

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

**IN THE MATTER OF:**  
**TATIANA METELEVA d/b/a**  
**PLAYFUL DISCOVERIES DAY CARE**  
Applicant

Mark North  
Tatiana Meteleva  
For the Application

Harry L. Stone, Esquire  
Attorney for the Applicant

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OZAH Case No. CU 17-05

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Paraskevoula Hays  
William Kane  
Madeline Cunningham  
Roger Hays  
Leo J. Kane, Esquire<sup>1</sup>  
Opposing the Application<sup>2</sup>  
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Before: Martin L. Grossman, Hearing Examiner  
Director, Office of Zoning and Administrative Hearings

**HEARING EXAMINER'S REPORT AND DECISION**

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<sup>1</sup> Although Mr. Leo Kane is an attorney, he is not an active member of the Maryland Bar, and he is not representing any party in this case, as he made clear in his opposition letter of November 29, 2016 (Exhibit 26(a)(i), p. 9).

<sup>2</sup> Although other neighbors joined in a letter of opposition (Exhibit 31(a)), only persons who testify at the hearing or who are designated as parties of record are included in the caption.

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## **I. STATEMENT OF THE CASE**

On August 17, 2016, the Applicant, Tatiana Meteleva, filed an application seeking approval of a conditional use to operate a Group Day Care for up to 12 children in her home at 9828 Belhaven Road in Bethesda. Her joint ownership of the property with her husband, Garegin Papoian, is established by their deed to the property (Exhibit 8) and Maryland Real Property Records (Exhibit 15) showing an SDAT Tax Account Number of 07-00636215. Mr. Papoian filed a letter consenting to this application (Exhibit 9). The Applicant currently runs a Family Day Care (Playful Discoveries) for up to eight children in her home, and wishes to expand to 12 children.

The Subject Site is Lot 20, Block 4 of the Ashburton Subdivision, and it is zoned R-60, as evidenced by the official zoning map of the area (Exhibit 6). A conditional use is required for a child care facility for 9 to 12 children in the R-60 Zone (*i.e.*, a Group Day Care), pursuant to Zoning Ordinance §59-3.4.4.D (9-12 persons).<sup>3</sup>

The Office of Zoning and Administrative Hearings (OZAH) initially scheduled a public hearing to be held on December 12, 2016, by notice issued on October 28, 2016 (Exhibit 22). The Technical Staff of the Montgomery County Planning Department (Technical Staff or Staff) issued a report on November 4, 2016, recommending approval of the application, subject to seven conditions. Exhibit 23. The Planning Board met on November 17, 2016, and voted unanimously to recommend approval with the conditions recommended by Staff, but with an increase in the permitted ages of the children from 6 to 10, as indicated in the Chair's letter of November 23, 2016. Exhibit 24.

On November 29, 2016, a neighbor, Leo J. Kane, filed a lengthy opposition letter

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<sup>3</sup> All citations in this Decision are to the 2014 Zoning Ordinance for Montgomery County, adopted September 30, 2014 (Ordinance No. 17-52), as amended.

(Exhibit 26(a)(i)) and a request to postpone the hearing until early 2017 (Exhibits 26(a), and 27).

The Applicant consented (Exhibit 28), and the Hearing Examiner granted the continuance request (Exhibit 29). A notice rescheduling the hearing to January 13, 2017 was issued on December 2, 2016 (Exhibits 30).

On December 9, 2016, nine additional neighbors filed a letter of opposition (Exhibit 31(a)), adopting the reasons set forth in Mr. Kane's letter of November 29, 2016. The central theme of the opposition is that the subject site is surrounded by elderly neighbors and the additional noise and disturbance resulting from any expansion of the existing child care facility will adversely affect them. The opposition letters and testimony are discussed in Part II. D. of this Report and Decision.

On January 9, 2017, at the request of the Hearing Examiner, Technical Staff filed a Supplemental Report (Exhibit 34) responding point-by-point to the concerns raised in Mr. Kane's letter of November 29, 2016.

On January 12, 2017, attorney Harry Stone entered his appearance on behalf of the Applicant (Exhibit 35). As indicated in Footnote 1, above, Mr. Leo Kane is an attorney, but he is not an active member of the Maryland Bar, and he did not represent any party in this case.

The public hearing proceeded as scheduled on January 13, 2017. The Applicant testified, as did her expert in architecture and site design, Mark North.<sup>4</sup> At the beginning of the hearing, the Applicant indicated that she accepted the findings of Technical Staff reports (Exhibits 23 and 34) as part of her evidence in the case. Tr. 25-26. She also introduced letters of support for the application from parents of three children currently using the day care. Exhibit 40.

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<sup>4</sup> The Applicant also attempted to introduce an expert report from the Traffic Group (Exhibit 38) first mentioned on the day of the hearing. The Hearing Examiner sustained the objection of the opposition and excluded this evidence because it had not been previously disclosed as required by OZAH's Rule 3.4. Tr. 20-24.

Five opposition witnesses testified – Paraskevoula Hays, William Kane, Madeline Cunningham, Roger Hays and Leo J. Kane. In addition to testifying about their concerns over the proposed expansion of the day care operation, the opposition raised a novel issue at the hearing, contending that the advanced ages of the nearby neighbors constituted an unusual site condition, which in combination with the added noise from the conditional use would create non-inherent adverse effects on the community. Tr. 40-41; 159-160.

At the conclusion of the hearing, the Hearing Examiner encouraged the parties to meet and discuss whether the plans could be revised to add additional screening to alleviate some of the neighbors' concerns. Tr. 197-200. He also invited the parties to brief the legal issue as to whether the existence of nearby elderly neighbors can constitute an unusual site condition sufficient to establish non-inherent adverse effects. Tr. 170-173. The record was left open for additional filings on the following schedule (Tr. 200-202):

- 1/25/17 Deadline for the parties' negotiations over the exact plan revisions for landscaping and board-on-board fence
- 1/25/17 Deadline for legal memos as to whether the presence of elderly residents in the neighborhood can constitute an unusual site condition, so as to potentially render any adverse effects as non-inherent, per the Zoning Ordinance
- 2/3/17 Deadline for any response to legal memos filed regarding the presence of elderly neighbors as an unusual site condition
- 2/3/17 Deadline for Applicant filing and serving revised plans showing the board-on-board fence and the screening trees
- 2/13/17 The parties (and Technical Staff) have until February 13, 2017 to respond to the revised plans
- 2/17/17 Applicant has until February 17 to respond to any comments from Staff or the other parties
- 2/17/17 The record will close at the close of business on February 17, 2017

None of the parties availed themselves of the Hearing Examiner's invitation to brief the legal issue as to whether the existence of nearby elderly neighbors can constitute an unusual site

condition sufficient to establish non-inherent adverse effects. However, on February 3, 2017, the Applicant filed a revised Landscape (“Play Yard Screening”) Plan showing a board-on-board fence and 11 new screening trees. Exhibit 46(a).

On February 7, 2017, Technical Staff responded indicating that Staff had no comments regarding the revised plans. Exhibit 47. The neighbors in opposition responded to the revised plan on February 13, 2017, and also included additional arguments regarding hours of outdoor play and the ages of the children. Exhibit 48(a).

On February 17, 2017, the Applicant responded to the opposition filing with a further revision to the proposed Landscape (“Play Yard Screening”) Plan, adding two more screening trees, bringing the total to 13 new trees (Exhibit 49(a)). She also objected to the portion of the opposition’s argument that went beyond the issues allowed for post-hearing briefing. Exhibit 49.

Since the record had been set to close on February 17, 2017, the Hearing Examiner issued an Order on that date (Exhibit 50), specifying that the record would be kept open for additional comments on the newly filed plan, with the following schedule:

- a. Technical Staff and the parties of record have 10 days, until February 27, 2017, to comment on the revised CU Site Plan filed by the Applicant on February 17, 2017.
- b. The Applicant will have 4 days, until March 3, 2017, to respond to any comments from Technical Staff or the other parties.
- c. No further plan revisions may be filed unless they are formally agreed to by all parties of record.
- d. The record will close at the close of business on March 3, 2017.

Technical Staff responded on February 17, 2017, that “Panning Staff has no comments on the revised plans.” Exhibit 51. Leo Kane responded on February 28, 2017, on behalf of the opposition (Exhibits 53 and 53(a)), and the Applicant replied on March 3, 2017 (Exhibit 55). No additional filings were made, and the record closed, as scheduled, on March 3, 2017.

For the reasons set forth at length in this Report and Decision, the Hearing Examiner approves the conditional use application, subject to the conditions listed in Part IV.

## II. FACTUAL BACKGROUND

### A. The Subject Property

Technical Staff described the subject site as follows (Exhibit 23, p. 2):

The Subject Site is Lot 20, Block 4 of the Ashburton Subdivision. It is located at 9828 Belhaven Road and has a one-and-one-half story, split level house. It is the residence of the Applicant, her husband, and their six and seven-year-old children. The Applicant has been operating an eight-child day care facility, named Playful Discoveries, on the premises for three-and-a-half years (Figure 1).

The Subject Site has two parking spaces on-site. One space is located in the garage and the other is on the paved driveway. The rear yard is enclosed with a four-foot tall chain link fence on all sides except for the 4.5-foot tall wooden picket fence and gate segment at the western entrance of the play yard. The rear yard has play areas and equipment for the existing day care facility. Pedestrian access to the Subject Site is via a concrete path from the sidewalk along Belhaven Road leading to two flights of stairs to the front entrance. . . .

Staff provided an aerial photograph of the site (Exhibit 23, p. 3):





Technical Staff also briefly evaluated the existing landscaping and lighting on the site (Exhibit 23, p. 2):

The existing landscaping on the Subject Site is inadequate to screen the proposed day care use. The landscaping includes bushes and a retaining wall along the front property line, two bushes along the western boundary, and no landscaping along the eastern property line. The rear side of the site has three trees; one is next to the residence near the east entrance of the play area, and the other two are along the rear property line.

The Site is well-lit with three residential wall lights on the residence by the front door entrance, the garage, and the patio along the rear of the house.

