

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

**IN THE MATTER OF:**

**ROBIN RICE**

Applicant

Robin Rice

Angela Pryor

For the Application

\*\*\*\*\*

Emily Tettelbaum, Planning Department

Testified at Applicant's request

\*\*\*\*\*

Beverley Lloyd and Thomas C. Johnson

G. Macy Nelson, Esquire

Attorney for Ms. Lloyd and Mr. Johnson

Anne Gregorski

Katie Becker

Jean Nodine

Rob & Patty Peterson

Barbara Feldmann

Jim Snee

Kathleen Mason

Clare and John De Cleene

Nancy McGinness

John Patrick Duffy

Andre Polissedjian

Sheryl Greenfield

Jane Lewis

Ruth Schwartz

Carol Gannon

Andrew Lucarelli

Bonnie Lloyd

Elaine French

Patricia Labuda

James E. Bentson, Expert Appraiser

Parties in Opposition

\*\*\*\*\*

Before: Martin L. Grossman, Hearing Examiner

Director, Office of Zoning and Administrative Hearings

OZAH Case No. CU 17-14

**HEARING EXAMINER'S REPORT AND DECISION**

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## I. STATEMENT OF THE CASE

On March 16, 2017, the Applicant, Robin Rice, filed an application seeking approval of a conditional use to operate a Child Day Care Center for up to 30 children in a single-family detached home she owns (but does not occupy) at 17505 Park Mill Drive in Derwood, Maryland. The Subject Site is Lot 8, Block G of the Mill Creek Towne Subdivision. It is zoned R-200, and it bears the SDAT Tax Account No. 09-00785383. Currently a Group Day Care for up to 12 children is operating on the site, as a Limited Use under the direction of Angela Pryor, who lives in the home. 12/4/17 Tr. 171.<sup>1</sup> A Conditional Use is required for a Child Day Care Center in the R-200 Zone, and the Applicant seeks approval of a Conditional Use pursuant to Zoning Ordinance §59-3.4.4.E (13-30 persons).<sup>2</sup>

The Office of Zoning and Administrative Hearings (OZAH) initially scheduled a public hearing to be held on July 21, 2017, but at the request of the opposition (Exhibit 53), the hearing was postponed until August 4, 2017 (Exhibit 59), and the new hearing date was publically noticed on June 23, 2017 (Exhibit 60). One attorney, G. Macy Nelson, Esquire, entered his appearance on behalf of two opposition neighbors, Beverley Lloyd and Thomas C. Johnson, who live next door to the subject site. Exhibit 50. The Applicant is proceeding *pro se*.

Approximately 120 letters of opposition were filed (collected in Exhibit 40), and signed petitions in opposition were filed by approximately 253 individuals (collected in Exhibit 70). The central points raised by the opposition include child safety, noise (kids playing, slamming car doors, *etc.*), traffic, parking, neighborhood safety issues from traffic and on-street parking (especially regarding pedestrians, absent a sidewalk), compatibility (*e.g.*, paving front yard), a

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<sup>1</sup> Transcript citations are identified by the date of the hearing session (12/4/17 or 9/13/17) and by the page number. The page numbering is continuous, with the 12/4/17 session ending on page 326, and the 9/13/17 session beginning on page 327 and running through page 661.

<sup>2</sup> Unless otherwise noted, all citations to the Zoning Ordinance in this Decision are to the 2014 Zoning Ordinance for Montgomery County, adopted September 30, 2014 (Ordinance No. 17-52), as amended.

commercial entity in a residential neighborhood and impact on property values. The community reaction will be discussed in Part II.D. of this Report and Decision.

The Technical Staff of the Montgomery County Planning Department (Technical Staff or Staff) issued a report on June 19, 2017, recommending denial of the application based on a number of factors (Exhibit 67, p. 2):

Staff recommends denial of CU 17-14 because of the incompatibility of the use with the surrounding neighborhood; non-inherent adverse impacts resulting from the location of the use on a substandard residential street; the intensity of the proposed daycare on a relatively small property; and the Applicant's failure to demonstrate that vehicle and pedestrian circulation in the proposed driveway will be safe and efficient. Further, the proposed driveway does not have a perimeter planting area that satisfies Section 6.2.9.B.

The Planning Board met on June 29, 2017, and after hearing statements from Technical Staff, the Applicant and numerous community members, voted unanimously to recommend denial of the application, as indicated in the Chair's letter of July 12, 2017. Exhibit 68. The Planning Board based its recommendation on Technical Staff's analysis and on its determination that there is insufficient parking for the proposed use; that Park Mill Drive is not designed to handle the proposed level of traffic; and that the intensity of the use is not compatible with the surrounding residential neighborhood.

The Applicant filed a pre-hearing submission on July 11, 2017 (Exhibit 62), and a list of alleged "Staff Report Factual Errors" on July 12, 2017 (Exhibit 65(b)). Opposition prehearing submissions were filed by Mr. Nelson, on behalf of Beverly Lloyd and Thomas Johnson, on July 14, 2017 (Exhibit 69), and by Anne Gregorski on July 21, 2017 (Exhibit 71). Four other neighbors (Katie Becker, Jean Nodine, and Rob and Patty Peterson) filed their own prehearing submission on July 21, 2017 (Exhibit 73).

On July 19, 2017, Technical Staff issued a Supplemental Staff Report (Exhibit 72) responding to Applicant's list of claimed factual errors in the initial Staff Report.

The public hearing proceeded as scheduled on August 4, 2017. The Applicant testified, as did Angela Pryor, the provider of the Group Day Care currently operating on the site, Emily Tettelbaum, the Technical Staffer who analyzed this case, and seven neighbors in opposition – Kathleen Mason, Clare De Cleene, Barbara Feldmann, Andre Polissedjian, James Snee, Nancy McGuinness and John Duffy. The Applicant also introduced a variety of new exhibits (Exhibits 79(a)-79(g); 80(a)-80(g); 81-84, 85(a)-85(u) and 86-87). The opposition introduced two photos (Exhibits 88 and 89). When the hearing adjourned for the day, Ms. Rice had still not finished her case in chief, and additional neighbors still wished to testify, so new dates were thereafter proposed for resumption of the hearing. The parties agreed to resume on September 13, 2017 (Exhibit 98).

On August 9, 2017, the Hearing Examiner issued a written ruling (Exhibit 91) upholding the objection raised by the Applicant at the hearing to the admission into evidence of the May 16, 2017 Real Estate Appraisal Report (Exhibit 69(a)), proffered by opposition attorney G. Macy Nelson, unless the Applicant had an opportunity to cross-examine the expert appraiser who authored the report (James E. Bentson). The Hearing Examiner indicated that he would subpoena Mr. Bentson, so that he would be available for cross-examination at the hearing, but Mr. Nelson indicated that Mr. Bentson would be available, and the subpoena was not needed. Exhibit 98.

On August 10, 2017, the Applicant filed a proposed amendment to her plans to substitute a sign on the rear of her property (adjacent to Shady Grove Road) for one previously proposed for the front of her property (Exhibits 92 and 92(a)). On August 15, 2017, the Applicant filed proposed amendments of her parking and landscaping plans (Exhibits 96 and 97). On August 29, 2017, these plans were combined into an overall site layout plan (Exhibit 111) showing proposed parking, lighting, landscaping, signage and the addition. Comments from Staff regarding these plans were filed from August 18 through August 29, 2017 (Exhibit 109), and Anne Gregorski

filed an Amended Prehearing Statement (Exhibit 114) on September 1, 2017, in further response and opposition to Applicant's case. The Applicant filed an updated affidavit of posting on August 29, 2017 (Exhibit 110).

The hearing resumed on September 13, 2017. Ms. Rice completed her testimony and rebuttal, and introduced Exhibits 116(a)-116((p); 117(a)-117(l); 118(a) and (b); 119(a)-119(g); 120(a)-120(k); 121(a) and (b); and 136(a) and (b). Additional opposition testimony was provided by one expert, James Bentson, and 13 lay witnesses – Thomas Johnson, Sheryl Greenfield, Jane Lewis, Ruth Schwartz, Carol Gannon, Andrew Lucarelli, Bonnie Lloyd, Elaine French, Patricia Labuda, Katie Becker, Jean Nodine, Patty Peterson and Anne Gregorski. The opposition introduced Exhibits 122-126; 128(a)-128(c); 129-130; 131(a)-131(v); 132-134; 134(a)-134(tt); and 135(a) and (b). James Bentson's real estate appraisal report (Exhibit 69(a)) was allowed into evidence because he testified as an expert real estate appraiser and was cross-examined.

At the conclusion of the hearing, the record was held open to September 22, 2017, solely to receive the transcript of the September 13 hearing session. It was announced that no further filings would be accepted. 9/13/17 Tr. 657-658. The record closed, as scheduled, on September 22, 2017.

For the reasons set forth at length in this Report and Decision, the Hearing Examiner finds that the Applicant has failed to prove that her proposed plans will comport with the requirements of the Zoning Ordinance, and this conditional use application is therefore denied.

## **II. FACTUAL BACKGROUND**

### **A. The Subject Property**

The subject property is described as Lot 8, Block G of the Mill Creek Towne Subdivision, in Derwood, Maryland. The area of the lot is only 15,000 square feet, which is undersized for an R-200 zoned property, since the normal minimum lot area would be 20,000 square feet for

standard development, per Zoning Ordinance §59.4.4.7.B. The site is located directly between Park Mill Drive, a secondary residential street with a 60-foot wide right-of-way, and Shady Grove Road, a six-lane major highway, with a 150-foot wide right-of-way, as can be seen below on the aerial photo of the site provided by Technical Staff (Exhibit 67, p. 3).



As noted at the beginning of this report and decision, the Applicant owns the property, but does not reside there. Angela Pryor, who manages the existing group daycare, currently resides in the house. Technical Staff indicates that Ms. Pryor's husband and two teenage children also presently live on the premises. Staff also described the site (Exhibit 67, pp. 2-3):

The Site is a through lot that fronts on both Park Mill Drive and Shady Grove Road, although vehicle access is only available from Park Mill Drive. There are no public sidewalks along this portion of Park Mill Drive. The existing driveway is approximately 62 feet long and between 12 and 16 feet wide with space available to tandem park 4 cars.<sup>3</sup> According to the Maryland Department of Assessments and Taxation, the house has an above grade living area of 2,390 square feet and a 660-square-foot finished basement area. The entrance to the

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<sup>3</sup> The Applicant contends that "The existing driveway is 47 feet long on site and 20 feet long on-street, a total of 67 feet." Exhibit 65(b).

existing daycare is through the double doors on the south side of the house, accessed from the end of the driveway.<sup>4</sup> Two wall-mounted lamps are located on either side of the entrance to the daycare, and one wall mounted lamp is located adjacent to the front door. A yellow sign with the name and contact information for the daycare, measuring 2.5 feet high by 3 feet wide, is located adjacent to the daycare entrance.

The rear yard is enclosed by various types of wooden fencing<sup>5</sup>. Along the south and east sides of the rear yard, there is a six-foot board on board fence with a gate that leads to Shady Grove Road. . . . A split rail fence, approximately four feet in height and lined with chicken wire is located between the Site's rear yard and the yard of the neighboring lot to the north. A 3.5-foot-tall board on board fence encloses the front portion of the rear yard. This section of fencing is interrupted by a shed, which serves as a barrier between the front and rear yards. Various types of play equipment are located in the rear yard. . . . The rear (east side) of the property has a 25-foot-wide slope and drainage easement.

The Applicant provided photographs of the subject site, front and rear (Exhibit 32):



Other photos from the Applicant show her shed, with the new fence abutting Tom Johnson's property (Exhibit 117(e)), and her back yard and play equipment (Exhibit 119(a)):

<sup>4</sup> The Applicant indicates that there is a single entrance to the day care, not double doors (Exhibit 65(b)). Technical Staff does not dispute that, but Staff rightly notes and demonstrates with a photo, that the "the entrance to the daycare has the appearance of a double door." Exhibit 72, pp. 2-3)

<sup>5</sup> As a through lot, the Site technically has two front setbacks, but this report refers to the rear yard as the portion of the yard between the Shady Grove right-of-way and the rear of the house.





Applicant's Shed and North Side Yard



Back Yard and Play Equipment

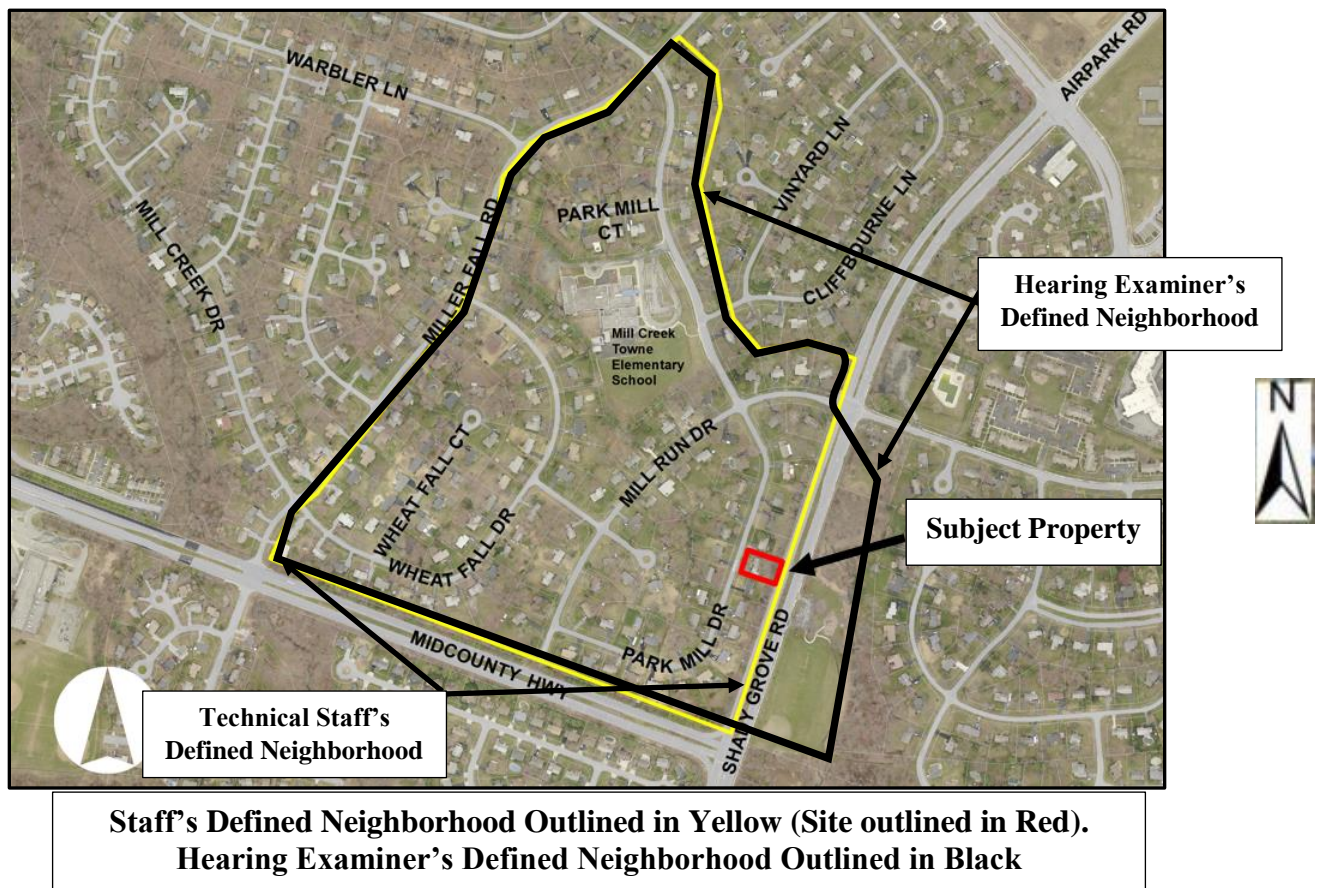
### B. Surrounding Neighborhood

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 circumscribed by the Mid County Highway to the south, Shady Grove Road to the east, and Miller Fall Road to the west. The rear lot lines of properties on the north side of Park Mill Drive and Mill Towne Elementary School form the northern boundary of the Neighborhood.” Exhibit 67, p. 4. Technical Staff observed that except for Mill Creek Towne Elementary School, the Staff-defined neighborhood is completely residential, with detached homes in the R-200 Zone. The Staff-defined neighborhood is depicted on the next page in a map from the Staff report.

The Applicant suggested that the neighborhood should be defined to include the Mill Creek Towne Park which confronts the subject site across Shady Grove Road because it is a confronting property. 12/4/17 Tr. 42-43. Alternatively, the Applicant suggests using a radius of a specific distance around the site to determine the neighborhood. 12/4/17 Tr. 50-52. Technical

Staffer Emily Tettelbaum testified that it is more appropriate to use existing streets as boundaries when they are located within the surroundings. 12/4/17 Tr. 163-164.

