

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

IN THE MATTER OF:
HANNAH WEISER
Applicant

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Hannah Weiser
For the Application

OZAH Case No. CU 16-07

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Leah Hanlon
Robin Rice
Supporting the Application

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Before: Martin L. Grossman, Hearing Examiner
Director, Office of Zoning and Administrative Hearings

**OPINION AND ORDER APPROVING A MINOR AMENDMENT OF A
CONDITIONAL USE ADMINISTRATIVELY**

I. Background

Conditional Use CU 16-07 was granted by the Hearing Examiner on July 8, 2016, to permit the Applicant, Hannah Weiser, to operate a Child Day Care Center for up to 15 children in her home at 9205 Fernwood Road in Bethesda, Maryland. The Subject Site is Lot 1, Block 8 of the Green Tree Manor Subdivision, and it is zoned R-90. The application was opposed by Ms. Weiser's adjoining neighbor to the north, Eric Reed, in a letter (Exhibit 41), but he did not appear at the hearing. The only witnesses at the hearing, in addition to Ms. Weiser, were the Applicant's sister, Leah Hanlon, and Robin Rice, both of whom run child day care facilities in the County and both of whom supported the application.

On July 14, 2016, the abutting neighbor to the south of the subject site, R. Joseph Webster, filed a request for oral argument with the Board of Appeals (Exhibit 66). That request was opposed by Ms. Weiser (Exhibit 67), but the Board granted oral argument.

After hearing oral argument on September 7, 2017, the Board adopted the Hearing

Examiner's Report and Decision, except for Condition No. 4 concerning limits on outdoor play time, which condition the Board modified by Resolution effective September 21, 2016.

Condition No. 4, as specified by the Hearing Examiner, provided:

4. Outside play time may not start prior to 9:00 a.m. and may not extend beyond 5:00 p.m.

Condition No. 4, as modified by the Board of Appeals, specified:

4. Outside play time may not start prior to 9:00 a.m. and may not extend beyond 4:00 p.m. Outdoor play shall be limited to no more than 4 hours per child, per day.

By letter dated April 11, 2017, and received by the Office of Zoning and Administrative Hearings (OZAH) on April 13, 2017, Ms. Weiser requested that the Hearing Examiner approve a minor amendment of the conditional use by an administratively modifying Condition No. 4, to change the afternoon limit on play time from 5 p.m. to 4 p.m. (Exhibit 69).

II. The Basis for the Modification Request

Ms. Weiser outlined the reasons for her request in her letter (Exhibit 69):

. . . I request a minor amendment of the current condition to extend play time to 5:00 pm from 4:00 pm in the existing condition, primarily because the employees of the child care are having trouble meeting the **Montgomery County Childcare Licensing regulations, which require outdoor play and encourages it**. Under the county regulations, a morning and afternoon period of outdoor play is required, weather permitting. See *COMAR 13A.16.09 Program Requirements, .01 Schedule of Daily Activities for All Children*. Retrieved on June 3, 2016 from: <http://www.dsd.state.md.us/comar/SubtitleSearch.aspx?search=13A.16.09>. With the current condition in place, by the time the children wake up from their nap, eat a snack, and get prepared to go outdoors with the proper attire, the employees are having difficulty getting them outside before the 4 pm deadline hits, making it difficult for us to meet this licensing requirement to have both morning and afternoon play while following the OZAH conditions.

I consider this request a minor amendment as it is only one hour time difference that is necessary to allow us to meet the licensing requirements required by the county under these respective governing bodies. This request is in line with the conditions originally set forth for this case in your July 8, 2016 report and it meets the conditions for similar daycare zoning permits in the area that serve as precedent for this type of condition. This minor amendment addresses OZAH's requirements

while also meeting the requirements set forth by the county for Large Family Child Cares. Furthermore, outdoor play will still be substantially limited by the four hour limit imposed by the Board of Appeals under condition #4 in combination with the limit of ten children outside at one time set forth in condition #2 (see attached Appeals Decision).

As no more than ten children are permitted outdoors at any one time under Condition #2, a simple change in the current appeals condition #4 to 5:00 pm from 4:00 pm would allow me to meet the regulations for both OZAH and the Child Care Licensing requirements for the county through this minor amendment. Thank you for your consideration.