Photographs provided by the Applicant depict the subject site as it presently exists (from Exhibits 11 and 42):



**Front of Applicant's Home**



**View of Belhaven Road in front of the Subject Site**



**Backyard taken from Applicant's Home**



**Backyard looking towards Applicant's Home**



## B. Surrounding Neighborhood

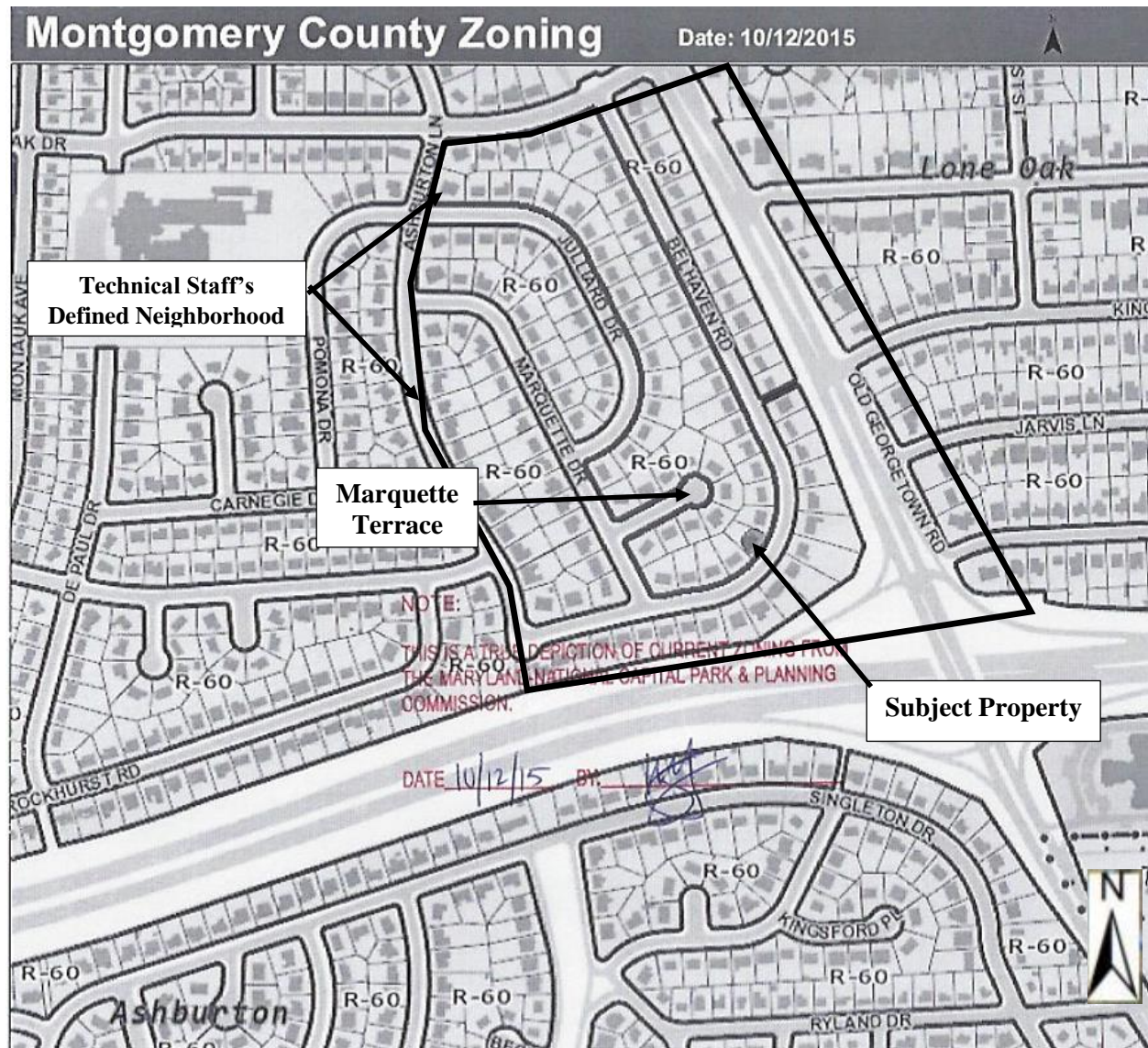
For the purpose of determining the compatibility of the proposed use, it is necessary to delineate and characterize the “surrounding neighborhood” (*i.e.*, the area that will be most directly impacted by the proposed use). Staff proposed defining the boundaries of the surrounding neighborhood as “generally bounded by Lone Oak Drive to the north; Interstate 495 to the south; the first row of houses across Old Georgetown Road to the east; and Ashburton Road to the west.” Exhibit 23, p. 3. It is depicted in an aerial photograph provided by Technical Staff (Exhibit 23, p. 4):



As can be seen in the above aerial photograph and noted by Staff, the neighborhood is composed of R-60 zoned single-family residential properties and includes the Ratner art museum. It also contains three approved conditional use/special exception uses:

- CU 15-02: a day care center at 9913 Old Georgetown Road, approved in 2015.
- CBA 1178: a medical office at 10010 Old Georgetown Road, approved in 1978.
- S-1229: an accessory apartment at 9829 Belhaven Road, across the street from the Subject Site, approved in 1985.

The Hearing Examiner accepts Technical Staff definition of the neighborhood, which may be more easily visualized on the approved Zoning Map (Exhibit 6), depicted below:



As will be seen in Part II.D. of this Report and Decision, it is the neighbors in the immediate vicinity of the subject site who have the most concerns about the proposed expansion.



### **C. Proposed Use**

The Applicant seeks approval of a conditional use to expand her current Family Day Care for up to 8 children into a Group Day Care for up to 12 children in her home at 9828 Belhaven Road in Bethesda. As she explained in Applicant's "Executive Summary/Planned Changes" (Exhibit 2):

Resident and Child Care Provider (Tatiana B. Meteleva), current owner/ operator of Playful Discoveries Daycare Licensed Family Child Care located in a single family detached home at 9828 Belhaven Road, Bethesda, Maryland 20817, requests a conditional use to operate a Group Day Care home for up to 12 children in the lower and main levels of the existing single-family detached home. The home is located in the Ashburton neighborhood and currently is a Licensed Family Child Care entity with two employees, (1 Full-Time [resident], 1 Full-Time [non-resident]) and 8 Children serving families Monday – Friday 7:30am-6:00pm.

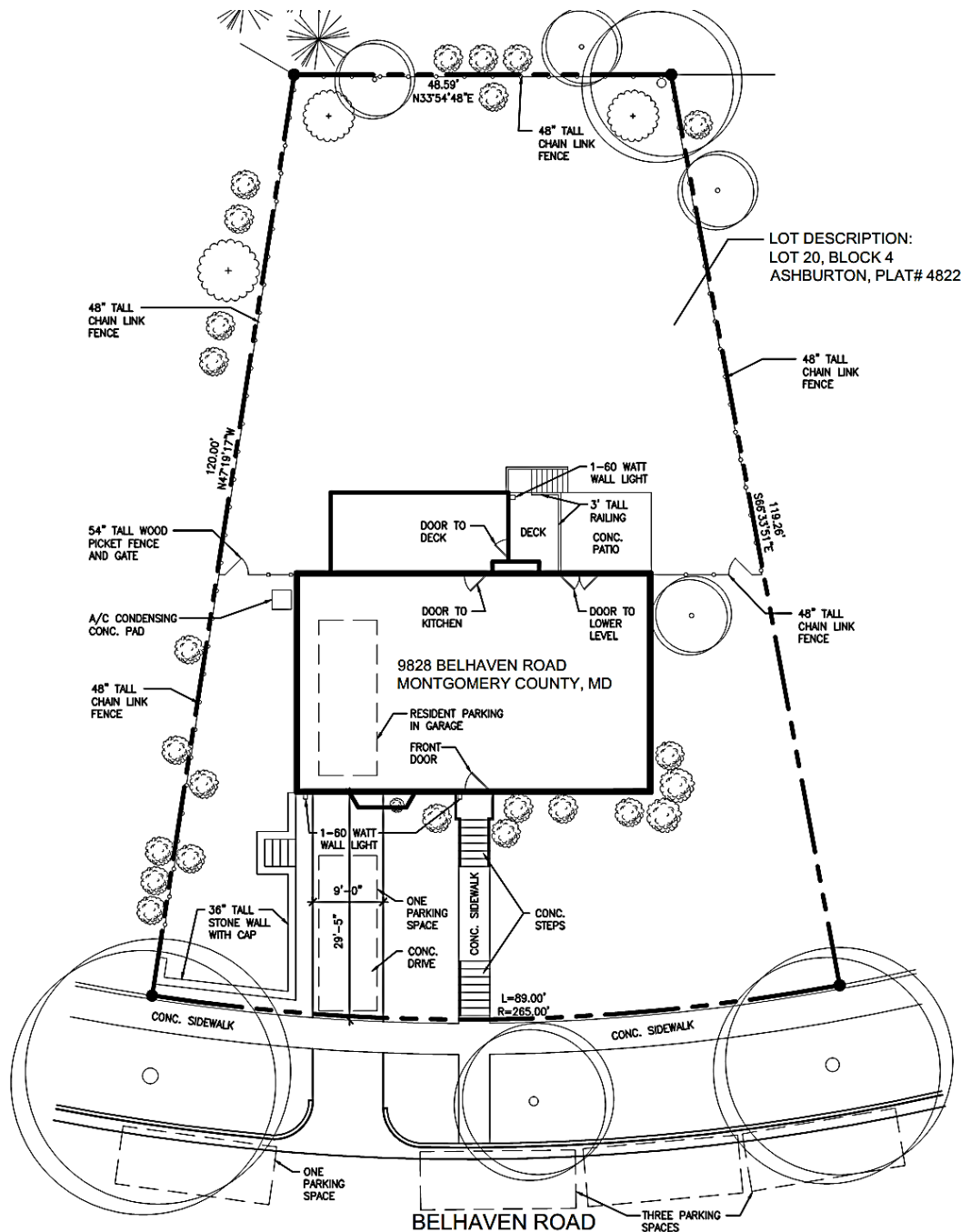
With the growing need and demand for high quality child-care in the immediate neighborhood, it is desirable for Playful Discoveries Daycare to expand to be able to serve more families in need of locally available quality child-care. This conditional use request is to expand the existing daycare to a Large Family Child Care entity from a maximum of 8 children to a total of 12 children. Because the property is located in an R-60 zone, a conditional use for the expansion is required.

The planned schedule for un-loading and loading of children would assure that there would be little impact for traffic, parking and noise from the Playful Discoveries property and adjacent properties. The expanded use is consistent with the residential character of the neighborhood and is in compliance with the area Master Plan requirements. There is no intention to alter the existing residence since the program surpasses the requirements for the expanded program.

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

The Applicant's original Conditional Use Site Plan (Exhibit 10(a)) showed features of the site (*i.e.*, the home, the parking area and the exiting lighting and vegetation), but none of the proposed additional screening for the back yard. The Applicant also provided a Landscape ("Play Yard Screening") Plan (Exhibit 10(b)) that showed the proposed addition of bushes and trees for screening, but no additional fence beyond the neighbors' chain link fence. The Site

Plan (Exhibit 10(a)) is reproduced below. The Applicant amended its original Landscape (“Play Yard Screening”) Plan a number of times to accommodate recommendations made by Technical Staff, as well as requests of the immediate neighbors for additional screening. The final revised Landscape (“Play Yard Screening”) Plan (Exhibit 49(a)), is reproduced on the next page. The original Site Plan (Exhibit 10(a)), shown below, and the final Landscape Plan (Exhibit 49(a)), together constitute the Conditional Use Site Plan in this case.



