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

IN THE MATTER OF:	*	
VALERIIA BRUNOVA	*	
Applicant	*	
	*	OZAH CASE No. CU 21-04
Valeriia Brunova	*	
For the Application	*	
	*	

* *

Before: Katherine L. Taylor, Hearing Examiner

HEARING EXAMINER'S REPORT AND DECISION

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I. STATEMENT OF THE CASE

On November 17, 2020, the Applicant, Valeriia Brunova, filed an application seeking approval of a conditional use to operate a Group Day Care for up to 12 children at 9205 Tulip Grove Road, Gaithersburg, Maryland ("Subject Property" or "Property"). Exhibit 1. The subject property is described as Lot 14, Block 2, Section 2 Charlene (Plat #10278, 1972). The property is located in the Charlene subdivision within the geographic area covered by the Gaithersburg Vicinity Master Plan, originally adopted in 1985 and amended in 1988 and again in 1990 ("Master Plan" or "Plan"). The property is zoned R-90 and the tax account number is 09-01533607). Exhibit 5. The property owners, Alexey V. and Irina Zhogina ("Owners" or "Owner"), submitted a letter consenting to the application. Exhibit 3. The Applicant submitted an Affidavit of Compliance. Exhibit 21. Applicant submitted an Affidavit of Posting. Exhibit 20.

Applicant resides on the property and operates the existing eight-child day care. The existing day care has been in operation at the property since April 2018. Applicant is seeking to expand the existing eight-child day care to a Group Day Care facility for up to 12 children. A childcare facility for up to 12 children must be approved as a conditional use under §§59-3.4.4.D and 7.3.1. of the Montgomery County Zoning Ordinance.[1]

On February 22, 2021, the Office of Zoning and Administrative Hearings ("OZAH") sent notice of a public hearing to be held on March 29, 2021. Exhibit 16. 1 Staff of the Montgomery County Planning Department ("Planning Staff" or "Staff") issued a report on March 1, 2021, recommending approval of the application with conditions. Exhibit 17. The Planning Board ("Board") met on March 11, 2021- and voted unanimously to recommend approval of the conditional use with the conditions recommended by Staff. Exhibit 17.

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[1] All citations in this Decision are to the 2014 Zoning Ordinance for Montgomery County, adopted in revised form on September 30, 2014 (Ordinance No. 17-52), as amended through March 16, 2021.

The public hearing proceeded as scheduled on March 29, 2021.[2] Valeria Brunova appeared *pro se* and testified in support of the conditional use application. No other witnesses were called and no letters of opposition were submitted or received into the record. A letter of support from the Walnut Creek Homeowners Association Board was submitted. Exhibit 17, Attachment 2. The record was held open for an additional 10 days to receive the hearing transcript. The transcript was received and accepted into the record which closed as scheduled on April 8, 2021.

For the following reasons, the Hearing Examiner approves the conditional use application subject to the conditions listed in Part IV of this Report and Decision.