The Hearing Examiner agrees with Technical Staff that the use of streets to aid in defining neighborhood boundaries is preferable in developed residential neighborhoods, but also concludes that the Applicant has a legitimate point in suggesting that the Mill Creek Towne Park across Shady Grove Road from her property should be included. Not only is it potentially within sight and sound of her property, but it also may be affected to some degree by additional traffic that would be generated by the proposed use. The dimensions of Staff's proposed neighborhood are shown below in yellow on an aerial photo map from the Staff report (Exhibit 67, p. 4). The defined neighborhood accepted by the Hearing Examiner (*i.e.*, expanded east to include the confronting park across Shady Grove Road) is shown below in black:



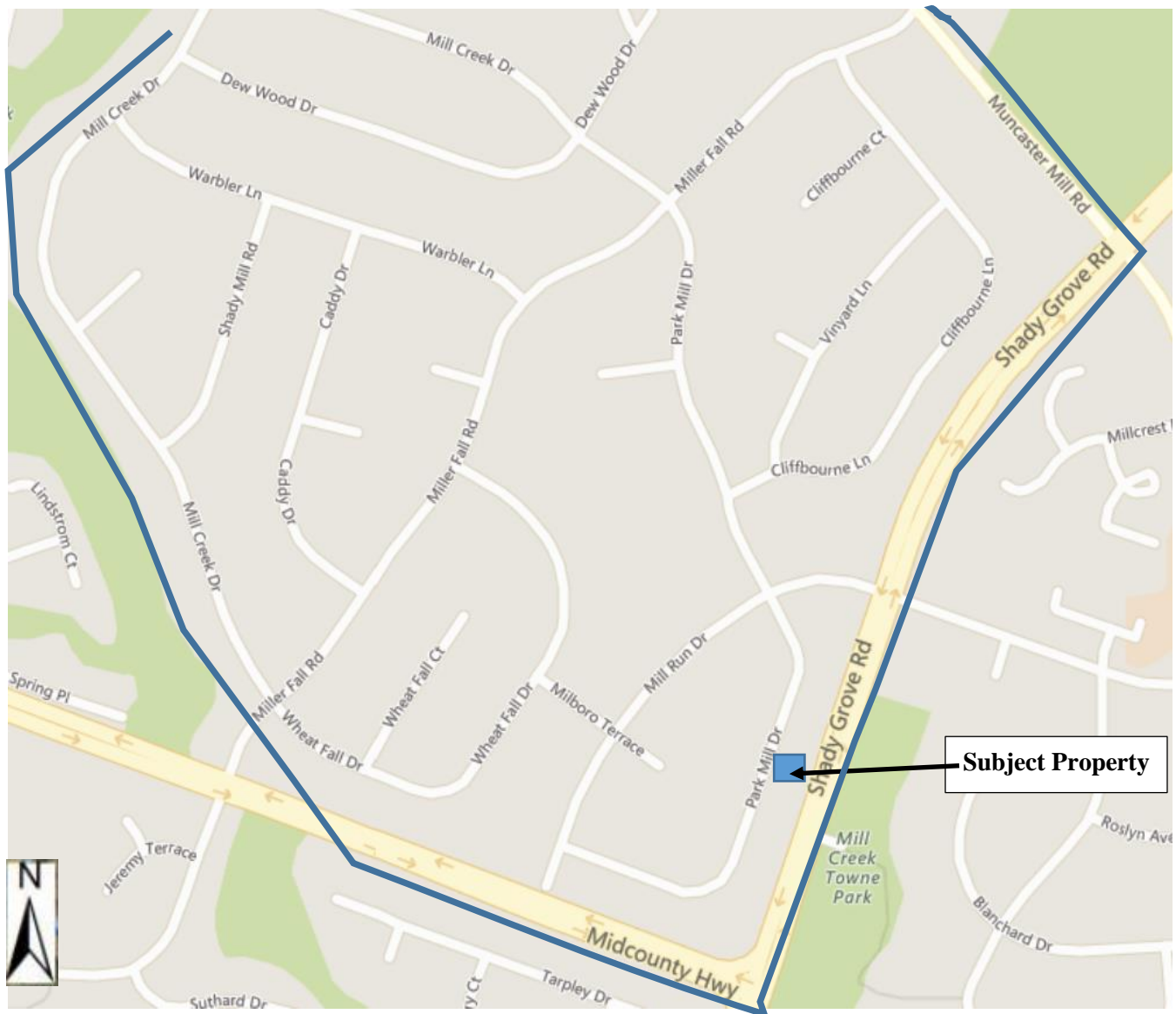
The Hearing Examiner's defined neighborhood is generally bounded by the Midcounty Highway to the south; the eastern edge of the Mill Creek Towne Park across Shady Grove Road to the east; Miller Fall Road to the west; and the rear lot lines of properties on the north side of Park Mill Drive and Mill Towne Elementary School to the north. Although the Hearing Examiner extended the defined neighborhood a bit to the east, the distinction between Technical Staff's proposed definition of the neighborhood and the Hearing Examiner's definition is not material to the outcome of this case. The Hearing Examiner's defined neighborhood has been superimposed in black on Technical Staff's map, above.

The Hearing Examiner's defined neighborhood is completely residential, except for Mill Creek Towne Elementary School and the confronting park just to the east of Shady Grove Road. As is evident from the above aerial photo map, the subject site is located about equidistant between Midcounty Highway, to the south, and the intersection Mill Run Drive and Shady Grove Road, to the north.

During the hearing, members of the opposition suggested that the neighborhood should be defined more broadly than Technical Staff recommended because the potential traffic from the proposed use will impact the entire Mill Creek Towne Subdivision. Some argued that only one intersection accessing the Mill Creek Towne Subdivision onto Shady Grove Road (the one at Mill Run Drive) is controlled by a traffic signal, and therefore residents of the entire subdivision would be adversely affected by the increased traffic and backups at that light from the proposed use. 9/13/17 Tr. 549, 558, 561, 620-621. On the other hand, Katie Becker of the opposition argued that because there are multiple routes that could be followed, more homes in the Subdivision would actually be affected by the additional traffic. 9/13/17 Tr. 605. Others living in the subdivision like to walk (*e.g.*, Jane Lewis) or have children (*e.g.*, Andrew Lucarelli) whose safety may be impacted by the additional traffic and parking on the grassy roadsides. 9/13/17 Tr. 532 and 542-543.

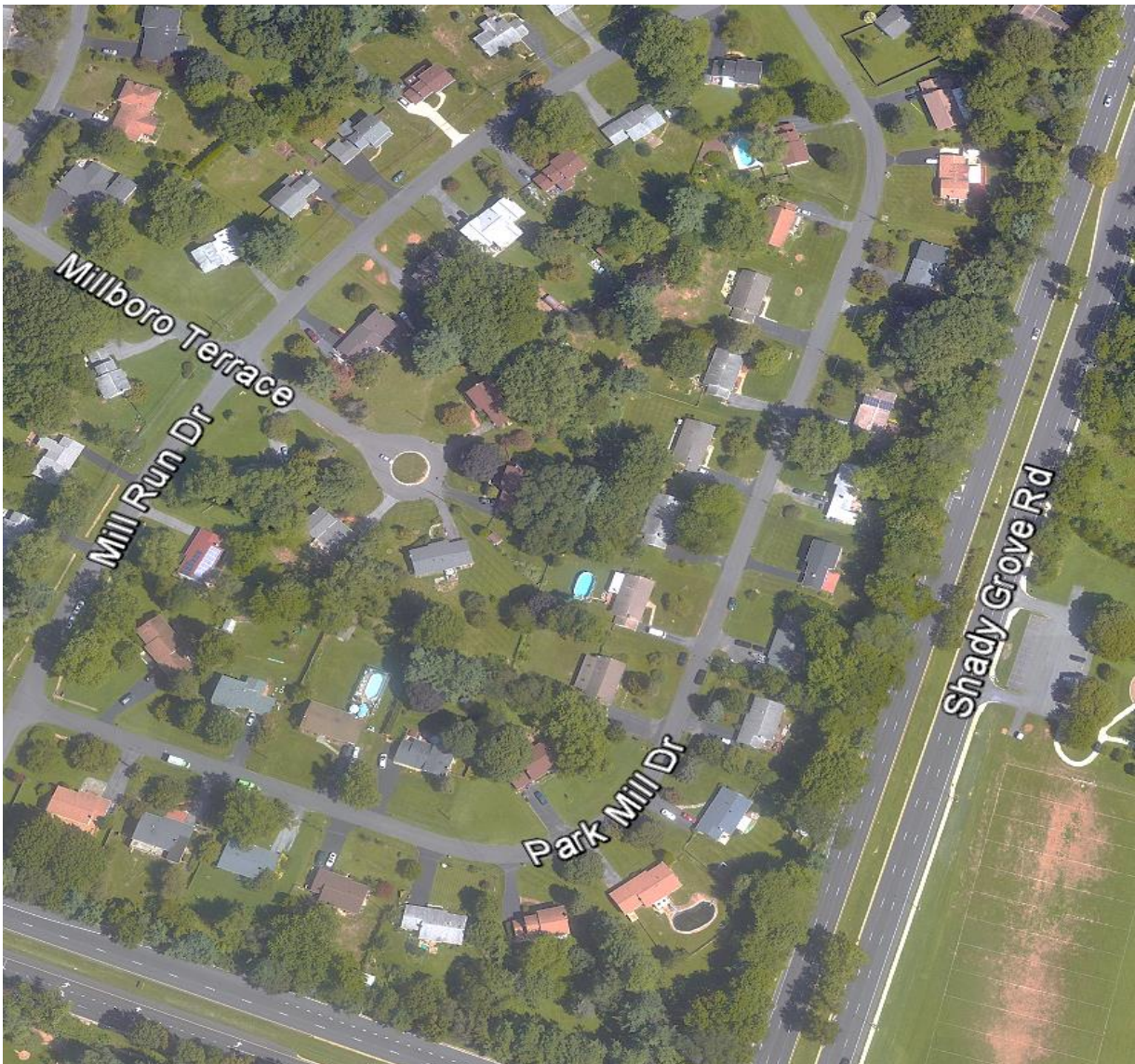


The Hearing Examiner agrees that the neighborhood could reasonably have been defined to include the entire Mill Creek Towne Subdivision, which would have approximate boundaries of Muncaster Mill Road on the north, Shady Grove Road on the east, Midcounty Highway on the south, and Mill Creek Drive on the west, as shown on the map below:



However, it is also true that the further one lives from the subject site, the more attenuated the impacts, visually and from additional traffic and parking. Expanding the defined neighborhood further to the north and west would add additional houses, but would not materially affect the

analysis of this case, for it would not change the nature of the neighborhood. It would still be a residential neighborhood composed almost entirely of single-family detached homes. The residential nature of the neighborhood adjacent to the subject site is well illustrated by the aerial photograph provided by the opposition (Exhibit 124):



The Hearing Examiner rejects the Applicant's suggestion that her neighbor's parking of a small truck or two in his driveway (8/4/17 Tr. 220-221) or the existence of a swim club (the Mill Creek Towne Swim Association) across Shady Grove Road (9/13/17 Tr. 397-399) somehow converted this neighborhood into a semi-commercial area. One has only to look at the above



aerial photograph or the street-level photographs of Park Mill Drive supplied by the Applicant herself (Exhibits 116(l) and (m)) to conclude that this is clearly a residential neighborhood:



### C. Proposed Use

The Applicant seeks approval of a conditional use to operate a Child Day Care Center for up to 30 children in the single-family detached house she owns at 17505 Park Mill Drive in Derwood, Maryland. As she explained in Applicant's Amended Statement (Exhibit 12, pp. 1-2):

My application is for 30 client children for my property on 17505 Park Mill Drive. The property is in the R-200 zone and has a limited use for 12 children. The property has been operating with a certificate from the Maryland State Department of Education since July, 2016 for 8 client children with two infants. The certificate was changed to 8 client children with 4 infants. A Use and Occupancy was issued on February 9<sup>th</sup> which approves the property for 12 client children with 4 infants. Once the conditional use is approved, applications for a Use and Occupancy permit (U&O) and fire approval for a child care center/educational use will be started. The forth [sic] government agency to comply with is then the Maryland State Department of Education, Office of Child Care; (MSDE/OCC). The business will need to provide 35 square feet per child inside the building. MSDE/OCC takes the Use and Occupancy's (U&O) square feet and subtracts space the children cannot use for play. The business will be designed for 32 children which is 1,120 SF. This will make room for two children in the U&O space that are not clients. Additional square footage will be needed to anticipate what OCC will subtract.

To comply with the conditions to obtain a U&O and fire approval, the building has to be divided into two parts. One for the residential use and one for the Educational use for the business. A fire wall needs to be installed between the two uses.

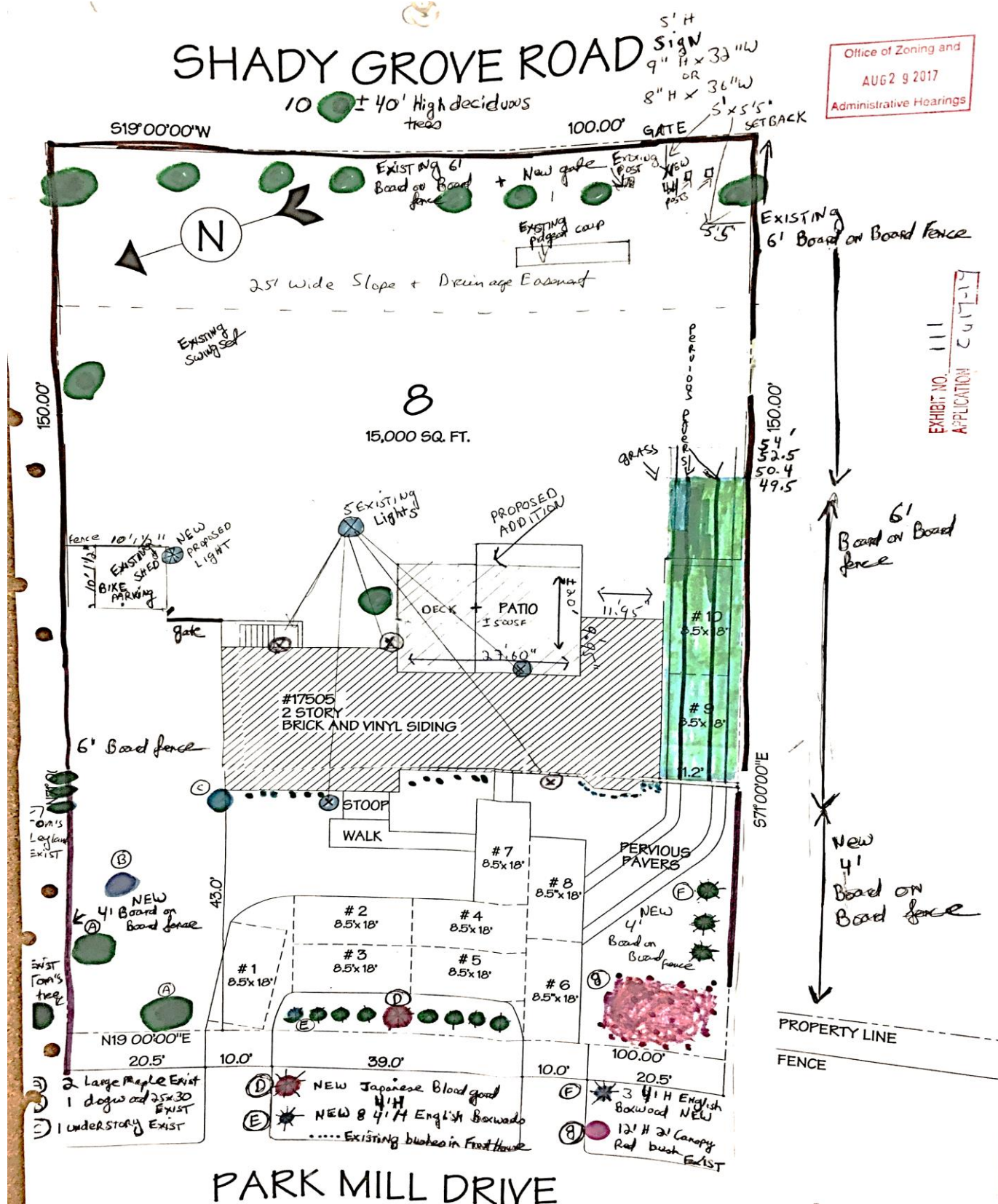
When the county approves the application for an educational U&O, the modifications can be made to the building and the permit is issued when completed. With the U&O, the business can then apply for a child care center. The square footage must then be divided again to meet OCC's requirements regarding group "rooms". This can be done with doors, walls, bookcases and baby gates.

The business will be designed for three group "rooms" that are outlined in OCC's regulations. One for 20 children, one for 6, and the third for 6. Children will not be excluded from care due to their age. The business can accommodate a school-age child as a client who is under the age of 13 or a special needs child that still needs care in spite of their biological age. The business design of the three group rooms, however, will attract children that are age 5 and under. Healthy children age 6 and older do not need care when their county's school system or their private school is open.

Operational characteristics of the proposed Daycare Center will be further discussed in Part II.C.5. of this Report and Decision.