**LEGEND:**

- EXISTING CANOPY/EVERGREEN/ LARGE AND MEDIUM SHRUBS
- LELAND CYPRESS (8' MIN. HT.)
- EXISTING 48" TALL CHAIN LINK FENCE
- NEW 6' HIGH BOARD ON BOARD WOOD FENCE

**PLAN DETAIL OF FENCE:**

1'-2" Q FENCE

EXISTING 48" TALL CHAIN LINK FENCE

PROPERTY LINE

NEW 6' HIGH BOARD ON BOARD WOOD FENCE

REMOVE GRASS/ VEGETATION AND PROVIDE MULCH/ SMALL STONE OVER LANDSCAPE FABRIC

SCALE: 3/8" = 1'-0"

0 5' 10' 20' 40'

SCALE: 1" = 20'-0"

**PLAY YARD SCREENING PLAN**

**EXHIBIT 'K.1'**

**1** EX K.1

**PLAY YARD 'A'**

**LOT DESCRIPTION:**  
LOT 20, BLOCK 4  
ASHBURTON, PLAT# 4822

**9828 BELHAVEN ROAD**  
MONTGOMERY COUNTY, MD

**BELHAVEN ROAD**

**EXISTING 48" TALL CHAIN LINK FENCE**

**NEW 6' HIGH BOARD ON BOARD WOOD FENCE**

**REMOVE TREE**

**2'-6" TALL BUSHES**

**6'-0" TALL BUSH**

**3'-0" TALL BUSH**

**2'-0" TALL BUSH**

**5'-0" TALL BUSH**

**175.00' NEW 1277'**

**119.12' NEW 1277'**

**DECK**

**CONC. PATIO**

**CONC. SIDEWALK**

**L=89.00' B=285.00'**

**02/16/2011**

Technical Staff recommended a condition requiring the addition of the 6-foot board-on-board fence (Exhibit 23, p. 2), but had no further comment regarding the addition of the 13 Leland Cypress trees for screening. Exhibit 51. Staff found that, with the addition of the board-

on-board fence (even without the additional screening trees), “[t]he proposal will be compatible with the nearby residential properties.” Exhibit 23, p. 14. Mr. Leo Kane suggests in his response to the revised plans, that the abutting neighbors also want the Applicant to remove their chain-link fences when erecting the board-on board fence (Exhibit 48(a), pp. 1-3). The Hearing Examiner agrees with the Applicant (Exhibit 49) that since Mr. Kane is not acting as an attorney for the neighbors, he cannot commit them to such an action on their property. If the neighbors want to make a side agreement with the Applicant, they are free to do so, but it would not be appropriate, on this record, for the Hearing Examiner to impose a condition that the Applicant must remove a chain-link fence from property not owned by the Applicant.

## **2. Parking for the Residence and the Day Care**

The subject site has two parking spaces, one in the garage and one in its driveway, and both of them may be used by the residents. Even though only the two residential parking spaces can be accommodated on the property, a parking space waiver is not required because Zoning Ordinance §59.6.2.4.B. expressly permits parking spaces for Group Day Care employees and operations to be provided on the street abutting the site. As noted by Technical Staff (Exhibit 23, p. 5),

The proposed day care facility needs a total of six vehicle parking spaces (4 per Zoning Ordinance, 2 for parent drop-off and pick-up) and one long-term bicycle parking space. Two of the vehicle spaces will be for the residents, two for the employees, and two for parent drop-offs and pick-ups. The Applicant is proposing to accommodate residential parking on-site (one space in the garage and one space in the driveway). Ample on-street parking is available on Belhaven Road. The Applicant is proposing that the two on-street spaces in front of the house be used for parent drop-off and pick-up and that the non-resident employees park in any of the available spaces near the Site on Belhaven Road. As for bicycle parking, the Applicant will provide one long-term bicycle space in the garage.

Staff repeated its finding that there is ample on-street parking available around the site to accommodate both employee parking and drop-offs and pickups of children (Exhibit 23, p. 6):



Besides the one vehicle parking in the garage, one vehicle can park off-street on the nine-foot wide by 29.5-foot long driveway from Belhaven Road at any one time. On-street parking is permitted and adequate for two parked parent drop-off and pick-up cars along the frontage of the Site and ample parking is available for employee vehicles nearby along Belhaven Road.

The opposition (Mr. Kane's letter) disputes that there is "ample" parking in the area (Exhibit 26(a)(i), pp. 14-15), but as Applicant's attorney noted during the hearing, the proposed conditional use would actually add only one more car parking in the neighborhood because of the addition of one more non-resident worker. Tr. 203. This is because the existing Family Day Care employs one non-resident employee, and the conditions recommended by Technical Staff and included in this decision limit the total number of non-resident employees on the site for the approved conditional use to two. Therefore, at most, approval of this application would result in only one more employee car parking in the neighborhood. In addition, the Applicant indicates that the driveway will be vacant during operating hours and thus can be used for drop-off and pickup of children. Exhibit 2, p. 5. Technical Staff responded to Mr. Kane's assertion regarding parking, stating (Exhibit 34, p. 4):

The street parking on Belhaven Road is within the public right-of-way and available for use by the public. All the properties surrounding the day care have a driveway with space to park at least one car (Figure 3). Staff believes that there is, in fact, "ample parking" on Belhaven Road for the day care employees, and that day care employees parking on Belhaven Road near the applicant's property will not create unsafe or inadequate conditions for vehicular or pedestrian traffic in the neighborhood.

Staff buttressed its point with photographs showing ample room for parking on Belhaven Road in front of and near the subject site:



**Subject Property**



Based on this evidence, the Hearing Examiner finds that there is sufficient room for parking in the immediate neighborhood of the subject site to accommodate both the non-resident employees and the drop-off and pickup operations of the proposed Group Day Care.

### 3. Site Lighting and Signage

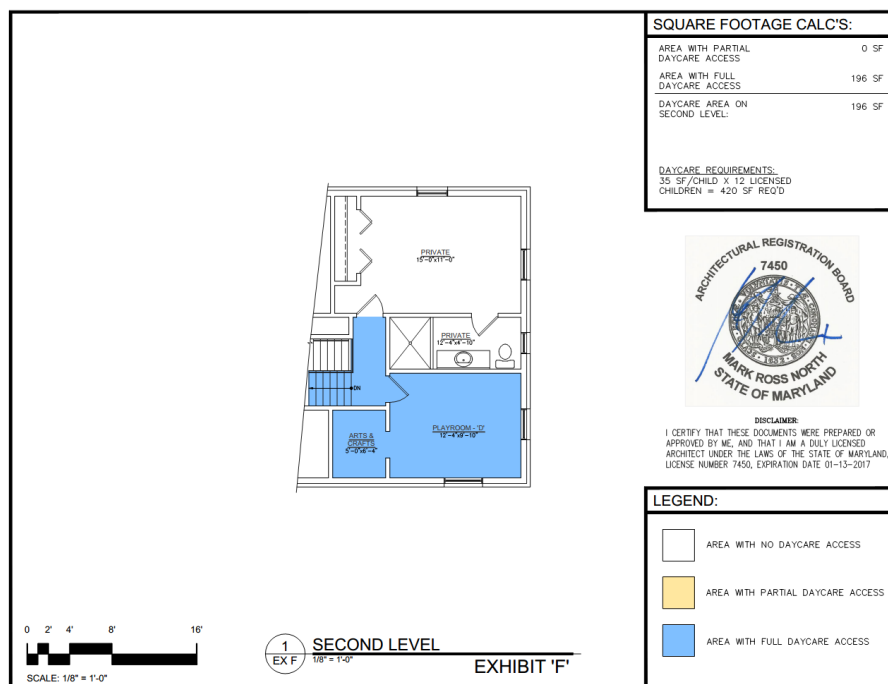
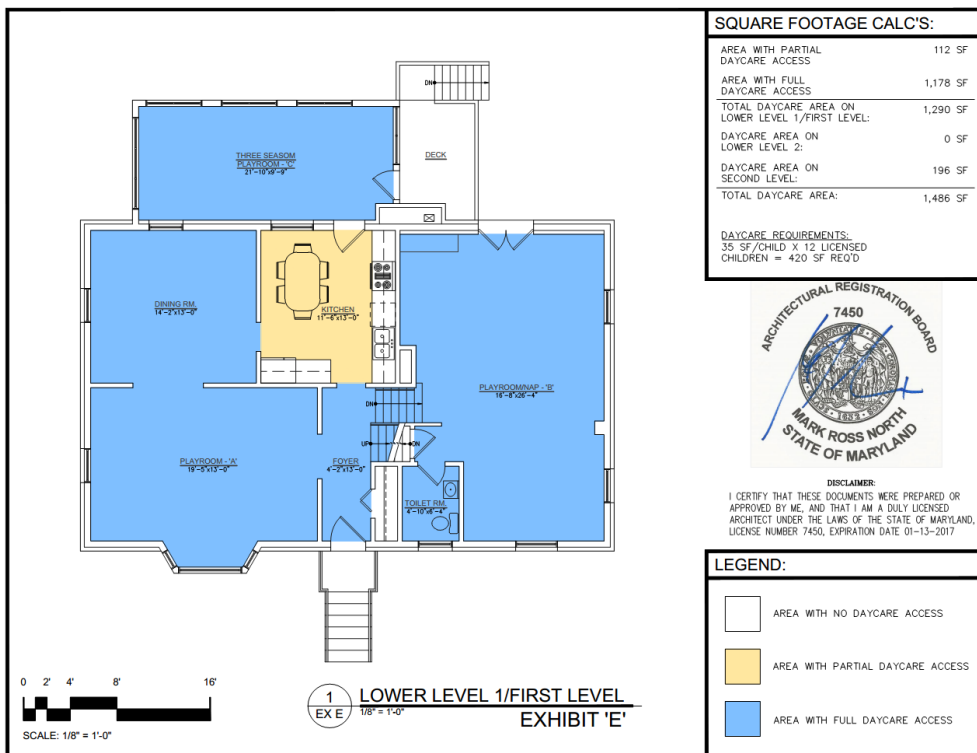
The lighting on the site will remain unchanged if the application is approved. It is described by Technical Staff (Exhibit 23, p. 13):

The lighting is located beside the front entrance, the driveway, and the rear deck near the rear entrance to the house. All of them are residential lights and will not intrude on neighboring properties.

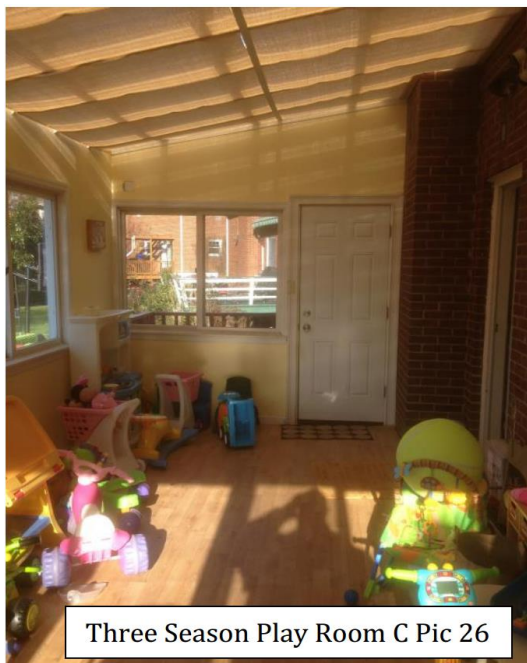
There is no signage on the site, and none has been sought in this application.

#### 4. Internal Physical Arrangements for Site Operations

The existing Family Day Care operates on two levels of the Applicant's home, as depicted in Floor Plans (Exhibits 12(b) and (c)) reproduced on the next page. The proposed Group Day Care facility will occupy the same space as the existing day care facility and will not need any additional space, according to Technical Staff (Exhibit 23, p. 4).



As shown above and described by Technical Staff, the main level of the single unit residence contains three playrooms, a bathroom, and a dining area. The second level contains an arts and crafts room, a playroom, and one bedroom that is not a part of the day care use. Pictures of a couple of these rooms from Exhibit 13 are reproduced below:



## 5. Operations

Proposed operations were summarized by Technical Staff (Exhibit 23, pp. 4-5):

The Applicant, Tatiana Meteleva, is requesting to expand her existing child day care facility, from eight to 12 children, three months to six years in age.<sup>5</sup> Besides the Applicant, there is currently one other employee on-site. In the future, the Applicant will hire an additional full time staff member so the proposal is for two non-resident employees.