II. FACTUAL BACKGROUND

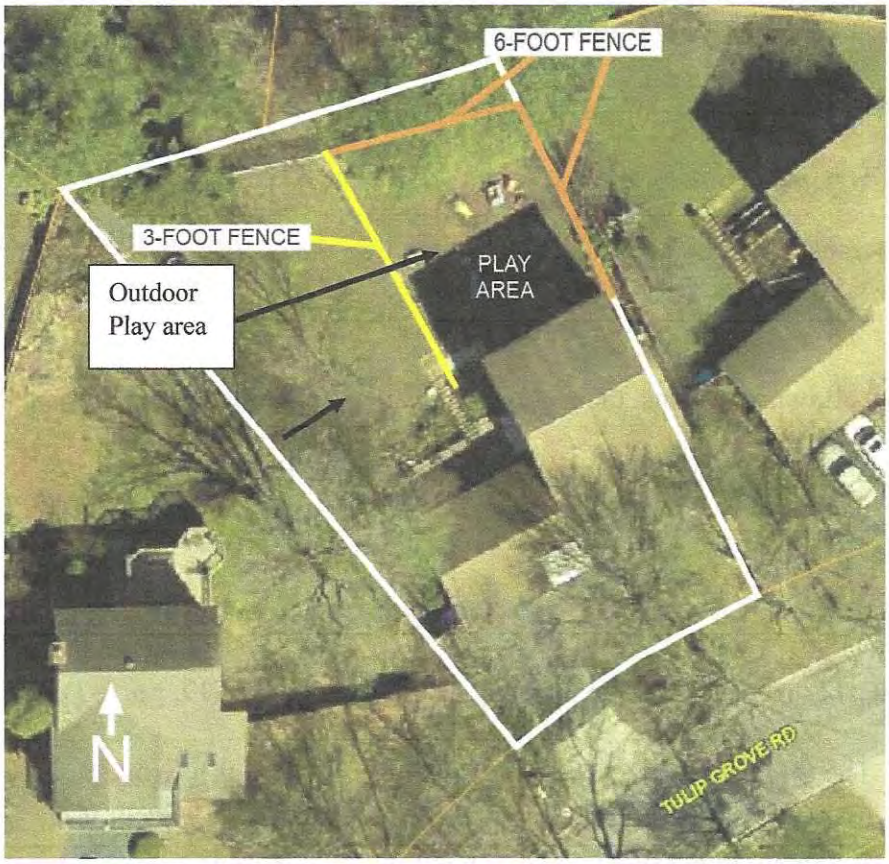
A. The Subject Property

Technical Staff described the property as follows (Exhibit 17, pp. 2-3):

> The Subject Property (Property or Site) is 9205 Tulip Grove Road in Gaithersburg, otherwise known as Lot 14, Block 2, Section 2 Charlene (Plat #10278, 1972). It is improved with a detached house (Figure 1) and the Applicant has been operating an eight-child day care facility on the premise since April 2018 for 3-month-old through five-year-old children. The existing daycare occupies the basement of the house.
>
> The 12,248-square foot lot is located mid-block on the north side of Tulip Grove Road. The Property has a driveway that is approximately 18 feet wide and 38 feet long that has space to park four to five cars.

[2] Due to the COVID-19 pandemic and the Montgomery County Executive's Orders restricting access to county offices for safety reasons, the public hearing was held remotely via Microsoft Teams. A link and phone number for the public to join the hearing were published on OZAH's website. Hearing exhibits were also published on OZAH's website prior to the hearing to permit the public to participate.

Below is an aerial photograph of the property (with labels added by the Hearing Examiner) taken from the Staff Report (Exhibit 17, p. 3):



Photographs of the property from the Staff Report (with labels added by the Hearing Examiner) are reproduced on the following page (Exhibit 17, pp. 5-6).

[NEXT PAGE]

Front view of house.

Rear yard (facing northeast).

Rear yard (facing northwest) showing both larger yard fencing and smaller play area fencing.

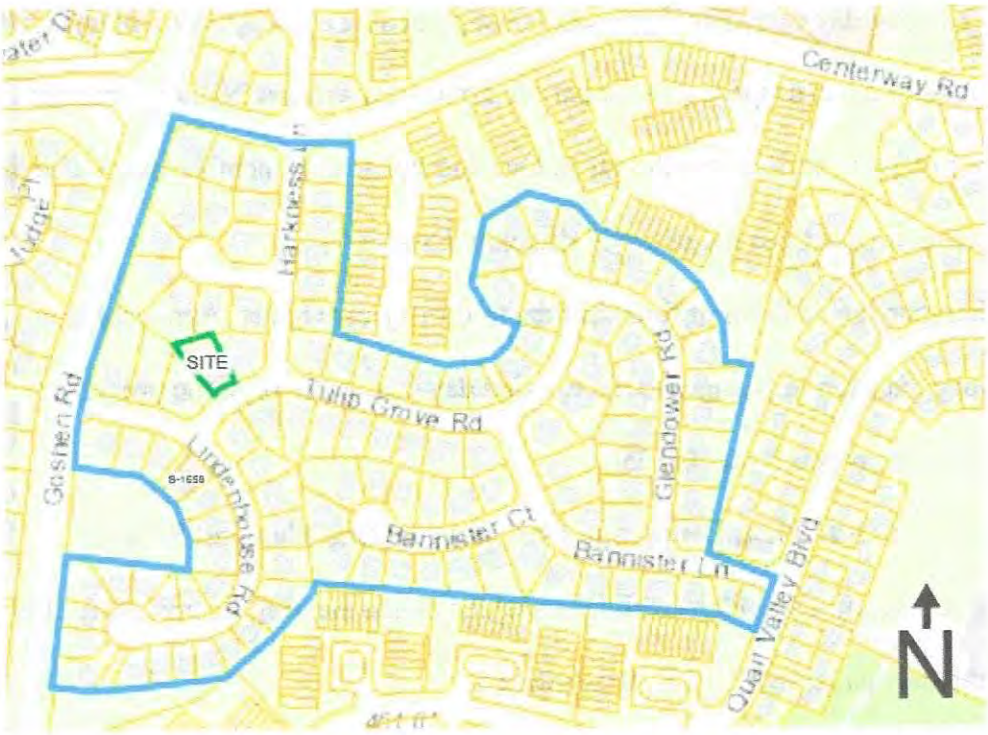
The site contains no streams, wetlands or their buffers, or known habitats of rare, threatened, or endangered species; thus, the Project is in conformance with the Environmental Guidelines. This Application is not subject to Chapter 22A, the Forest Conservation Law, because no clearing or grading activities are proposed on or near the Property. Exhibit 17, p. 8.