### **1. Site Plan, Access, On-Site Parking and Areas for Drop-off and Pickup of Children**

The Applicant had numerous discussions with Technical Staff regarding her plans prior to the first day of the hearing, but she requested permission to amend her plans again prior to the resumption of the hearing. The Hearing Examiner gave the Applicant until August 11, 2017 to file her amended plans, and gave the Technical Staff and the other parties until August 21, 2017 for comment. 8/4/17 Tr. 320-321. At the Applicant's request, the Hearing Examiner extended her time until August 18, 2017, and extended the time for Technical Staff and the other parties to respond until August 28, 2017. On August 10, 2017, the Applicant filed a proposed amendment to her plans to substitute a sign on the rear of her property (adjacent to Shady Grove Road) for one previously proposed for the front of her property (Exhibits 92 and 92(a)). On August 15, 2017, the Applicant filed proposed amendments of her parking and landscaping plans (Exhibits 96 and 97, later combined into Exhibit 111). Technical Staff commented that the plan revisions do not alter their recommendation that the application be denied (Exhibit 109). The final Site plan for access, parking, landscaping, lighting and signage (Exhibit 111) is reproduced below:





Applicant's parking plan and proposal for drop-offs and pickups of children was described by Technical Staff (Exhibit 67, pp. 5-7):

The Applicant proposes to install a semi-circular driveway in the Site's front yard (Figure 3). The Department of Permitting Services (DPS) approved an additional curb cut for the proposed driveway on November 29, 2016 (Attachment 2). The parking plan shows off-street parking for [eleven] cars.<sup>6</sup> However, if all [eleven]<sup>6</sup> of the proposed spaces are occupied by vehicles, eight cars would be blocked in by the cars parked in space #1 and space #6, and the walkway to the front door of the house would be blocked by car #7. The applicant proposes installing pervious pavers for the [three]<sup>6</sup> spaces required for the residents to park between the house and the adjacent property to the south. These parking spaces would be set back less than two feet from the lot line, and the Applicant requests a parking waiver for relief from the 24-foot parking setback required under Section 6.2.5.K.2.b.<sup>7</sup> The Applicant indicates that she would construct a 6-foot fence after the driveway is installed to shield parking spaces #9 . . . #10 [and #11]<sup>6</sup> from view of the adjacent neighbor to the south. In addition, the side yard would be graded to slope away from the adjacent yard to the south.

The Applicant proposes to have contracts with parents to allow a maximum of six vehicles to drop-off or pick-up children during a ten-minute period at peak morning and evening hours (Attachment 1). The Applicant states that it takes five minutes to drop-off, sign-in and give a second hug to each child, and this time can be further reduced to one to three minutes if the drivers stay in their cars, and staff escorts children to and from the cars.

Applicant's revised parking plan is shown in the complete site layout plan reproduced above. It adds an eleventh parking space in the side yard. As noted by Staff (Exhibit 67, pp. 5-7), the Applicant suggests alternatives to some of the onsite parking:

The Applicant indicates a high probability that only three non-resident staff members will need parking, while the rest will take the bus or get dropped off and picked up. In the submitted application materials, the Applicant offers several alternatives to the onsite parking . . . including:

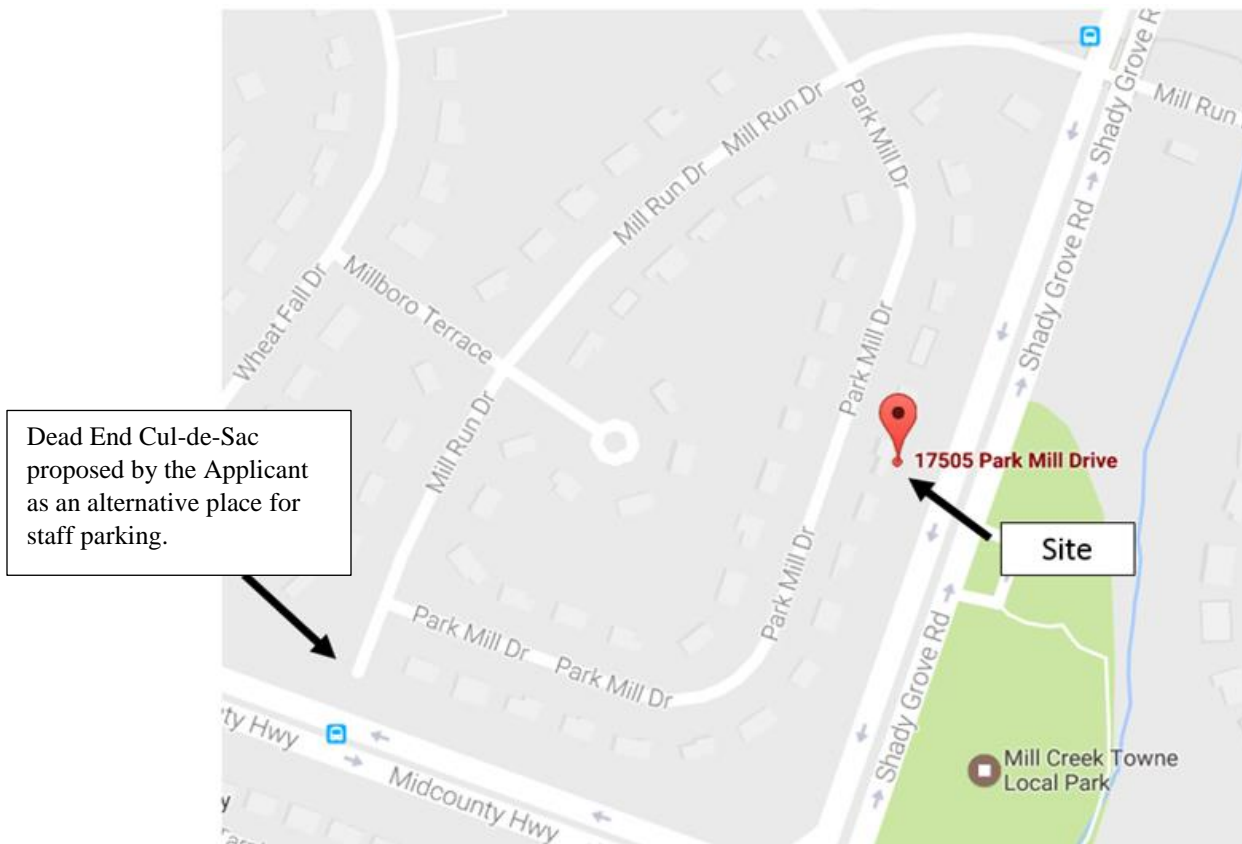
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<sup>6</sup> In her revised parking plan, the Applicant added space for an eleventh parking spot on the southern edge (*i.e.*, side yard) of her property. *See*, Exhibit 111. The Hearing Examiner therefore changed Staff's number from 10 to 11.

<sup>7</sup> The Applicant correctly pointed out (Exhibit 65(b)) that an amendment to the Zoning Ordinance, ZTA 16-13, Ord. No. 18-15, removed the setback requirement of Section 59.6.2.5.K.2.b. with regard to detached houses. Technical Staff agreed in a Supplemental Report (Exhibit 72, p. 2) that the referenced subsection no longer applies. The Hearing Examiner points out, however, that Section 59.6.2.5.K.1, remains applicable, as do Sections 59.6.2.9.A, B & C, which call for certain setbacks and screening of parking lots for more than 5 cars.

1. Allowing cars to use on-street parking;
2. Require that all cars associated with the proposed daycare use on-street parking on the same (east) side of the street where the daycare is located;
3. Require day care staff to park 200 feet from the Site;
4. Require residents of the subject Site to park their cars on street at certain times while the day care is open; or
5. Require staff and/or residents of the subject Site to park where the south end of Mill Run Drive dead ends at the Midcounty Highway, approximately ¼ mile away from the Site (Figure 4 [in the Staff Report]).

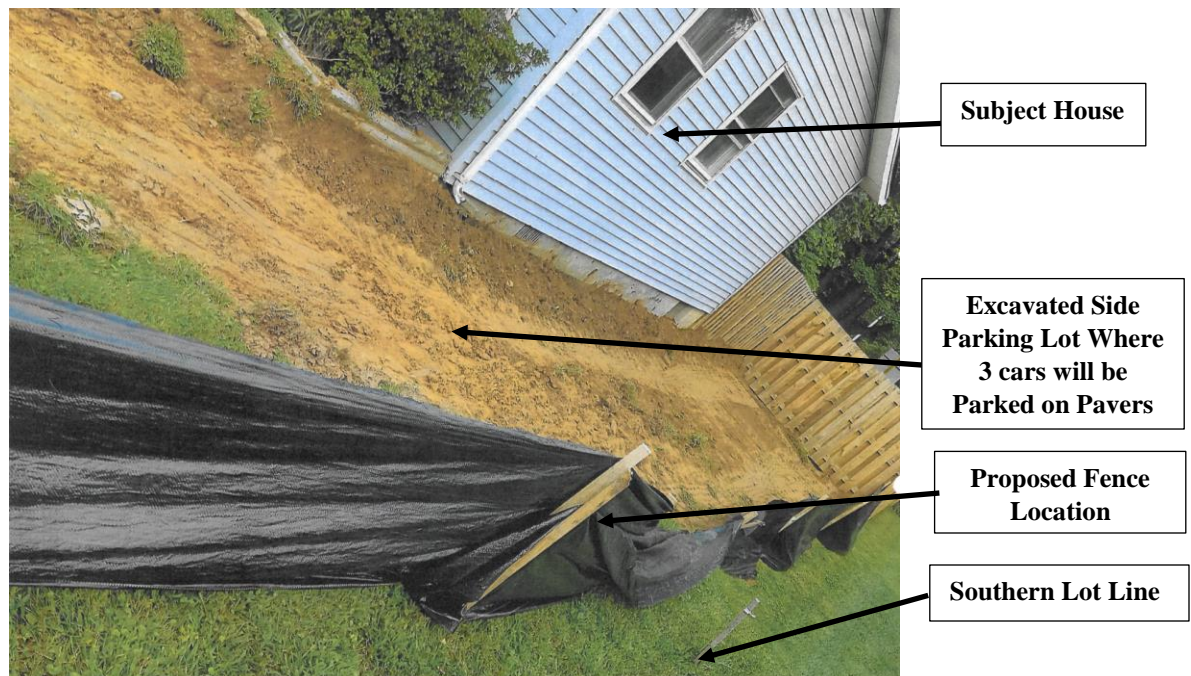
The location suggested by the Applicant for off-site daycare staff parking is the dead end cul-de-sac of Mill Run Drive, approximately ¼ mile away from the Subject Site. It is shown below on the map supplied by Staff (Exhibit 67, p. 7):



Of course, the major problem with the Applicant's proposal for an eleven-car surface parking lot with a paved circular drive in front of her single-family detached house is lack of compatibility with the residential neighborhood. Having a few extra parking spaces on an R-200

site is one thing; parking eleven cars is quite another. This lack of compatibility has been pointed out by Technical Staff, the Planning Board and innumerable neighbors. The Hearing Examiner agrees with their observation, and the only evidence from an expert planner, Emily Tettelbaum, supports this conclusion, as well. Exhibit 67, p. 2; 8/4/17 Tr. 114.

Even aside from questions of general compatibility, the Applicant's parking plan does not meet the setback and screening requirements of Zoning Ordinance Sections 59.6.2.9.A, 1., B. and C., which call for certain setbacks and screening of parking lots for 5 or more cars. These sections are still applicable, and they are quoted in Part III.D.2 of this Report and Decision. Under Section 59.6.2.9.B., a conditional use parking facility with 5 to 9 parking spaces must have a minimum of an 8-foot perimeter planting area unless a different one is specified in Article 59-4. Since that Article does not specify a setback area, the 8-foot requirement would apply to a parking lot for 5 to 9 cars. The Applicant's plans clearly do not meet that minimum, especially along the southern side yard, where the Applicant's plan includes three parking spaces on pavers, with almost no setback (2 or 3 feet) from the neighbor's lot line. See Exhibit 123, below:



Such proximity, even with a planned 6-foot fence, would unfairly intrude on her southern neighbor's (*i.e.*, Beverly Lloyd's) peaceful enjoyment of her property, as testified to by her daughter-in law, Bonnie Lloyd. 9/13/17 Tr. 554-555.

Moreover, the Applicant's plan (Exhibit 111) calls for eleven parking spaces, and therefore we must look to the requirements of Sections 59.6.2.9.A,1. and C., which govern surface parking lots of 10 or more cars.<sup>8</sup> Those sections require, *inter alia*, landscape islands and a perimeter parking area at least 10 feet wide. Once again, the Applicant's plans do not meet this standard.

Alternatives such as having Daycare staff parking ¼ of a mile away are impractical, and parking on the street or on the grass along the side of the road is not a viable option for the narrow street in question due to the resulting obstruction of pedestrian and vehicular traffic and destruction of the grass and compacting the soil alongside the road. The obstruction of traffic issue is well illustrated by Staff's photograph of a truck trying to squeeze though the narrow path left open on Park Mill Drive when vehicles parked on either side of the roadway, even though one is on the grass (Exhibit 67, p. 10):



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<sup>8</sup> Technical Staff indicated that it evaluated the parking lot based on Section 59.6.2.9.B. because only 9 of the spaces would be for the conditional use, with 2 spaces being for the residence (Exhibit 109). That approach is certainly arguable; however, the Hearing Examiner concludes that it is Sections 59.6.2.9.A,1. and C that should be applied because they address surface parking lots for 10 or more vehicles, and they do not distinguish between spaces for the residence and spaces for the conditional use. This approach makes sense because the provision is clearly intended to reduce the impact of any such facility on the neighbors, and from that standpoint, a surface lot for 10 or 11 cars would have the same impact whether or not some of the spaces were intended for the residents.

As stated in the Technical Staff Report (Exhibit 67, p. 2):

Staff recommends denial of CU 17-14 because of the incompatibility of the use with the surrounding neighborhood; non-inherent adverse impacts resulting from the location of the use on a substandard residential street; the intensity of the proposed daycare on a relatively small property; and the Applicant's failure to demonstrate that vehicle and pedestrian circulation in the proposed driveway will be safe and efficient. Further, the proposed driveway does not have a perimeter planting area that satisfies Section 6.2.9.B.

The proposed semi-circular driveway with [11]<sup>9</sup> parking spaces would not permit vehicles parked in 8 of the [11] spaces to maneuver within the driveway to enter, park, and leave without being blocked by other vehicles. Staff does not recommend allowing any on-street parking, because cars would have to park on the grass in the right-of-way. The proposed 10 minute windows to drop off children during the busiest part of the peak periods is unrealistic and would be difficult to enforce on a day-to-day basis. The Applicant has recently expressed a willingness to modify the drop-off/ pick-up schedule, but this will not mitigate the issues with the substandard road or inadequate parking.

## **2. Parking Facility Waiver Proposed by the Applicant**

The Applicant has requested a parking facility waiver regarding the side-yard setback under Section 59-E-4.5 of the old (*i.e.*, 2004) Zoning Ordinance (Exhibit 16). That Zoning Ordinance is not applicable to this case, which was filed under the new (*i.e.*, 2014) Zoning Ordinance. The Parking Facility Waiver provision of the 2014 Zoning Ordinance is Section 59.6.2.10. Section 59.6.2.10 provides:

*The deciding body may waive any requirement of Division 6.2, except the required parking in a Parking Lot District under Section 6.2.3.H.1, if the alternative design satisfies Section 6.2.1. Any request for a waiver of the vehicle parking space requirement under Section 6.2.4.B requires application notice under Section 7.5.2.D.<sup>10</sup>*

The Hearing Examiner will treat the Applicant's mislabeled waiver request as a request for a waiver of the side-yard setback requirement under the applicable 2014 Zoning Ordinance.

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<sup>9</sup> See Note 6. As indicated there, Applicant's final plan (Exhibit 111) added space for an eleventh parking spot on the southern edge (*i.e.*, side yard) of her property. The Hearing Examiner therefore changed Staff's number from 10 to 11.

<sup>10</sup> The Applicant did not request a waiver of the number of vehicle parking spaces required because she will have the required number of spaces for the child care facility and two spaces for the residence, as will be discussed in Part III of this Report and Decision. Therefore, no additional notice is required in this case.

