The special exception adjacent to the eastern boundary of the commercial area (on residentially zoned property) is a parking area associated with offices within the CO Zone. *Id.* Staff characterized the area as consisting of residential dwellings in the R-90 and RE-2 Zone, retail services in the commercial center and several professional services and offices, such as doctor's, in the CO Zone. Staff notes that special exceptions outside the commercial area include multiple medical practitioners' offices. *Id.*

Neighbors testified and submitted evidence of the increasing commercialization of the neighborhood. T. 218-221, 251-257, Exhibits 76(h), 90. According to them, there is an unbroken line of non-residential uses along New Hampshire Road between the McCeney Avenue (the neighborhood boundary) and the shopping center, consisting of both special exceptions and other non-residential uses. Starting from the south, a special exception for non-resident medical practitioner (10928 New Hampshire Avenue, BOA Case No. S-2116) is located just south of the neighborhood boundary on the southern side of McCeney Avenue.<sup>4</sup> Mr. Berry contends that this office has paved parking for approximately 5 spaces. Exhibit 76(h). Beginning at the southern end of the neighborhood (the north side of McCeney Avenue), there is a special exception for a doctor's office (11000 New Hampshire Avenue, BOA Case No. 2150). Individuals opposing this application do not object to this special exception because the owners reside within the dwelling and because it retains a residential appearance with the exception of a small sign. T. 255. The subject property is immediately north of this special exception. Moving to the north on the opposite side of Northwest Drive, 924 Northwest Drive was originally identified by Staff as an existing special exception approved in 1971 (CBA-3082); subsequent investigation revealed that the special exception had been revoked in 2008. Exhibits 80(d), 84(a). Neighbors complain that, while the special exception has been revoked, the paved parking area and driveway (large by residential standards) remains along the New Hampshire Avenue service road. This paved parking area, which is unscreened, extends without separation into the next property to north (toward the shopping center), as shown in the aerial photograph on page 13 of this Decision. This next property, 11016 New Hampshire Avenue, is a doctor's office with

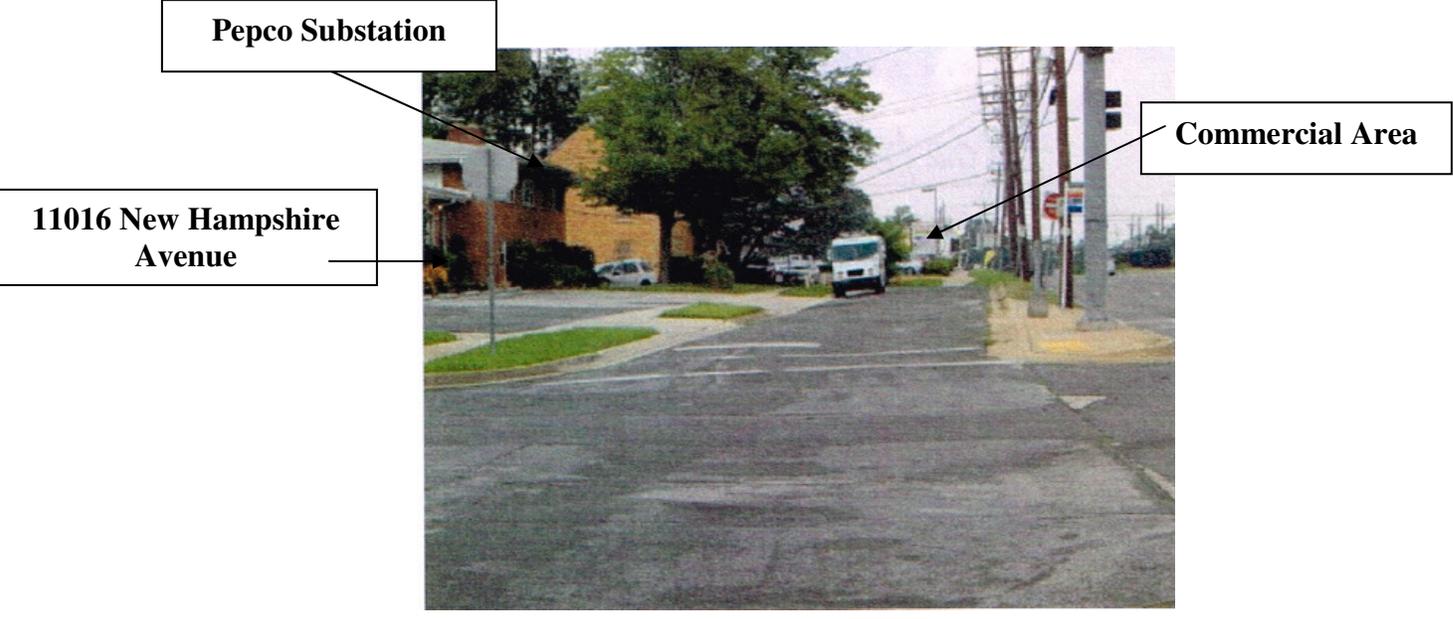
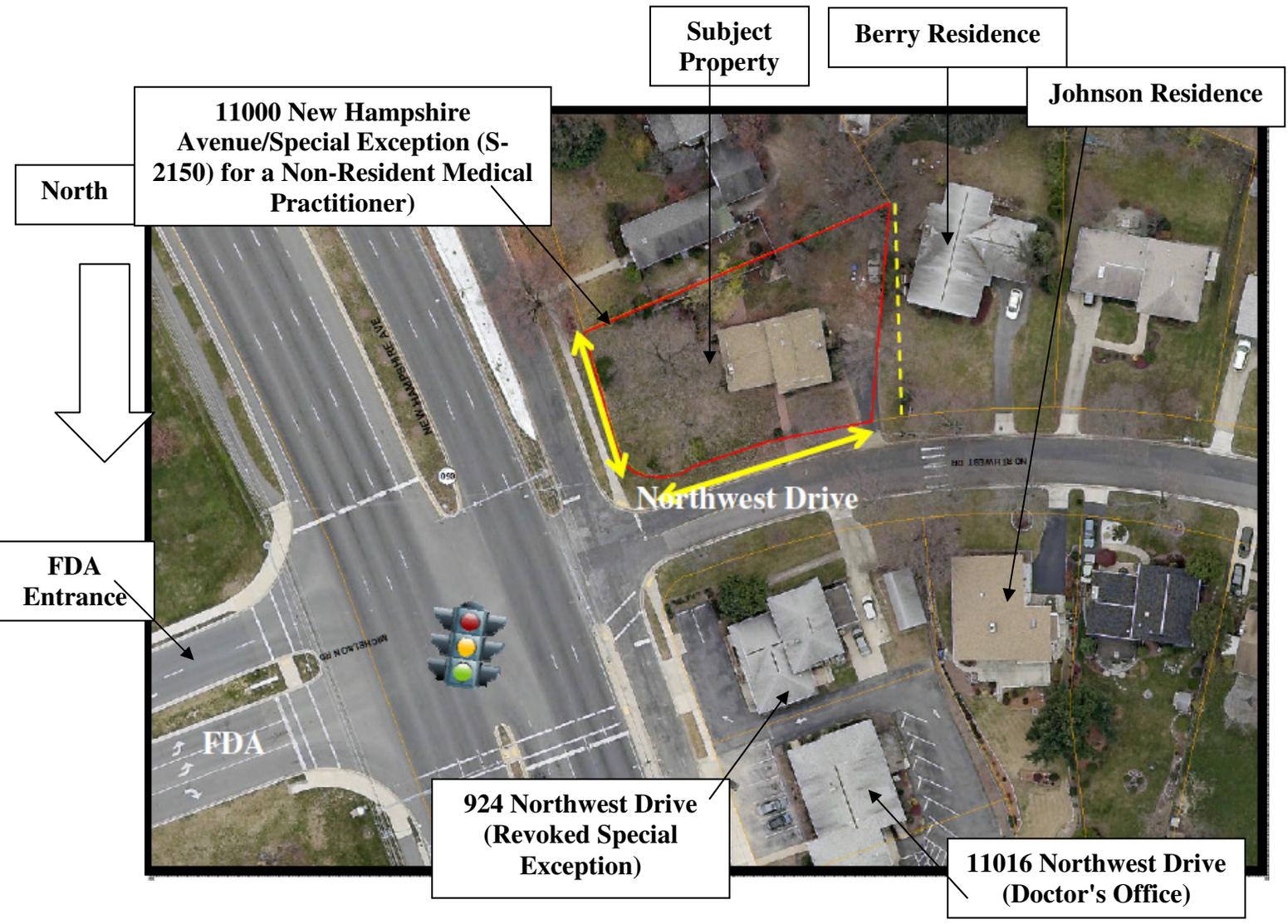
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<sup>4</sup> Because this property is outside the neighborhood, the Hearing Examiner does not consider this in determining the character of the neighborhood, but does include it as relevant to the argument relating to the Master Plan. Specifically, those opposing the petition contend that approval of this use will result in an overconcentration of special exceptions and non-residential uses along New Hampshire Avenue. T. 217-218.

extensive paved parking on all four sides, with the exception of a small, grassy area in the front. Parking along the north, west, and southern sides is unscreened, and directly abuts Ms. Johnson's yard. T. 185. Mr. Berry testified that the doctor's office at 11016 New Hampshire Avenue uses the parking lot located at 924 Northwest Drive (the abandoned special exception for a doctor's office) for overflow parking. T. 218. The next property to the north houses a PEPCO substation (11020 New Hampshire Avenue). According to Mr. Berry, the structure itself is looks similar to a home, but there are yellow gates and large warning signs in front of the property along the service road. Exhibit 90(a).

Properties located along New Hampshire Avenue between the existing special exception immediately south of the subject property to the doctor's office at 11016 New Hampshire Avenue are shown in an aerial photograph from the Technical Staff Report (Exhibit 59(c)), on the following page. The Pepco substation and the shopping center are located immediately below 11016 New Hampshire Avenue (just beyond the bottom of the photograph). Another photograph included in the Technical Staff Report, taken from the intersection of Northwest Drive and New Hampshire Avenue looking north to the shopping center, depicts a street view of some the commercial uses bordering the service road between the subject property and the shopping center (Exhibit 59(c), Attachment 2), shown on the same page.

The Hearing Examiner queried Technical Staff, the Board of Appeals, and representatives of the Montgomery County Department of Permitting Services (DPS) regarding the legal status of these non-residential uses not listed as special exceptions. Exhibits 76(f). As indicated, Staff to the Board of Appeals promptly replied that the special exception for the doctor's office at 924 Northwest Drive had been abandoned, and that no special exception had been recorded for the doctor's at 11016 New Hampshire Avenue. Exhibit 84. DPS stated



**View Looking North from Signalized Intersection at New Hampshire Avenue and Northwest Drive**

that no commercial use and occupancy was on file for the property

. A resident of the neighborhood, Mr. Michael Berry, submitted a letter stating that he was personally acquainted with the son of the physician who established the practice in the 1960's and believes the use is permitted. Exhibit 90(a).