III. The Governing Law

Requests to amend a conditional use are governed by Zoning Ordinance §59.7.3.1.K.

Whether an amendment request is characterized as one for a major amendment or for a minor amendment is significant because a *major amendment* application must “*follow[] the same procedures, must meet the same criteria, and must satisfy the same requirements as the original conditional use application . . .*” Zoning Ordinance §59.7.3.1.K.1.b. However, an application for a *minor amendment* need not go through those extensive procedures. Rather, “. . . *it may be approved administratively by the Hearing Examiner.*” Zoning Ordinance §59.7.3.1.K.2.a.

Zoning Ordinance Section 59.7.3.1.K. also defines major and minor amendments:

§59.7.3.1.K.1.a. *A major amendment to a conditional use is one that changes the nature, character, or intensity of the conditional use to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected, when considered in combination with the underlying conditional use.*

§59.7.3.1.K.2.a. *A minor amendment to a conditional use is one that does not change the nature, character, or intensity of the conditional use to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected, when considered in combination with the underlying conditional use.*

Whether an application to amend a conditional use is characterized as a major amendment or a minor amendment, the County Council has recently made it clear that the request to amend a conditional use must be filed with the Hearing Examiner, and not the Board

of Appeals.¹ See Zoning Text Amendment (ZTA) 16-16, (Ord. No. 18-25, eff. 2/27/17), which amended Zoning Ordinance §59.7.3.1.K. to clarify jurisdiction over applications to amend conditional uses and special exceptions.

IV. Evaluation and Decision

It is clear from the above-cited jurisdictional provisions of the Zoning Ordinance, that Ms. Weiser was correct in filing her request to amend CU 16-07 with the Hearing Examiner, even though the current version of Condition 4 is the one imposed by the Board of Appeals, and not the one imposed by the Hearing Examiner.

Moreover, under ordinary circumstances, the request by a conditional use holder to make a one-hour change in a CU condition would be a very simple matter, easily addressed as a minor amendment; however, the situation in this case is complicated by the fact that the Board of Appeals expressly changed the Hearing Examiner's afternoon time limit from 5 p.m. to 4 p.m., and Ms. Weiser is now asking the Hearing Examiner to change it back to 5 p.m.

Two issues must be considered:

1. Is the Hearing Examiner bound by the doctrine of “administrative *res judicata*,” given the Board of Appeals' decision in its Resolution of September 21, 2017? and
2. Does this proposed modification fall within the above-quoted definition of a major amendment or a minor amendment?

1. The Administrative *Res Judicata* Issue:

The doctrine of “administrative *res judicata*” precludes re-examination in a later proceeding of a decision in the same case by an administrative body acting in a quasi-judicial capacity, absent good cause (*e.g.*, fraud, surprise, mistake, inadvertence or a new or different factual situation). See, *Woodlawn Area Citizens Assoc. v. Board of County Comm'rs*, 241 Md.

¹ The opposite is true with requests to modify special exceptions. They must be filed with the Board of Appeals.

187, 193-197, 216 A.2d 149 (1966). As was pointed out by the Court in *Woodlawn*, application of the strict *res judicata* doctrine to administrative proceedings has been criticized, but the Court noted that *res judicata* concepts do have some application in *quasi-judicial* administrative proceedings (241 Md. at 193):

In light of the administrative procedures and adjudications which the District Council is required to follow and make in the process of rezoning, the principles of public policy which underlie the rule of *res judicata* logically would seem to be applicable to its actions in this respect.

These *res judicata* concepts likely would not apply at all in the case of ordinary modification requests because the Zoning Ordinance clearly contemplates and permits conditional use holders to seek amendments to their conditional uses. It is only the fact that, in this particular case, the Board of Appeals had expressly modified the condition the Applicant now seeks to amend, in a manner contrary to the current request, that raises questions of whether *res judicata* concepts should be considered.

If we assume that *res judicata* concepts should be considered, the key is to determine whether there has been a showing of fraud, surprise, mistake, inadvertence or a new or different factual situation which allows the administrative body to reconsider the earlier ruling. The Hearing Examiner finds that in this case, Mrs. Weiser has stated new facts regarding the unexpected impacts of the 4 p.m. time limit for outdoor play on her ability to fully comply with Maryland state requirements of outdoor play time for child care facilities. *See* Part II of this Opinion, above. The Hearing Examiner finds that these new facts are sufficient to remove this evaluation from the constraints of *res judicata* concepts.