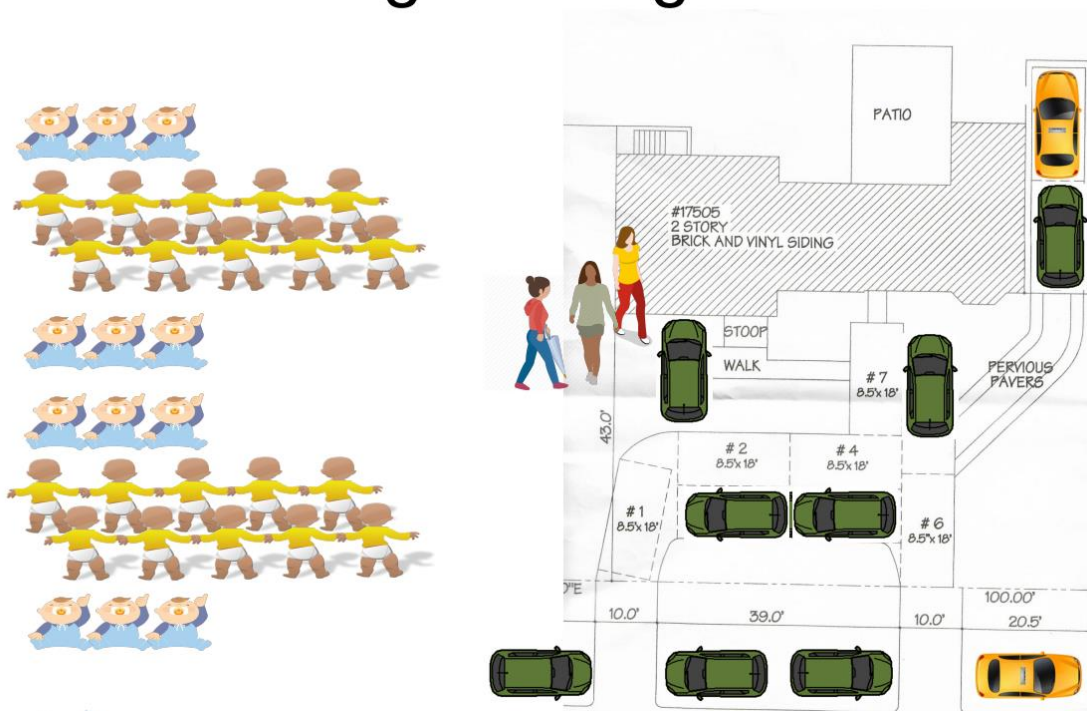


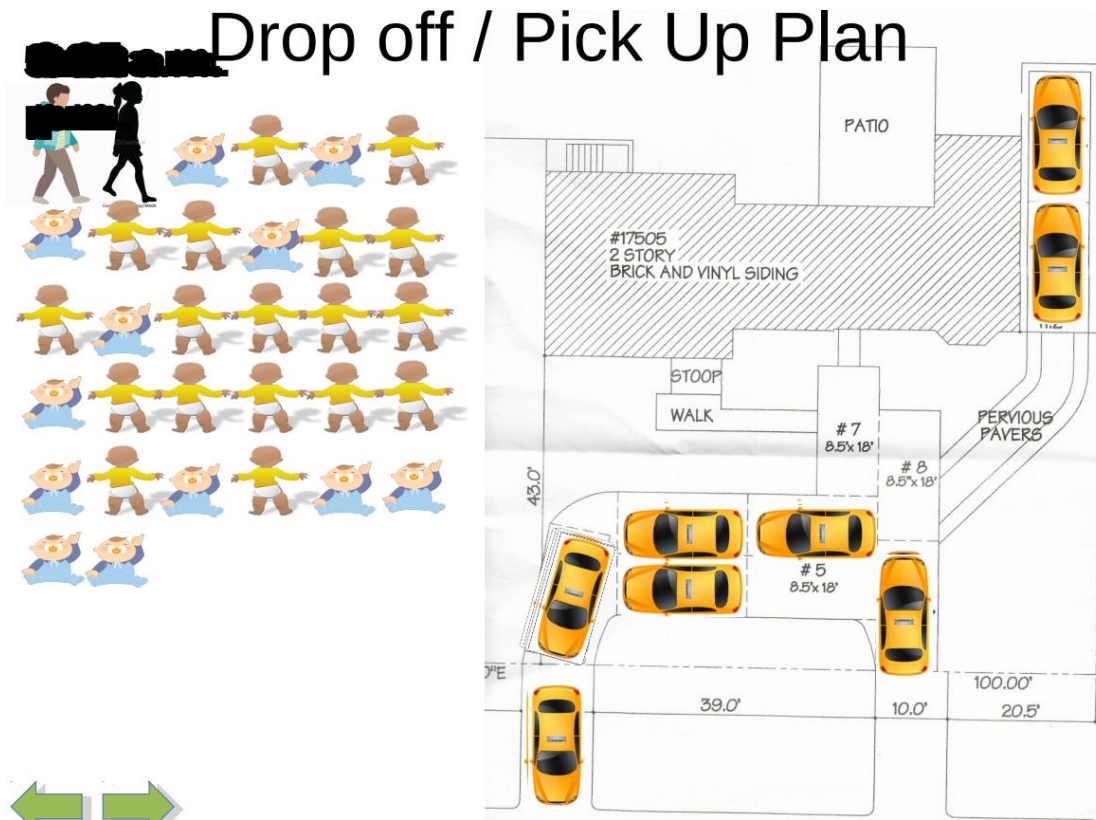
The parking facility waiver she is requesting is essentially from Sections 59.6.2.9.A.1. B., and C., regarding setbacks and screening for parking lots. The above-quoted provision allows a waiver only “*if the alternative design satisfies Section 6.2.1.*”

Section 6.2.1. specifies that “The intent of the vehicle and bicycle parking, queuing, and loading requirements is to ensure that adequate parking is provided in a safe and efficient manner.” For the reasons discussed below, the Hearing Examiner finds that the Applicant has failed to prove that her parking design will provide parking, discharge and loading in “a safe and efficient manner.”

The Applicant did address this issue at the hearing (9/13/17 Tr. 349-359, 401), and provided Diagrams showing how staff parking will be allocated (Exhibit 121(a)) and how drop-off and pickup of children would be arranged (Exhibit 121(b)). These diagrams are reproduced below and on the next page.

## Staffing/Parking Plan





The Applicant testified that for discharge and pickup of children, she “would have six cars in a 10 minute time period. That is my plan. I will not sign a contract for more than six cars in a 10 minute time period.” 9/13/17 Tr. 356. Ms. Rice also testified that it only “takes three minutes for a parent to drop off, get in their car, and get the car out of the parking spot.” 9/13/17 Tr. 355. She repeated this assertion on cross-examination (9/13/17 Tr. 454):

My statement is that it's three minutes for a parent to be able to drop off and pick up. I want 6 cars to be able to come onto the property during a 10 minute time period. But it's one after the other. So the first car is gone when the third car shows up.

Applicant’s claim that her drop-off and pickup plan could be practically accomplished was hotly disputed by opposition witnesses Tom Johnson (9/13/17 Tr. 512-513) and Ruth Schwartz, the latter having once provided child care services herself. Ms. Schwartz testified (9/13/17 Tr. 534):

So I operated the daycare for nine years, and after that I had a job with Montgomery County Social Services and I visited a lot of daycare homes. It was really my job to visit the homes. So I really have a lot of experience in daycare, and with daycare

and with preschool children. And my specific point I want to make here is that there is no way, it's totally unrealistic for parents to drop off or pick up their children in three minutes, or even five minutes. My daycare parents would usually spend anywhere from 15 to 30 minutes with me and the children because children can't transition that easily. If you just pick up a child like that, you know, you're going to have screaming. They have to be ready to go, find their shoes or whatever. And it's just hard for them to transition. And that is totally unrealistic. And if parents try to do that based on some contract you're going to have, you know, parents in tears as well. It's just not going to happen. . . . [Emphasis added.]

As pointed out by Technical Staff, even when the Applicant planned only 10, not 11, parking spaces (Exhibit 67, p. 2):

The proposed semi-circular driveway with 10 parking spaces would not permit vehicles parked in 8 of the 10 spaces to maneuver within the driveway to enter, park, and leave without being blocked by other vehicles. . . . The proposed 10 minute windows to drop off children during the busiest part of the peak periods is unrealistic and would be difficult to enforce on a day-to-day basis.

The Hearing Examiner does not necessarily agree with Ms. Schwartz that a daycare facility must allow 15 minutes or more for transition during discharge and pickup of children, but he does find that Applicant's plan for 3 minutes or less for each discharge and pickup, with 6 cars arriving in each 10-minute window, is not workable on this site, with this access and this planned parking facility. This site is not the same as other sites with larger lots, or fewer children or on a different street. As the Hearing Examiner pointed out to the Applicant at the hearing (9/13/17 Tr. 356):

. . . [A]side from any questions of compatibility with the neighborhood and traffic and all that, . . . [it is] a question of whether a plan with this number of car parking spaces and your three minute interval concept, whether that actually would work out as a practical matter.

Given the testimony at the hearing, Technical Staff's opinion on the subject and the space limitations of the site, the Hearing Examiner finds that the Applicant has failed to prove that her parking design will provide parking, discharge and loading in "a safe and efficient manner" on this site.



Perhaps even more important is the fact that the Applicant's plan does not comply with Zoning Ordinance §59.6.2.5.K.1., which provides "*Each parking facility must be located to maintain a residential character and a pedestrian-friendly street.*" The Hearing Examiner finds that the Applicant's parking lot plan clearly would not "*maintain a residential character and a pedestrian-friendly street.*" As stated by Technical Staff (Exhibit 67, p. 15):

The proposed parking for the day care in front of the house would accommodate up to eight cars, in addition to the two spaces for the residents. Section 6.2.5.M allows the Applicant to pave a driveway of this size in the front yard, but as proposed, the driveway will not be residential in character because of its large size in relation to the size of the property. The design does not include space for the extensive landscaping between the street and the driveway that is typical of semi-circular driveways in residential neighborhoods, so the large driveway will be highly visible from the street. The proposed driveway would have a commercial, rather than residential, appearance. [Emphasis added.]

This sentiment has been echoed by innumerable neighbors (*See* letters collected under Exhibit 40 and the testimony at both hearing sessions). The conclusion that the proposed use would lead to a commercial appearance of the site is also supported by the finding of the expert real estate appraiser, James E. Bentson, that the commercial appearance of the proposed use would reduce the property value of the next-door neighbor (Exhibit 69(a) and 9/13/17 Tr. 466-504). There is no expert testimony rebutting Mr. Bentson's conclusions.

In sum, there is no legitimate basis for waiving the parking lot setback and screening requirements, in light of the incompatibility an eleven-car parking lot would produce in a single-family detached residential zone, especially on an undersized lot (*i.e.*, 15,000 square feet in an R-200 Zone), and the Applicant's failure to demonstrate that such a waiver would meet the intent of Zoning Ordinance §59.6.2.1. to ensure that adequate parking is provided in a safe and efficient manner for parking, queuing, and loading.

### **3. Site Landscaping, Lighting and Signage**

#### **a. Landscaping and Lighting**

The Applicant proposes to supplement the existing landscaping and fencing as shown in her final site plan (Exhibit 111), which is reproduced on page 16 of this Report and Decision. Significant landscaping issues arise in conjunction with the proposed parking facility, as discussed above. The evaluation of landscaping and screening is linked to compatibility under Zoning Ordinance §59.6.5.2.B. That Section provides, “. . . All conditional uses must have screening that ensures compatibility with the surrounding neighborhood.” As discussed above, the subject site lacks the screening of its parking facility needed to ensure compatibility.

There does not appear to be a significant issue with the lighting proposed in this case, most of which is already existing. The only new light proposed is to be attached to an existing shed in the back yard (Exhibit 111).

b. Signage

The only signage proposed by the Applicant is a freestanding, unilluminated sign to be located in rear of the house, facing Shady Grove Road. This newly proposed sign would have blue letters on a yellow background, and would replace the existing sign located on the front wall of the house, adjacent to the Group Daycare entrance. Exhibits 92 and 92(a). The proposed new sign area would not exceed 2 square feet (288 square inches) and would be 5 feet in height, as allowed in residential zones under Zoning Ordinance §59.6.7.8.A.1. It would also be set back 5 feet from the property line, as called for in this section, and would be near the rear gate.

The Applicant testified that this sign would be visible from Shady Grove Road because it would be located directly behind the 4 foot tall rear gate, not the 6 foot tall, board-on-board fence, and the proposed sign would be taller than the gate. 9/13/17 Tr. 377. The sign's visibility from Shady Grove Road raises a question about its potential impact on traffic safety, especially since the Board of Appeals denied the Applicant's appeal from the denial of a sign variance in part because of potential driver distraction in trying to read an earlier proposed sign (one that was

even larger and higher) from a high-speed road. *See* Board of Appeals decision in *Appeal of Robin Rice*, Case No. A-6509, decided effective 2/24/17 (Exhibit 71(c)). Presumably, the smaller, lower sign would be even more difficult to read from the roadway, and thus would potentially cause even greater driver distraction.

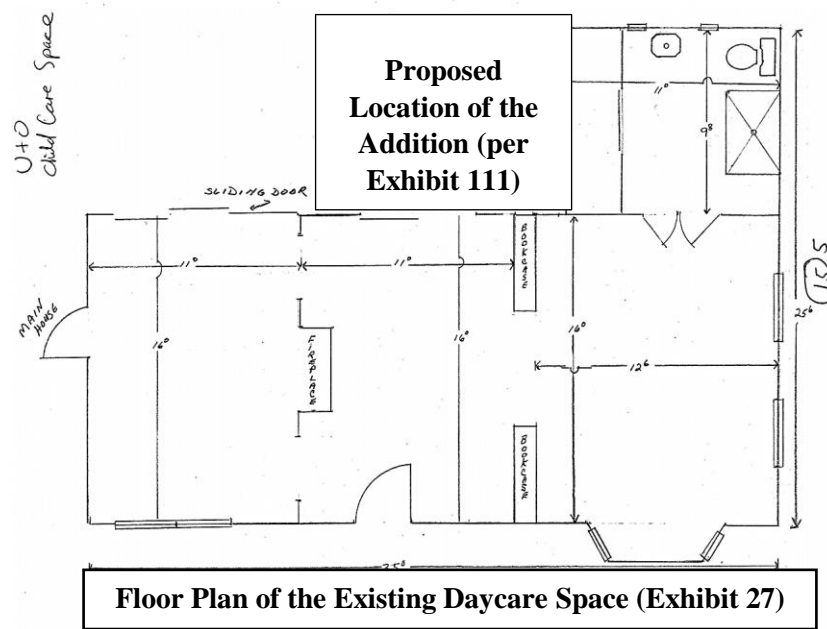
The Hearing Examiner need not reach that issue since he is denying the conditional use application, thereby obviating the need for a new sign.

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

Technical Staff described the proposed physical layout for the Day Care (Exhibit 67, p. 4):

The Applicant proposes to remove part of the patio in the rear yard and construct a 468-square-foot<sup>11</sup> addition to the house to increase the space for the day care. After the addition, the expanded day care would comprise an estimated 1,120 square feet of space on the first floor of the house.

The Applicant provided a diagram of the existing Floor Plan in Exhibit 27, but it does not include the proposed addition to be added onto the rear of the house on top of what is now the patio. That Floor Plan is reproduced below, with the addition's proposed location shown by the Hearing Examiner.



<sup>11</sup> The latest figures supplied by the Applicant in her final site plan (Exhibit 111) place the approximate size of the proposed addition at about 550 square feet (20 feet by 27.5 feet).

## 5. Operations

Proposed operations were summarized by Technical Staff (Exhibit 67, pp. 4-6):

The day care would accept children of all ages, but the facility would be designed primarily to care for children age five and under. . . .

The current day care facility operates Monday through Friday, from 7:00 a.m.<sup>12</sup> to 6:30 p.m., and the same hours of operation are proposed for the 30-child day care. The Applicant prefers that the children go outside on a staggered schedule in three different groups, with each group going out once in the morning and once in the afternoon. Total outdoor play time would be 40 minutes each morning and afternoon (weather pending). For 20 minutes each morning and the afternoon, all of the children would be outside at the same time.

The Applicant indicates that up to seven employees would be needed to staff the day care facility at any one time. The Applicant's traffic statement shows two residents staffing the day care between 7:00 and 7:50 a.m. Between 7:50 and 8:45 a.m., five non-resident staff would arrive at staggered 10- to 20-minute intervals. One of the resident employees would also leave during this time. Non-resident employees would depart one at a time at the following times: 3:30 p.m., 4:30 p.m., 5:00 p.m., 5:50 p.m., 6:00 p.m.

\* \* \*

The Applicant proposes to have contracts with parents to allow a maximum of six vehicles to drop-off or pick-up children during a ten-minute period at peak morning and evening hours (Attachment 1 [to the Staff Report]). The Applicant states that it takes five minutes to drop-off, sign-in and give a second hug to each child, and this time can be further reduced to one to three minutes if the drivers stay in their cars, and staff escorts children to and from the cars.

The Applicant expanded on this formula in her Amended Statement (Exhibit 12, pp. 1-4), and a sample of that detail is reproduced below:

### STAFF MEMBERS

A group room for 6 infants needs two staff members. One staff member must be at least age 18 and a qualified teacher. The second staff member can be an aid and can be age 16. A group room for 6 children can also be used for children age 2 or older

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<sup>12</sup> Staff indicated that the day care center will operate Monday through Friday, from 7:00 AM till 6:30 PM, based on the current operating hours of the Group Day Care, which the Applicant had suggested would be followed if the conditional use were granted. However, the Applicant added that she actually wishes to have operating hours of 6:00 AM till 6:30 PM, and she has proposed a condition to that effect. Exhibit 65(b).

with one staff member who must be age 18. The group room for 20 preschool age children needs two staff members.

The maximum number of staff members needed to meet OCC's regulations with the designed three group rooms is 6 working staff members at one time. If the enrollment in one size 6 group room is age 2 and over, only 5 staff members would be needed. The number of non-resident staff members permitted on-site, however, needs to be 7. If one staff member relieves a working staff member, the staff must change places inside the building and inside the group room to be in compliance with OCC's staff ratio. The non-working staff member will probably leave within 5 minutes if they have a car, possibly 15 minutes if they use the rest room. A non-working staff member that does not have a car however, might be on-site waiting for a ride. The goal from a zoning point of view is to try and reduce the number of employee's cars, not the number of non-working staff members that are on-site. Staff members who are age 16 to 18 years old are most likely to be staff members without cars. Staff members need to be permitted on-site when they are not working without being counted in the number of staff permitted at one time. This will assist the owner of the business to try and hire employees that might wait on-site to walk to the bus stop or wait for a ride and decrease the need for staff parking without requiring non-working staff members to stand off the property in the rain. . . .

\* \* \*

## OUTDOOR ACTIVITY AREA

OCC requires 75 SF per child for an outdoor activity area. The area must have room for at least 20 children outside. The group size either needs to be able to go outside all together or the business must hire two qualified teachers who must be age 18 or older. The largest group of 20 children need to go outside together. OCC requires outside play both in the morning and in the afternoon. It is preferable that all three groups be permitted outside at the same time. The preschool group would go outside first, then the toddler group, then the infant group. They go inside starting with the infant group, then the toddler group and then the preschool group. While the best time for outside play is usually after 9:00 a.m. and after 3:30 p.m. the weather could change the schedule.