The Hearing Examiner concludes that there are three legally permitted, active special exceptions in the *residentially*-zoned portion of the Staff-defined neighborhood. These include the physician's office adjacent to the southern side of the subject property, the parking area associated with commercial uses in the CO Zone, and another special exception located within the interior of the neighborhood that neighbors identified as another doctor's office. Exhibit 75. In addition to these special exceptions, she also finds that that there are additional non-residential uses located between the subject property and the commercial area to the north. These include the Pepco substation and the doctor's office at 11016 New Hampshire Avenue. Parking areas for the doctor's office at 11016 New Hampshire Avenue are unscreened and consist solely of paving. This parking area connects to the parking area associated with the former special exception at 924 Northwest Drive. Access to the Pepco substation is barred by a yellow gate and caution signs. Exhibit 90.

Those in opposition agree that the special exception immediately to the south (a doctor's office) of the subject property retains its residential character and is relatively low-impact, but complain of the commercial appearance of the uses between Northwest Drive and the shopping center, as well as the continuing line of commercial uses along New Hampshire Avenue from the shopping center to the doctor's office immediately south of McCeney Avenue. T. 215-216, 255.

It is unclear whether the Planning Board was aware of the non-residential uses because only special exceptions were identified in the Staff Report.<sup>5</sup> Nor is their evidence in this record that any of the uses along New Hampshire Avenue violate the Zoning Ordinance. The Hearing Examiner does not consider the *activity* of using the parking area at 924 Northwest Drive as overflow parking for the physician's office to the north in considering the character, although she does consider the physical attributes of the property. From a zoning perspective, the physician's office at 11016 New Hampshire Avenue may be a permitted use and there is certainly insufficient evidence in this case to determine that it is not.<sup>6</sup> Mr. Berry submitted evidence that the office was established in the 1960's. Exhibit 90. Doctor's offices within a residence were a permitted use in the R-90 Zone at that time without a special exception. *See, Montgomery County Zoning Ordinance (1957), §§107-7, 107-5.*

The Hearing Examiner finds that the neighborhood is characterized by single-family homes that are residential in character, except for those uses along New Hampshire Avenue between the subject property and the shopping center. With one exception (i.e., the abandoned special exception at 924 Northwest Drive), these uses are non-residential and commercial with obvious commercial or non-residential characteristics. Even the single exception (i.e., the abandoned special exception at 924 Northwest Drive) retains vestiges of a commercial character because of the unscreened parking extending unbroken into the parking area of 11016 New Hampshire Avenue. In addition, while the special exception to the south of the subject property maintains a residential appearance, it has a sign clearly visible from New Hampshire Avenue.

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<sup>5</sup> The general conditions of approval for a special exception caution only against an overconcentration of *special exception* uses. *See, e.g., Zoning Ordinance, §59-G-1.21(a)(7).* For reasons discussed later in this decision, the Hearing Examiner concludes that Master Plan is broader in scope.

<sup>6</sup> A use and occupancy permit is a function of the building code rather than the Zoning Ordinance. *See, Montgomery County Code,*

Thus, while the interior of the neighborhood retains a strong residential character, the properties along New Hampshire Avenue are markedly more commercial, but in use and in physical attributes.

Thus, the Hearing Examiner finds that the surrounding area, for the purposes of this special exception petition, is characterized by single-family detached residential uses with a series of much more commercial and non-residential uses along New Hampshire Avenue.

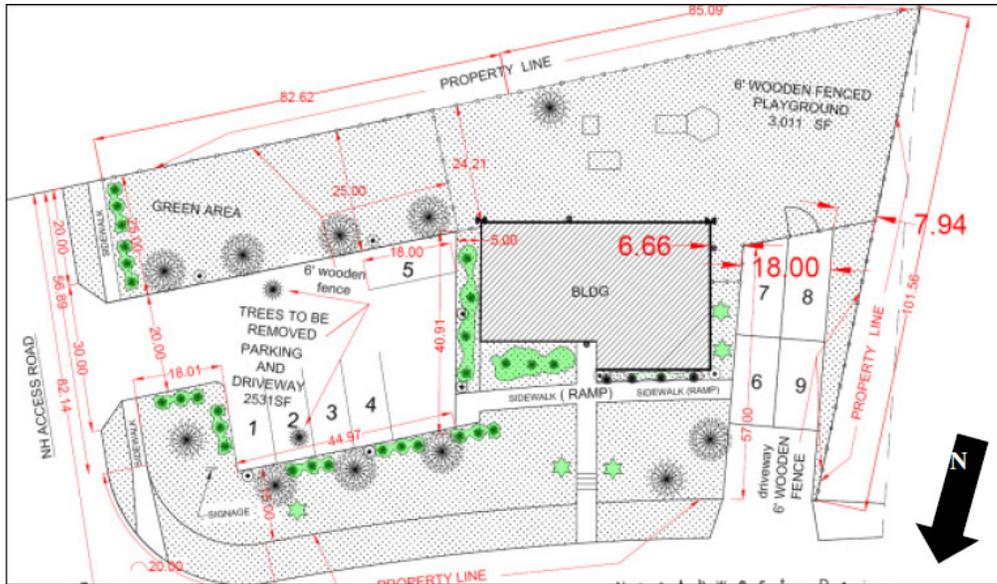
### **C. The Proposed Use**

#### **1. The Proposed Use:**

Petitioners propose a child day care facility for up to 30 children, ranging between 2 to 5 years of age, to be operated entirely within the existing single-family detached dwelling. The existing structure is a split-level home with three levels. Petitioners propose to modify the interior to provide classrooms, a kitchen, and bathrooms. The existing structure will not be used as a residence.

Parking is provided in a driveway on the western side of the property and a parking lot on the eastern side facing New Hampshire Avenue. Exhibit 57. Initially, the Petitioners proposed four parking spaces within the driveway on the western portion of the property, thus providing the minimum number of parking spaces (i.e., 9 spaces) required by the Zoning Ordinance. The Petitioner's original site plan (from Exhibit 47) is reproduced on the following page.

The minimum setback for a driveway in the R-90 Zone is 16 feet. The setback shown in the plan above ranges from one foot to 8 feet; thus the driveway would require a waiver of between 8 and 15 feet. Petitioners proposed to screen the driveway with a wooden privacy fence; Technical Staff found that the narrowness of the setback would create a non-residential appearance for the special exception and the fence would reduce site distances for those backing



**Exhibit 47(f)**

out of driveway to unsafe levels. Exhibit 59(c), p. 11, 18. In order to increase the buffer from the western property line, Staff recommended realigning the driveway to provide a constant 10-foot setback between the property line and the driveway. Staff’s recommendation is illustrated in a diagram from the Technical Staff Report showing the difference between the Petitioners’ proposed alignment and Staff’s recommended alignment (Exhibit 59(c), reproduced below:

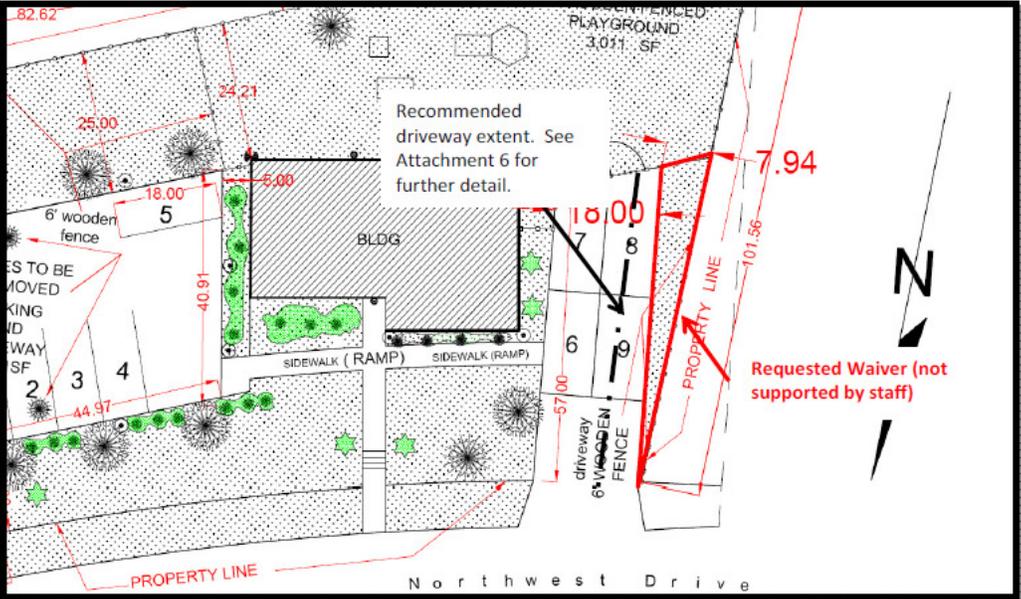


Figure 6: Western Parking Area, as proposed by Staff and Associated Waiver Request

**Comparison of Petitioners’ Proposed Alignment and Alignment Recommended by Technical Staff (Exhibit 59(c))**

Reducing the western driveway setback, however, also reduces the number of available on-site parking spaces. Technical Staff concluded that access to the site is unusually constrained due to its proximity to a signalized intersection, parking restrictions along both frontages, and the intensity of the use proposed. Staff stated (Exhibit 59, p. 10-11):

The Property is located on a corner and has two fronts, along the New Hampshire Avenue Service Road and Northwest Drive (see Figure 5). While there are many corner lots within the staff defined neighborhood, this particular location is constrained because of the existing house location on the Property, the on-street parking restrictions, and not enough queuing distance from the signalized intersection along Northwest Drive. Because of these conditions, the site is limited in locating any large parking area to serve the proposed intensity.

Figure 5 from the Staff Report (Exhibit 59, p. 11) demonstrates the basis for Staff's position:



Representatives of the MCDOT agreed with Staff's assessment regarding the location of access to the property. They determined, "[I]f drop-offs do occur and they create traffic safety and/or operational problems at the intersection" existing restrictions would have to be upgraded. According to MCDOT Staff, this would "have a negative impact on the day care center and other residents of the neighborhood." Exhibit 54. MCDOT Staff recommended moving access to the New Hampshire Avenue service road. Because of these site constraints, Staff recommended reducing the intensity of the use by limiting the maximum enrollment to 24 children, noting that (*Id.* at 11):

While the Master Plan is supportive of daycare uses in general, it discourages front yard parking because of its commercial appearance. Staff supports a daycare use at this location, but believes that the intensity of the proposed use is too high for this location.

Relying on the fact that parking along Northwest Drive is prohibited, Technical Staff reasoned that, with a maximum of 24 children, all parking could be provided on-site without a waiver. With this condition, Staff recommended approval of the special exception with the following conditions:

1. The Applicants must revise the site/landscape plan prior to the Hearing Examiner's close of record as follows:
  - a. Modify the proposed western driveway as shown on Attachment 6 to show a consistent, 10-foot wide green panel.
  - b. Include pavement markings or sign (no larger than 2 feet by 2 feet) indicating that parking space #5, as noted on Site Plan stamped September 2013, is for 10-minute parking only.
  - c. Parking space four is for staff parking only. Parking spaces one, two, three and five are for drop-offs and pick-ups only.
2. The daycare use is limited to 24 children (between two and five years old) and 3 non-resident employees, including the Director.

3. The hours of operation must be limited to 6:30 a.m. until 6:30 p.m., with the first employee arriving at 6:30 a.m., and the last employee leaving no later than 6:45 p.m., Monday through Friday. No weekend or overnight daycare is permitted.
4. The Applicants must provide parental agreements to the Hearing Examiner, indicating that the drop-off and pick-up times of all children attending the daycare will be limited to no more than 3 vehicles at any one time.
5. Outdoor play times must be staggered and may not start prior to 9:00 a.m. No more than eight children are permitted to play outdoors at any one time.
6. The Applicants must modify and seek a parking setback waiver for a maximum of 6 feet along the western driveway.