2. Is this Request Properly Characterized as a Major Amendment or a Minor Amendment?

The definitional distinction between a major and minor amendment is whether the proposal, if granted, would “*change the nature, character, or intensity of the conditional use to*

an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected, when considered in combination with the underlying conditional use. Under the facts of this case, the Hearing Examiner finds that the proposed change would clearly not change the nature or character of the use. It would still be a child care facility for up to 15 children. Adding one hour of outdoor play would intensify the use slightly, but not enough that one would reasonably expect substantial adverse effects on the surrounding neighborhood.

In sum, the Hearing Examiner agrees with Ms. Weiser that the one hour change proposed in the afternoon outdoor play would have very little impact on the neighborhood, especially in view of the fact that outdoor play is an accepted inherent effect of child care facilities, and not even one neighbor appeared at the hearing conducted by the Hearing Examiner to complain about outdoor play. There is nothing in the factual record compiled by the Hearing Examiner to demonstrate that limiting outdoor play to 4 p.m. rather than 5 p.m. is a significant issue for the neighborhood. Since the Board of Appeals must evaluate this case, at oral argument, based solely on the factual record compiled by the Hearing Examiner (Zoning Ordinance §59.7.3.1.F.2.b), there is no basis in this record from which one could reasonably conclude that an extra hour of outdoor play would create a substantial adverse effect on the neighborhood.²

The Hearing Examiner concludes that the proposed modification is properly characterized as a minor amendment – one which will not change the nature, character, or intensity of the conditional use to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected, when considered in combination with the underlying conditional use. Thus, the statutory standard for an administrative modification to allow a minor amendment is satisfied, and it is hereby approved without a public hearing, subject to reconsideration if a request for a hearing is received in accordance with the provisions of this Order.

² By definition, oral argument before the Board of Appeals cannot change the factual record in this or any other case.

ORDER

Based on the foregoing, it is, this 24th day of April, 2017:

ORDERED: That the request for a minor amendment to Conditional Use 16-07, allowing outdoor play to continue until 5 p.m., as spelled out below in a modified Condition 4, is hereby administratively **APPROVED**; and, it is

FURTHER ORDERED: That Condition 4 of the Board of Appeals Resolution of July 20, 2016 is administratively modified to read as follows:

4. Outside play time may not start prior to 9:00 a.m. and may not extend beyond 5:00 p.m. Outdoor play shall be limited to no more than 4 hours per child, per day.

and, it is

FURTHER ORDERED: That this modification and the continued use of the conditional use are subject to all terms and conditions imposed in connection with the initial approval, except as specifically amended by the Hearing Examiner in this Opinion and Order. The Applicant is directed to comply fully with all applicable county, state and federal regulations; and, it is

FURTHER ORDERED: That pursuant to Section 59.7.3.1.K.2.b. of the Zoning Ordinance, any party may request a public hearing on the Hearing Examiner's action within 15 days after this decision is issued. The request for public hearing must be in writing, and must specify the reason for the request and the nature of the objection or relief desired. If a request for a hearing is received, the Hearing Examiner must suspend his administrative amendment and conduct a public hearing to consider whether the amendment substantially changes the nature, character, or intensity of the conditional use or its effect on the immediate neighborhood. If the Hearing Examiner determines that such impacts are likely, then the amendment application must be treated as a major amendment application. A decision of the Hearing Examiner may be appealed on the basis of the Hearing Examiner's record to the Board of Appeals.



Martin L. Grossman
Hearing Examiner

NOTICES TO:

Parties of record (Hannah Weiser, Leah Hanlon and Robin Rice)
All parties entitled to notice at the time of the original filing
Current abutting and confronting property owners
Barbara Jay, Executive Director
Montgomery County Board of Appeals
Kathleen Reilly, Planning Department
Planning Board
Local Civic Associations
Ehsan Motazedi, Department of Permitting Services
Alexandre A. Espinosa, Director, Finance Department