All children enrolled in the center will be outside together for required monthly fire drills to stay in compliance with state OCC regulations and the fire regulations. We can exit in 1.5 minutes. Coming back in with the excitement can take 5 minutes or we just stay outside.

The three groups of children will go outside and back inside in groups. If each group is outside for 30 minutes, the outside time could be 90 minutes. If all 3 groups were allowed outside at the same time, the outside time could be 30

minutes. If the groups were allowed to overlap their playtime, the second group going out 5 minutes after the first, and the third group going in after the second group by 5 minutes, the outside time will all of the children would be reduced from 90 minutes to 40 minutes. This is the best plan for the children and what I would prefer if I was a neighbor. All children would need to go outside together if the weather reduced the time they would be permitted to go outside according to OCC regulations. i.e. rain; heat advisory, snow and ice. My experience is a few days in each season. The outside playground will not be used at all during bad weather. My experience is 10 winter days per year.

\* \* \*

As mentioned in the Staff Report quoted above, the Applicant indicated that she would follow a Drop-off and Pickup schedule. It is shown below in an excerpt from her Traffic Statement (Exhibit 8):

#### TRAFFIC STATEMENT

Am Time/type of trip	6:00	7:00	7:30	7:50	8:00	8:10	8:30	8:45	9:00	9:15	9:30	9:45	Total
Resident staff	2	2	2	2	2	2	1	1	1	1	1	1	in varies
Resident staff leaving													
non-resident staff arrive bus/walk		0	0	0	0	1	0	0	0	0	0	0	
non-resident staff arrive ride no park				1		0							
non-resident staff arrive and park					1		1	1					3
non-resident staff IN													5
CARS WITH CHILDREN		1	1	3	6	2	2	2	2	1	1	0	21
Children in cars or vacancy		2	2	3	10	2	2	3	4	1	1	0	30
HIGHEST AM PEAK HOUR CARS drop-off	0	1	1	4	6	2	2	2	2	1	1	0	
Staff cars parked	0	0	0	0	1	0	2	3	3	3	3	3	
Resident cars parked	2	2	2	2	2	2	1	1	1	1	1	1	
Total cars parked	2	2	2	2	3	2	3	4	4	4	4	4	

Maximum peak hours 12 cars  
7:50 - 8:10

#### TRAFFIC STATEMENT

PM Time/type of trip	1:00	1:30	3:15	3:30	4:00	4:30	5:00	5:30	5:50	6:00	6:10	Total
Resident staff	1	2	1	1	1	1	1	1	1	1	1	in/out 1
Resident staff returning												varies
teenage resident staff in bus/walk			1									1
non-resident staff leave bus walk						-1				-1		
non-resident staff with cars out	0	0	0	-1	0	0	-1	0	-1	0	0	-3
non-resident staff out												-5
CARS WITH CHILDREN	1	0	0	1	1	1	2	4	3	6	2	21
Children for after school bus/walk				1								1
Children in cars or vacancy	-1			-1	-2	-1	-4	-5	-4	-10	-3	-31
HIGHEST PM PEAK HOUR	1	0	0	0	1	1	1	4	2	6	2	
Staff cars parked	4	4	4	3	3	3	2	1	0	0	0	
Resident cars parked	1	2	1	1	1	1	1	2	2	2	2	
Total cars parked	5	6	5	4	4	4	3	3	2	2	2	

maximum peak hours 12 cars  
5:50 TO 6:10

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

#### **D. Community Concerns and the Applicant's Response**

##### **1. Community Concerns**

Approximately 120 letters of opposition were filed (collected in Exhibit 40), and signed petitions in opposition were filed by approximately 253 individuals (collected in Exhibit 70). The central points raised by the opposition include child safety, noise (kids playing, slamming car doors, *etc.*), traffic, parking, neighborhood safety issues from traffic and on-street parking (especially regarding pedestrians, absent a sidewalk), compatibility (*e.g.*, paving front yard), a commercial entity in a residential neighborhood, impact on property values and environmental concerns.

Other items mentioned in the letters include air pollution; lighting; parking at dead end would interfere with Verizon (Exhibit 40-hhh); absentee family after business hours (Exhibit 40-fff); paved front yard (Exhibits 40-zz & 40-fff); private covenants (Exhibits 40-q & 40-ddd); circular drive (Exhibit 40-bbb); possible use as a meeting facility or banquet hall (Exhibit 40-zz); construction for increased space (Exhibit 40-vv); insufficient structural strength for the use *e.g.*, small floor joists (Exhibit 40-ss); demand on police and fire departments; and that the property owner will not be a resident (Exhibit 40-j).

Twenty witnesses from the community testified in opposition in two hearing sessions. One expert, James Bentson, a real estate appraiser, testified in explanation of the conclusion in his real estate appraisal (Exhibit 69(a)) that the resale value of an abutting property would be diminished if the proposed conditional use were to operate next door. The testimony of each of these witnesses, and the Applicant's responses are discussed below.

Kathleen Mason has lived for about 30 years at 17408 Park Mill Drive, across the street and roughly six houses away from the subject site. She testified that Verizon trucks often occupy the dead end of the cul-de-sac at the southern terminus of Mill Run Drive that the Applicant suggested could be used for staff parking. 8/4/17 Tr. 187-195. She objects to the County Council allowing this type of facility in a residential area because “. . . when you get a commercial property [nearby] you lose that feeling of being safe and secure and quietness.” She realizes that there is a “big need’ for child care, but “it’s an imposition to the county residents to have to change [their] lifestyles . . . [and] cope with children when [they’re] getting up in . . . age.” 8/4/17 Tr. 197-198.

Clare De Cleene testified that she lives on Mill Creek Drive, outside of the defined neighborhood, but within the Mill Creek Towne Subdivision. She testified that she selected a home in a residential neighborhood, and it was “our major lifetime investment predicated on it remaining a residential neighborhood.” 8/4/17 Tr. 285. She alleged that the Applicant’s intent in buying the subject site was to change the environment she was buying into from residential to a business, with a profit motive. In Ms. De Cleene’s view, the Applicant’s intent “is contrary to what Mill Creek Towne is and has been.” She feels that a six-child day care center is appropriate in a neighborhood, but a 30-child day care is a business. 8/4/17 Tr. 285-286.

Barbara Feldmann also lives on Mill Creek Drive. She testified that she bought her home in Mill Creek Towne in 1968, as a place that would be quiet and safe for walking and biking in a friendly noncommercial neighborhood. She felt it would also be green and safe to raise children and possibly to have visiting grandchildren. She feels that the Applicant purchased a home in this residential neighborhood with the express intention of creating a commercial venture. Ms. Feldmann then listed other concerns (8/4/17 Tr. 288-290):



[A] day care facility for 30 children . . . would definitely destroy the type of residential neighborhood we all thought we had bought into. One, with at least 65 to 70 cars a day running back and forth the idea of friendly walks with neighbors or safe bike riding for children would be destroyed. Two, with the paving in of much of the yard in order to create parking facilities the idea of green open space would completely vanish. Three, with the accommodation of 30 children, the size of at least two kindergarten classes in Montgomery County Public schools, in a house built for a family of four or five, the notion of a residential, rather than a commercial community would be destroyed. Four, with . . . the owner living elsewhere in another community entirely, not even in Mill Creek Towne itself, the idea of a community of neighbors helping one another would vanish completely. Five, with the very real possibility that one such commercial enterprise would most certainly lead to many other such ventures, the idea of a residential community rather than a commercial strip is a near certainty. Six, with the presence of such a business in the community very real possibility of a decrease in property value is an almost foregone conclusion. As you people here, and one member of the panel, contemplate the allowance of this enterprise, please keep in mind that this is no warm, loving stay-at-home mom helping out parents of four or five neighbors' children. This is unquestionably a blatant commercial enterprise barging into a residential neighborhood, masquerading as a community service.

She also noted that in the mornings and the evening rush hours, there is sometimes a backup of five, six, or seven cars trying to get on or off Shady Grove Road at Mill Run Drive. Ms. Feldmann worries that the proposed facility will certainly make that situation worse. She also observed that the Applicant has underestimated the time it will take to drop off and pick up children and that the cul-de-sac on Mill Run that she talked of as a place of possible parking is often needed by fire, sanitation and emergency response vehicles in order to be able to back up and move around. 8/4/17 Tr. 290-291.

Ms. Feldmann responded to the Applicant's claim that others park trucks on the street by noting that some of the trucks she had referenced were for a construction crew putting an addition on a neighborhood house, not a commercial venture. 8/4/17 Tr. 292.

Andre Polissedjian, who lives on Mill Creek Drive, testified that he was concerned about the Applicant being given so much time to present her case. 8/4/17 Tr. 294-296. The Hearing Examiner reassured him that everyone would be given an opportunity to be heard.

James Snee, who also lives on Mill Creek Drive, testified about insufficient stormwater drainage in the neighborhood. Mr. Snee identified photos evidencing this problem (Exhibits 88 and 89) and testified that the enlargement of the impervious surface of the Applicant's driveway would worsen the water runoff situation. The photos from Exhibits 88 and 89 are reproduced below:



Mr. Snee noted that the damage to the grass and compaction of the soil from cars parked on the grass along Park Mill Drive would further aggravate this condition. 12/4/17 Tr. 297-311. In addition, he raised a concern that cars parked on Park Mill Drive would block access for emergency vehicles, and he expressed doubt that the Applicant's staff would actually park a quarter of a mile away in a cul-de-sac, as the Applicant proposed, in the event of a blizzard, snowstorm, or torrential downpour. 12/4/17 Tr. 299-300.

Nancy McGinness, who lives on Shady Mill Road, testified that she has lived in the Mill Creek Towne area for almost 50 years, and that it is a residential community with single family dwelling houses. That philosophy was reflected in the covenants when she bought her house 50 years ago. The Hearing Examiner explained that he could not enforce private covenants. Ms. McGinness responded that she was just talking about the philosophy of the neighborhood as a

residential area, where young people come back to raise their families and where one would not think to establish a business. 8/4/17 Tr. 313-316.

John Patrick Duffy, who lives on Dew Wood Drive, testified that he recently purchased a home in this community because of its residential friendly philosophy where he could raise a family. He is concerned about cut-through traffic creating a hazard for children and bicyclists, and he urged reject of the application “as just not compatible with the philosophy and the kind of the whole character of the neighborhood . . .” 8/4/17 Tr. 317-319.

Tom Johnson, whose property abuts the subject site to the north, testified that he is not sure who owns the fence along Shady Grove Road enclosing the rear of the properties fronting along Park Mill Drive, but he is sure that his home is not being used as a business (9/13/17 Tr. 508):

Saying that my property is used as a commercial business is 100 percent false. My home is not a business.

He testified that only one of his trucks is for commercial use (a van with a trailer), and the other is a pleasure vehicle. 9/13/17 Tr. 523-525. Mr. Johnson noted that he did not mind a small child care next door, but the larger proposal would be inappropriate in this residential community. “[A]ny property that requires signs and new paving will be out of place. It will be inconsistent with the neighborhood and it will be an eyesore.” 9/13/17 Tr. 509. He also mentioned the impact on the value of his property, as the next-door neighbor, stating that “to have a daycare center of that size would be like having a McDonald's drive-in next door.” 9/13/17 Tr. 509. Mr. Johnson observed that the staggered arrivals promised by the Applicant are not working even with the present small facility (as demonstrated photographically with Exhibits 128(a) and (b)), and he asked, “My point is that they can't do it with only six to eight kids, that they have now how can they do it with more?” 9/13/17 Tr. 512-513. Ms. Rice argued that the photos are irrelevant

because if the conditional use is granted, she will have a circular drive that would change the situation. 9/13/17 Tr. 515. Finally, Mr. Johnson indicated his worry about the potential noise from so many children playing outdoors next to his property. Even now, with fewer children, he has heard loud screaming coming from the day care. 9/13/17 Tr. 517-518.

Sheryl Greenfield testified that she lives on Caddy Drive (which is within the subdivision but outside the defined neighborhood). As stated by Ms. Greenfield (9/13/17 Tr. 530):

We are all affected by this proposed property. This house is not a 30 child house. This is a residential house. I don't know where she's going to put 30 children inside that house on a rainy day. Where is she going to put 30 children in a backyard? How is she going to drop off these people in this 10 minute time limit, which is purely unrealistic? That she's going to back up the traffic on Mill Creek, backup the traffic on Mill Run, backup the traffic on Park Mill. This neighborhood was built as a residential neighborhood in 1967 and that's the way it should stay.

Jane Lewis testified that she also lives on Caddy Drive, but walks frequently on Park Mill Drive (9/13/17 Tr. 532):

I am opposed to the conditional use application. The main- and I agree with what my neighbors have said, but I just wanted to point out that I live on the other side of Miller Fall I walk the neighborhood every single day usually between the hours of 6:00 a.m. and 8:30 a.m. I walk with my dog and I probably go two to three miles and I would say that at least twice a week, if not three times a week I am walking down Park Mill Drive. I find that there are cars parked along the road in front of many of the homes and I am forced to walk out into the street to walk around them to keep going; while the grass in the 10 feet on either side of the roadway may be public access land, I view it as my neighbors land and I choose to stay out of it. . . . I guess I have a concern that with the increased traffic that could be coming in mornings and afternoons that those vehicles will add to the difficulty of pedestrians, young, old, and with or without pets walking along the street. . . .

Ruth Schwartz lives at 17828 Cliffbourne Lane, just north of the defined neighborhood. Her testimony (9/13/17 Tr. 533-537) was summarized on pages 23-24 of this Report and Decision in connection with the parking setback waiver issue. She challenged Applicant's proposed 3-minute timing for discharge and pickup of children.

Carol Gannon testified that she lives at 17516 Park Mill Drive, across the street from the

subject house, and the fourth house down. 9/13/17 Tr. 537-541. She bought in Mill Creek Towne because it was a quiet, peaceful, safe neighborhood. In her opinion (9/13/17 Tr. 538-539),

“Mrs. Rice's plan for a daycare center, not only does not support the values of Mill Creek Towne residents have strived to create and maintain, but seriously jeopardizes its continued success as a quiet and safe neighborhood. She is capitalizing on the advantages of the neighborhood while jeopardizing the very values it was built on.

Ms. Gannon also noted that the site is in an environmentally sensitive area, and she has a spring on her property.

Andrew Lucarelli testified that he lives at 17436 Park Mill Drive, across the street and two houses down from the subject site. He incorporated his letters (Exhibits 40(c) and 40(dddd)) into his testimony. 9/13/17 Tr. 541-547. Mr. Lucarelli's chief concern is the safety of his children and other pedestrians who will be impacted by the increased traffic and parking on his street caused by the use. The path his children walk to school takes them past the subject site each day. He also decried the commercialization of this residential neighborhood and argued that the reason for zoning is to prevent this kind of problem. Mr. Lucarelli stated that “[the Applicant's] plan is just completely incompatible with our neighborhood and the effects on our way of life would be much greater than what is contemplated . . .” 9/13/17 Tr. 543.

Bonnie Lloyd testified that she lives at 17605 Park Mill Drive, and her mother-in-law is Beverly Lloyd, who lives in the property abutting the subject site to the south (17501 Park Mill Drive). 9/13/17 Tr. 547-557. Ms. Lloyd observed that “the traffic, the limited parking, pedestrian safety, devaluation of our properties, and the proposed changes to the Rice property make it discordant with our neighborhood.” 9/13/17 Tr. 548. She introduced a map (Exhibit 130) and photographs of the 22 homes she said would be most directly affected by the proposed use. Exhibits 131(a)-(v). These homes along Mill Run Drive and Park Mill Drive will be the

most affected by the added traffic from the conditional use because the entrance to Shady Grove Road at Mill Run Drive is the only one with a traffic light, and therefore the most safely used by those accessing the community. 9/13/17 Tr. 549. She noted that these photos show the character of the neighborhood and that none of these homes have circular driveways, parking for 10 vehicles or fencing in the front yard. 9/13/17 Tr. 551-552.

Finally, Bonnie Lloyd introduced a photo of Beverly Lloyd's bedroom window (Exhibit 133), showing its proximity to the side and front lots of the subject site. It is reproduced below:



Ms. Lloyd concluded, stating that (9/13/17 Tr. 554-555):

. . . [her] mother-in-law's bedroom window overlooks the Rice property right at her driveway. And I just think it's patently unfair that my mother-in-law is subjected to drop off times from 6:30 a.m. until 9:00 a.m.; doors slamming, children screaming, adults talking, into her bedroom window, disturbing her sleep. She's lived there for over 50 years. She shouldn't have to tolerate this.

Elaine French testified that she lives at 17701 Mill Creek Drive and almost every day she observes traffic backups at the intersection of Mill Run Drive and Shady Grove Road (9/13/17 Tr. 558-560):

. . . So I am a witness to that intersection, virtually on a daily basis. I come from my neighborhood, Mill Creek Towne, Mill Creek Drive, but I'm coming down the hill from the top of Mill Run Drive. There is always, always, no exaggeration a back up of traffic that goes from Shady Grove Road back over Park Mill Drive and up the hill. Since school has started I count 8 to 10 cars waiting for the light . . . Anywhere between 7:30 and 9:00 [AM].