Staff later amended Condition No. 3 to add a requirement for maintenance of the property (Exhibit 59(b)):

3. The hours of operation must be limited to 6:30 a.m. until 6:30 p.m., with the first employee arriving at 6:30 a.m., and the last employee leaving no later than 6:45 p.m., Monday through Friday. No weekend or overnight daycare is permitted. General Property maintenance, which includes landscaping, may occur on weekends and during normal business hours in accordance with the Montgomery County Noise Control Ordinance.

Staff also deleted a recommendation to add a sixth space to the eastern parking area. *Id*

Petitioners agreed to adopt Staff's proposed realignment of the driveway and submitted a site plan reflecting this recommendation (Exhibit 57, below), which reduced the waiver of the setback for the western driveway to 6 feet. While agreeing to realign the driveway, Petitioners continue to seek a maximum enrollment of 30 children. The revised site plan (Exhibit 57) includes 7 on-site parking spaces, thus necessitating a waiver of 2 parking spaces from the minimum of 9 required spaces.



Before the Planning Board, the Petitioners maintained that a maximum enrollment of 30 children could be accommodated on the site based on a revised arrival/departure schedule for employees and parents. According to this schedule, no more than 5 parking spaces at one time will be in use, as shown on the following page (Exhibit 59(a)):

	Time	No. of Children	No. of Employees
a.m. arrival	6:30	4	2
	7:00	5	0
	7:30	4	0
	8:00	5	0
	8:30	4	1
	9:00	4	0
	9:30	4	1(part-time)
	10:00		
	10:30		
	11:00		
	11:30		
	NOON		
	12:30		
	1:00		
	1:30		
	2:00		
	2:30		
3:00			
p.m. departure	3:30	4	1(part-time)
	4:00	4	0
	4:30	4	1
	5:00	4	0
	5:30	4	0
	6:00	5	0
	6:30	5	2

**Schedule of Arrival/Departure Times  
for Employees and Parents  
Exhibit 59(a)**

The Planning Board recommended approval of the site plan, but disagreed with Staff that enrollment should be limited to 24 children. Exhibit 59. Based on the Petitioners’ schedule of arrival and departure times, the Planning Board found that parking for the day care center could be accommodated entirely on the subject property. The Board modified Staff’s recommended conditions as follows, adding a requirement that parents sign agreements that include an assigned

30-minute drop-off/pick-up time. The Board required the Petitioners to provide copies of these agreements to the Hearing Examiner and recommended the following modifications to the conditions included in the Technical Staff Report (Exhibit 59):

1. (No change).
2. The daycare use is limited to ~~24~~ a maximum enrollment of 30 children (between two and five years old, and three non-resident full-time employees, and one non-resident part-time employee, including the Director. The non-resident part-time employee may not arrive prior to 9:30 a.m. and must depart no later than 3:30 p.m.
3. The hours of operation must be limited to 6:30 a.m. until 6:30 p.m., with the first employee arriving at 6:30 a.m., and the last employee leaving no later than 6:45 p.m., Monday through Friday. No weekend or overnight daycare is permitted. General property maintenance, which includes landscaping, may occur on weekends and during normal business hours in accordance with the Montgomery County Noise Control Ordinance.
4. The Applicants must provide parental agreements to the Hearing Examiner, indicating ~~that~~ the specific 30-minute drop-off and pick-up times of all for each children attending the daycare. The agreements must show that no more will be limited to no more than 3 five vehicles may drop-off or pick-up at any one time.
5. Outdoor play times must be staggered and may not start prior to 9:00 a.m. No more than ~~eight~~ ten children are permitted to play outdoors at any one time.
6. (No change).

At the public hearing before the Hearing Examiner, the Petitioners submitted another revised site plan (Exhibit 61), showing six rather than five parking spaces on the eastern portion of the property. According to the Applicant, this site plan requires a waiver of only 1 parking space, which can be remedied by using an on-street space within the New Hampshire Avenue service road bordering the eastern side of the property. In accordance with §59-A-4.48 of the Zoning Ordinance, the Hearing Examiner referred this version of the site plan to Technical Staff for an opportunity to comment. The public hearing version of the special exception site plan (Exhibit 61) is shown on the next page.

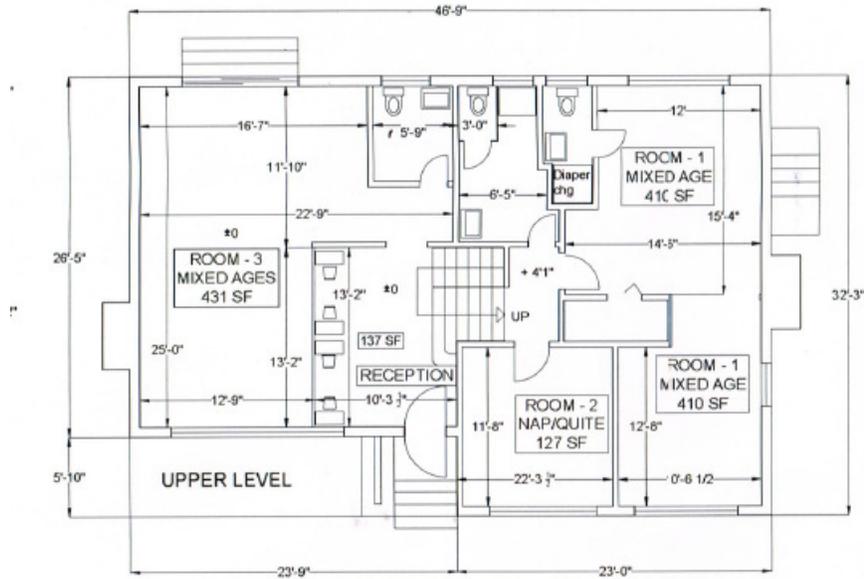


The Petitioners later withdrew the site plan presented at the public hearing from consideration (Exhibit 88), and the only site plan at issue in this case is the one reviewed by the Planning Board (Exhibit 57), shown on page 21 of this Decision and Opinion and as Attachment 1 to the Technical Staff Report.

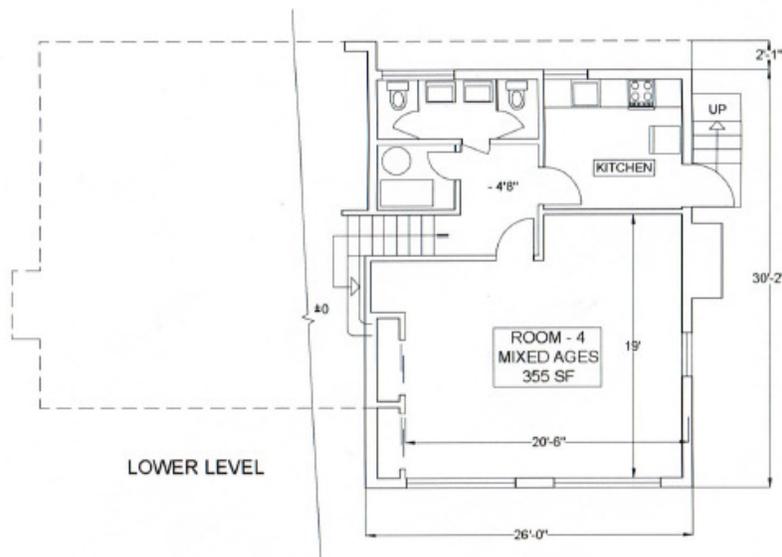
Mr. Mojes Kassa testified that he has a master's degree in architecture and one in construction management, although he is not licensed as an architect. He prepared the special exception site plan. T. 29-33. Entrance to the facility from the eastern parking area will be from a ramp leading from the parking lot to a proposed sidewalk leading to the building's front entrance. T. 63-65. The ramp will be made of gray concrete asphalt. T. 65. According to Mr. Kassa, both the existing dwelling and the eastern parking area meet all required setbacks. The play area consists of 3,011 square feet, and is fully enclosed with a privacy fence. Exhibit 47(b). According to Petitioners' Statement of Operations, the play equipment will be located behind the existing home to avoid active uses along the western property line adjoining the closest neighbors. Exhibit 47(b), p. 2.

Mr. Kassa also described the interior changes and proposed layout for the facility. Exhibit 57. Mr. Kassa described the changes to the interior of the structure, which are the same proposed under both special exception site plan proposals (Exhibits 57 and 61). A reception hall is at the main entrance to the building. Children may enter a large room, labeled Room 3, (currently the current living room, dining room and kitchen). The kitchen will be removed and replaced with a bathroom. Proceeding up some existing steps, there is a second smaller room (Room 2) and another larger room (Room 1) that contains 431 square feet. A small closet for lockers is located between these rooms. Room 2 will be used for a nap area. Another bathroom

is located in the upstairs; the existing shower in the bathroom will be removed and replaced with a diaper changing area. T. 74-78.



There will be a fourth room in the basement containing 355 square feet. The basement will also have a kitchen and bathroom. There is an entrance from the outdoors to the kitchen, but it will be restricted to employees only. T. 78. The floor plan for the lower level is shown below (Exhibit 57):



Children will range in age between 2 and 5 years old. They will be divided into three groups of up to 10 children, each of which will have one assigned teacher. Each group will use a separate level of the home.

2. Parking:

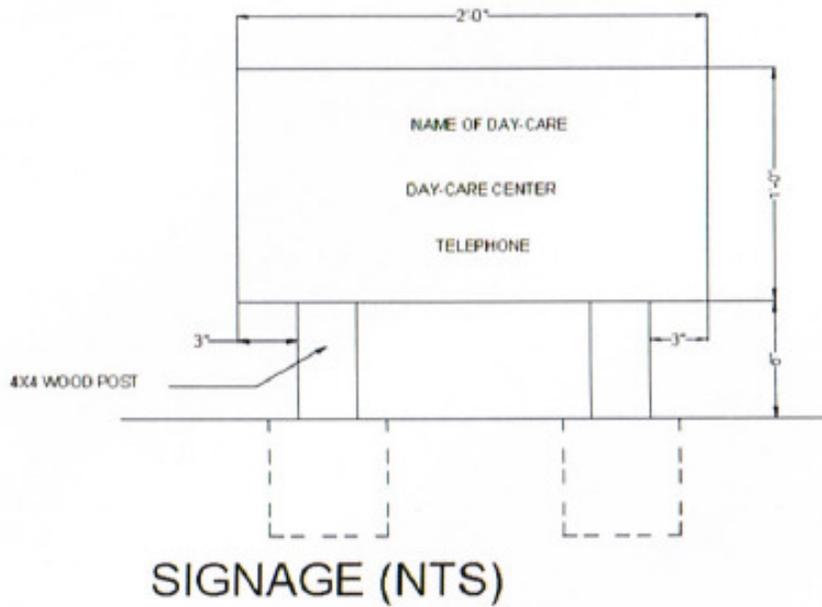
The general location and number of parking spaces for the property is described earlier in this section. Petitioners request two parking waivers – one of the minimum required setback and one of the minimum number of parking spaces. Petitioners base the request for these waivers on both the hardship stemming from a previous transfer of property and the arrival/departure schedule which, if adhered to, will require no more than 5 parking spaces at any time.