B. Surrounding Neighborhood

To determine 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 defined the boundaries of the surrounding neighborhood as "generally bounded by Centerway Road to the north and by Goshen Road to the west. To the east, the neighborhood extends to Quail Valley Boulevard." To the south, Staff concluded that the boundary is not a road but the division between (1) the single-family homes on Lindenhouse Road, Bannister Court and Bannister Lane and (2) the townhomes on Quail Valley Boulevard as

that road turns west south of Bannister Court and Bannister Lane. Exhibit 17, p. 3. Staff characterized the defined neighborhood as consisting of single-family detached residential properties in the R-90 Zone. Exhibit 17, p. 3.

Staff identified one approved conditional use/special exception within the defined neighborhood as S1658: 18924 Lindenhouse Road – To permit a home occupation (import/export business). Exhibit 17, p. 4. A map depicting the boundaries of the surrounding neighborhood as defined by Staff is shown on the next page. Exhibit 17, p. 4.



Staff-Defined Neighborhood (outlined in blue). Site (outlined in green).

Having no evidence to the contrary, the Hearing Examiner accepts the neighborhood delineation determined by Staff. The Hearing Examiner also agrees with Staff's characterization of the neighborhood, consisting primarily of single-family detached homes in the R-90 Zone.

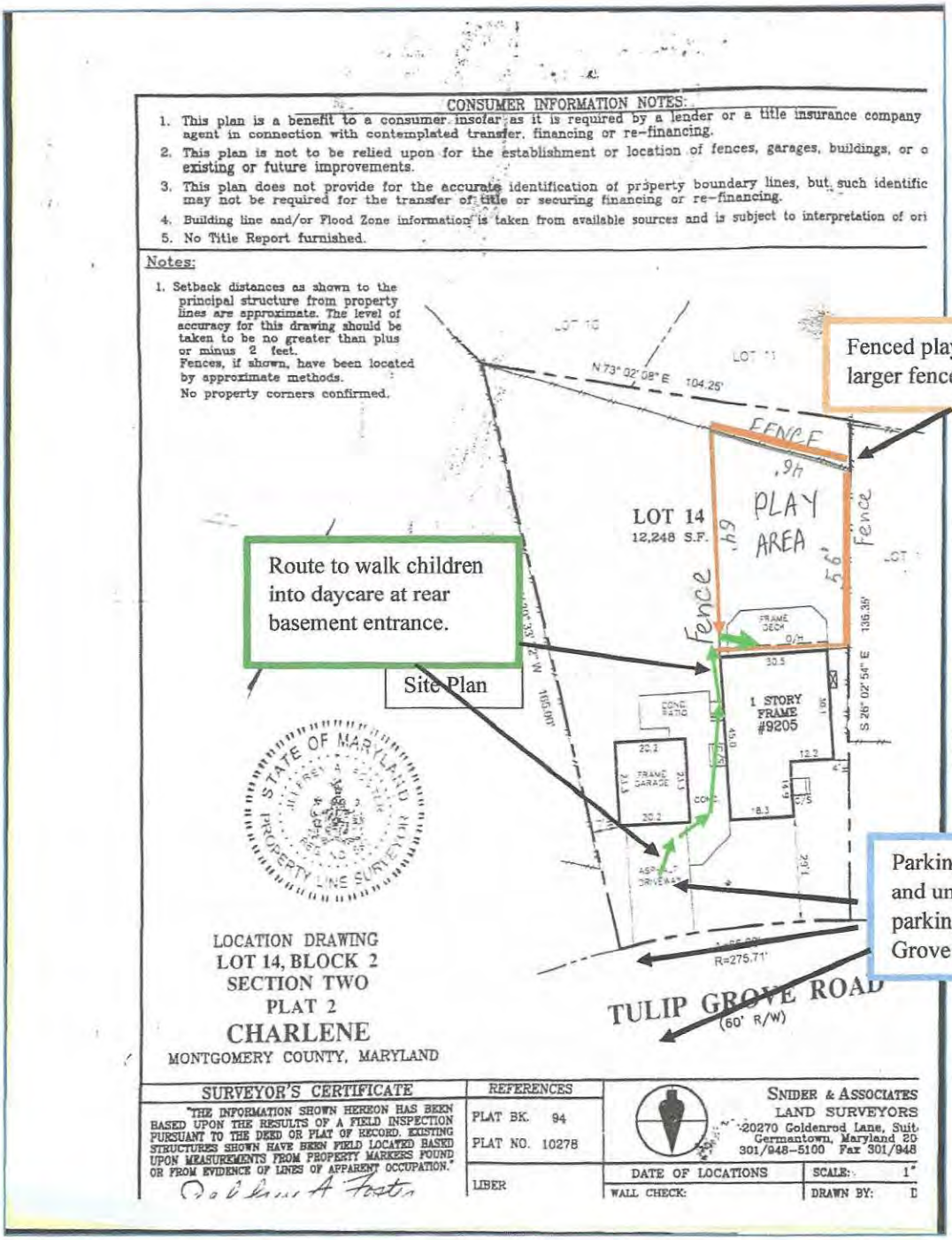
C. Proposed Use

Applicant, the daughter of the owner of the Property, along with Applicant's husband, have operated a Family Day Care for up to 8 children at the home since 2018. The Applicant and her husband live on the Property and serve as the daycare's primary caregivers. Exhibit 4. Applicant seeks approval of a conditional use to expand the existing eight-child Family Day Care operation into a Group Day Care for up to 12 children. The proposed day care will continue to occupy the same space used for the existing