She also noted that the intersection of Mill Run and Park Mill Drives is “a chaotic intersection.”

Pat Labuda testified that she lives on Briardale Road, which is in Derwood, but not in the Mill Creek Towne Subdivision. She has lived there for over 44 years, and for close to two decades she has served as the president of the Greater Shady Grove Civic Alliance, which is an umbrella organization for the homeowners associations of the greater Derwood area. However, she testified as an individual, not on behalf of the Association. Ms. Labuda stated that “It is very important for us to continue to maintain the residential appeal of the Derwood community.” She feels that “Commercial uses such as a 30 child daycare facility are not in keeping with a residential area.” 9/13/17 Tr. 563-566.

Katie Becker (17712 Shady Mill Road), Patty Peterson (7505 Park Mill Court) and Jean Nodine (7508 Park Mill Court) testified as a team (9/13/17 Tr. 570-609) and introduced a slide show (Exhibits 134(a)-(tt)). They noted that the Staff Defined Neighborhood is approximately 34 percent of Mill Creek Towne as a whole. It includes 155 of the 462 homes in Mill Creek Towne Subdivision. They worry that traffic generated by the daycare may exceed the 25 MPH speed limit when daycare parents try to arrive for allocated time slots for discharge or pickup, or circle within the neighborhood waiting for allocated time slots to begin.

Noting that there are four major access points into the community, Ms. Becker and Ms. Peterson calculated that as many as 59 homes will be affected by the use-generated traffic, if the one access point is used, but an average of 40 homes will be affected per access point, not the total of only 19 homes suggested by the Applicant.

Ms. Becker further testified that the proposed use would add more cars parking on both sides of the narrow street, making it difficult to navigate in-between the cars and especially difficult for emergency vehicles, school buses, and commercial trucks. In addition, the excessive on-street parking will limit the line of sight, which endangers pedestrians, and it will also make it difficult for the residents on Park Mill Drive to back out of their driveways. She alleged that additional parking on the grass will destroy the grass on the road sides, which will lead to more stormwater runoff.

Ms. Becker noted that within Mill Creek Towne there are 16 or more school bus stops, and that the additional on-street parking and traffic would endanger children walking to school or to the bus stops, and even those standing at the bus stops. Ms. Nodine added that the Applicant seeks to have all 30 children outside together at the same time, and that is another example of disturbing the peace of the community. Ms. Becker mentioned that large signs for the conditional use can be offensive to the neighborhood. Ms. Becker also pointed out that the Mill Creek Towne Park across Shady Grove Road is not just “across the street” from the subject site; it is across six lanes of traffic and those six lanes of traffic are divided by a very wide median. Addressing the need for parking for staff serving the proposed day care center, Ms. Becker stated her opinion that the dead end of Mill Run Drive is not a viable option.

Ms. Becker stated that she, Ms. Peterson and Ms. Nodine all oppose the application because (9/13/17 Tr. 606):

[the proposed use] . . . will have an extraordinarily negative impact on Mill Creek Towne as well as the Staff Defined Neighborhood. It will not promote the health, safety, morals and general welfare of the community. It will not protect and conserve the value of the buildings and encourage the most appropriate use of the land and it will not facilitate the creation of a convenient, attractive and harmonious community.



Anne Gregorski testified that she lives at 17500 Park Mill Drive, across the street and one house over from the subject site. She stated that she walks her dog every day, and described her route in the neighborhood. She distinguished other conditional use applications raised by the Applicant for comparison purposes, but the Hearing Examiner noted that each site condition is different and therefore each application must be assessed based on that individual site. Ms. Gregorski also discussed the applicable Gaithersburg Vicinity Master Plan, agreeing with the Hearing Examiner that it says little or nothing about this neighborhood. She noted that the situation on Park Mill Drive makes it especially dangerous for additional traffic or parking. Ms. Gregorski raised a question about the lack of details provided by the Applicant regarding the proposed addition, but the Hearing Examiner explained that if the conditional use were approved, the Applicant would have to go through the permitting process. Ms. Gregorski asserted that the planned fence would not satisfy screening requirements, nor be a sufficient buffer for the neighbors. On cross-examination, she pointed out the differences in the lot sizes and other circumstances of other approved day cares relied on by the Applicant. 9/13/17 Tr. 609-624.

In addition to these lay witnesses, the opposition called James Bentson of 12805 Folly Quarter Road, Ellicott City, Maryland, who testified as an expert in residential real estate appraisals. 9/13/17 Tr. 460-504. Mr. Bentson is certified in this field by the State of Maryland (Exhibit 69(a)) and has done approximately 10,000 residential appraisals over the course of his 30-year career. He is also a licensed realtor, and a member of the Montgomery County Board of Realtors. The Applicant objected to his testimony as an expert because his experience, while it included the impacts of commercial property on adjacent residential property values, did not include appraising the effects of a conditional use on nearby properties. The Hearing Examiner ruled that her objection went to the weight to be given his testimony, not to his ability to testify

as an expert. The Hearing Examiner therefore accepted Mr. Bentson as an expert in real estate appraisals and the effects of a daycare center on adjacent property values. 9/13/17 Tr. 461-471.

Mr. Bentson explained his methodology and testified that if the expanded daycare center is approved next door to Mr. Johnson's residence at 17509 Park Mill Drive, it will have an adverse effect on the value of his property in the amount of approximately \$15,000.00. His opinion and methodology are reflected in his Appraisal Report (Exhibit 69(a)). 9/13/17 Tr. 480-485. On cross-examination, Mr. Bentson indicated that, in his opinion, the existing 12 children group day care has no effect on the price of Mr. Johnson's house, but a 30-child day care center would. 9/13/17 Tr. 487. The Applicant objected to Mr. Bentson's testimony and report because her proposal is for a conditional use, not a commercial property, and based on the comparables he chose in his evaluation. The Hearing Examiner overruled her objections as they went to the weight to be given Mr. Bentson's testimony and Appraisal Report, not to their admissibility. 9/13/17 Tr. 504.

Given the number of community members who testified, and/or who signed letters and a petition in opposition to this application, the Hearing Examiner must point out, as he did at the first day of the hearing (8/4/17 Tr. 15), that the decision on a zoning application "is not a plebiscite," and the Hearing Examiner must evaluate this case based on the evidence, not on a nose-count of those for and against. *Rockville Fuel v. Board of Appeals*, 257 Md. 183, 192, 262 A.2d 499, 504 (1970). It is not the Hearing Examiner's function to determine which position is more popular, but rather to assess the Applicant's proposal against the specific criteria established by the Zoning Ordinance.

Since the Hearing Examiner is not counting noses, it is irrelevant that some of the people in opposition live just outside of the defined neighborhood, as long as they are offering evidence

that is probative of the issues in the case – *i.e.*, compliance with the Zoning Ordinance; traffic concerns; safety concerns, and the like. We now turn to the Applicant’s testimony at the hearing, noting that Applicant’s proposal is already set forth at length in Part II. C. of this Report.

## **2. The Applicant’s Response**

On the first day of the hearing, Ms. Rice discussed her selection process for the subject site and considerations in defining the neighborhood. 8/4/17 Tr. 23-54. Also, she observed that some of the neighbors testifying or sending opposition letters live outside of the neighborhood as defined by Technical Staff (8/4/17 Tr. 56, 60-61), and she contends that only 18 houses will be affected by additional traffic caused by the conditional use. 8/4/17 Tr. 68-70.

Ms. Rice stated that she could have brought legions of supporters to testify (8/4/17 Tr. 57), but the Hearing Examiner would not allow Ms. Rice to testify regarding hearsay about what supporters would allegedly have said had she asked them to attend. 8/4/17 Tr. 58.

Ms. Rice made an effort to show that there is already some commercial activity on the street, in that her next-door neighbor, Thomas Johnson, and others sometime parks trucks there. 8/4/17 Tr. 214-228 and Exhibits 85 and 86.

Ms. Rice noted that a flyer distributed throughout the neighborhood (Exhibit 41) incorrectly states that she would pave two thirds of her yard, although she would only pave 30% of it, and that she would have cars parked on the street, although she plans to have cars parked on the grass along side the street. 8/4/17 Tr. 62-65. Ms. Rice argues that parking on the grass is an option that the Hearing Examiner could approve, and that pedestrians could just walk around the parked cars. 8/4/17 Tr. 229-231. Ms. Rice also challenges the idea that having a daycare center in a neighborhood will decrease property values because there are 448 child care facilities in the County. She noted that there is one day care center (the Bar-T Club) located in the Mill Creek

Towne Elementary School, in the neighborhood. 8/4/17 Tr. 235-238.

Angela Pryor, who lives in the house on the subject site, testified that she owns and runs a Group Day Care for up to 12 children there, as a Limited Use. 12/4/17 Tr. 171.

On the second day of the hearing, the Applicant's testified in response to the concerns of the neighbors (9/13/17 Tr. 340-458 and 656-653). Her presentation consisted of:

1. an effort to refute the evidence about traffic flows in the neighborhood and to show that parking is permitted on Park Mill Drive, near her property (9/13/17 Tr. 340-347 and Exhibits 116(a) – (p));
2. a description of her plan for parking of staff and for discharge and pickups of children at the site (9/13/17 Tr. 348-357 and Exhibits 121(a) and (b));
3. an argument as to why she thinks parking lot setbacks should not apply in her case (9/13/17 Tr. 359-370);
4. an argument that her shed should not have to meet the Zoning Ordinance side setbacks for accessory structures in the Zone (9/13/17 Tr. 370-376 and Exhibits 117(a)-(f));
5. a description of her existing and planned fences and her planned sign (9/13/17 Tr. 376--381 and Exhibits 117(g)-(j));
6. an argument that even with 30 children playing outside at the same time, the noise level would not be non-inherent (9/13/17 Tr. 381-396 and Exhibits 117(k)-(l), 118(a) & (b)) and 119 (a) –(g));
7. evidence that a swim club (the Mill Creek Towne Swim Association) is located in the vicinity, and arguing that it establishes commercialization of the subject neighborhood even though it is on the other side of Shady Grove Road (9/13/17 Tr. 397-401 and Exhibits 120(a)–(k);
8. noted that her application includes five social and promotional events at the site and discussed logistics for those events (9/13/17 Tr. 402-404);
9. rebuttal evidence that her fence along Shady Grove Road is owned by her and not by the County (9/13/17 Tr. 626-631 and Exhibits 136(a) and (b));
10. an argument that approvals of other special exceptions approved in the R-200 zone should govern here even though they involve vastly different sites (9/13/17 Tr. 632-635);
11. a statement that 62 of the 458 child day care centers in Montgomery County allow from 13 to 30 children (9/13/17 Tr. 636);
12. a closing argument that the concerns of the neighbors all pertain to inherent adverse effects, and that this neighborhood is not completely residential (9/13/17 Tr. 642-645); and
13. requests regarding conditions that may be imposed if the conditional use is granted (9/13/17 Tr. 646-653).

Although the Hearing Examiner appreciates the fact that the Applicant put a lot of effort into assembling and presenting her case, he finds that she has failed to prove compliance with the standards in the Zoning Ordinance, as will be discussed in Part III of this Report and Decision.

### 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 child day care center for up to 30 children. *Zoning Ordinance* §59.3.4.4.E.

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 will not 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>13</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, in that both a Family Day Care and the existing Group Day Care are allowed as limited uses in this zone without zoning approval. Exhibit 67, p. 12. Therefore, the Hearing Examiner finds that this standard is inapplicable to the subject application.

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<sup>13</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.

***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>14</sup>***

Conclusion: This subsection requires an analysis of the standards of the R-200 Zone contained in Article 59-4; the use standards for Child Day Care Centers for 13 to 30 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, as did Technical Staff (Exhibit 67, pp. 12-18) and the Planning Board (Exhibit 68), that the application fails to satisfy 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 Gaithersburg Vicinity Master Plan, approved and adopted in 1985, and amended in 1988 and 1990. The Applicant discusses other Master Plans in her filings, but does not cite any language in the applicable Master Plan that supports her case (Exhibit 6). As noted by Technical Staff (Exhibit 67, pp. 8-9), “The Master Plan does not discuss the Site, nor does it include language about day cares, special exceptions, or residential areas in general.” Nevertheless, Staff concludes that:

... the proposed extensive paving in the front yard to accommodate 10 cars will turn the front yard into a parking lot, which will give a non-residential appearance to the property with or without all the cars parked there. This is a detached residential zone and the proposed changes are not consistent with the inherent character of the existing single-family detached housing neighborhood.

Conclusion: While the Hearing Examiner may agree with Staff’s conclusion, and nothing in the Master Plan appears to contradict Staff’s analysis, it is hard to tease such a conclusion out of the

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<sup>14</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).

language in this 32-year-old Master Plan. Suffice it to say, a Master Plan of this vintage, which does not discuss the subject site, nor contain recommendations about day cares or special exceptions (nor their impacts on residential areas), is of little use in evaluating this case. The Hearing Examiner's own review of the Master Plan reveals that the subject site falls within the extreme southeastern corner of the "Airpark Planning Area" (MP, p. 43), but there appear to be no land use and zoning recommendations for that segment of the Planning Area, since it does not fit within the defined Midcounty Highway District, the Flower Hill District or the Airpark District. The Plan's discussion of the Airpark Planning Area (MP, pp. 36-49) does not address the kinds of concerns raised in this case (*e.g.*, commercialization of residential areas). Although the Applicant has also not produced evidence that the proposed conditional use substantially conforms with any recommendations of the Gaithersburg Vicinity Master Plan, given the age and vagaries of the applicable Master Plan, the Hearing Examiner's decision in this case is based on the wealth of other evidence in this case, not on the Master Plan analysis.

***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 does not meets this standard (Exhibit 67, p. 16):

The location and intensity of the proposed daycare is not harmonious with the surrounding neighborhood. The proposed use will adversely impact the residential neighborhood by introducing more noise and activity, and substantially increasing vehicle trips on a substandard residential street without sidewalks, leading to unsafe conditions for pedestrians.

The Hearing Examiner agrees with this conclusion based on the evidence outlined in Parts II.C. and D. of this Report and Decision, beginning on page 15. It is clear that the design and operation of this large a day care center in this residential neighborhood would not be

harmonious with the surrounding community. A Group Day Care, such as already exists on the site, is very different from the kind of facility and operation the Applicant seeks in this case – a Day Care Center for 30 children with an 11-car parking lot in the front and side yards.

***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: The problem in this case is not with the number of conditional uses in the neighborhood, but with the intensity of the proposed conditional use in this Residential Detached Zone. As stated by Technical Staff (Exhibit 67, p. 16):

The intensity of the proposed use will adversely affect the surrounding neighborhood and alter the residential nature of the area. The volume of traffic generated by the proposed use during the morning and evening rush hour will exacerbate pedestrian/vehicle conflicts on the substandard residential streets.

Staff's conclusion is supported by the figures calculated for the number of anticipated weekday peak hour person trips (49) reported on page 11 of the Staff report (Exhibit 67). While that number is one under the threshold of 50 that would have required a full traffic study under the 2017 Local Area Transportation Review (LATR) Guidelines, it is a clear indication of the intensity of the proposed use. This numerical evidence is further buttressed by the testimony of the neighbors regarding traffic issues, as discussed in Part II.D. of this Report and Decision, and by Technical Staff's observations about the risks to pedestrians from the increased neighborhood traffic and from the pedestrian obstructions that would be caused by on-street (or on-grass) parking on the narrow Park Mill Drive, a secondary street with no sidewalks.

This record establishes that adding the proposed conditional use would "increase the number, intensity, or scope of conditional uses sufficiently to affect the area adversely or alter



the predominantly residential nature of the area.” Thus, the Hearing Examiner finds that this standard has not 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 67, p. 17. Therefore, the Hearing Examiner must determine whether the proposed development will be served by adequate public services and facilities. In this case, two matters regarding public facilities require discussion – the possible impacts on storm drainage as a result of damage to the grass and soil from planned parking on the grass along the edges of the pavement of Park Mill Drive and the increased demand on transportation facilities.

1. Whether the proposed on-street parking will create unacceptable storm drainage problems:

Although Technical Staff does not directly address this issue, the opposition provided evidence that there is a stormwater drainage issue in the area (Exhibits 88 and 89, reproduced

and discussed on pages 34 and 40, above), which may be exacerbated by damage from daycare cars parking on the grass alongside Park Mill Drive and by the additional impervious surface planned by the Applicant for her on-site parking lot.

Conclusion: It is difficult for the Hearing Examiner to assess this problem in the absence of any expert evidence regarding the impacts of the proposed use on the storm drainage problem. The Applicant has not produced any evidence that the public facilities for storm drainage are adequate to handle the additional burdens that would be created by the conditional use, but instead suggests that “Eventually killing grass and causing rutting can be resolved by a condition to repair damage with grass seed, straw and/or sod.” Exhibit 65(b). Technical Staff commented that all public facilities, other than transportation facilities, “. . . are adequate to serve the proposed use” (Exhibit 67, p. 17). Staff also noted that “the site contains no streams or stream buffers, wetlands or wetland buffers, hydraulically adjacent steep slopes, [or] 100-year floodplains . . .,” and concluded that the application is “in conformance with the *Environmental Guidelines*. . .” Exhibit 67, p. 11.