3. Landscaping, Lighting and Signage:

The Petitioners propose to landscape the western property line with Japanese holly. The holly will be 3-feet high when installed and will grow up to 6 feet. They also propose Japanese Holly spaced 5 feet apart along the front of the house. Green Giant shrubs will be planted around the eastern parking area. These will be three feet high at planting and grow to six-feet high as well. Mr. Zewdu also plans to add some deciduous sweet gum trees to provide shade for the parking area and to maintain the residential character of the property. He does not plan to make any exterior changes to the house. T. 118-120. A board-on-board fence will run along the rear yard of the western property line and surround the play area. T. 158.

Currently there are three motion sensor lights on the two southern corners of the house and a light in the front entrance, which will remain. There will be six pole lights in the eastern parking lot and three pole lights in front of the house that will have shielded fixtures to prevent glare onto neighboring properties. Each will have three 40-watt bulbs. T. 162-163.

Mr. Zewdu testified that there will be one sign measuring one foot by two feet with the name of the daycare and telephone number. It will be in the front yard nearest New Hampshire Avenue. They may have directional signs, such as “entrance” and “exit” on the parking lot. T. 197. A detail of the sign is included on Petitioners’ Site Plan/Landscape Plan/Lighting Plan (Exhibit 57), below:



**Sign Detail  
Exhibit 57**

4. Operations:

Petitioners’ proposal for conducting the child day care center is set forth in their Statement of Operations (Exhibit 47(b)), with the exception of the amended schedule of arrival/departure times for parents and employees, contained in Exhibit 59(b).

a. Staffing:

The proposed child day care center will have a total of four non-resident employees. Three of these employees will be full-time and one will be part-time. Exhibit 47(b). According to Petitioners' Statement of Operations, Ms. Desalegn will be one of the full-time teachers. The center's director will be part-time, and will meet all State licensing requirements. Exhibit 47(b). The Petitioners testified that the scheduled arrival/departure times for the employees will be enforced. The part-time employee will work between 9:30 a.m. and 3:30 p.m., leaving more spaces open for parents in the morning and evening. The director will "float" from room-to-room between 9:30 a.m. and 3:30 p.m. to give a break to staff members and administer the facility. The center will meet all State requirements. T. 147-149.

b. Hours of Operation:

The center's hours of operation hours are from 6:30 AM to 6:30 PM, Monday through Friday. Children will be dropped off picked up as set forth on the arrival/departure schedule (Exhibit 59(b)), also incorporated as a condition of approval. Petitioners will not have any child care overnight or on weekends. Exhibit 47(b).

c. Drop-off and Pick-up of Children:

Parent drop-off and pick-up will be according to the schedule described previously in this Decision and Opinion. Petitioners have submitted a blank copy of the contract to be used for child enrollment, which provides assigns a particular ½ hour pick-up and drop-off time for each parent, as recommended by the Planning Board. The contract also requires parents to park only in the eastern parking area. Exhibit 71.

d. Outdoor Activities:

Outdoor playtimes will be staggered by age group, in accordance with the following schedule (Exhibit 47(b)):

Group Number	Morning Recess		Afternoon Recess	
	Number of Children	Time	Number of Children	Time
Group 1 (Mixed age)	10	10:00-10:30	10	2:00-2:30
Group 2 (Mixed age)	10	10:30-11:00	10	2:30-3:00
Group 3 (Mixed age)	10	11:00-11:30	10	3:00-3:30

**D. Master Plan**

The subject property is located within the geographic area covered by the *1997 White Oak Master Plan* (Master Plan or Plan) and the pending *White Oak Science Gateway Master Plan* (Gateway Plan). Two highlights of the Plan's objectives, set forth in its beginning, include (1) retaining existing residential zoning to protect and reinforce the integrity of existing neighborhoods, and (2) to clearly delineate residential and non-residential areas, and encourage landscaping or other physical separation between residential neighborhoods and non-residential uses. *Plan*, p. xii. Staff advises that the Plan's purpose was to “ensure livable communities for the future by protecting and strengthening their positive attributes and encouraging development that will enhance the communities’ functions, sense of plan and identity.” Exhibit 59(c), p. 6, (quoting the *Master Plan*, p. 16).

There is no site-specific reference to the subject property in the Master Plan; however, it does contain recommendations regarding special exception uses in general. An overall objective of the Plan states (*Plan*, p. 24):

[E]xcessive concentration of special exception uses and non-residential uses along major transportation corridors should be avoided. Sites along these corridors are more vulnerable to over-concentration because they are more visible. This is especially a concern along New Hampshire Avenue, Randolph Road, and Powder Mill Road.

To achieve this objective, the Plan seeks to, “[E]valuate new requests for special exception uses and their impact on the character and nature of the residential neighborhoods in which they are proposed.” *Id.* at 24. Specifically, the Plan lists the following guidelines:

- Require new requests for special exception uses along major transportation corridors and in residential communities to be compatible with their surroundings. Front yard setback should be maintained.
- Avoid front yard parking because of its commercial appearance. Side and rear parking should be screened from view of the surrounding neighborhoods.
- Require new buildings or any modification or additions to existing buildings to be compatible with the character and scale of the adjoining neighborhood.
- Avoid placing large impervious areas in the Paint Branch watershed due to its environmental sensitivity. *Id.*

Staff points out that the Plan encourages location of child daycare facilities at appropriate locations. Staff concluded, “[T]his Property is situated near several employment areas that include the Food and Drug Administration and the White Oak Shopping Center, and is served by Metrobus and Ride-On bus routes and can therefore be considered as a good location for daycare.” Exhibit 59(c), p. 7.

Because the subject property is a corner lot, it has two front yards, one fronting Northwest Drive and one fronting New Hampshire Avenue. Exhibit 59(c), p. 7. Staff analyzed both locations regarding the impact of a new parking area on the existing community. It concluded that the front yard along New Hampshire Avenue was more commercial and non-residential in nature, while the Northwest Drive frontage consisted of “well-maintained one-

family residential dwellings.” *Id.* Staff felt that the frontage along New Hampshire Avenue would be acceptable, provided the area was well setback and screened. *Id.*

Nor did Staff believe that approval of this use would result in an overconcentration of special exception uses along New Hampshire Avenue for the following reasons:

- (1) the Master Plan refers to a larger area, not the staff defined neighborhood; and
- (2) one cannot compare the commercial center special exceptions (e.g., the gas station and drive through) located in commercial zones as they do not have the same character issues as the proposed use in a residential setting. *Id.*

Staff reasoned that the proposed use remained residential in character because there were no changes to the exterior of the existing home and the house would “continue to appear as a single-family residence with play structures for children,” which are contained within a six-foot high board fence. *Id.* Staff advised that the view from New Hampshire Avenue would include only the driveway leading into the site and evergreens along the rest of the lot frontage. The evergreens will prevent lights from cars from spilling onto adjacent properties. Staff also cited to the fact that the property directly across Northwest Drive “is an existing non-residential special exception and will not be directly impacted by the headlights.” *Id.*

Residents of the surrounding area who appeared at the public hearing disagreed with position of the Staff and the Planning Board. Mr. Michael Berry, the adjoining neighbor to the west, testified that the proposed use is inconsistent with the master plan because of the concentration of special exceptions and other commercial and non-residential uses along New Hampshire Avenue. He cited to the properties between the subject property and the shopping center, the commercial appearance of the parking at 924 Northwest Drive, and the two additional special exceptions south of the property on either side of McCeney Road. According to Mr. Berry, the property just outside the neighborhood boundary (10928 New Hampshire Avenue) has paved parking in the front yard. Exhibit 90. The result has been that there are many

commercial uses in a row along New Hampshire Avenue. In his opinion, this results in an excessive concentration of commercial uses. T. 219-224.

He disagrees with Staff's opinion that the proposed use complies with the master plan because the master plan specifically cautions against a proliferation of commercial uses along New Hampshire Avenue. He believes that Staff's justification (i.e., that this prohibition applies to a larger area rather than the defined neighborhood) is incorrect because this is exactly the type of commercial use along New Hampshire Avenue that the master plan did not want to see. He does not think that his neighborhood is as nice as it was when he moved there in 1973 because commercial development has damaged it. T. 222-223.

Ms. Eleanor Lauderdale also testified that the use would increase the commercial nature of the area because no one would actually live in the building. She testified that she and her late husband purchased their home in 1983. She agreed with Mr. Berry that the area has since become more and more commercial. She would like to stay in the community, but doesn't feel that she can if commercial uses are begun by people who don't live there. She believes that cars are being repaired at another house at 801 Northwest Drive and feels that no one has been able to address that problem. T. 251-252.

She objects to the proposed use because it is purely commercial—no one will reside at the facility. She does not have as many problems with the doctor's office to the south of the subject property because someone lives there and the property is well-maintained. She believes that the purely commercial nature of the use will bring more purely commercial uses into the neighborhood. T. 255-256. In her opinion, the community should remain residential or more commercialization will come. T. 257.

Ms. Wilma Johnson, a neighbor confronting the subject property, also expressed concern regarding the commercial nature of the area. She testified that there has been too much commercial growth in the immediate area. The property adjacent to hers is a doctor's office (11016 New Hampshire Avenue) that has turned its backyard into parking. There are also two homes on her street that provide day care. T. 181-186.

The Hearing Examiner agrees with Mr. Berry that the proposed use contravenes the objective of the Master Plan to avoid an overconcentration of special exceptions and non-residential uses along major thoroughfares like New Hampshire Avenue and to clearly delineate between residential and commercial areas.

Staff and the Planning Board focused only on special exception uses when determining whether the use complied with this objective of the Plan—there is no mention in either recommendation regarding the Pepco substation or the doctor's office at 11016 New Hampshire Avenue. The Master Plan's language, however, is not so limited—its objective is to avoid excessive concentrations of “special exception uses and non-residential uses” along major thoroughfares like New Hampshire Avenue. *Master Plan*, at 24. When the Pepco substation and the doctor's office at 11016 New Hampshire Avenue are added to the mix, there is a virtually unbroken line of non-residential uses along the New Hampshire Avenue service road, stretching from the shopping center to south of McCeney Avenue. Even the single property within that stretch that is no longer used for a commercial purpose, 924 Northwest Drive, contains parking that is not residential in character. Rather than clearly distinguishing between commercial and residential areas, delineation between commercial and residential areas area has become blurred.

Nor does the Hearing Examiner find a basis for Staff's assumption that the Master Plan language applies to a larger area than the defined neighborhood (even though the testimony in this case alone indicates that special exception uses extend beyond the defined neighborhood). Certainly, there is no language in the Plan to support this. Approval of this special exception would create an unbroken line of commercial or non-residential uses (with the exception of 924 Northwest Drive, which retains a commercial appearance) for the two blocks south of the shopping center. Even if some have more residential characteristics than others, the Hearing Examiner does not find that the proposed use at this location will achieve the Plan's goal to clearly delineate between residential and commercial areas.