day care which includes the entry area, play areas, nap area, desk area, kitchen area. The proposed facility will also use the same outdoor recreation area as the existing day care. The Applicant is not proposing any expansion or change to the indoor or outdoor daycare space and the current hours of operation, Monday through Friday, from 8 a.m. to 6 p.m., will remain the same. One additional staff member may be hired at a later date, depending on need and the family's situation. Exhibit 4.

Other than the addition of four children to the day care roster, Applicant is not proposing any physical expansion or changes to the existing day care space or to the property to accommodate the proposed use. Exhibit 4.

1. Site Plan, Landscape Plan and Lighting Plan and Signage

The Applicant's Site Plan (with labels added by the Hearing Examiner) for the property is shown on the next page. Exhibit 17, Attachment 5.



Applicant's Site Plan (with labels applied by Hearing Examiner).

As stated in the Staff Report:

> The daycare is accessed via an entrance at the rear of the house that opens into the basement daycare area. People dropping off children may park in the driveway or on the street, and walk their child through an enclosed vestibule, out to the back of the house. People then walk down a set of exterior stairs, through a gate in the fenced-in rear recreation area and finally to the entrance of the basement- level main daycare area. The area just outside the daycare entrance is covered by a second-level deck, which will be off-limits to children.
>
> The rear yard of the house is enclosed by a 6' tall fence along the western, northern, eastern property lines. The outdoor play area is located within the eastern portion of the rear yard, bounded by additional fencing on the western (3' in height) and northern (6' in height) sides.
>
> Unrestricted on-street parking is allowed on both sides of Tulip Grove Road in the vicinity of the Property.

Exhibit 17, p. 2.