Given these statements, the Hearing Examiner concludes that there is insufficient evidence for him to find that the proposed conditional use would unduly tax the existing storm drainage facilities. Nevertheless, that does not mean that parking on the grass alongside Park Mill Drive is an acceptable practice for this neighborhood. As Technical Staff added in its Supplemental Report (Exhibit 72, p. 7), “Planning Staff do not support allowing a use that needs to use parking in the unpaved portion of the right-of-way.” The Hearing Examiner agrees with that sentiment based on pedestrian safety and compatibility considerations, wholly aside from storm drainage issues.

2. The increased demand on transportation facilities:

The Applicant addressed the impact on transportation facilities in her submission entitled

“Zoning Standard Responses” (Exhibit 6), stating that “The traffic from 6 cars per 10 minute time periods will have little impact during 68% of the days the child care is open.” In her “Traffic Statement” (Exhibit 8), the Applicant discussed proposed drop-off and pickup procedures, and attached a chart of the expected trips to the facility, which is reproduced on page 30 of this Report and Decision.

Technical Staff evaluated the potential impacts of the proposed conditional use on transportation facilities per the 2017 Local Area Transportation Review (LATR) Guidelines (Exhibit 67, p. 11):<sup>15</sup>

#### Local Area Transportation Review

The Applicant submitted a traffic statement that included the projected number of vehicles arriving and departing between 6:00-9:45 a.m. and 1:00-6:10 p.m. by residents, staff, and parents (Attachment 1 [to Ex. 8]). Based on the Applicant’s traffic statement, Staff calculated that the proposed daycare would generate 32 vehicle trips during the weekday morning and evening peak hour.

Staff also calculated the number of weekday peak hour trips using the 2016-2020 Subdivision Staging Policy methodology for a day care center with seven employees. The following table demonstrates that the proposed daycare would generate fewer than 50 weekday peak hour person trips, therefore no further analysis is required. [Emphasis added.]

	Peak Hour	Type of Trips				
		Person	Auto Driver	Auto Passenger	Transit	Bike & Ped.
For the Adjacent Intersections*	Morning	47	30	13	1	3
	Evening	45	29	13	1	3
For a Child Daycare Center	Morning	49	31	14	1	3
	Evening	49	31	14	1	3

\*The 2016-2020 Subdivision Staging Policy transportation test is based on traffic generated during the highest weekday peak hour on the adjacent street to analyze the worst-case traffic scenario even though the peak hour of the daycare may be higher while the adjacent street is lower.

<sup>15</sup> The approach of the 2017 LATR Guidelines differs somewhat from LATR analysis under previous LATR Guidelines, in that the 2017 Guidelines count “weekday peak hour person trips” trips (*i.e.*, driver, passenger, transit, bike and pedestrian) rather than just peak hour vehicle trips, and change the threshold of when a full traffic study is needed from 30 weekday peak hour vehicle trips to 50 weekday peak hour person trips.

Although Technical Staff found that the number of “weekday peak hour person trips” (49) would not warrant a full traffic study to satisfy LATR (*i.e.*, it was one under the threshold of 50), Staff still determined that the transportation facilities would not be adequate to accommodate the conditional use proposed by the Applicant (Exhibit 67, p. 17):

Park Mill Drive is inadequate to serve the increase in vehicle traffic generated by the proposed use. The travelway on Park Mill Drive is substandard, with a 20-foot wide pavement that only permits enough room for two-way through movement with no room for parking on the street. Park Mill Drive lacks sidewalks and pedestrians must walk in the street. The increase in traffic volume generated by the proposed use will exacerbate pedestrian/vehicle conflicts.

Conclusion: There is no expert evidence in the record to dispute Technical Staff’s conclusion that the adjacent road system is inadequate to support the proposed use. Based on Technical Staff’s analysis and the evidence of record as summarized in Parts II. C. and D. of this Report and Decision, and the Hearing Examiner finds that the proposed use will not be served by adequate transportation services and facilities, in that Park Mill Drive is insufficient to safely accommodate the traffic and parking that would result from the use.

***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 child daycare center for up to 30 children. 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 child day care center (Exhibit 67, pp. 17-18): “(1) vehicular trips to and from the site; (2) outdoor play areas; (3) noise generated by children; (4) drop-off and pick-up areas; (5) lighting; and (6) onsite parking for employees.”

Technical Staff also found that the proposed use would have non-inherent physical and operational characteristics, which it described as “the location of the proposed facility on a

substandard secondary residential street, and the intensity of the proposed daycare facility on a relatively small lot.” Exhibit 67, p. 18.

The Hearing Examiner agrees with Staff’s description of both the inherent and non-inherent characteristics of the proposed use and this particular site.

Technical Staff then analyzed of the potential impacts of these physical and operational characteristics on the neighborhood in this case (Exhibit 67, p. 18):

. . . As described in the Transportation section, Park Mill Drive lacks sidewalks, and pedestrians on Park Mill Drive must walk on the street. The increased vehicle traffic resulting from the proposed use, combined with the location of the Site along a substandard road without sidewalks will create adverse safety conditions for pedestrians and for other vehicles travelling along the relatively narrow road. Further, the intensity of the proposed use on a relatively small lot does not allow space for safe and efficient on-site vehicle circulation and parking, even with the addition of a very large driveway to the front yard. The intensity of the use also generates the need for a parking waiver. If on-street parking were allowed, cars would need to park on the grass in the right-of-way, which would eventually kill the grass and cause rutting.

The existence of non-inherent characteristics does not mean that the conditional use must be automatically denied. However, when there are non-inherent characteristics of the proposed conditional use on the subject site, the Hearing Examiner must determine whether the proposed use will 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.

Based on the record in this case, the Hearing Examiner finds that the combination of inherent and non-inherent adverse effects from the proposed use, if approved, would cause undue harm to the neighborhood in almost all the categories listed in this provision. There is ample evidence that the paving over of the site’s yard to accommodate an 11-car parking lot, plus the added traffic, parking on the grass along Park Mill Drive, noise and activities in a residential



neighborhood, would unduly interfere with the peaceful enjoyment and economic value of the neighbors' properties and the health, safety and welfare of pedestrians. This evidence consists not only of the testimony of the neighbors (8/4/17 Tr. 187-319 and 9/13/17 Tr. 506-624),<sup>16</sup> but also the testimony of an expert real estate appraiser (Exhibit 69(a); 9/13/17 Tr. 460-505),<sup>17</sup> the analysis of the Technical Staff (Exhibits 67 and 72 and 8/4/17 Tr. 75-170) and the unanimous opinion of the Planning Board (Exhibit 68). As stated by the Planning Board (Exhibit 68, p. 2):

The Board agreed with Staff analysis and determined that the proposed parking is not adequate to accommodate the proposed use and that Park Mill Drive is not designed to handle the proposed level of traffic. Further, the Applicant failed to demonstrate that the intensity of the use is compatible with the surrounding residential neighborhood.

While the Applicant submitted a plethora of exhibits (Exhibits 1-33, 62, 79-87, 96, 97, 101, 111, 116-121) and hours of her own testimony (8/4/17 Tr. 23-74, 202-283 and 9/13/17 Tr. 340-458, 625-653), she failed to establish that the day care center she proposes on this undersized residential lot in a neighborhood of single-family, detached homes would not have the undue harms discussed above. The fact that other day care facilities have been approved in other locations, as demonstrated by the Applicant's exhibits (Exhibits 26 and 62) does not establish that the one she proposes on this site, in this neighborhood, with these operational and site characteristics would be compatible and would not unduly harm the neighbors.<sup>18</sup> In other words, past Hearing Examiner decisions based on different factual predicates are not binding precedent on this case. While we strive to apply the Zoning Ordinance consistently, the question of compatibility must always be decided on a case-by-case basis, given all the variables, both physical and operational.

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<sup>16</sup> The testimony of the neighbors is summarized in Part II.D.1. of this Report and Decision, at pages 31-41.

<sup>17</sup> The testimony of Mr. Bentson, the expert real estate appraiser, is summarized in Part II.D.1. of this Report and Decision, at pages 41-42.

<sup>18</sup> For a listing of numerous characteristics that distinguish the conditional uses listed by the Applicant from the characteristics of the subject of this case, see the "Amended Pre-hearing Submission of Anne Gregorski" (Ex. 114).

As stated by the Court of Appeals in *Montgomery County v. Butler*, 417 Md. 271, 305, 9 A.3d 824, 844 (2010), “the Board’s task is to determine if there is or likely will be a detriment to the surrounding properties [and] . . . it 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.” Similarly, in *People’s Counsel for Baltimore County v. Loyola College in Maryland*, 406 Md. 54,102, 956 A.2d 166, 195 (2008), the court said there must be “an individual case analysis focused on the particular locality involved around the proposed site.”

Zoning Ordinance §59.7.3.1.E.3. very explicitly warns that “[t]he 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.”

This point was highlighted by the Maryland Court of Appeals in *Montgomery County v. Butler*, *supra*, 417 Md. at 291, 9 A.3d at 835-836 (2010), interpreting 2004 Zoning Ordinance §59-G-1.21(a)(2), the predecessor to the current §59.7.3.1.E.3:

. . . Finally, presenting a *prima facie* case meeting the County Code’s standards and requirements applicable to specific special exception use does not ensure the approval of the special exception application. Rather, § 59-G-1.21(2) states that “[t]he fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties.”

The court explained, 417 Md. at 295, 9 A. 3d at 838,

Yet, even assuming the presumption [of compatibility] derives from the local legislative policy decision to provide in its original zoning regulatory scheme (or by amendment to its text) for the potential of such a use with the grant of a special exception, the use remains only permissible conditionally and each applicant must prove actually, to the satisfaction of the administrative decision-maker (subject to the narrow standards for judicial review and applicable constitutional principles), that his/her/its application will be compatible with the uses on (or future permitted use of) other properties in the neighborhood. [Emphasis added.]

The court added, 417 Md. at 305, 9 A. 3d at 844,

. . . [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 *Butler*, the court upheld the denial of a special exception to a landscape contractor, even though that type of use was permitted in residential areas of the zone, based on the evidence that “. . . the configuration of the commercial enterprise activities and installations on the lot, and the proximity of the commercial activities to adjacent properties were sufficient non-inherent adverse effects to persuade the Board to deny the application.” *Butler*, 417 Md. at 308, 9 A. 3d at 846.

The Hearing Examiner finds that the situation described in the quoted sentence from the *Butler* case is analogous to the circumstances in the case at bar. The non-inherent characteristics of the proposed child day care center and the resulting adverse effects make the proposed use incompatible with the adjacent residential neighborhood. These adverse effects include the commercial appearance of the property, with an 11-car, paved, parking lot in its front and side yards; the noise from 30 children playing outdoors in close proximity to other residential properties; the noise and disruption of early-morning drop-off activities adjacent to abutting residential properties; potential hazards to pedestrians from additional traffic on a secondary street; potential hazards to pedestrians from on-street and on-grass parking on a narrow street; potential traffic congestion in the neighborhood and especially at the single, traffic-light controlled intersection at Mill Run Drive and Shady Grove Road; and potential negative impacts on the economic value of adjacent properties from such an intensive use next door.<sup>19</sup>

Given this record, the Hearing Examiner concludes that the Applicant has failed to demonstrate compliance with Zoning Ordinance §59.7.3.1.E.1.g and §59.7.3.1.E.3.

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<sup>19</sup> The Hearing Examiner notes that he would have reached the same conclusion (*i.e.*, that the proposed day care center of this size at this site would be incompatible with this residential neighborhood) even without any expert evidence regarding potential impacts on nearby property values.

***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 67, p. 18), “. . . the Applicant did not provide sufficient details about the proposed addition for Staff to make a judgement about architectural compatibility.” The Hearing Examiner concludes that even if the planned addition turns out to be architecturally compatible with the neighborhood, that would not make the proposed use and proposed parking lot 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: Technical Staff responded to this provision by stating (Exhibit 67, p. 18), “The proposed use is not compatible with the surrounding neighborhood and Staff recommends denial of the application.” In some cases, conditions can be imposed that would render an otherwise incompatible use appropriate for a neighborhood, but that is not the case here. The proposed use is just too large and busy for the existing residential neighborhood. While reducing the number of day care children down to 12 would improve compatibility, that would not be a sensible solution since a Group Day Care for up to 12 children is permitted in this R-200 Zone without a conditional use. For all the reasons previously discussed, the Hearing Examiner finds that the proposed use would not be compatible with the neighborhood, and should not 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-200 Zone. Development standards for the R-200 Zone are contained §59.4.4.7.B. of

the Zoning Ordinance. Staff compared the minimum development standards of the R-200 Zone to those provided for the main structure in a Table included in the Staff Report (Exhibit 67, p. 13), and reproduced below. Staff used a second Table to compare the development standards for an accessory structure in the R-200 Zone with those provided in this application (Exhibit 67, p. 14). It is reproduced below the first table.

**R-200 Standard Method Development Standards for a Detached House**

<b>Development Standard</b>	<b>Required/Permitted</b>	<b>Existing</b>
Minimum Lot Area (Section 4.4.7.B.1)	20,000 sq. ft.	15,000 sq. feet <sup>*</sup>
Minimum Lot Width at Front Building Line (Section 4.4.7.B.1)	100 feet	±100 feet
Minimum Lot Width at Front Lot Line (Section 4.4.7.B.1)	25 feet	±100 feet
Maximum Lot Coverage (Section 4.4.7.B.1)	25%	±10%
Minimum Front Setback; also applies to Shady Grove Road frontage (Section 4.4.7.B.2)	40 feet	± 43 feet
Minimum Side Setback (Section 4.4.7.B.2)	12 feet <sup>**</sup>	±11 feet <sup>**</sup> (south)
Minimum Sum of Side Setbacks (Section 4.4.7.B.2)	25 feet	±34 feet
Minimum Rear Setback (Section 4.4.7.B.2)	30 feet	Not applicable for through lots
Maximum Height (Section 4.4.7.B.3)	40 feet	< 40 feet

<sup>\*</sup> Pursuant to the Density Control Development standards of the R-200 Zone under Section C-1.431(a) of the 2004 Zoning Ordinance (in effect prior to October 30, 2014), the minimum lot size is 15,000 square feet . . . . As such, the lot size of the existing house is conforming under Section 7.7.1.A.1 of the 2014 Zoning Ordinance.

<sup>\*\*</sup> The boundary and location survey [Exhibit 14] indicates that the house is setback 11.2 feet from the southern lot line . . . .

**R-200 Development Standards for an Accessory Structure**

<b>Development Standard</b>	<b>Required/Permitted</b>	<b>Existing</b>
Minimum Front Setback; also applies to Shady Grove Road frontage (Section 4.4.7.B.2)	65 feet; must also be located behind the rear building line of the principal building	± 60 feet* (Shady Grove Road frontage); behind rear building line
Minimum Side Setback (Section 4.4.7.B.2)	12 feet	±5 feet (north side)
Minimum Rear Setback (Section 4.4.7.B.2)	7 feet	Not applicable for through lots
Maximum Height (Section 4.4.7.B.3)	35 feet	< 35 feet

\*Pursuant to the Density Control Standards of the R-200 Zone in the 2004 Zoning Ordinance, the setback for an accessory building from the front lot line or proposed street line is 60 feet.

Conclusion: As can be seen from the above Tables, the proposed use meets most, but not all the development standards of the R-200 Zone, as provided in Zoning Ordinance §59.4.4.7.B. The standards that have not been met are:

1. Minimum lot area (15,000 square feet v. 20,000 square feet required);
2. Minimum side setback of the main building (11 feet v. 12 feet required);
3. Minimum side setback of the accessory structure (5 feet v. 12 feet required); and
4. Minimum front setback of the accessory structure (60 feet v. 65 feet required).

1. With regard to the minimum lot area, it appears from this record that the subject lot was recorded in 1964 (*See* Plat Map, Exhibit 11). At that time, the Zoning Ordinance in effect was the 1955 Zoning Ordinance, which identified the R-200 Zone by its previous name, the “Rural Residential (RR) Zone.” The RR Zone required a minimum lot size of 20,000 square feet, and that same requirement is listed for the R-200 Zone in subsequent Zoning Ordinances. However, Technical Staff correctly points out, in a footnote to their Development Standards Table, that Section C-1.431(a) of the 2004 Zoning Ordinance permitted undersized lots of 15,000 square feet in the R-200 Zone if they were recorded prior



to September 23, 1986. Section C-1.44 of the 2004 Zoning Ordinance specified that no record plats pursuant to this method of development (*i.e.*, density control standards) were to be approved for recordation on or after September 23, 1986; however, since the record plat for the subject site was recorded in 1964 (*See* Plat Map, Exhibit 11), the lot size of 15,000 square feet is considered lawful. As such, the lot size is “grandfathered” as “conforming” under Sections 59.7.7.1.A.1 and 59.7.7.1.D.5. of the 2014 Zoning Ordinance.

2. Unlike the minimum lot size, the minimum side setback of the main building (11 feet v. 12 feet) was not exempted by the density control standards of the 2004 Zoning Ordinance. The 12-foot side setback has been a requirement at least as far back as the 1955 Zoning Ordinance, and it continues up through the current 2014 Zoning Ordinance. As such, the existing side setback on the southern side of the main building is not compliant with the Zoning Ordinance, and the granting of a conditional use would require a variance being approved by the Board of Appeals. This is a moot point, however, since the Hearing Examiner’s decision is to deny the conditional use as discussed herein.

3. The existing location of the shed is not in conformance with the minimum side setback for accessory structures in this zone (5 feet v. 12 feet required). Therefore, if this conditional use were granted, the shed would have to be moved.