The proposed day care facility will maintain the same hours of operation as the existing day care facility, which are Monday through Friday from 7:30 A.M. to 6:00 P.M. The proposed day care facility will also occupy the same space as the existing day care facility and will not need any additional space. . . .

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<sup>5</sup> The Applicant changed the requested age limit before the Planning Board, seeking permission to have children up to age 10, so that she could include an after-school homework program if she later decides to add it. Tr. 129-131. The Planning Board agreed to this proposal (Exhibit 24), but it is strongly opposed by the neighbors, who fear it will lead to louder noises during outdoor play. Tr. 129-131 and Exhibit 48(a), pp. 5-6.



\* \* \*

Parent drop-off and pick-up times will be staggered from 7:30 A.M. to 9:00 A.M. and from 3:30 P.M. to 6:00 P.M. The first employee will arrive at 7:00 A.M. and leave at 4:30 P.M. The second employee will arrive at 9:00 A.M. and leave at 5:30 P.M.

\* \* \*

Technical Staff also described an outdoor play schedule and a proposed condition that would have limited outdoor play to no more than 8 children at a time, but it would also have resulted in 4 one-hour outdoor play sessions each day to accommodate the 12 children in the Group Day Care. The opposition requested (Exhibit 26(a)(i), p. 16) and the Applicant agreed to (Tr. 34) allowing up to 12 children outside during a one hour session, but limiting the number of such one-hour sessions to two per day. The Hearing Examiner finds that this is a sensible change since the neighbors feel that it will reduce their disturbance from the expanded facility. The neighbors also requested “that those hours [for outdoor play] be set at a specifically scheduled time each day so that the neighbors can plan their naps, meals, walks and porch-time accordingly.” Exhibit 48(a), p. 4. This also seems like a reasonable request by the neighbors, and the Hearing Examiner has attempted to craft a condition in Part IV of this Report and Decision which accommodates these requests by the neighbors, while still providing the Applicant a reasonable amount of flexibility. This condition, as shown below, also addresses a request by one neighbor, Roger Hays, that the Applicant monitor noise levels and remove children who are unduly noisy. Tr. 151-152. The Hearing Examiner’s Condition No. 6 provides:

Outdoor play time is limited to two sessions a day, with each session lasting up to approximately one hour. All 12 Group Day Care children may be outside during these periods, but any child creating an undue amount of noise should be instructed to reduce the noise level, or if necessary, escorted indoors. These outdoor sessions must be scheduled to occur at approximately the same time each day, which currently is from 10:15 a.m. to 11:15 a.m. and from 3:30 p.m. to 4:30 p.m., according to the Applicant’s Exhibit 2, pp. 1-4. If the Applicant elects to establish

a different regular time schedule for outdoor play, she must notify the parties of record of that change. These scheduled times may be varied in the event that inclement weather on any given day so requires, but each session must not exceed one hour, and the number of outdoor sessions must not exceed two per day.

As discussed by Staff, the parent drop-off and pick-up times will be staggered from 7:30 AM to 9:00 AM and from 3:30 PM to 6:00 PM. The Applicant provided a schedule for that process with 12 children in her “Executive Summary/Planned Changes” (Exhibit 2, pp. 2-3):

Planned Un-Loading and Loading Schedule:

7:30am – Child 1 & 2 Drop off/ Owner Operator clock in  
8:00am – Child 3& 4 Drop off / Employee A clock in  
8:15am – Child 5 & 6 Drop off  
8:30am – Child 7 & 8 Drop off  
8:45am – Child 9 & 10 Drop Off  
9:00am – Child 11& 12 Drop Off/ Employee B clock in  
3:30pm – Child 1&2 Picked up  
4:00pm – Child 3 & 4 Picked up  
4:30pm – Child 5 & 6 picked up – Employee A clock out  
5:00PM – Child 7 & 8 picked up  
5:30PM – Employee B clock out  
5:15PM – Child 9 & 10 Picked up  
6:00pm – Child 11 & 12 picked up – Owner Operator clock out

The Applicant also introduced signed statements from parents of children in the day care committing to a staggered drop off and pickup schedule so that non-pedestrian arrivals at the site for these purposes will not exceed 8 per hour, as called for by Technical Staff and provided by the Hearing Examiner’s conditions in Part IV of this Report and Decision. Exhibit 39.

The potential impacts of the proposed operations on the neighborhood and the transportation system will be further discussed in Part III of this Report and Decision.

#### **D. Community Response and Related Legal Issue**

##### **1. Community Response and the Threshold Legal Question:**

The application is supported by letters from parents of three children currently using the day care. Exhibit 40. On the other hand, the opposition, spearheaded by Leo J. Kane’s letter of



November 29, 2016 (Exhibit 26(a)(i)), raised numerous concerns, as did the testimony by five opposition witnesses – Paraskevoula Hays, William Kane (Leo Kane’s father), Madeline Cunningham, Roger Hays and Leo J. Kane. These concerns have been addressed above with regard to parking and outdoor play. Other concerns are discussed in Part II.D.3., below. We first turn to the threshold legal issue raised by Mr. Leo Kane.

As mentioned in the first part of this Report and Decision, the central theme of the opposition is that the subject site is surrounded by elderly neighbors and the additional noise and disturbance resulting from any expansion of the existing child care facility will adversely affect them. Moreover, the opposition raised a novel issue at the hearing, contending that the advanced ages of the nearby neighbors constituted an unusual site condition, which, in combination with the added noise from the conditional use, would create non-inherent adverse effects on the community. Tr. 40-41; 159-160.

None of the parties availed themselves of the Hearing Examiner’s invitation to brief the legal issue as to whether the existence of nearby elderly neighbors can constitute an unusual site condition sufficient to establish non-inherent adverse effects. However, the Hearing Examiner’s analysis leads him to conclude that such a factor can result in an unusual site condition, and therefore it can create a non-inherent adverse effect within the meaning of the Zoning Ordinance. This analysis is discussed in the next section of this Report and Decision.

But first, the Hearing Examiner hastens to add that the existence of a non-inherent adverse effect does not mean that an application for a conditional use must be denied. Rather, it means that it can result in denial if the Hearing Examiner finds that such a non-inherent adverse effect, either alone or in combination with a inherent adverse effects, creates “undue harm to the

neighborhood” in any of the categories listed in Zoning Ordinance §59.7.3.1.E.1.g. That analysis is contained in Part III of this Report and Decision.

## **2. The Issue of Numerous Nearby Elderly Neighbors Creating an Unusual Site Condition:**

The opposition contends that the existence of nearby elderly neighbors can constitute an unusual site condition sufficient to establish non-inherent adverse effects, within the meaning of the Zoning Ordinance. To the knowledge of the Hearing Examiner, this issue has not previously been raised regarding the elderly; however, the existence of other types of unusual surrounding neighbors has been previously been considered to create an unusual site condition.

The closest example, to the recollection of the Hearing Examiner, came in the case of *Costco Wholesale Corporation*, Case No. S-2863, where the Hearing Examiner’s recommendation to deny a special exception for a gas station was based, in part, on the fact that medically fragile students, who were susceptible to adverse effects from fumes produced by the station, were present daily in a special school located within the defined neighborhood. *Petition of Costco Wholesale Corporation, Case No. S-2863, Hearing Examiner’s Report and Recommendation of December 12, 2014, at page 247.* The Hearing Examiner’s report and recommendation was adopted by the Board of Appeals in a Resolution effective April 3, 2015, and that decision was affirmed on December 18, 2015, by the Montgomery County Circuit Court in an Opinion and Order in Civil Action No. 404629-V.<sup>6</sup>

The Hearing Examiner’s decision on this point in the *Costco* case was premised on language used by the Maryland Court of Appeals in *Montgomery County v. Butler*, 417 Md. 271, at 305, 9 A.3d 824, at 844 (2010),

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<sup>6</sup> The matter is now pending before the Maryland Court of Special Appeals in Case No. 02450, *Costco Wholesale Corporation v. Montgomery County, Maryland, et al.*

. . . [I]t is for the zoning board to ascertain in each case the adverse effects that the proposed use would have on the *specific, actual* surrounding area. [Italics in original.]

In sum, each combination of site and surrounding area has some unique characteristics that must be evaluated in the context of the particular characteristics of the use. While it is not clear on this record that the number of elderly in the defined neighborhood is unmatched in other neighborhoods, it is clearly documented that there are numerous elderly neighbors living in homes nearby the subject site. Of the 12 nearby neighbors that signed the opposition letter of December 2, 2016 (Exhibit 31(a)), four do not list their ages, but the remaining eight list ages ranging from 85 to 91. It is not necessary for the Hearing Examiner to find that this is a unique situation to conclude that the number of elderly living near a proposed child care facility constitutes an unusual site condition which must be considered in this case, and that therefore the effects on this particular neighborhood are not inherent in this type of use.

Whether the proposed expansion of the existing Day Care would create non-inherent adverse effects that would do “undue harm to the neighborhood,” as set forth in Zoning Ordinance §59.7.3.1.E.1.g., will be discussed in Part III of this Report and Decision. We turn now to the specific concerns raised by the opposition.

### **3. The Specific Concerns of the Opposition:**

On January 9, 2017, at the request of the Hearing Examiner, Technical Staff filed a Supplemental Report (Exhibit 34) responding point-by-point to the concerns raised in Mr. Kane’s letter of November 29, 2016 (Exhibit 26(a)(i)). Mr. Kane’s concerns, as summarized by Technical Staff, are listed below with Staff’s response to each and the Hearing Examiner’s finding on each:

- *Unightly and Embarrassing Clutter in the Yard*

Staff Response: Staff disagrees with Mr. Kane’s description of the Property.

During two different site visits, Staff found the Property to be in reasonably good condition, with the front yard free of any apparent clutter . . . Staff continues to recommend a condition of approval requiring the applicant to install a six-foot board-on-board wooden fence that will screen views of the play area in the rear yard.

Hearing Examiner Finding: Mr. Kane also raised the clutter issue at the hearing, pointing to a photo of the back yard (Exhibit 43(b)) as an example of what he considered clutter. Tr. 37, 111-114, 122 and 174-175. Exhibit 43(b) is reproduced below:



The Hearing Examiner's finding is that the Applicant's back yard has the toys one would normally expect to see in an outdoor child care play area (and possibly just in a backyard of a home with resident children). If this were the situation in the Applicant's front yard, the opposition would have a basis for complaining about clutter, but not in her back yard. Moreover, the Applicant will be required to install a six-foot tall, board-on-board fence around the back yard, which will eliminate any ground view of the "clutter," a benefit the neighbors do not have now with the existing Family Day Care on the site. In addition, the Hearing Examiner has

imposed a condition which requires the Applicant to maintain the grounds in a clean condition, free from debris, on a daily basis. It should be noted, however, that the Hearing Examiner does not consider toys which are designed to be kept outdoors to be debris. Given the fence and the cited conditions, the Hearing Examiner does not find the condition of the Applicant's back yard to be a basis for denial of the conditional use.