In addition, the Plan recommends that extra care be taken to avoid front yard parking and suggests that it be located in the side or rear yards to screen this commercial characteristic from view. Here, because the property is a corner lot, it has two front yards—one along Northwest Drive and one along the New Hampshire Avenue service road. While Staff recommended locating the parking in the front yard facing New Hampshire Avenue because it would have less impact on the neighborhood, doing so only adds to the line of existing parking lots that are on New Hampshire Avenue and contributes to the commercial character of this area. While Staff found the screening sufficient to *reduce* the commercial appearance, it will still add to the non-residential activity within the immediate neighborhood and the driveway will be visible from the road. The Hearing Examiner finds that this is exactly the result that the Master Plan sought to avoid.

While Staff correctly points out that the Plan encourages the provision of day care facilities within the planning area, the Hearing Examiner notes that the Plan qualifies this by recommending day care facilities at "appropriate locations." Because of the existing

concentration of non-residential and commercial uses at this location, and because of the non-inherent aspects of this particular property (discussed later), the Hearing Examiner finds that approval of a daycare of this intensity at this location would contravene major goals of the Plan, and concludes that this is not an appropriate location for the proposed facility.

## **E. Public Facilities and Site Circulation**

### **1. Transportation Review**

Technical Staff reports that the Petitioners need not submit a traffic study because day care facilities with fewer than six employees generate fewer than 30 peak-hour trips. Exhibit 59(c), p. 8. Thus, Local Area Transportation Review (LATR) is satisfied. For Transportation Policy Area Review (TPAR), Staff advises that the Fairland/White Oak Policy Area is inadequate under the roadway test, but adequate under the transit test. *Id.* at 9. Despite this, the Petitioners will not need to pay a Transportation Impact Tax to satisfy the requirements of TPAR because they are not increasing the size of the existing structure.

### **2. Site Circulation**

Initially, Technical Staff found that site circulation and access were safe and adequate if parking space one, two, three and five were used for parent drop-off and pick-up only and space four was reserved for staff only. Exhibit 59(c), p. 2. Staff recommended against the addition of a sixth parking space in the eastern lot because of the size of parking spaces required by the ADA and because it would adversely impact on circulation within the lot. Upon further review of ADA requirements, Staff suggested the following (Exhibit 81):

Staff recommends that the parking configuration be similar to Attachment 1 of the staff report, and allow for parking space #4 to become the van-accessible space. Parking space 5 (as shown in Attachment 1 to the staff report) should remain a parallel space, and be only used for drop-off and pick-up, since if it were to be used by staff would limit the ability for space #4 to function. If this option is not preferred by the hearing examiner, staff can support five parking spaces be

perpendicular to the entrance, with space #5 being van-accessible, and no restrictions on the remaining 4 spaces for drop-off or pick-up, so long as the parking spaces meet the minimum dimensions under §59-E-2.2.

Several neighbors raised concerns about traffic related to the proposed use. Ms. Johnson, Mrs. Jo Ann Berry, and Ms. Lauderdale testified that Northwest Drive is a very busy road because people use it as a cut-through between Lockwood Drive and New Hampshire Avenue and the FDA. T. 186, 248, 252. Ms. Johnson testified that she has lived there since 1982, and there have never been any signs prohibiting parking along Northwest Drive. In her opinion, on-street parking along Northwest Drive has increased since the FDA located immediately across the street. T. 185. Mr. and Mrs. Berry testified that speed bumps were installed approximately 10-15 years ago, but have done little to reduce traffic speeds. T. 249-250. They are concerned that parents will park along Northwest Drive to pick-up or drop-off their children, thus adding to the congestion.

Representatives of MCDOT confirmed that there are no signs restricting parking along Northwest Drive, although a traffic order was issued in 1973 prohibiting parking. MCDOT opposed locating the access and parking along Northwest Drive because, "[I]f drop-off's do occur and they create traffic safety and/or operational problems at the intersection," existing restrictions would have to be upgraded. Exhibit 54. Were this to happen, MCDOT asserted that this "would have a negative impact on the day care center and other residents in the neighborhood." *Id.* In response, Staff concluded that maximum enrollment should be 24 children. The record does not indicate that MCDOT ever reviewed this application after the Planning Board's recommendation to increase the enrollment to 30 children.

### **F. Community Reaction**

The application was opposed by two adjoining neighbors, Mr. and Mrs. Berry, Ms. Johnson, who lives immediately to the north and west across Northwest Drive, and Ms. Lauderdale, who lives along Northwest Drive slightly further from the property. Their concerns are set forth specifically in the different sections of this Opinion and Decision, but will briefly be summarized here. The increased commercialization of the neighborhood is a primary concern voiced by all who testified. Ms. Lauderdale in particular feels that a commercial use in which no one actually resides at the property is a significant intensification of the commercial nature of the area. Several others stated that traffic had greatly increased along Northwest Drive, and expressed concern regarding on-street parking by Staff and parents. The Hearing Examiner received several letters from neighborhood residents raising concerns about the commercialization of the neighborhood, on-street parking by staff and parents, by dangerous congested conditions, and about property maintenance. *See, e.g.*, Exhibits 51, 56.

### **III. SUMMARY OF TESTIMONY**

Testimony presented at the public hearing is set forth herein as relevant. A complete summary of testimony is contained in the appendix attached hereto and incorporated herein.

### **IV. FINDINGS AND CONCLUSIONS**

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning ordinance establishes both general and specific standards for special exceptions, and the Petitioner has the burden of proof to show that the proposed use

satisfies all applicable general and specific standards. Technical Staff and the Planning Board concluded that Petitioners will have satisfied all the requirements to obtain the special exception, with conditions imposed, although they disagreed on the maximum enrollment that could be allowed without significant impact on the community. On reaching their recommendation, however, they did not consider any non-residential uses other than special exceptions.

Weighing all the testimony and evidence of record under a “preponderance of the evidence” standard (Zoning Ordinance §59-G-1.21(a)), the Hearing Examiner concludes that the petition fails to substantially comply with the Master Plan, the site has non-inherent characteristics that warrant denial of the petition, and that Petitioners have failed to prove that on-site parking and site circulation is adequate for the use proposed use.

#### **A. Standard for Evaluation**

The standard for evaluation prescribed in Code § 59-G-1.2.1 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.2.1. This provision specifies, “Inherent adverse effects alone are not a sufficient basis for denial of a special exception.” Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant

case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a “child day care center” use. Characteristics that are consistent with the “necessarily associated” characteristics of child day care center uses will be considered inherent adverse effects, while those characteristics of the proposed use that are not necessarily associated with child day care center uses, or that are created by unusual site conditions, will be considered non-inherent effects. The inherent and non-inherent effects thus identified must then 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.

Technical Staff identified the following inherent characteristics of a child day care center (Exhibit 50, p. 7):

- (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.

To this list, the Hearing Examiner would add the need for sufficient parking spaces on-site, in accordance with Zoning Ordinance §59-E-3.7, and screening of the parking area.

Technical Staff identified several non-inherent physical and operational aspects of the proposed use. These included the property’s location on a corner lot close to a signalized intersection, parking restrictions along both frontages, the location of the home on the property, and the intensity of the use proposed. Staff noted that, while there are many corner lots in the neighborhood, access to the property is particularly constrained due to the location of the home on the property, on-street parking restrictions, and lack of sufficient queuing distance from the

signalized intersection along Northwest Drive. The parking restrictions and site distance requirements on Northwest Drive restrict the number of potential access locations available that will not disrupt traffic circulation between eastbound vehicles queuing on Northwest Drive and westbound vehicles trying to access the property. Staff also concluded that some level of daycare is appropriate at the property because the Master Plan encourages these facilities. However, Staff concluded that the requested enrollment of up to 30 children was too intense given the site constraints. Exhibit 59(c), p. 11. Staff also found that the use was too intense as originally proposed because the western driveway was too close to the property line. *Id.*

Petitioners rectified Staff's concern regarding the distance between western driveway and property line, but maintain that a maximum enrollment of 30 children is compatible with the surrounding area, even though it requires a waiver of the parking requirements. To support their position, they submitted a staggered schedule of arrival and departure times for parents and staff. If parents and staff adhere to this schedule, there should be no more than five vehicles on the property at any one time. To further bolster their position, they have submitted a proposed contract that requires each parent to specify a one-half hour window for arrival and pick up. They have also agreed to prohibit parking along Northwest Drive. T. 138.

Due to the non-inherent site constraints, Technical Staff found an enrollment of 30 children too intense for the property. The Hearing Examiner agrees, but finds that a maximum enrollment of 24 children is too intense for the property for several reasons. The Hearing Examiner agrees with Technical Staff that the location of the lot, combined with on-street parking restrictions, proximity to a signalized intersection and the location of the home are non-inherent site conditions. To these non-inherent conditions, the Hearing Examiner adds the lack of signs prohibiting parking on Northwest Drive.

The site constraints noted by Technical Staff require a waiver of the setback driveway setback along the western property line closest to the nearest neighbor. While this is more than the existing setback, the nature of the use and activity surrounding the site will intensify, thus increasing the commercial character of the property in an area that already has a number of commercial and non-residential uses. The intensification of the commercial nature of the area is further reflected in the fact that parking would be located in the front yard along New Hampshire Avenue, thus adding to the string of parking lots already lining that road within the defined neighborhood.

All of the non-inherent site constraints, combined with the requested waiver of the minimum number of parking spaces, also lead the Planning Board and Technical Staff to recommend several operational restrictions on the use. These include (1) designation of certain parking spaces for specific users (i.e., employee parking or parent pick-up and drop-off), (2) adherence to a specific arrival/departure schedule for employees and parents, and (3) assignment of particular one-half hour arrival/departure times in the contract with parents. The Hearing Examiner hesitates to rely on these operational restrictions in this case because of the consequences of failure to comply. Both MCDOT and Technical Staff found that no parking or access should occur on Northwest Drive because of the potential interference with the operation of the signalized intersection. Technical Staff assumed that, because parking is prohibited, it will not occur. Yet, the evidence is uncontroverted that there are no street signs announcing that parking is prohibited along Northwest Drive. The Hearing Examiner finds credible neighbors' testimony that on-street parking does occur along the street because no signs are posted. This special exception approval may directly control the actions of the Petitioners, but may not directly control the arrival/departure times of parents and it is reasonable to expect that there will

be some level of non-compliance with these conditions, even if unintentional on the part of the Petitioners. While conditions of approval of day care facilities typically require that arrival and departure times be staggered, these cases are not typically combined with (1) a deficit of required spaces, (2) the potential for unsafe conditions if parking on Northwest Drive does occur, (3) a lack of street signs clearly informing drivers that on-street parking is prohibited, and (4) the need to assign particular parking spaces for particular persons in order for on-site circulation to be adequate. The combination of these factors, combined with testimony that traffic in the neighborhood has significantly increased because the FDA has located across the street, justifies denial of the petition because of the non-inherent adverse site conditions.

### **B. General Standards**

The general standards for a special exception are found in Code § 59-G-1.21(a). The record in this case supports a finding that the general standards will be satisfied, as outlined below.

#### **Sec. 59-G-1.21. General conditions.**

**§5-G-1.21(a)** *-A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

*(1) Is a permissible special exception in the zone.*

Conclusion: A group day care home use is a permissible special exception in the R-90 Zone, pursuant to Code § 59-C-1.31.