4. The existing shed also does not conform to the current front setback requirement for an accessory structure in this zone (60 feet v. 65 feet required); however, as pointed out by Technical Staff, the 65-foot front setback for accessory structures was modified to 60 feet by the previously discussed “density control standards” in the 2004 Zoning Ordinance. Thus, the existing shed’s front setback would be considered as conforming for the same reasons the existing lot size is considered conforming.

The Hearing Examiner hastens to add that the fact that the lot size of 15,000 square feet is considered legally “conforming” in a zone that calls for a minimum lot size of 20,000 square feet does not mean that its smaller size has no effect on compatibility of the proposed use with the neighborhood. It does, for all the reasons discussed in Pat III. A., above.

**C. Use Standards for a Child Day Care Center for 13 to 30 Persons (Section 59.3.4.4.E.2.)**

The specific use standards for approval of a Child Day Care Center for 13 to 30 Persons are set out in Section 59.3.4.4.E.2. of the Zoning Ordinance. Standards applicable to this application are:

***2. Use Standards***

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

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

Conclusion: This proposal is for a day care center in a single-family, detached house, and is therefore compliant with this provision.

***b. An adequate area for the discharge and pick up of children is provided.***

The Applicant addressed her proposed procedures for drop-off and pickup of children in her testimony (9/13/17 Tr. 349-359, 401, 454), and provided charts showing her proposed staff parking procedures (Exhibit 121(a)) and drop-off and pickup procedures for the children (Exhibit 121(b)). These charts are reproduced on pages 22-23 of this report. Essentially, the Applicant contends that, “. . . it’s three minutes for a parent to be able to drop off and pick up. I want 6 cars to be able to come onto the property during a 10 minute time period. But it’s one after the other. So the first car is gone when the third car shows up.” 9/13/17 Tr. 454.

Applicant's claim that her drop-off and pickup plan could be practically accomplished was hotly disputed by opposition witnesses Tom Johnson (9/13/17 Tr. 512-513) and Ruth Schwartz (9/13/17 Tr. 534), the latter having once provided child care services herself. Her testimony in this regard is quoted on pages 23-24 of this Report and Decision.

Technical Staff addressed the drop-off-pickup issue in its report (Exhibit 67, p. 10):

Drop-Off/Pick-Up and Parking

The drop-off/pick-up and parking is inadequate as shown in the Applicant's submission and described below:

- The proposed driveway reconfiguration to park 10 vehicles<sup>20</sup> would not permit 8 of the 10 vehicles to maneuver within the driveway to enter, park, and leave without being blocked by other vehicles.
- The travelway on Park Mill Drive is substandard with a 20-foot wide pavement that only permits enough room for two-way through movement with no room for cars to park on the street. A Montgomery County Department of Transportation (MCDOT) representative commented that vehicles on this type of road typically park half-on and half-off the road which kills the grass and causes rutting (Attachment 3). Staff does not support the Applicant's proposal for on-street parking.
- Park Mill Drive has no sidewalks or shoulder, so pedestrians walk in the street. The proposed increase in traffic could result in significant vehicular/pedestrian conflicts.
- The proposed employee parking at the end of Mill Run Drive's dead end at Midcounty Highway is not a reasonable alternative. MC DOT commented that parking in dead ends is typically restricted because they are used by garbage trucks, utility trucks, etc. that need to make a U-turn.
- The 10-minute windows to drop off children during the busiest part of the morning peak period (7:50-8:10) would be difficult to enforce on a day-to-day basis. Variability in traffic and the unpredictable nature of young children can easily disrupt morning schedules. The Applicant has recently expressed a willingness to modify the drop-off/ pick-up schedule, but this will not mitigate the issues with the substandard road or inadequate parking. [Emphasis added.]

Conclusion: The Hearing Examiner finds that the evidence in this case supports Technical Staff's findings and conclusions. Aside from compatibility issues, the proposed 11-car parking lot on the Applicant's property does not provide space and flexibility for cars and children being dropped off and picked up to safely and efficiently maneuver to get in and out of the parking lot. Nor is on-street-parking an acceptable solution for all the reasons previously discussed.

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<sup>20</sup> Now 11 vehicles under the final Site Plan (Exhibit 111).

The Hearing Examiner also finds that the Applicant's plan for 3 minutes or less for each discharge and pickup, with 6 cars arriving in each 10-minute window, is not workable on this site, with this access and this planned parking facility.

In sum, the Hearing Examiner finds that the Applicant's plans do not provide an adequate area for the discharge and pick up of children, in a safe and efficient manner, thus failing to satisfy this provision.

***c. The number of parking spaces under Division 6.2 may be reduced if the applicant demonstrates that the full number of spaces is not necessary because:***

- i. existing parking spaces are available on abutting property or on the street abutting the site that will satisfy the number of spaces required; or***
- ii. a reduced number of spaces would be sufficient to accommodate the proposed use without adversely affecting the surrounding area or creating safety problems.***

Conclusion: Not Applicable. The proposal does not request a reduction in the number of parking spaces required for the conditional use and the residence. Moreover, safe on-street parking is not available abutting the property, as previously discussed.

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

Conclusion: Not Applicable. The proposal is for a Day Care Center, not a Family Day Care.

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

Conclusion: Not Applicable. The subject site is in the R-200 Zone.

Conclusion: In sum, the application does not satisfy the use standards in Code §59.3.4.4.E.2.

#### **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 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-200 Zone involved in this case. Although the specific provisions of Division 59.6.1 do not apply to this case, the Hearing Examiner notes that site access is a significant safety issue in this case in connection with the discharge and pickup of children, so it was discussed in that context in the previous section of this Report and Decision.

## 2. Parking Spaces Required, and Parking Lot Location, Setbacks and Screening

The standards for the number of parking spaces required, and parking lot location, setbacks and screening are governed by Division 6.2 of the Zoning Ordinance.

### *a. Number of Parking Spaces Required by Section 59.6.2.4*

The required number of parking spaces for the subject site was calculated by Staff in the Table on page 14 of the Staff report (Exhibit 67), which assumes that the gross floor area of the child care area will be about 1,120 square feet (Exhibit 67, p. 4).

#### *Section 6.2.4. Parking Requirements*

	Required	Proposed
Vehicle Parking Requirement (Section 59.6.2.4.B)	<i>Day care center:</i> 4 spaces (3 spaces per 1,000 sf of GFA)  <i>Residence:</i> 2 spaces per dwelling unit	11 spaces*
Bicycle Parking Requirement (Section 59.6.2.4.C)	1 long term space	1 (in the shed)

\* The Hearing Examiner added one space to the 10 listed by Technical Staff based on the Applicant increasing the number of proposed parking lot spaces to 11 in her final plans (Exhibit 111).

Conclusion: As can be seen from the above Table, Section 59.6.2.4 of the Zoning Ordinance requires a total of 6 parking spaces for the subject site (2 spaces for the single-family dwelling

unit and 4 for the child-care facility). The parking for a Day Care Center is calculated by applying the specified baseline minimum of 3 spaces per 1,000 square feet of gross floor area to the actual gross floor area planned for the use.

Although Section 59.6.2.4 requires only 6 vehicular parking spaces for the subject site, the Applicant testified that she expects that she will have 3 non-resident teachers and 3 non-resident aides, so she anticipates she will need 7 nonresident staff member parking spaces to allow for a 5-minute overlap when one staff member leaves after another arrives. 8/4/17 Tr. 206. Moreover, Section 59.3.4.4.E.2.b. additionally requires that “An adequate area for the discharge and pick up of children [be] provided.” Thus, additional discharge and pickup spaces must be allocated to satisfy that requirement.

Unfortunately, as discussed in Part III.C. of this Report and Decision, there is just not enough space on the undersized property in question to provide a parking area with sufficient maneuvering and access room to accommodate the number of expected parked vehicles plus those discharging and picking up children. Thus, while the Hearing Examiner finds that the Applicant’s proposal is compliant with Section 59.6.2.4, it is not compliant with Section 59.3.4.4.E.2.b.

***b. Parking Lot Location, Setbacks and Screening***

Conclusion: Zoning Ordinance Section 59.6.2.5.K.1. requires that “*Each parking facility must be located to maintain a residential character and a pedestrian-friendly street.*”<sup>21</sup> For the reasons set forth in Part II. C.1. and 2. of this Report and Decision, at pages 15-25, the Hearing Examiner finds that the Applicant’s parking lot plan clearly would not “*maintain a residential character and a pedestrian-friendly street,*” and thus violates this provision.

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<sup>21</sup> The Applicant correctly pointed out (Exhibit 65(b)) that an amendment to the Zoning Ordinance, ZTA 16-13, Ord. No. 18-15, removed the setback requirement of Section 59.6.2.5.K.2.b. with regard to detached houses. However, Section 59.6.2.5.K.1, quoted above, remains applicable, as do Sections 59.6.2.9.A, B & C, which call for certain setbacks and screening of parking lots for more than 5 cars.

Moreover, Sections 59.6.2.9.A, B and C, prescribe setbacks and screening of parking lots for more than 5 cars. As discussed in Part II. C.1. and 2. of this Report and Decision, the Applicant's proposal also fails to comply with those sections, which provide:

***Section 6.2.9. Parking Lot Landscaping and Outdoor Lighting***

***A. Applicability***

*Section 6.2.9 applies to any:*

- 1. surface parking lot with 10 or more spaces;*
- 2. structured parking facility; or*
- 3. property with a conditional use requiring 5 to 9 spaces that abuts an Agricultural, Rural Residential, or Residential Detached zoned property that is vacant or improved with an agricultural or residential use.*

***B. Parking Lot Requirements for Conditional Uses Requiring 5 to 9 Spaces***

*If a property with a conditional use requiring 5 to 9 parking spaces is abutting Agricultural, Rural Residential, or Residential Detached zoned property that is vacant or improved with an agricultural or residential use, the parking lot must have a perimeter planting area that:*

- 1. satisfies the minimum specified parking setback under Article 59-4 or, if not specified, is a minimum of 8 feet wide;*
- 2. contains a hedge, fence, or wall a minimum of 4 feet high; and*
- 3. has a minimum of 1 understory or evergreen tree planted every 30 feet on center.*

***C. Parking Lot Requirements for 10 or More Spaces***

***1. Landscaped Area***

- a. A surface parking lot must have landscaped islands that are a minimum of 100 contiguous square feet each comprising a minimum of 5% of the total area of the surface parking lot. Where possible, any existing tree must be protected and incorporated into the design of the parking lot.*
- b. A maximum of 20 parking spaces may be located between islands.*
- c. A landscaped area may be used for a stormwater management ESD facility.*

***2. Tree Canopy***

*Each parking lot must maintain a minimum tree canopy of 25% coverage at 20 years of growth, as defined by the Planning Board's Trees Technical Manual, as amended.*

***3. Perimeter Planting***

- a. The perimeter planting area for a property that abuts an Agricultural, Rural Residential, or Residential Detached zoned property that is vacant or improved with an agricultural or residential use must:*
  - i. be a minimum of 10 feet wide;*
  - ii. contain a hedge, fence, or wall a minimum of 6 feet high;*
  - iii. have a canopy tree planted every 30 feet on center; and*
  - iv. have a minimum of 2 understory trees planted for every canopy tree.*



*b. The perimeter planting area for a property that abuts any other zoned property, right-of-way, or an Agricultural, Rural Residential, or Residential Detached zoned property that is improved with a civic and institutional, commercial, industrial, or miscellaneous use must:*

- i. be a minimum of 6 feet wide;*
- ii. contain a hedge or low wall a minimum of 3 feet high; and*
- iii. have a canopy tree planted every 30 feet on center; unless*
- iv. the property abuts another parking lot, in which case a perimeter planting area is not required.*

\* \* \*

Whether one applies the 8-foot setback and screening provision listed in Section 59.6.2.9.B. for conditional use parking lots of 5 to 9 spaces, or the 10-foot setback and screening provisions of Sections 59.6.2.9.A. & C., for any surface parking lot of 10 or more spaces, the Applicant's parking lot proposal would be noncompliant, for the reasons set forth in Part II. C.1. and 2. of this Report and Decision.

Part II. C.2. of this Report and Decision discusses why a parking waiver pursuant to Section 59.6.2.10 would not be appropriate in this case. Although the Hearing Examiner treated the Applicant's mislabeled request for a parking waiver as one brought pursuant to Section 59.6.2.10, he determined that there is no legitimate basis for waiving the parking lot setback and screening requirements, in light of the incompatibility an eleven-car parking lot would produce in a single-family detached residential zone, especially on an undersized lot (*i.e.*, 15,000 square feet in an R-200 Zone).

In sum, the Hearing Examiner finds, as did Technical Staff (Exhibit 67, pp. 15-16), that the Applicant's parking lot proposal does not comply with the location, setback and screening provisions of Section 59.6.2.5.K.1. and Sections 59.6.2.9.A, B and C.

### **3. Site Landscaping, Screening and Lighting**

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

Division 6.4 is “to preserve property values, preserve and strengthen the character of communities, and improve water and air quality.” §59.6.4.1. The stated intent of Division 6.5 is “to ensure appropriate screening between different building types and uses.” Zoning Ordinance §59.6.5.1. These site screening and landscaping requirements are in addition to those that apply to screening and landscaping of parking facilities discussed above.

***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 previously discussed, the only new lighting or modified lighting on the subject site would be the addition of a new light on the existing shed (Exhibit 111). If the Hearing Examiner had decided to grant the conditional use, he would have imposed a condition that would have required the new light to be residential in style, shielded and aimed down so that no glare would impose upon adjacent properties. However, since the conditional use is being denied, the proposal for this additional light is a moot point. All the existing lighting on the site is exempt from the requirements of Division 6.4

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

The issues of site landscaping and screening for detached, single-family houses was significantly simplified by Zoning Text Amendment 16-13, which exempted them from the

specific landscaping requirements of other conditional uses in Agricultural, Rural Residential, and Residential Detached zones, and substituted a general compatibility standard. Zoning Ordinance §59.6.5.2.B. now provides:

*In the Agricultural, Rural Residential, and Residential Detached zones, a conditional use in any building type except a single-family detached house must provide screening under Section 6.5.3 if the subject lot abuts property in an Agricultural, Rural Residential, or Residential Detached zone that is vacant or improved with an agricultural or residential use. All conditional uses must have screening that ensures compatibility with the surrounding neighborhood. [Emphasis added.]*

Conclusion: Although the Applicant proposes to supplement the existing landscaping and fencing as shown in her final site plan (Exhibit 111), significant screening issues arise in conjunction with the proposed parking facility, as discussed above. For the reasons discussed previously in this Report and Decision, the Hearing Examiner finds that the final proposal for the subject site lacks the screening of its parking facility needed to comply with the parking lot screening requirements of the Zoning Ordinance or to ensure compatibility with the neighborhood, which is the specific requirement of Section 59.6.5.2.B. for conditional uses. The proposed parking lot is just too big to be effectively screened on a lot the size of the subject site, and is too big for the residential nature of the surrounding neighborhood.

#### **4. Signage**

The use of signage is governed by Division 6.7. Zoning Ordinance §59.6.7.8.A.1 sets the standards for signs in Residential Zones:

##### **A. Base Sign Area**

*The maximum total area of all permanent signs on a lot or parcel in a Residential zone is 2 square feet, unless additional area is permitted under Division 6.7.*

##### **1. Freestanding Sign**

- a. One freestanding sign is allowed.*
- b. The minimum setback for a sign is 5 feet from the property line.*
- c. The maximum height of the sign is 5 feet.*

*d. Illumination is prohibited.*

Conclusion: The Applicant proposed a freestanding, unilluminated sign to be located to the rear of the house facing Shady Grove Road. Exhibits 92 and 92(a). As discussed in Part II.C.3. of this Report and Decision, the proposed new sign area would not exceed 2 square feet (288 square inches) and would be 5 feet in height, as allowed in residential zones under Zoning Ordinance §59.6.7.8.A.1. It would also be set back 5 feet from the property line, as called for in this section, and would be near the rear gate.

Since the sign would be visible from Shady Grove Road (9/13/17 Tr. 377), its potential impact on traffic safety would have to be considered if this conditional use were approved, especially since the Board of Appeals denied the Applicant's appeal from the denial of a sign variance in part because of potential driver distraction in trying to read an earlier proposed sign (one that was even larger and higher) from Shady Grove Road. *See* Board of Appeals decision in *Appeal of Robin Rice*, Case No. A-6509, decided effective 2/24/17 (Exhibit 71(c)). Presumably, the smaller, lower sign would be even more difficult to read from the roadway, and thus would potentially cause even greater driver distraction.

The Hearing Examiner need not reach that issue since he is denying the conditional use application, thereby mooting the sign issue.

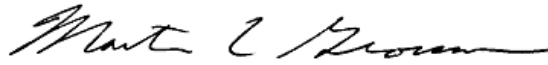
#### **IV. CONCLUSION AND DECISION**

As set forth above, the application fails to meet the standards for approval in Articles 59-3, 59-4, 59-6 and 59-7 of the Zoning Ordinance.

Based on the foregoing findings and conclusions and a thorough review of the entire record, the application of Robin Rice (CU 17-14), for a conditional use under Section 59.3.4.4.E.

of the Zoning Ordinance, to operate a child day care center for up to 30 children in and on her property at 17505 Park Mill Drive in Derwood, Maryland, is hereby ***DENIED***.

Issued this 4<sup>th</sup> day of October, 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.

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/>.

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