- *Concerns about Child welfare, injuries, escapes and illnesses.*

Staff Response: Child care facilities are subject to state laws and regulations governing child health, safety, and welfare. These laws are administered by a separate State agency. As stated in the staff report, Staff finds the proposed use will not create unsafe conditions for children, employees or people living in the surrounding neighborhood.

Hearing Examiner Finding: The Hearing Examiner agrees with Staff's finding. As Staff points out, child care facilities are subject to state laws and regulations governing child health, safety, and welfare. However, the Hearing Examiner does include conditions in Part IV of this decision which aid in protecting the safety of children using the facility. These include conditions requiring that all children must be under the direct supervision of a staff member at all times; that children must be accompanied by an adult to and from the child-care entrance; that when drop-offs or pickups are made by vehicle outside of the Applicant's driveway, children must embark or disembark the vehicle from the curb side; and that the Applicant must comply with and satisfy all applicable State and County requirements for operating a Group Day Care for children, and must correct any deficiencies found in any government inspection.

- *Noise, Commotion, Increased Stress, and Disturbance of the Peace*

Staff Response: The Applicant proposes to split the children into two groups based on age (infants/toddlers and pre-school age) to play outside. Each age group will spend one hour outside in the morning and another hour outside in the afternoon. Staff finds that a condition limiting the total number of children outside at any one time will prevent excessive noise, and that a requirement for a six-foot board-on-

board fence will further mitigate disturbance to neighbors. As described in the staff report, noise generated by children is an inherent characteristic of a daycare facility.

Hearing Examiner Finding: As discussed previously, the Hearing Examiner used the alternative approach to outdoor play requested by the opposition (Exhibit 26(a)(i), p. 16) and agreed to by the Applicant (Tr. 34), allowing up to 12 children outside during a one hour session, but limiting the number of such one-hour sessions to two per day. The Hearing Examiner finds that this is a sensible change since the neighbors feel that it will reduce their disturbance from the expanded facility.

- *Increased Traffic and Increased Difficulty of Driving for Senior Neighbors*

Staff Response: Staff has evaluated Belhaven Road for circulation and parking and finds it safe and adequate as required by the Zoning Ordinance. Belhaven Road is designed for street parking on both sides of the road. Despite the bend in the road, Staff observed during a site visit that cars can park along the curb in front of the applicant's daycare (Figure 2) without creating sight line issues or other unsafe conditions for drivers and pedestrians.

Hearing Examiner Finding: The Hearing Examiner accepts Technical Staff's unrebutted expert analysis regarding the minimal impact of increased traffic and parking from the proposed expansion. At most, one additional car will be added for all-day parking with the addition of one non-resident employee, and 4 additional cars will be added to the local traffic for dropping off and picking up children in the AM and PM hours. Those will be required to be staggered, a condition which will now apply to all children arriving at and departing the child care facility. That is a benefit to the community that did not exist for the current Family Day Care.

- *Negative Impacts on Property Values [and Applicant Making a Profit]*

Staff Response: Staff has no evidence that the proposed daycare would have any adverse impact on property values, as claimed by Mr. Kane.

Hearing Examiner Finding: An alleged decrease in property values can be proven by expert evidence to that effect, but no such evidence was adduced in this case. The expressed feelings of



some in the opposition, and hearsay about the fears of others (Exhibit 26(a)(i), pp. 6-7), do not constitute a scientific analysis of likely impacts on property values. Generalized fear in the community is not evidence. *Rockville Fuel v. Board of Appeals*, 257 Md. 183, 192, 262 A.2d 499, 504 (1970). While some people may find the existence of a small child care facility in the neighborhood to be a negative feature, others (*e.g.*, families with young children) may see it as a positive feature. There is no evidence upon which the Hearing Examiner can conclude that the proposal to expand the existing Family Day Care by 4 children will reduce property values in the defined neighborhood.

The opposition also suggests that this application should be denied because it is a money-making business (Tr. 161 and Exhibit 26(a)(i), pp. 7-8). The Zoning Ordinance does not permit the Hearing Examiner to reject a proposed Group Day Care run by a resident based on the fact that it is operating as a business, probably because most such small day care facilities are profit-making operations. Such facilities are encouraged by the applicable *1992 North Bethesda Garrett Park Master Plan*, as is discussed in Part III of this Report and Decision, and are permitted by the Zoning Ordinance if specified criteria are met. None of those criteria limit such facilities to non-profits.

- *Neighbors concerned that their seniority and length of ownership have been ignored.*

Staff Response: The concerns and property rights of everybody are given equal weight in evaluating a proposed conditional use. The Zoning Ordinance does not give any priority to long-term owners over those who been in the neighborhood for a shorter period.

Hearing Examiner Finding: Although Technical Staff is correct in pointing out that the Zoning Ordinance does not give any preference based on length of ownership, the Hearing Examiner has

taken into account the fact that there are numerous elderly residents very close to the subject site, as discussed above.

- *The “Staff-Defined Neighborhood” Was Set with Incorrect Boundaries, and Therefore Included Properties that were Outside the Ashburton Neighborhood.*

Staff Response: Staff defines a “Neighborhood” as the area that will be most directly impacted by the proposed use for the purposes of establishing compatibility. Other special exceptions/conditional uses within the Neighborhood are identified in order to evaluate whether the proposed conditional use will increase the number, intensity, or scope of conditional uses sufficiently to affect the area adversely or alter its predominantly residential nature. Staff has no objection to removing the properties on the east side of Old Georgetown Road from the Hearing Examiner’s “Defined Neighborhood,” as those properties are unlikely to be impacted by the proposed conditional use. The properties on the west side of Old Georgetown Road fit into a logical delineation of the neighborhood based on the road network. Staff notes that excluding the east side of Old Georgetown Road from the neighborhood boundary would not change Staff analysis and recommendations in this case.

Hearing Examiner Finding: Although the appropriate size of the defined neighborhood is fairly debatable, the Hearing Examiner does not find fault with Technical Staff’s recommended neighborhood definition. Nearby residential properties to the north, south and west of the site and those on both sides of Belhaven Road are indisputably a proper part of the defined neighborhood. The Hearing Examiner finds that properties just to the east of Old Georgetown Road are fairly included in the defined neighborhood because Old Georgetown Road is only about 150 feet from Belhaven Road, and the proposed use may well produce some traffic on Old Georgetown Road. More importantly, the inclusion or exclusion of the properties to the east of Old Georgetown Road has had no impact on the outcome of this case, which is dominated by other factors discussed herein.

- *The Staff Acted Improperly When It Simply Assumed that Ms. Meteleva’s Neighbors Would Be Away from their Homes During the Designated “Outside Play Hours.”*

Staff Response: This conditional use application was evaluated with the same methodology typically used to review group day care applications. Staff conducts a site visit and reviews the exterior of the applicant's property, but does not interview the surrounding neighbors.

Hearing Examiner Finding: The opposition raises a fair point in asserting that the elderly neighbors are more likely to be present during the day than those employed outside their homes, and therefore are more susceptible to being disturbed by outdoor play. While Technical Staff evaluated the more general situation, the reason the process includes a public hearing by OZAH is so that the neighbors can adduce evidence that varies from the general assumptions, as was done in this case, both by Mr. Kane's extensive letter and by testimony at the hearing. As previously mentioned, the Hearing Examiner has taken into consideration the proximity of elderly neighbors in this case, but still finds that, as limited by the conditions imposed in Part IV of this Report and Decision, there will not be undue harm to the neighborhood from the addition of 4 children to the outdoor play for two hours per day.

- *The Staff Should Investigate Whether Ms. Meteleva and Her Family Actually Reside at the Property.*

Staff Response: At the public hearing before the Hearing Examiner, the applicant will be bound by sworn testimony concerning her residence. Staff does not typically visit the inside of structures evaluated for conditional use approval and whether an applicant actually resides at the premises as stated in the application.

Hearing Examiner Finding: The Applicant, Tatiana Meteleva, identifies herself in the initial statement in support of her application (Exhibit 2) as a "Resident and Child Care Provider." The Maryland Real Property (SDAT) records (Exhibit 15) identify the subject premises as the "principal residence" of Mr. Papoian and Ms. Meteleva. At the hearing, Ms. Meteleva testified under oath that her two children, ages 6 and 8, live there as well. Tr. 81. There is no evidence that the Applicant is not a resident of the subject site. The Hearing Examiner hereby finds that she is a resident of the subject site.

- *The Staff Report Was Inaccurate When It Assumed that the Proposed Enrollment Increase from 8 Children to 12 Children Was Merely a “Small Expansion.”*

Staff Response: Regardless of the specific wording used in the original report, Staff analyzed the proposed day care per the Zoning Ordinance regulations, and found that it satisfied all findings required to grant the proposed conditional use for up to 12 children.

Hearing Examiner Finding: Mr. Kane argues that the expansion of the child care facility from 8 children to 12 children cannot be characterized as “small” because the imposition of the Group Day Care standards by the County’s Zoning Ordinance means that “it is a very big deal.” Exhibit 26(a)(i), p. 14). Mr. Kane fails to mention that the standards for establishing a Group Day Care apply also to a completely new facility, so the standards were needed to go from having no facility to creating a new one with up to 12 children. Thus, the fact that these standards apply here do not necessarily mean that the County was determining that a 4-child expansion would be “a very big deal.”

More importantly, whether one characterizes the addition of 4 children to an existing child care facility for 8 children as a “small expansion,” as Staff did (Exhibit 23, p. 11), or as a 50% expansion, as one could accurately do, makes no difference to an evaluation of this case. Regardless of how one labels it, the real question is whether the expanded child care facility meets the Zoning Ordinance standards for a Group Day Care. The Hearing Examiner finds in Part III of this Report and Decision that the application does meet those standards.

- *The Staff Report Was Incorrect When It Asserted that “Ample Parking” Was Available on Belhaven Road.*

Staff Response: The street parking on Belhaven Road is within the public right-of-way and available for use by the public. All the properties surrounding the day care have a driveway with space to park at least one car (Figure 3). Staff believes that there is, in fact, “ample parking” on Belhaven Road for the day care employees, and that day care employees parking on Belhaven Road near the applicant’s property

will not create unsafe or inadequate conditions for vehicular or pedestrian traffic in the neighborhood.

Hearing Examiner Finding: As discussed in Part II.C.2. of this Report and Decision, the Hearing Examiner finds that there will be sufficient parking to accommodate the residence, the one additional car for the added employee and the child care operations.

- *The Staff Might Not Have Disseminated All Required Notices to Neighbors in the Community, and Might Have Mailed the Notice of Hearing Too Late.*

Staff Response: The applicant posted the required notice sign on the property informing neighbors about the conditional use application. A notice is not mailed out in advance of the Planning Board hearing, unless the application requires a forest conservation plan, because the Planning Board only serves an advisory role to the Hearing Examiner who makes the final decision on conditional use applications. The Hearing Examiner sends out notice thirty days prior to the Hearing Examiner hearing.

Hearing Examiner Finding: Mr. Kane's assertion of late notice is incorrect. As noted by Technical Staff, the subject site was properly posted with a notice sign. OZAH initially scheduled a public hearing to be held on December 12, 2016, and mailed its notice on October 28, 2016, well in advance of the 30-day notice requirement in Zoning Ordinance §59.7.5.2.E.1.a. (Exhibit 22). When Mr. Kane requested a continuance of the hearing on November 29, 2016, the Hearing Examiner granted the continuance request (Exhibit 29). A notice rescheduling the hearing to January 13, 2017 was issued on December 2, 2016 (Exhibits 30), once again more than complying with the 30-day notice provision.