(2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

Conclusion: Staff advises that the proposed use would comply with the standards and requirements of §59-G-2, except for the western driveway setback. The Zoning Ordinance (Section 59-E-2.83(b)) requires a side yard setback of twice the side yard setback in the R-90 Zone. As the development standards for the R-90 Zone provide for a minimum side yard setback of 8 feet, the required setback for the western driveway is 16 feet. The site plan proposed provides a 10-foot setback from the property line. Section 59-E-4.5 of the Zoning Ordinance permits a waiver of the minimum setback required:

When approving an application, the Director, Planning Board, Board of Appeals, or Hearing Examiner may waive any requirement in this Article not necessary to accomplish the objectives in Section 59-E-4.2, and in conjunction with reductions may adopt reasonable requirements above the minimum standards. Any request for a waiver under this Section must be referred to all adjoining property owners and affected citizen associations for comment before a decision on the requested waiver.

Section 59-E-4.2 sets forth the purposes of the regulations governing parking facilities for special exceptions. These are:

(a) The protection of the health, safety and welfare of those who use any adjoining land or public road that abuts a parking facility. Such protection shall include, but shall not be limited to, the reasonable control of noise, glare or reflection from automobiles, automobile lights, parking lot lighting and automobile fumes by use of perimeter landscaping, planting, walls, fences or other natural features or improvements.

(b) The safety of pedestrians and motorists within a parking facility.

(c) The optimum safe circulation of traffic within the parking facility and the proper location of entrances and exits to public roads so as to reduce or prevent traffic congestion.

(d) The provision of appropriate lighting, if the parking is to be used after dark.

The existing driveway has no setback and, in fact, crosses onto the neighbor's property.

As a result, the proposed site plan increases the existing setback. Technical Staff found that a

10-foot setback better maintained a residential appearance for the day care facility than the initial setbacks proposed by the Petitioner, which ranged between one and eight feet. Exhibit 59(c).

The Hearing Examiner agrees with Technical Staff that the increased setback shown on the site plan (Exhibit 57) better maintains the residential appearance of the facility and minimizes potential traffic problems were the day care facility constructed. Nevertheless, she determines that the intensity of the proposed facility, the addition of the eastern parking area fronting New Hampshire Avenue, and the commercial aspects of the surrounding uses will, combined with the failure to provide the full setback, increase the non-residential character of the community.

- (3) *Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.*

Conclusion: The subject site is within the *1997 White Oak Master Plan*. For the reasons already set forth in Part II.D of this Decision and Opinion, the Hearing Examiner finds that a day care facility of the intensity proposed at this location does not substantially comply with the Master Plan.

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*

Conclusion: Staff found that the daycare facility will be in harmony with the general character of the neighborhood because the existing dwelling will not have external modifications. The Hearing Examiner disagrees and finds that the intensity of the use will adversely impact the

primarily residential character of the surrounding area in terms of commercial activity and the number of non-residential uses. She further finds the Petitioners have failed to prove that on-site circulation will be adequate to accommodate the proposed use, as discussed later in this Decision and Opinion. For these reasons, the Hearing Examiner finds that the proposed use is not in harmony with the character of the neighborhood.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: For the reasons already set forth, the Hearing Examiner concludes that the proposed use will be detrimental to the peaceful enjoyment, economic value or development of surrounding properties at the site.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Nothing in this record indicates that the proposed use will cause objectionable vibrations, fumes, odors and dust. There is no allegation that the proposed use will result in objectionable noise, although Petitioners did agree to perform a noise study after the use was implemented. As the Hearing Examiner recommends denial of this application for other reasons, she does not impose this condition. The Hearing Examiner therefore finds, as did Technical Staff, that there will not be objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the site as a result of the special exception.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: Technical Staff identified six special exceptions within the surrounding area and concluded that this special exception would not result in an excessive concentration of these uses. Staff noted that two of the special exceptions were located in the White Oak commercial area to the north. Another special exception is for a parking facility on the residentially-zoned portion of a use within the shopping center.

Further research requested by the Hearing Examiner establishes that there are five operating special exceptions within the neighborhood. The special exception for a doctor's office at 924 Northwest Drive, confronting the subject property, has been abandoned. Neighbors argue that other non-residential uses, such as the Pepco substation and the doctor's office at 11016 New Hampshire Avenue, have altered the predominantly residential nature of the area. As these are not special exceptions, they may not be considered under this standard, but may be considered under whether the application substantially conforms to the Master Plan. For these reasons, the Hearing Examiner finds that this standard has been met.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: For the reasons set forth herein, the Hearing Examiner have failed to prove that the proposed use at this location will not adversely affect the surrounding area.

- (9) *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.*

Conclusion: Technical Staff advises that these facilities are adequate to serve the proposed use. Exhibit 59(c), p. 14. Having no evidence to the contrary, the Hearing Examiner so finds.

- (A) *If the special exception use requires approval of a preliminary plan of subdivision, the Planning Board must determine the adequacy of public*

*facilities in its subdivision review. In that case, approval of a preliminary plan of subdivision must be a condition of granting the special exception.*

(B) *If the special exception:*

- (i) does not require approval of a new preliminary plan of subdivision; and*
- (ii) the determination of adequate public facilities for the site is not currently valid for an impact that is the same as or greater than the special exception's impact;*  
*then the Board of Appeals or the Hearing Examiner must determine the adequacy of public facilities when it considers the special exception application. The Board of Appeals or the Hearing Examiner must consider whether the available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the application was submitted.*

Conclusion: The special exception sought in this case would not require approval of a preliminary plan of subdivision and there is no currently valid determination of the adequacy of public facilities for the site, taking into account the impact of the proposed special exception. Therefore, the Hearing Examiner must consider whether the available public facilities and services will be adequate to serve the proposed development under the applicable Growth Policy standards. These standards include Local Area Transportation Review (LATR) and Transportation Policy Area Review (TPAR). Technical Staff concluded that LATR is satisfied without a traffic study because the facility will generate fewer than 30 trips. In addition, there are no TPAR payments required because no building additions are proposed. Exhibit 59(c). Having no evidence contradicting this, the Hearing Examiner agrees with their conclusions and so finds.

(C) *With regard to public roads, the Board or the Hearing Examiner must further find that the proposed development will not reduce the safety of vehicular or pedestrian traffic.*

Conclusion: Technical Staff found that the use as proposed use will not reduce the safety of vehicular or pedestrian traffic with the conditions recommended. As previously stated, the Hearing Examiner finds that the potential for harm created by the non-inherent site conditions cannot be adequately addressed by the recommended conditions of approval in this case. In

addition, the Hearing Examiner finds that the Petitioners have failed to prove that there is adequate on-site circulation or that there is adequate provision for parent drop-off and pick-up, as described in the next section.

### C. Specific Standards

The specific standards for Child Day Care Facilities are found in Code § 59-G-2.13.1. The record in this case provides adequate evidence that the specific standards would be satisfied, as outlined below.

#### **Sec. 59-G-2.13.1. Child day care facility.**

- (a) *The Hearing Examiner may approve a child day care facility for a maximum of 30 children if:*
  - (1) *a plan is submitted showing the location of all buildings and structures, parking spaces, driveways, loading and unloading areas, play areas, and other uses on the site;*

Conclusion: The submitted Site Plan/Landscape Plan/Lighting Plan (Exhibit 57) satisfies this requirement.

- (2) *parking is provided in accordance with the parking regulations of article 59-E. The number of parking spaces may be reduced by the Hearing Examiner if the applicant demonstrates that the full number of spaces required in section 59-E-3.7 is not necessary because:*
  - (A) *existing parking spaces are available on adjacent property or on the street abutting the site that will satisfy the number of spaces required; or*
  - (B) *a reduced number of spaces would be sufficient to accommodate the proposed use without adversely affecting the surrounding area or creating safety problems;*

Conclusion: The Hearing Examiner finds that Petitioners have failed to meet their burden of persuasion that the reduced number of spaces would be sufficient to accommodate the use without adversely affecting the area. As already described, the Zoning Ordinance requires a

minimum of 9 parking spaces for enrollment of up to 30 children. As the proposed site plan includes only 7 parking spaces, the Petitioners have requested a waiver of two of the required number of spaces, based on the staggered arrival and departure times of employees and parents, which if adhered to, requires only a total of five on-site spaces at any one time. In addition, Petitioners' cite to the fact that there is one on-street space along the New Hampshire Avenue service road frontage that may be used for parent drop-off and pick-up, thus leaving a practical shortfall of only 1 space. The Planning Board found the waiver appropriate based on the staggered arrival and departure schedule and if certain of the parking spaces are used for designated purposes (i.e., parent pick-up and drop-off only, employee parking only). The Hearing Examiner disagrees with this analysis.

Technical Staff's finding that site circulation would be adequate was based on the requirement that space #4 be reserved for employees of the facility; when queried whether the site plan complied with the ADA, Technical Staff confirmed that the Petitioners would have to provide one ADA accessible space. Staff recommended that the accessible space should be space #4. If the latter is true, then that space must be open to both employees and parents and may not be restricted to employees only, thus negating the purpose of Staff's recommended condition in the original Staff Report.

Staff also offers another alternative parking layout that is not shown on any plan. This would have five parking spaces perpendicular to the entrance, with space #5 being van-accessible, and no restrictions on the remaining 4 spaces for drop-off or pick-up, "so long as the parking spaces meet the minimum dimensions under §59-E-2.2." Exhibit 81. The teachings of *Concerned Citizens v. Constellation-Potomac*, 122 Md. App. 700, 762 (1998), suggest that imposing a condition mandating that layout would be inappropriate.

In *Concerned Citizens*, the Maryland Court of Special Appeals took the Board of Appeals to task for approving a special exception even though the Board did not appear to be satisfied with the landscaping plan, and had imposed a condition allowing a revised plan to be filed following discussions with neighbors and approvals of other agencies. The Court stated:

If the Board concluded that Constellation's evolved landscaping plan did not satisfy the minimum requirements of the Zoning Ordinance for approval of a special exception, the Board either should have denied the petition, or, pursuant to section 59-A-4.24, requested Constellation to revise its petition before closing the record.

The Petitioners in this case did not offer to revise their petition to reflect Staff's suggested alternative, nor is it clear from this record that such an alternative is viable given that Staff did not know whether the alternative alignment would be possible and still have the parking spaces meet the standards of the County Code.

In addition, given the safety issues surrounding site access, she is not persuaded that the operational restrictions recommended adequately protect against potential severity of the harm because they are not completely capable of control by the Petitioners.

(3) *an adequate area for the discharge and pick up of children is provided;*

Conclusion: For the reasons set forth above, the Hearing Examiner finds that the Petitioners have failed to prove that there is adequate area for the discharge and pick-up provided.

(4) *the petitioner submits an affidavit that the petitioner will:*

- (A) *comply with all applicable State and County requirements;*
- (B) *correct any deficiencies found in any government inspection; and*
- (C) *be bound by the affidavit as condition of approval for this special exception; and*

Conclusion: The required affidavit has been submitted for each of the Petitioners (Exhibits 15, 72, 73).

- (5) *the use is compatible with surrounding uses and will not result in a nuisance because of traffic, parking, noise or type of physical activity. The hearing examiner may require landscaping and screening and the submission of a plan showing the location, height, caliper, species, and other characteristics, in order to provide a physical and aesthetic barrier to protect surroundings properties from any adverse impacts resulting from the use.*

Conclusion: For the reasons already set forth, the Hearing Examiner finds that the day care facility, at the intensity proposed here, is incompatible with the surrounding area.

(b) A child day care facility for 31 or more children may be approved by the Board of Appeals subject to the regulations in subsection (a) above, and the following additional requirements: . . .