The landscaping and lighting on the site will remain unchanged if the application is approved. Applicant did not identify the existing landscaping or exterior lighting for the property on the Site Plan. However, the photographs of the property previously shown on pages 4 and 5 in this Report and Decision provides a visual of the existing landscaping on the property. Specifically, the photographs show a shaded and manicured front lawn with several mature trees, and landscaping with a variety of bushes and other plants along the driveway and around the vestibule leading to the rear of the home and day care entrance. In the rear of the house, there are trees along the rear property line fence and the fence along the east fence line, as well as a few trees inside the larger fenced yard. There is a shed in the backyard at the northwest corner of the Property outside of the fenced play area. Exhibit 17, pp. 4-5.

There is a residential light fixture at the driveway close to the road. Exhibit 17, p. 5. Applicant is not proposing any signage for the proposed use.

2. Operations

The day care will operate from Monday through Friday, from 8 a.m. to 6 p.m. The ages of the children range from 3 months to 5 years old. The Applicant's son (18 months at the time of application) will be one of the children. The daily routine consists of breakfast, lessons, snack, play time, lunch, nap, circle time and outdoor release time. Weather permitting, the children will play outside during designated hours. Part of the outside play area is underneath a deck and sheltered from sun and rain. While outdoor play hours typically occur from 10:30 a.m. to 12:00 p.m. and from 5:00 p.m. to 6:00 p.m., children may play outside as early as 9:00 a.m. (as a condition to the approval). Most parent drop-offs take place between 8:30 a.m. and 10:00 a.m. and most pick-ups occur between 4:30 p.m. and 6:00 p.m. Exhibit 17, pp. 4-5; Exhibit 4.

3. Parking for Employees and Parent Pick-Up and Drop-Off

Space is available to park at least 4 cars in the driveway, and there is additional parking available on-street along both sides of Tulip Grove Road, where there are no parking restrictions. The garage on site can also hold up to two cars, which will be primarily used by residents. The existing driveway and street provide parking capacity for parents dropping-off or picking-up children attending the day care, as well as on-site parking for members of the household. Exhibit 4.

Staff reports that parent drop-off and pick-up will be staggered from 6:30 a.m. to 9:30 a.m. and 4:00 p.m. to 7:00 p.m. Staff advises that sibling groups will likely reduce the total number of projected vehicle trips. The projected peak-hour morning and evening trips based on

the Institute of Transportation Engineers' (ITE) trip generation rates for a day care center, and the Policy Area mode split assumptions (Exhibit 17, p. 7), are:

Period	ITE Vehicle Trips	Subdivision Staging Policy Projected Trips			
		Person Trips	Auto Driver Trips	Auto Passenger Trips	Pedestrian Trips
Morning Peak Hour	11	14	11	2	1
Evening Peak Hour	11.12	14	11	2	1
ITE Land Use Category: 565 – Day Care Center; pedestrian trips represent all walking, biking, and transit trips					

Because this application was submitted in November of 2020, it is subject to the 2016-2020 Subdivision Staging Policy, rather than the new Growth and Infrastructure Policy that took effect on January 1, 2021. Under the 2016-2020 Subdivision Staging Policy, a traffic study is not required to satisfy the Local Area Transportation Review (LATR) test because the proposed day care center generates fewer than 50 person-trips during the weekday in both AM and PM peak hours.. The LATR test parameter is total peak-hour person trips and not vehicular peak-hour trips. Person trips include all travel modes - vehicular, transit, walking, and bicycle trips. Exhibit 17, p. 7-8.

D. Community Response

There is no opposition to the conditional use application in the record. As a part of the application, the Applicant submitted a letter of support from the Walnut Creek Homeowner's Association. Exhibit 7.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A conditional use is a zoning device that authorizes certain uses provided that pre-set legislative standards are met. Pre-set legislative standards are both specific and general. General standards are those findings that must be made for almost all conditional uses. Zoning

Ordinance §59-7.3.1.E. Specific standards are those which apply to the particular use requested, in this case, a Group Day Care for up to 12 children. Zoning Ordinance §59-3.4.4.D.

Weighing all the testimony and evidence of record under the "preponderance of the evidence" standard specified in Zoning Ordinance §59-7.1.1, the Hearing Examiner concludes that the conditional use proposed in this application, subject to the conditions imposed in Part IV of this Report and Decision, will satisfy all of the specific and general requirements for the use.

A. Necessary Findings (§59-7.3.1. E)

The general findings necessary to approve a conditional use are found in §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:[3]

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: The proposed conditional use will supersede the existing use of a Family Day Care, a use permitted by right in this R-90 zone. Staff advises that there are no applicable previous approvals associated with this site. Exhibit 17, p. 8. Therefore, the Hearing Examiner finds that this standard is inapplicable to the subject application.