- *The Elderly Neighbors Would Like Ms. Meteleva to Install a Privacy Fence.*

Staff Response: Neither the Planning Board nor the Hearing Examiner have the authority to require a privacy fence absent a condition tied to the conditional use approval.

Hearing Examiner Finding: Mr. Kane is requesting that the Hearing Examiner order a privacy fence even if the application for a conditional use is denied. Technical Staff correctly points out

that the Hearing Examiner has no authority to do so outside the confines of a Decision granting the conditional use. Just such a privacy fence (six foot board-on-board fence) has been included as a condition of this grant of the conditional use.

- *The Neighbors Are Opposed to Any Plan that Would Increase the Number of Hours Per Day that Children are Playing Outside.*

Staff Response: A request to drop the condition that would allow only 8 children outside at any given time. In its place, a condition could be added that would limit outside play to one hour in the morning and one hour in the afternoon.

Staff finds that a condition limiting the total number of children outside at any one time, as currently recommended by staff, will prevent excessive noise, and that a requirement for a six-foot board-on-board fence will further mitigate disturbance to neighbors. However, Staff has no objection to a change in the condition about outdoor play time that would allow all the children to play outside for one hour in the morning and one hour in the evening.

Hearing Examiner Finding: As discussed in Part II.C.5. of this Report and Decision, the Applicant and the Hearing Examiner accepted the opposition's request for limiting outside play to two one-hour periods, rather than limiting the number of children outside to 8.

- *The Day Care Employees Should be Required to Park Their Vehicles on Marquette Drive.*

Staff Response: Staff does not recommend a specific location for on-street parking for daycare employees. Belhaven Road and other roads in the neighborhood are public. All the nearby properties on Belhaven Road have driveways leaving ample parking spaces available on Belhaven Road and other nearby streets. Employees should be able to park close to the daycare where parking is available.

Hearing Examiner Finding: The Hearing Examiner agrees with Technical Staff and will not limit parking to Marquette Drive. The children should be dropped off as close to the subject site as possible, and the one additional employee car from the expanded day care should impose no significant burden on the community.

- *If the daycare is approved, Ms. Meteleva Should Be Required to Commit, in Writing, that She Will Not Build an Addition onto Her Home.*



Staff Response: Staff does not support such a condition. Any expansion of the day care use in the future will be subject to further review at that time. Any expansion of the existing structure will be subject to the applicable County Code and regulations, and therefore should not be subject to an express condition prohibiting any expansion of the existing structure.

Hearing Examiner Finding: The holder of a conditional use is not permitted to change the subject site without seeking an amendment to the conditional use. Any such request would be examined at that time to determine compliance with applicable standards. It would not be appropriate for the Hearing Examiner to preclude such a future application which is permitted under the Zoning Ordinance.

Technical Staff noted in its response to Mr. Kane's letter that it continued to recommend approval for this conditional use. Based on the evidence, including the Staff reports, the Planning Board review, the exhibits, the concerns expressed by the opposition, the testimony at the hearing, and a review of the applicable Zoning Ordinance provisions in Part III of this Report and Decision, the Hearing Examiner concludes that the conditional use, as limited by conditions set forth herein, should be granted.

### **III. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

A conditional use is a zoning device that authorizes certain uses provided that pre-set legislative standards are met. Pre-set legislative standards are both specific and general. General standards are those findings that must be made for almost all conditional uses. *Zoning Ordinance*, §59.7.3.1.E. Specific standards are those which apply to the particular use requested, in this case, a Group Day Care for up to 12 children. *Zoning Ordinance* §59.3.4.4.D.

Weighing all the testimony and evidence of record under the "preponderance of the evidence" standard specified in *Zoning Ordinance* §59.7.1.1, the Hearing Examiner concludes

that the conditional use proposed in this application, as governed by the conditions imposed in Part IV of this Report and Decision, would satisfy all of the specific and general requirements for the use.

**A. Necessary Findings (Section 59.7.3.1.E.)**

The general findings necessary to approve a conditional use are found in Section 59.7.3.1.E of the Zoning Ordinance. Standards pertinent to this review, and the Hearing Examiner's conclusions for each finding, are set forth below:<sup>7</sup>

***E. Necessary Findings***

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

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

Conclusion: Technical Staff advises that there are no previously approved conditional uses associated with this site. Exhibit 23, p. 9. Therefore, the Hearing Examiner finds that this standard is inapplicable to the subject application.

***b. satisfies the requirements of the zone, use standards under Article 59-3, and to the extent the Hearing Examiner finds necessary to ensure compatibility, meets applicable general requirements under Article 59-6;***<sup>8</sup>

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

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<sup>7</sup> Although §59.7.3.1.E. contains six subsections (E.1. through E.6.), only subsections 59.7.3.1.E.1., E.2. and E.3. contain provisions that arguably apply to this application. Section 59.7.3.1.E.1. contains seven subparts, a. through g.

<sup>8</sup> The underlined language was added by the Council when the 2014 Zoning Ordinance was amended effective December 21, 2015, in ZTA 15-09 (Ordinance No. 18-08, adopted December 1, 2015).

as did Technical Staff (Exhibit 23, pp. 9-15), that the application satisfies the requirements of Articles 59-3, 59-4 and 59-6.

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

The subject property lies within the geographic area covered by the 1992 *North Bethesda Garrett Park Master Plan*. The Master Plan does not specifically discuss the subject site, but it supports having more child day care facilities in the area. As explained by Technical Staff (Exhibit 23, p. 11):

The Site is located within the 1992 North Bethesda Garrett Park Master Plan. The Master Plan does not specifically discuss the Site but it expresses support for more child day care centers in the area. “In general, the Plan endorses provision of child day care, group homes, elder day care, and nursing homes”, ([Master Plan] p. 38). The Master Plan also recommends that child day care centers should be provided in appropriate locations . . . ([Master Plan] p. 245). The Site is an appropriate location for a child day care facility. The existing eight-child day care facility has been on the Site for three-and-a-half years, and the proposal is a small expansion. Therefore, the proposal is in substantial conformance with the Master Plan.

Conclusion: The proposed use satisfies the guidelines for special exceptions specified in the Master Plan (pp. 37-38), especially the fifth guideline:

- \*                      \*                      \*
5. Support special exception uses that contribute to the service objectives of the Plan. The needs and objectives related to child day care and the elderly are discussed in the Community Facilities Chapter. **In general, the Plan endorses provision of child day care, group homes, elder day care, and nursing homes.** [Emphasis added.]

There is no contrary evidence in the record, and the Hearing Examiner finds that the proposed conditional use substantially conforms with the recommendations of the applicable master plan, which seeks to provide adequate child care facilities in the area.

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

Conclusion: Technical Staff found that the proposed use meets this standard (Exhibit 23, p. 11):

The proposal is harmonious with, and will not alter the character of, the surrounding neighborhood. As discussed above, the Master Plan encourages day care uses in the area. The Staff recommended six-foot board-on-board fence will provide screening and privacy to the adjoining properties. No physical changes are proposed for the main house. Therefore, the proposed expansion of the existing day care use will not alter the character of the neighborhood.

The Hearing Examiner concludes that the proposed use “*is harmonious with and will not alter the character of the surrounding neighborhood*” because it will remain a single-family, detached residence in a neighborhood of single-family, detached residences; no external modifications to the home are planned; and the only changes will be the addition of 4 children and one employee to an existing day care, and the improvement of screening with a board-on-board fence and 13 more trees. As noted above, it is consistent with the applicable Master Plan.

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

Conclusion: According to Technical Staff, the neighborhood, as defined by Staff, contains three other conditional uses – an accessory apartment, a medical office, and a day care center. The day care center is located at the edge of the defined neighborhood, across Old Georgetown Road and approximately a half-mile drive from the subject site. The Hearing Examiner agrees with Technical Staff that the addition of the proposed 12-child Group Day Care will not result in an overconcentration of day care facilities in the area. As observed by Staff (Exhibit 23, p. 12):

If the proposed day care facility were approved there would only be two conditional use day care facilities in the neighborhood. Although the proposal will increase the

number of day care uses in the neighborhood, the increase will not affect the area adversely or alter the area's predominantly residential nature.

The proposed expansion of the existing Family Day Care into a Group Day care will not alter the residential nature of the area. A day care facility already exist in the home, and it will remain a single-family, detached home. Moreover, the provision in question also provides that “*a conditional use application that substantially conforms with the recommendations of a master plan does not alter the nature of an area,*” and as noted above, the proposed use is consistent with the Master Plan. Thus, the Hearing Examiner finds that this standard has been met.

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

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

***ii. if a preliminary subdivision plan is filed concurrently or required subsequently, the Planning Board must find that the proposed development will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage; and***

Conclusion: According to Technical Staff, the application does not require approval of a preliminary plan of subdivision. Exhibit 23, p. 12. Therefore, the Hearing Examiner must determine whether the proposed development will be served by adequate public services and facilities. By its nature, a small child care facility operating within an existing single-family residence will not ordinarily create significant additional burdens for schools, police and fire

protection, water, sanitary sewer and storm drainage. The only public facilities issue in this case concerns the demand on transportation facilities posed by the conditional use.

Although the opposition expressed concerns about additional traffic in the neighborhood, the expert analysis by Technical Staff did not find significant impacts from the proposed conditional use. Technical Staff analyzed that impact in accordance with Local Area Transportation Review (LATR) and Transportation Policy Area Review (TPAR), as set forth in Exhibit 23, p. 7:

The proposed day care facility will operate between 7:30 A.M. and 6:00 P.M. and will generate 12 total peak-hour vehicular trips within both the weekday morning peak period (6:30 to 9:30 A.M.) and the evening peak period (4:00 to 7:00 P.M.). A traffic study is not required to satisfy the LATR test because the proposed land use generates fewer than 30 peak-hour trips within the weekday morning and evening peak periods.

The Subject Site is located in the North Bethesda Policy Area that has inadequate transit capacity for Transportation Policy Area Review (TPAR) analysis purposes. No TPAR payment will be required because the proposal does not add any new floor area to the Site.

The Applicant also addressed the impact on transportation facilities in her submission “Executive Summary/Planned Changes” (Exhibit 2, pp. 2-3). As discussed in Part II.C.5 of this Report and Decision, and as required by conditions imposed in Part IV, she will have contractual arrangements with her clients to ensure staggered arrivals and pick-up times, which will reduce any additional burdens on the transportation system. The Applicant also introduced signed statements from parents of children in the day care committing to a staggered drop off and pickup schedule so that non-pedestrian arrivals at the site for these purposes will not exceed 8 per hour, as called for by Technical Staff and required by the Hearing Examiner’s condition in Part IV of this Report and Decision. Exhibit 39.

Technical Staff concluded that “There are adequate public services and facilities to serve the proposed use.” Exhibit 23, p. 12. Based on this record, the Hearing Examiner finds that the proposed development will be served by adequate public services and facilities. LATR standards have been met, and the addition of four children and one employee to the facility will not unduly burden local transportation facilities.

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

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

Conclusion: This standard requires consideration of the inherent and non-inherent adverse effects of the proposed use, at the proposed location, on nearby properties and the general neighborhood.