Conclusion: Not applicable.

- (c) *The requirements of section 59-G-2.13.1 do not apply to a child day care facility operated by a nonprofit organization and located in: . . .*

Conclusion: Not applicable.

#### **D. Additional Applicable Standards**

##### ***59-G § 1.23. General development standards***

- (a) ***Development Standards.*** *Special exceptions are subject to the development standards of the applicable zone where the special exception is located, except when the standard is specified in Section G-1.23 or in Section G-2.*

Conclusion: The subject property is located in the R-90 Zone, which permits the proposed use by special exception. Technical Staff found that the proposed use conforms to the development standards of the R-90 Zone, except for the driveway setback along the western property line (discussed below). A comparison of the development standards required and provided is

included in Table 2 of the Staff Report (Exhibit 59(c), p. 12), shown below.<sup>7</sup>

**Table 2: Applicable Development Standards – R-90 Zone**

Development Standards	Required	Provided
Maximum Building Height:	3 stories or 40 feet if approved by the Planning Board	<40 ft.
Minimum Lot Area	9,000 sq. ft.	12,445 sq. ft.
Minimum Width at Proposed Street Line:	25 ft.	± 80 ft.
Minimum Street Setback <sup>2</sup> :	15 ft.	±26 ft.
Minimum Side Yard Setback:	8 ft. 25 ft. (sum of both)	±27 ft. ±27 ft.
Minimum Rear Yard Setback:	25 ft.	±25 ft.
Parking Facility Side Yard Setback for Special Exceptions in a Residential Zone (§59-E-2.83)	16	±1 ft. (bottom of driveway) ±8 ft. (top of driveway) <sup>3</sup>
Parking Requirement (§59-E-3.7)	1 space/staff; 1 space/6 students (4 + 5 = 9)	9

- (b) **Parking requirements.** *Special exceptions are subject to all relevant requirements of Article 59-E.*

Conclusion: The parking standards are addressed in the preceding section of this Decision and Opinion.

- (c) **Minimum frontage.** *In the following special exceptions the Board may waive the requirement for a minimum frontage at the street line if the Board finds that the facilities for ingress and egress of vehicular traffic are adequate to meet the requirements of section 59-G-1.21:*
- (1) Rifle, pistol and skeet-shooting range, outdoor.
  - (2) Sand, gravel or clay pits, rock or stone quarries.
  - (3) Sawmill.

<sup>7</sup> This table was prepared before Exhibit 57 was submitted, increasing the western side yard setback to 10 feet.

- (4) *Cemetery, animal.*
- (5) *Public utility buildings and public utility structures, including radio and T.V. broadcasting stations and telecommunication facilities.*
- (6) *Riding stables.*
- (7) *Heliport and helistop.*

Conclusion: This special exception is not included in the above list.

- (d) ***Forest conservation.*** *If a special exception is subject to Chapter 22A, the Board must consider the preliminary forest conservation plan required by that Chapter when approving the special exception application and must not approve a special exception that conflicts with the preliminary forest conservation plan.*

Conclusion: Technical Staff determined that this project is exempt from the forest conservation regulations and confirmation of this is attached to the Technical Staff Report. Exhibit 59(c), Attachment 3.

- (e) ***Water quality plan.*** *If a special exception, approved by the Board, is inconsistent with an approved preliminary water quality plan, the applicant, before engaging in any land disturbance activities, must submit and secure approval of a revised water quality plan that the Planning Board and department find is consistent with the approved special exception. Any revised water quality plan must be filed as part of an application for the next development authorization review to be considered by the Planning Board, unless the Planning Department and the department find that the required revisions can be evaluated as part of the final water quality plan review.*

Conclusion: Staff advises that the proposed use is in compliance with all environmental guidelines. Exhibit 59(c), p. 9

- (f) ***Signs.*** *The display of a sign must comply with Article 59-F.*

Conclusion: Petitioners propose a sign measuring one foot by three feet, a representative example of which is shown on the site plan. Exhibit 57. This meets the requirements for signs in residential zones; however, the Hearing Examiner finds other aspects of the use are not residential in character.

- (g) ***Building compatibility in residential zones.*** *Any structure that is constructed, reconstructed or altered under a special exception in a residential zone must be well*

*related to the surrounding area in its siting, landscaping, scale, bulk, height, materials, and textures, and must have a residential appearance where appropriate. Large building elevations must be divided into distinct planes by wall offsets or architectural articulation to achieve compatible scale and massing.*

Conclusion: There will be no external building modifications, so the building itself will maintain its residential character, although the Hearing Examiner finds that other aspects of the use are not compatible with the surrounding area.

(h) ***Lighting in residential zones.*** *All outdoor lighting must be located, shielded, landscaped, or otherwise buffered so that no direct light intrudes into an adjacent residential property. The following lighting standards must be met unless the Board requires different standards for a recreational facility or to improve public safety:*

(1) *Luminaires must incorporate a glare and spill light control device to minimize glare and light trespass.*

(2) *Lighting levels along the side and rear lot lines must not exceed 0.1 foot candles.*

Conclusion: In addition to the existing lighting, the Petitioners propose adding eight light poles, measuring 6.5 feet from the base to the bottom of the lamp. The light fixture will emit up to 180 watts per light. The fixtures have full cut-off shields to prevent spilling light onto adjacent properties. The Hearing Examiner notes that the pole lights will be located primarily in the eastern parking area and away from neighboring homes. Staff concluded that the lantern-style fixtures are typical in residential developments, and except for motion sensor lights, no lights will be lit after the daycare closes. Based on this evidence, the Hearing Examiner finds that this standard has been met.

Based on the testimony and evidence of record, I conclude that the child day care center use proposed by Petitioners, does not substantially comply with the Master Plan, will be incompatible with the residential character of the neighborhood, and that Petitioners have failed to prove that parking is adequate to serve the site.

#### IV. DECISION

Based on the foregoing findings and conclusions, Petition No. SE 13-02 for a special exception in the R-90 Zone to operate a child day care center for up to 30 children in an existing single-family detached home, at 921 Northwest Drive, Silver Spring, Maryland, is **DENIED**.

Dated: February 24, 2014



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Lynn A. Robeson  
Hearing Examiner

#### NOTICE OF RIGHT TO APPEAL

Any person, board, association, corporation or official aggrieved by a decision of the Hearing Examiner under this section may, within ten days after this decision is rendered, appeal the decision to the County Board of Appeals in accordance with the provisions of Section 59-G-1.12(g) of the Zoning Ordinance.

cc: Petitioners  
All parties of record  
The Planning Board  
All parties entitled to notice of filing

APPENDIX

1. Moges Kassa:

Mr. Kassa testified that he has a master's degree in architecture and one in construction management, although he is not licensed as an architect. He prepared the special exception site plan. T. 29-33. He was not offered as an expert in architecture.

He testified that the subject property is located on the western side of New Hampshire Avenue and is separated from New Hampshire by a service access road on the eastern side of the property. According to Mr. Kassa, parking is permitted along the access road for two-hour periods. No parking is permitted along Northwest Drive. T. 34-35.

Mr. Kassa described the existing dwelling on the property as a split level house similar in style to other homes in the neighborhood. No changes are proposed to the exterior of the home. T. 36. He testified that the driveway will be relocated to be closer to the existing dwelling to provide a 10-foot-wide buffer strip between the driveway and the adjoining property to the west. The buffer strip will be landscaped with Japanese Holly. T. 39. The front walkway from Northwest Drive consists of brick pavers that will remain the same. The two evergreens between the house and the driveway will be removed and replaced with Japanese Holly. Japanese Holly will also be planted under the windows on the front of the house. T. 41-42. The holly grows up to six feet when mature. T. 50.

The backyard contains a six-foot privacy fence along the southeastern portion of the property. He believes that it will provide an adequate buffer for adjoining properties. T. 50-51. The fence adjacent to the driveway, leading to the back yard, will be replaced and a locked gate to prevent exit will be installed. The Petitioner proposes to install playground equipment in the back yard. An existing brick walkway and patio from a sliding door in the rear of the house will remain. T. 45-46.

Additional parking will be located on the western side of the house adjacent to New Hampshire Avenue, Mr. Kassa testified. The Petitioner proposes to remove two mature trees to accommodate the parking; these will be replaced with eight new trees. In addition, the Petitioners propose to plant Green Giant shrubs along the perimeter of the eastern parking area. T. 47-49.

Mr. Kassa described the existing and proposed lighting. There will be a total of eight lights, some of which are existing motion detector lights. One light will be a 9-foot pole light with a backboard which will prevent glare, similar to other lights in the neighborhood. T. 57.

Mr. Kassa also described the differences between the site plan recommended by Technical Staff and the revised site plan presented at the public hearing, Exhibits 57 and 61, respectively. The only difference is the addition of one parking space in the eastern parking lot. Each parking space is 8-feet wide by 16 feet long. He did not know whether one of the spaces had to be an ADA accessible handicapped spot. A ramp leads from the parking lot to a proposed sidewalk leading to the building entrance. T. 63-65. The ramp will be made of gray concrete asphalt. T. 65.

According to Mr. Kassa, the proposed use will need a waiver of the 16-foot side yard setback required on the eastern side of the house. At the suggestion of Staff, the Petitioners will relocate the existing driveway to provide a 10-foot buffer strip. Thus, the proposed use will provide a greater setback than exists today. A portion of the existing driveway is located on the western neighbor's property. T. 66-68. The existing home meets the minimum 25-foot front setback. The eastern parking area meets the minimum 16-foot side yard setback along the New Hampshire Avenue service road as well as the minimum rear setback of 25 feet. T. 65-70.

Mr. Kassa testified that there is one parking space available on the portion of the New Hampshire Avenue property bordering the subject property. If the eight spaces shown in Exhibit 61 are provided on-site, there is a need for a waiver of only 1 of the required parking spaces. T. 72.

Mr. Kassa described the changes to the interior of the structure, which are the same proposed under both special exception site plan proposals (Exhibits 57 and 61). A reception hall is at the main entrance to the building. Children may enter a large room, labeled Room 3, which is the current living room, dining room and kitchen. The kitchen will be removed and replaced with a bathroom. Proceeding up some existing steps, there is a second smaller room (Room 2) and another larger room (Room 1) that contains 431 square feet. A small closet for lockers is located between these rooms. Room 2 will be used for a nap area. Another bathroom is located in the upstairs; the existing shower in the bathroom will be removed and replaced with a diaper changing area. T. 74-78. There will be a fourth room in the basement containing 355 square feet. The basement will also have a kitchen and bathroom. There is an entrance from the outdoors to the kitchen, but it will be restricted to employees only. T. 78.

Mr. Kassa testified that there is a need for a child care facility at this location because the FDA has located directly across New Hampshire Avenue. He also testified that, when constructed, the proposed facility will be compatible with the surrounding neighborhood. He also testified that the full number of required parking spaces is not necessary for the proposed use and a waiver of the required number of parking spaces will not adversely affect the area. T. 83-84. According to him, the full number of spaces is not necessary because parents will drop off and pick-up children by the schedule set forth by the Petitioner (Exhibit 65). T. 86. He testified that two staff members will park on the eastern side of the building. The remaining will park on the western side and will be staggered as children arrive. T. 89.