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

[3] Although §59.7.3.1. E. contains six subsections (E.1. though 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.

Conclusion: This subsection requires an analysis of the standards of the R-90 Zone contained in Article 59-4; the use standards for Group Day Care for 9 to 12 Persons contained in Article 59-3; and the applicable development standards contained in Article 59-6. Each of these Articles is discussed below in separate sections of this Report and Decision (Parts III.B, C, and D, respectively). Based on the analysis contained in those discussions, the Hearing Examiner agrees with Staff and finds that the application satisfies the requirements of Articles 59-3, 59-4 and 59-6 subject to the conditions of approval in Part IV of this Report.

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

The subject property is located within the Gaithersburg Vicinity Master Plan ("Master Plan" or "Plan") and the proposal is in substantial conformance with the Sector Plan. Staff discussed the Mater Plan as follow (Exhibit 17, p. 6):

> The Site is located within the *Gaithersburg Vicinity Master Plan,* originally adopted in 1985 and amended in 1988 and again in 1990. The Master Plan does not discuss the Site, nor does it include language about day cares, special exceptions/conditional uses, or residential areas in general.
>
> The existing eight-child day care has been on the Site for two years, and the proposal is a modest expansion which will not change the character of the neighborhood. The Subject Site is an appropriate location for a day care facility and compatible with the neighborhood. Therefore, the proposal is in substantial conformance with the Master Plan.

Conclusion: The Hearing Examiner agrees with Technical Staff that the proposed conditional use for a group day care facility is consistent with the objectives of the Master Plan. The proposed use is allowed by conditional use in the R-90 Zone. The existing eight child day care has been in operation at the property since 2008 and is already part of the character of the neighborhood. The Hearing Examiner agrees with Staff that the proposed expansion of the

existing Family Day Care into a Group Day Care will not alter the residential character of the neighborhood as no physical exterior alterations are proposed or required to accommodate the addition of 4 children to the existing day care roster. Thus, the dwelling will remain a single-family, detached home consistent with the current R-90 zone.

With the conditions of approval listed in Part IV of this Report, the Hearing Examiner agrees with Technical Staff and finds that the proposed use will substantially conform to the goals and objectives of the *Master Plan*.

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

Planning Staff found that the proposed use meets this standard (Exhibit 17, p. 11):

> The proposal is harmonious with, and will not alter the character of the surrounding neighborhood. No physical changes are proposed on the Property. Therefore, the proposed expansion of the existing day care will not alter the character of the neighborhood.

Staff further found "[t]he proposed facility will occupy the same space in the basement and the same outdoor recreation area as the existing day care. The Applicant is not proposing any expansion or change to the indoor or outdoor daycare space and the current hours of operation, Monday through Friday, from 8 a.m. to 6 p.m., will remain the same." Exhibit 17, p. 11. Staff further noted that "[w]eather permitting, the children will play outside during designated outdoor play hours. . .. Parent drop-offs take place between 8:30 a.m. and 10:00 a.m. and pick-ups occur between 4:30 p.m. and 6:00 p.m. . . .. The Applicant indicates that space is available to park at least 4 cars in the driveway, and there is additional parking available on-street along Tulip Grove Road, where there are no parking restrictions. The garage on site can also hold up to two cars, which will be primarily used by residents. . .. The Applicant has not proposed any signage with

this Application." Last, the two primary caregivers are and will remain the applicant and her husband and potentially one additional staff member, depending on need. Exhibit 17, pp. 4-5.

Conclusion: Based on this record, the Hearing Examiner agrees with Staff and finds, with the conditions listed in Part IV of the Report and Decision, that the proposed use is harmonious with and will not alter the residential character of the surrounding area in a manner inconsistent with the Master Plan.

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

Staff reports that there is one approved conditional use/special exception in the neighborhood -- a Home Occupation located at 18924 Lindenhouse Road. Exhibit 17, p. 4. Technical Staff found:

> Although approval of this Application will increase the number of conditional uses in the Staff-defined Neighborhood, the proposed daycare expansion will not affect the area adversely or alter the area's predominantly residential nature. The existing day care has been operating on the Site since April 2018, the increase in the number of children being served is modest, and the Applicant is not proposing any physical changes to the Property.