*Inherent adverse effects are “adverse effects created by physical or operational characteristics of a conditional use necessarily associated with a particular use, regardless of its physical size or scale of operations.” Zoning Ordinance, §59.1.4.2. Non-inherent adverse effects are “adverse effects created by physical or operational characteristics of a conditional use not necessarily associated with the particular use or created by an unusual characteristic of the site.” Id. As specified in §59.7.3.1.E.1.g., quoted above, non-inherent adverse effects in the listed categories, alone or in conjunction with inherent effects in those categories, are a sufficient basis to deny a conditional use. Inherent adverse effects, alone, are not a sufficient basis for denial of a conditional use.*

Analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a Group Day Care facility.

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

Technical Staff determined that the following physical and operational characteristics are necessarily associated with (*i.e.*, are inherent in) a Group Day Care facility (Exhibit 23, p. 13): (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. The Hearing Examiner agrees with that listing of inherent characteristics of a Group Day Care. Staff also concluded that “the proposal will not have any non-inherent effects at this location.” Exhibit 23, p. 14. For the reasons set forth in Parts II.D.2. and 3 of this Report and Decision, the Hearing Examiner does not agree with Staff’s conclusion in this regard. Based on submissions by the opposition (Exhibits 26(a)(i) and 31(a)) and testimony at the hearing (Tr. 138- 175), the Hearing Examiner finds that there are numerous elderly residents living in close proximity to the subject site who are sensitive to the noise and commotion produced by the kind of child care facility proposed in this case. The Hearing Examiner concludes that the number of elderly living near the proposed child care facility constitutes an unusual site condition which must be considered in this case, and that therefore the effects on this particular neighborhood are not inherent in this type of use.

Nevertheless, the existence of a non-inherent adverse effect does not mean that an application for a conditional use must be denied. Rather, it means that it can result in denial if



the Hearing Examiner finds that such a non-inherent adverse effect, either alone or in combination with a inherent adverse effects, creates “undue harm to the neighborhood” in any of the categories listed in Zoning Ordinance §59.7.3.1.E.1.g. We now turn to that evaluation.

Staff initially analyzed the potential impacts on the neighborhood as follows (Exhibit 23, pp. 13-14):

The drop-offs in the morning and pick-ups are limited by the conditions of approval of the proposed use. The play area is adequate and the number of children outside at one time will be limited to no more than eight, except for the four times a year when there will be a special event. The scheduled play times of 9:15 A.M. to 10:15 A.M., 10:20 A.M. to 11:20 A.M., 3:15 P.M. to 4:15 P.M., and 4:15 P.M. to 5:15 P.M. or 5:30 P.M. (5:15 P.M. in the winter, 5:30 P.M. in the summer) are during hours when many in the neighborhood will likely not be in their residences so the noise generated from the eight children playing outside will have little negative impact on nearby neighbors. In addition, replacing the chain link fence with a board-on-board fence will reduce the noise impact of children playing in the back yard.

On Belhaven Road, there are two on-street parking spaces along the Site’s frontage for parent drop-off and pick-up trips in the morning and afternoon, and ample on-street parking available for the two employees.

The existing lighting and landscaping on the Site will be adequate for the proposal. The lighting is located beside the front entrance, the driveway, and the rear deck near the rear entrance to the house. All of them are residential lights and will not intrude on neighboring properties.

Staff has determined that the proposal will not have any non-inherent effects at this location.

Staff filed a supplemented report (Exhibit 34) on January 9, 2017, evaluating the points raised by the opposition in Mr. Kane’s letter of November 29, 2016 (Exhibit 26(a)(i)). The Hearing Examiner listed those responses and addressed each of the concerns raised by the opposition in Part II.D.3. of this Report and Decision. Those concerns fairly cover the categories of potential impacts listed in Zoning Ordinance §59.7.3.1.E.1.g., as they apply to the facts of this case. As a result of that evaluation, the Hearing Examiner changed some of the conditions

proposed by Technical Staff and the Planning Board. For example, the Hearing Examiner has accepted the opposition's request, agreed to by the Applicant, to limit outdoor play times to twice a day, with up to 12 children.

In addition, the Hearing Examiner rejects the Planning Board's proposed change to Technical Staff's first recommended condition (Exhibit 23, p. 2), which had limited the age of the children to be served by the Group Day Care to six years of age. The Planning Board, at the Applicant's request, recommended allowing children up to the age of 10, so that the Applicant could "include an after-school homework program." Exhibit 24. The opposition objected to this change, arguing that 10 year old children make more noise than 6 year old children. Tr. 163 and Exhibit 48(a), pp. 4-6.<sup>9</sup> Although the opposition did not present any scientific evidence to this effect, there is also no basis to reject their observation that older children can be louder.

At this time, the children at the Family Day Care are all aged three or under. Tr. 125-126. Significantly, the Applicant admitted at the hearing that she had no current plans to have an after-school homework program for children over 6 years of age (Tr. 129):

Well, right now we don't have any plans for it but I did not want to limit our possibilities in the future if we did decide to have just a homework group, that, that when children come after school and we sit down and do homework with them. Umm, it's not in my current plans . . .

Given these circumstances, the Hearing Examiner sees no harm to the Applicant in limiting the ages of the children to six or younger at this point, which is what she originally requested

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<sup>9</sup> The Applicant objected to the Hearing Examiner considering this argument in Mr. Kane's letter of February 13, 2017 (Exhibit 48(a), pp. 4-6), arguing that it was untimely and went beyond the purpose for which the record was held open. Exhibit 49. While the Hearing Examiner indicated at the hearing that the opposition had until February 13 to respond to any revised plans filed by the Applicant, he did not expressly limit that response to the question of the physical changes on the plans. Tr. 201-202. Since Mr. Kane's letter raised no significant factual material on this issue beyond what was discussed at the hearing (Tr. 125-131, 163), and since the Applicant was also given the opportunity to (and did) respond to the opposition's February 13 filing, the Hearing Examiner finds no prejudice in considering Mr. Kane's arguments and requests regarding limits on the ages of the children. He therefore overrules the Applicant's objection on this point.

(Exhibit 2, p. 2), especially since this limitation will further alleviate concerns raised by the neighbors in opposition.

Even though the Hearing Examiner has concluded that the existence of nearby elderly neighbors has created an unusual site condition, he agrees with Technical Staff's and the Planning Board's overall finding that the proposed Group Day Care will satisfy the provisions of Zoning Ordinance §59.7.3.1.E.1.g. The Hearing Examiner might have reached a different conclusion, if there were no way to ameliorate the potential effects of the conditional use on the elderly neighbors. However, the conditions imposed in Part IV of this Report and Decision will actually reduce the impact of the existing child care facility on the neighbors. These conditions include the requirement of adding a six-foot tall board-on-board fence and 13 screening trees in the back yard; restrictions on outside noise, both from amplified sound and excessively loud children; limits on the timing and duration of outdoor play times; limits on hours of operation; limits on the ages of the children; a requirement for the staggered arrival of vehicles; and a stipulation that the grounds must be daily maintained free of debris. All of these conditions are enforceable by the Department of Permitting Services.

While a Group Day Care facility cannot be rendered free of all outdoor noise, neither can the existing Family Day Care. The difference is that the existence of a conditional use allows reasonable limits to be placed on the operation so as to reduce the impacts on the neighbors. When the Hearing Examiner questioned one of the neighbors on this point, she admitted that such conditions would be beneficial. Tr. 143.

The Hearing Examiner finds that the proposed Group Day Care for no more than 12 children, up to age of 6, as limited by the conditions imposed in Part IV of this Report and Decision, will actually have less adverse impact on the neighbors than the existing, uncontrolled

Family Day Care for up to 8 children. Therefore, none of the adverse effects complained of by the neighbors will create “undue” harm.

Based on the entire record, the Hearing Examiner finds that, with the conditions imposed in Part IV of this Report and Decision, the proposed use will not cause undue harm to the neighborhood as a result of non-inherent adverse effects alone or the combination of inherent and non-inherent adverse effects, in any of the categories listed in §59.7.3.1.E.1.g.

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

Conclusion: As observed by Technical Staff (Exhibit 2, p. 14), “The proposal is for the expansion of an existing day care facility in an existing house; it will not construct, reconstruct, or alter the outside appearance of the house.” The only structural change allowed in this case will be the erection of a six-foot tall, board-on-board fence around the back yard to screen the child care’s outdoor activities from the neighbors. Those changes, in addition to the 13 trees to be planted around the perimeter of the backyard, will enhance compatibility and will not change the residential character of the neighborhood. The Hearing Examiner therefore agrees with Staff’s conclusion that the proposed alterations to the site will be compatible with the neighborhood.

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

Conclusion: The application satisfies all specific requirements for the conditional use, and as discussed above, the proposed use will be compatible with the neighborhood. The Hearing Examiner concludes that, with the conditions imposed in Part IV of this Report and Decision, the conditional use should be approved.

### **B. Development Standards of the Zone (Article 59.4)**

In order to approve a conditional use, the Hearing Examiner must find that the application meets the development standards of the zone where the use will be located – in this case, the R-60 Zone. Development standards for the R-60 Zone are contained §59.4.4.9.B. of the Zoning Ordinance. Staff compared the minimum development standards of the R-60 Zone to those provided by the application in a Table included in the Staff Report (Exhibit 23, pp. 9-10), and reproduced below. Only the portion of the Table that pertains to the standards of the R-60 Zone under Article 59-4 is reproduced in this section. The remainder of the Table concerns development standards set forth in Article 59-6 (regarding parking), and those standards will be discussed in Section III.D. of this Report and Decision.

<b>Development Standards</b>	<b>Required/Permitted</b>	<b>Proposed</b>
Minimum Lot Area: (Section 59.4.4.9.B.1)	6,000 sq. ft.	8,310 sq. ft.
Minimum Lot Width at Front Building Line (Section 59.4.4.9.B.1)	60 feet	±71 feet
Minimum Lot Width at Front Lot Line (Section 59.4.4.9.B.1)	25 feet	±84 feet
Maximum Density (Section 59.4.4.9.B.1)	1.39 units (7.26 dwelling units/acre)	1 unit
Maximum Lot Coverage (Section 59.4.4.9.B.1)	35 percent	±14.29%
Minimum Front Setback (Section 59.4.4.9.B.2)	25 feet	±28 feet
Minimum Side Setback (Section 59.4.4.9.B.2)	8 feet	±10 feet
Minimum Sum of Side Setbacks (Section 59.4.4.9.B.2)	18 feet	±24 feet
Minimum Rear Setbacks (Section 59.4.4.9.B.2)	20 feet	±61 feet
Maximum Height (Section 59.4.4.9.B.3)	30 feet	±27.6 feet

Conclusion: As can be seen from the above Table, the proposed use more than meets all the development standards of the R-60 Zone, as provided in Zoning Ordinance §59.4.4.9.B., and the Hearing Examiner so finds.

**C. Use Standards for a Group Day Care for 9 to 12 Persons (Section 59.3.4.4.D.)**

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

**1. Defined**

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

Conclusion: The Applicant will be required to have staffing, operations, and structures compliant with State and local regulations. At the hearing, Ms. Meteleva testified under oath that her two children are ages 6 and 8. Tr. 81. Since they are not “under the age of 6,” they do not count towards the maximum number of children allowed in the Group Day Care.