On cross-examination, Mr. Kassa testified that there will not be any bedrooms because no one will reside in the building. T. 99-102. The Petitioner will have an alarm system and security lighting. T. 104-105. He did not know whether the County had any noise standards for outdoor noise. Mr. Kassa stated that the Petitioner is not planning to make any major changes to the electrical wiring. T. 106-108.

2. Dereje Zewdu:

Mr. Zewdu testified that he and his wife would like to open a daycare for up to 30 children on the subject property because of its proximity to the Food and Drug Administration (FDA). He purchased the property in 2008 when he learned that the FDA would be locating

across New Hampshire Avenue. T. 109. Since that time, he has rented the property to a friend until September, 2013. It is now empty. He believes the source of Ms. Lauderdale's complaint about maintenance arose because the contractor he hired to do the outside maintenance did not perform very well. Despite this, in his opinion, Ms. Lauderdale's complaints are exaggerated. After September, he hired a different contractor and the exterior is now in good condition. If the day care facility is approved, he will hire a licensed contractor to maintain the lawn. T. 110-112.

According to Mr. Zewdu, while reviewing this application Technical Staff of the Montgomery County Planning Department discovered that the existing driveway was actually located on his neighbor's property. The original record plat showed the area containing the existing driveway as part of the subject property; subsequently, a small triangular piece was conveyed to the former owner of the property to the west (917 Northwest Drive). As a result, Technical Staff recommended that the driveway be moved closer to the existing dwelling on the subject property. Staff also recommended that Mr. Zewdu provide a 10-foot buffer along that edge of the property. T. 117. The revised special exception site plan provides the 10-foot buffer with an edge of Japanese Holly along that property line. T. 118. The holly will be 3-feet high when installed and will grow up to 6 feet. He also proposes Japanese Holly spaced 5 feet apart along the front of the house. Green Giant shrubs will be planted around the eastern parking area. These will be three feet high at planting and grow to six feet high as well. Mr. Zewdu also plans to add some deciduous sweet gum trees to provide shade for the parking area and to maintain the residential character of the property. He does not plan to make any exterior changes to the house. T. 118-120.

Mr. Zewdu testified that the existing dwelling faces Northwest Drive. According to him, the only access to the eastern parking area will be from the service road along New Hampshire Avenue. T. 130.

Mr. Zewdu testified that he proposes to have a maximum of 30 children between the ages of 2 and 5 years. The facility will have three full-time and one part-time employee, which meets the minimum requirements of the State of Maryland. The children will be in three rooms, with 10 children and one staff member in each room. The part-time employee will work between 9:30 a.m. and 3:30 p.m. According to Mr. Zewdu, the arrival times of employees and children will be staggered in one-half hour increments so that no more than 7 parking spaces will be required at any given time. The two parking spaces on the western side of the existing building will be utilized only by staff. Arrival times will be included in the contract with the parents; if parents do not comply, they will no longer be permitted at the facility. He presented the contract he intends to use (Exhibit 71) requiring parents to park in the eastern parking lot. In response to a question from the Hearing Examiner, he agreed to add language prohibiting parents from parking along Northwest Drive. He testified that the revised site plan shows 8 spaces with an additional on-street space along the service road. Thus, the facility is only one space short of the required minimum and will be able to accommodate the proposed use.

The part-time employee will be a director licensed by the State of Maryland. The director will "float" from room-to-room between 9:30 a.m. and 3:30 p.m. to give a break to staff members and administer the facility. One of the three full-time employees will be his wife, Ms. Desalegn, who is the co-Petitioner. The center will meet all State requirements. T. 147-149.

Mr. Zewdu plans to have children in outdoor recess in three half-hour increments in the morning between 10:00 a.m. and 11:30 a.m. and in the afternoon between 2:00 p.m. and 3:30 p.m. There will be no more than 10 children outdoors at any one time. T. 153. The playground will be in the back yard of the house and all equipment will meet State guidelines. It will be completely enclosed by a six-foot board-on-board privacy fence. Currently, an ADT security system is installed in the house and that will remain for the child care facility. T. 158. The only access to the back yard will be through the main door of the dwelling. The fence on the western side of the house will have a gate that will be locked. The only entrance that may be used by the children to access the playground is a sliding door that leads to the rear patio. There is a second side door leading from the kitchen that may be used only by employees. T. 158-159.

Mr. Zewdu described the exterior lighting proposed. There are currently three existing motion sensor lights on the two southern corners of the house and a light in the front entrance. There will be six pole lights in the eastern parking lot and three pole lights in front of the house that will have shielded fixtures to prevent glare onto neighboring properties. Each will have three 40-watt bulbs. T. 162-163.

Mr. Zewdu also described the proposed floor plans. The existing hallway will serve as a reception area. He plans to install a wall between the reception area and the hallway and then remove an interior wall to make one large room. The existing kitchen will house a new bathroom and a new kitchen will be installed in the lower level. The dwelling currently has three bedrooms. He intends to remove some interior walls to make two large rooms. Another bathroom will be installed on this level. T. 165-168.

Mr. Zewdu confirmed that there will be no residential use of the house if the special exception is granted. The child day care will operate between 6:30 a.m. and 6:30 p.m. After 6:30 p.m., the lights on both parking areas will be turned off and the only lighting will be from the motion sensor lights. T. 167.

Mr. Zewdu agreed to comply with the conditions of approval as modified by the Planning Board to the extent relevant to the revised site plan (Exhibit 61). He agreed to Condition No. 1 requiring a 10-foot wide green panel on the western side of the property, which is shown in both the site plan reviewed by the Planning Board and the revised site plan presented at the public hearing. He testified that under the revised plan (Exhibit 61), Condition No. 1(b) is no longer necessary. Condition No. 2 would have to be modified to reflect the revised number of parking spaces. Mr. Zewdu agreed to comply with the remaining conditions. T. 172-174.

On cross-examination, Mr. Zewdu testified that all parking spaces shown on the revised plan are van-accessible. T. 175-176. He testified that he attempted to retain a residential character through landscaping, location of the parking along New Hampshire Avenue rather than Northwest Drive, and not changing the exterior of dwelling.

He also described the proposed signage. He stated that there will be one sign that is one foot by two feet with the name of the daycare and telephone number. It will be on the eastern

side of the property nearest New Hampshire Avenue. They may have directional signs, such as “entrance” and “exit” on the parking lot. T. 197.

On rebuttal, Mr. Zewdu testified that DPS would have to inspect electrical wiring in the house and he would comply with anything they required. T. 271. He also agreed to perform a noise study if the Hearing Examiner retained jurisdiction and made this a condition of approval. T. 272. He also stated that he would keep the property well-maintained, including employing professional landscapers to care for the exterior. T. 273. The contractor would be instructed to pick up any outside trash.

3. Ms. Wilma Johnson:

Ms. Johnson testified that she lives across Northwest Drive to the north. According to her, there are no signs prohibiting parking on Northwest Drive. She was informed by the Montgomery County Department of Transportation (MCDOT) that if there are no signs, parking is permitted without restriction. She is concerned that parents using the child care facility will park in front of her house. She believes that there should be a sign prohibiting parking to one or two hours if the day care is approved. T. 181.

She is also concerned that there has been too much commercial growth in the immediate area. The property adjacent to hers is a doctor’s office that has turned its backyard into parking. There are also two homes on her street that provide day care.

Her final concern relates to traffic. She stated that there is a lot of traffic along Northwest Drive because it’s used as a cut-through to Lockwood Drive and the Federal Drug Administration (FDA) across New Hampshire Avenue. T. 184-186.

On cross-examination, she testified that parking for the adjacent doctor’s office exacerbates traffic on Northwest Drive because that office has access from Northwest Drive. She did not agree that having access from the service road would differentiate the proposed use from the doctor’s office. T. 189.

4. Mr. Michael Berry:

Mr. Berry lives adjacent to the subject property. He is concerned that the Petitioners do not plan to upgrade the electrical wiring. He was called to the house a couple of years ago by a previous owner to help with a blown circuit breaker. He was dismayed to see the age and condition of the electrical wiring. He did not know whether the wiring had been improved since then; if not, then upgrades will be needed.

He has lived at his property since 1973. In his opinion, the proposed use is not consistent with the master plan because it recommends against concentrating special exceptions along major transportation corridors. There is a physician to the north of the subject property along New Hampshire Avenue that has entirely paved over his front yard so that he can use it for parking. The property immediately across the Northwest Drive is now used for overflow parking for that property. Immediately south of the subject property is another doctor’s office.

Immediately south of McCeney Street, the next street to the south of Northwest Drive, is another doctor's office that has paved over his yard with parking. This has resulted in having four doctors in a row along New Hampshire Avenue, three of which have paved their front yards. In his opinion, this results in an excessive concentration of commercial uses. T. 219-224.

He disagrees with Staff's opinion that the proposed use complies with the master plan because the master plan specifically cautions against a proliferation of commercial uses along New Hampshire Avenue. He believes that Staff's justification that this prohibition applies to a larger area rather than the defined neighborhood is incorrect, because this is exactly the type of commercial use along New Hampshire Avenue that the master plan did not want to see. He does not think that his neighborhood is as nice as it was when he moved there in 1973 because commercial development has damaged it. T. 222-223.

Mr. Berry also expressed concern that the color of the sign will be too gaudy, emphasizing a commercial appearance for the property. T. 236-237. Mr. Berry expressed concern that the outdoor noise would not meet the County Code standards, particularly in the winter, based on his experience with noise studies.

5. Mrs. Jo Ann Berry:

Mrs. Berry testified that Northwest Drive serves as a shortcut between New Hampshire Avenue and Route 29 rather than Lockwood Road. She stated that speed bumps were put on Northwest Drive to try to reduce the cut-through traffic, although in her opinion, these have not worked. T. 249.

6. Mrs. Eleanor Lauderdale:

Mrs. Lauderdale lives at 901 Northwest Drive. She testified that she works for the American Federation of Government Employees and knows that every federal agency has on-site daycare. Thus, in her opinion, the location of the FDA across the street does not mean that there is a need for daycare. Even if the FDA did need daycare, however, that does not mean that her neighborhood should be destroyed. T. 251.

She testified that she and her late husband purchased their home in 1983. She agreed with Mr. Berry that the area has since become more and more commercial. She would like to stay in the community, but doesn't feel that she can if commercial uses are begun by people who don't live there. She believes that cars are being repaired at another house at 801 Northwest Drive and feels that no one has been able to address that problem. T. 251-252.

She is also working on an application to MCDOT that would stop traffic from being able to cross New Hampshire from Northwest Drive to access the FDA. T. 253. The Petitioner speaks as if all of the traffic will come to the subject property from New Hampshire Avenue, but she disagrees. Instead, she believes that a lot of people are going to take Northwest Drive to get to Lockwood or to Route 29. T. 254.

She objects to the proposed use because it is purely commercial—no one will reside at the facility. She does not have as many problems with the doctor’s office to the south of the subject property because someone lives there and the property is well-maintained. None of the commercial use faces Northwest Drive. She believes that the purely commercial nature of the use will bring more purely commercial uses into the neighborhood. T. 255-256. In her opinion, the community should remain residential or more commercialization will come. T. 257.

Her opinion that traffic has greatly increased along Northwest Drive stems from personal experience. She used to be able to turn right immediately upon reaching New Hampshire Avenue. Now, she must wait behind seven or eight cars. T. 266.