**2. Use Standards**

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

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

***ii. In a detached house, the registrant is the provider and a resident. If the provider is not a resident, the provider may file a conditional use application for a Day Care Center (13-30 Persons) (see Section 3.4.4.E).***

***iii. In a detached house, no more than 3 non-resident staff members are on-site at any time.***

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

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

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

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

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

Furthermore, as discussed in Part III.A., above, and the Conditional Use standards of Zoning Ordinance §59.7.3.1 have been satisfied.

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

#### **D. General Development Standards (Article 59.6)**

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

##### **1. Site Access Standards**

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

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

Conclusion: The standards for the number of parking spaces required, parking facility design and parking facility screening are governed by Division 6.2 of the Zoning Ordinance. However, because the subject site is a detached home and is not required to have a parking facility with 5



or more parking spaces, the Code sections pertaining to parking facility design and screening do not apply in this case. *See Zoning Ordinance §§59.6.2.5.A.1 and 59.6.2.9.A.3.*

The required number of parking spaces is established by Zoning Ordinance §59.6.2.4., as referenced in the Table on page 10 of the Staff report (Exhibit 23), and reproduced below:

Development Standards	Required/Permitted	Proposed
Vehicle Parking Requirement (Section 59.6.2.4.B)	Group Day Care: 2 (1/employee) Dwelling: 2  On-street parking allowed	Day Care: 2 on-street employee spaces Dwelling: 2 on-site
Bicycle Parking Requirement (Section 59.6.2.4.C)	Group Day Care: 1 Long-Term	1 in garage

As can be seen from the above Table, Section 59.6.2.4 of the Zoning Ordinance requires a total of 4 parking spaces for the subject site (2 spaces for the single-family dwelling and 2 for the child-care facility), but it allows on-street parking to satisfy this requirement. As discussed in Part II.C.2. of this Report and Decision, the proposed Group Day Care also needs an area where parents can safely drop off and pick up children.

Technical Staff found that the two on-street spaces in front of the house could be used for that purpose and that the non-resident employees could park in any of the available spaces near the subject site on Belhaven Road. In addition, the Applicant indicates that the driveway will be vacant during operating hours and thus can also be used for drop-off and pickup of children. Exhibit 2, p. 5. The Applicant will provide one long-term bicycle space in the garage.

Based on this record and the findings in Part II.C.2. of this Report and Decision, the Hearing Examiner concludes that the Applicant will be compliant with the cited sections of the Zoning Ordinance.

### 3. Site Landscaping, Screening and Lighting

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

#### *a. Lighting*

Zoning Ordinance §59.6.4.4.E. provides:

##### ***E. Conditional Uses***

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

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

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

Conclusion: As discussed in Part II.C.3. of this Report and Decision, no new lighting is planned for this conditional use, and Technical Staff found the existing lighting to be adequate and non-intrusive (Exhibit 23, p. 13):

The existing lighting and landscaping on the Site will be adequate for the proposal. The lighting is located beside the front entrance, the driveway, and the rear deck near the rear entrance to the house. All of them are residential lights and will not intrude on neighboring properties.

Based on this record, the Hearing Examiner finds that the existing lighting is compliant with the requirements of Division 6.4, regarding lighting.

#### ***b. Site Screening and Landscaping***

Conclusion: Although some provisions in this portion of the Zoning Ordinance contain very specific requirements, the review of site landscaping and screening for conditional uses in single-family, detached homes is limited to an assessment of compatibility. Zoning Ordinance

§59.6.5.2.B. This language is reinforced by Section 59.7.3.1.E.1.b., under which the Hearing Examiner need only find that the proposed use meets applicable general requirements under Article 59-6 “to the extent the Hearing Examiner finds necessary to ensure compatibility. . .”

The existing landscaping and screening includes trees and shrubs, and a chain-link fence, portions of which are owned by the neighbors. As a condition of this conditional use, the landscaping and screening will include a new six-foot tall, board-on-board fence, as well as 13 additional Leland Cypress trees to be provided by the Applicant, as described in Applicant’s final revised Landscape (“Play Yard Screening”) Plan (Exhibit 49(a)).

As discussed in Part II. C.1. of this Report and Decision, Staff found that, with the addition of the board-on-board fence (even without the additional screening trees), “[t]he proposal will be compatible with the nearby residential properties.” Exhibit 23, p. 14. However, based on the concerns expressed by the neighbors during the hearing, the Applicant agreed to supplement the new fence with 13 additional Leland Cypress trees, which will be at least 8 feet tall at planting, as shown in Exhibit 49(a).

The Hearing Examiner finds that the proposed site landscaping and screening will ensure compatibility with the surrounding neighborhood and thus will meet the requirements of the Zoning Ordinance.

#### **4. Signage**

Conclusion: The use of signage is governed by Zoning Ordinance Division 6.7. Although Zoning Ordinance §59.6.7.8.A.1 sets the standards for signs in Residential Zones, no sign is proposed for the subject conditional use. Therefore, the Hearing Examiner has imposed a condition in Part IV of this Report and Decision which will prohibit the Applicant from posting a sign on the property.

#### **IV. CONCLUSION AND DECISION**

As set forth above, the application meets all the standards for approval in Articles 59-3, 59-4, 59-6 and 59-7 of the Zoning Ordinance. In terms of impacts on the neighbors, it must be remembered that this is not an application to establish a new child care facility on the subject site; rather, it is an application to add 4 children to an already functioning child care facility on the site.

While any day care facility will have some adverse effects on the immediate neighbors in terms of noise and commotion during outdoor play and traffic on arrival and pickup, those effects are inherent in the use. The only non-inherent adverse effect in this case results from the unusual site condition of proximity to a number of elderly neighbors who are likely to be more susceptible to noise and visual disturbance than most. The Hearing Examiner finds that those effects can be sufficiently ameliorated by the conditions imposed in this part of the report so that their impacts on the neighbors are not “undue.” These conditions include the requirement of adding a six-foot tall board-on-board fence and 13 screening trees in the back yard; restrictions on outside noise, both from amplified sound and excessively loud children; limits on the timing and duration of outdoor play times; limits on hours of operation; limits on the ages of the children; a requirement for the staggered arrival of vehicles; and a stipulation that the grounds must be daily maintained free of debris. All of these conditions are enforceable by the Department of Permitting Services.

The Hearing Examiner rejects the opposition’s suggestion that this application should be denied because it is a money-making business (Tr. 161 and Exhibit 26(a)(i), pp. 7-8). The Zoning Ordinance does not permit the Hearing Examiner to make such a distinction with regard to a Group Day Care conditional use.

Based on the foregoing findings and conclusions and a thorough review of the entire record, the application of Tatiana Meteleva (CU 17-05), for a conditional use under Section 59.3.4.4.D. of the Zoning Ordinance, to operate a Group Day Care for up to 12 children in her home at 9828 Belhaven Road in Bethesda, Maryland, is hereby **GRANTED**, subject to the following conditions:

1. The proposed group day care facility is limited to 12 children up to 6 years in age.
2. Non-resident employees are limited to two. They may park on Belhaven Road.
3. The rear yard must be enclosed with a six-foot tall board-on-board privacy fence on all sides, and the Applicant must provide the screening trees and vegetation depicted in Applicant's final revised Landscape ("Play Yard Screening") Plan (Exhibit 49(a)).
4. The hours of operation are limited to Monday through Friday, 7:30 a.m. to 6:00 p.m.
5. The Applicant must ensure that vehicular drop-offs and pick-ups for all children will be limited to no more than eight per hour (not including children walked to the facility), and must require written parental agreements to that effect.
6. Outdoor play time is limited to two sessions a day, with each session lasting up to approximately one hour. All 12 Group Day Care children may be outside during these periods, but any child creating an undue amount of noise should be instructed to reduce the noise level, or if necessary, escorted indoors. These outdoor sessions must be scheduled to occur at approximately the same time each day, which currently is from 10:15 a.m. to 11:15 a.m. and from 3:30 p.m. to 4:30 p.m., according to the Applicant's Exhibit 2, pp. 1-4. If the Applicant elects to establish a different regular time schedule for outdoor play, she must notify the parties of record of that change. These scheduled times may be varied in the event that inclement weather on any given day so requires, but each session must not exceed one hour, and the number of outdoor sessions must not exceed two per day.
7. Outside play time may not occur prior to 9:15 a.m. or after 5:15 p.m.
8. All children must be under the direct supervision of a staff member at all times.
9. The Applicant must not erect a sign on the subject site.
10. The Applicant must comply with and satisfy all applicable State and County requirements for operating a Group Day Care for children, and must correct any deficiencies found in any government inspection.

11. Children must be accompanied by an adult to and from the child-care entrance, and when drop-offs or pickups are made by vehicle outside of the Applicant's driveway, children must embark or disembark the vehicle from the curb side.
12. The Applicant must not use a public address system of any kind outside the building, and must not allow any amplified music to be played outside the building.
13. The Applicant must maintain the grounds in a clean condition, free from debris, on a daily basis. Toys which are designed to be kept outdoors are not considered debris.
14. The Applicant must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the conditional use premises and operate the conditional use as granted herein. The Applicant shall at all times ensure that the conditional use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements, including the annual payment of conditional use administrative fees assessed by the Department of Permitting Services.

Issued this 22<sup>nd</sup> day of March, 2017.



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Martin L. Grossman  
Hearing Examiner

#### NOTICE OF RIGHT TO REQUEST ORAL ARGUMENT

Any party of record may file a written request to present an appeal and oral argument before the Board of Appeals, within 10 days after the Office of Zoning and Administrative Hearings issues the Hearing Examiner's Report and Decision. Any party of record may, no later than 5 days after a request for oral argument is filed, file a written opposition to it or request to participate in oral argument. If the Board of Appeals grants a request for oral argument, the argument must be limited to matters contained in the record compiled by the Hearing Examiner. A person requesting an appeal, or opposing it, must send a copy of that request or opposition to the Hearing Examiner, the Board of Appeals, and all parties of record before the Hearing Examiner.

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

The Board of Appeals may be contacted at:

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

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

The Board of Appeals will consider your request for oral argument at a work session. Agendas for the Board's work sessions can be found on the Board's website and in the Board's office. You can also call the Board's office to see when the Board will consider your request. If your request for oral argument is granted, you will be notified by the Board of Appeals regarding the time and place for oral argument. Because decisions made by the Board are confined to the evidence of record before the Hearing Examiner, no new or additional evidence or witnesses will be considered. If your request for oral argument is denied, your case will likely be decided by the Board that same day, at the work session.

Parties requesting or opposing an appeal must not attempt to discuss this case with individual Board members because such *ex parte* communications are prohibited by law. If you have any questions regarding this procedure, please contact the Board of Appeals by calling 240-777-6600 or visiting its website: <http://www.montgomerycountymd.gov/boa/>.

NOTICES TO:

Tatiana Meteleva, Applicant  
Harry L. Stone, Esquire, Attorney for the Applicant  
Mark North  
Paraskevoula Hays  
William Kane  
Madeline Cunningham  
Roger Hays  
Leo J. Kane, Esquire  
Barbara Jay, Executive Director  
Montgomery County Board of Appeals  
Emily Tettelbaum, Planning Department  
Ehsan Motazed, Department of Permitting Services  
Alexandre A. Espinosa, Director, Finance Department