Exhibit 17, p. 11.

Conclusion: The Hearing Examiner agrees with Staff that the addition of the proposed group day care use for up to 12 children to the neighborhood will not adversely affect or change the residential character of the neighborhood. The existing day care has been operating in the basement an existing single-family dwelling for about 3 years and no physical changes are proposed or necessary to accommodate the proposed use. Thus, the existing dwelling will remain a single-family detached dwelling. The other special exceptions in the area are residential in

nature with minimal impact. As discussed in the previous sections (above), the Hearing Examiner finds that the proposed use substantially conforms with the recommendations of the Master Plan. Thus, the Hearing Examiner finds that the proposed use does not alter the nature of the area and this standard has been met.

> ***f. will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage, and other public facilities. If an approved adequate public facilities test is currently valid and the impact of the conditional use is equal to or less than what was approved, a new adequate public facilities test is not required. If an adequate public facilities test is required and:***
>
> > ***i. if a preliminary subdivision plan is not filed concurrently or required subsequently, the Hearing Examiner must find that the proposed development will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage; or***
> >
> > ***ii. if a preliminary subdivision plan is filed concurrently or required subsequently, the Planning Board must find that the proposed development will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage; and***

Staff reports that the conditional use application does not require approval of a preliminary plan of subdivision. Exhibit 17, p. 11. Therefore, the Hearing Examiner must determine whether the proposed development will be served by adequate public services and facilities. Staff expressly found that that "[t]here are adequate services and facilities to serve the proposed use [.]" Exhibit 17, p. 11.

Staff the impacts on transportation facilities of the proposed use (Exhibit 17, pp. 6-7):

> ***Local Area Transportation Review***
> A proposed schedule of drop-offs/pick-ups during the weekday morning peak period (6:30 to 9:30 a.m.) and evening peak period (4:00 to 7:00 p.m.) is included in the Application for Conditional

Use. The morning arrival schedule shows up to twelve children dropped off between 8:30 a.m. and 10:00 a.m., and the evening schedule shows up to twelve children picked-up between 4:30 and 6:00 p.m. Sibling groups will likely reduce the total number of projected vehicle trips. The projected peak-hour morning and evening trips based on the Institute of Transportation Engineers' (ITE) trip generation rates for a day care center, and the Policy Area mode split assumptions, are shown below:

Period	ITE Vehicle Trips	Subdivision Staging Policy Projected Trips			
		Person Trips	Auto Driver Trips	Auto Passenger Trips	Pedestrian Trips
Morning Peak Hour	11	14	11	2	1
Evening Peak Hour	11.12	14	11	2	1
ITE Land Use Category: 565 – Day Care Center; pedestrian trips represent all walking, biking, and transit trips					

Note that pedestrian trips are the projected sum of transit riders walking to/from their bus stop, bicyclists, and other students expected to walk to the daycare.

This application was submitted in November of 2020, and as such is subject to the 2016-2020 Subdivision Staging Policy, rather than the new Growth and Infrastructure Policy that took effect on January 1, 2021. Under the 2016-2020 Subdivision Staging Policy, a traffic study is not required to satisfy the Local Area Transportation Review (LATR) test because the proposed day care center generates fewer than 50 person-trips during the weekday both AM and PM peak hours of the adjacent street. The LATR test parameter is total peak-hour person trips and not vehicular peak-hour trips. Person trips include all travel modes - vehicular, transit, walking, and bicycle trips.

Conclusion: By its nature, a small childcare facility operating within an existing single-family residence will not ordinarily create significant additional burdens for schools, police and fire protection, water, sanitary sewer and storm drainage. There is no evidence that existing facilities will not be sufficient to serve an increase of four children and potentially one additional employee. Based on this evidence, the Hearing Examiner finds that the proposed use will be

served by adequate public services and facilities. The LATR standards have been met and the addition of four children and one potential employee at a later time to the group day care will not unduly burden the transportation system.

> ***g. will not cause undue harm to the neighborhood as a result of a non-inherent adverse effect alone or the combination of an inherent and a non-inherent adverse effect in any of the following categories:***
>
> ***i. the use, peaceful enjoyment, economic value or development potential of abutting and confronting properties or the general neighborhood;***
> ***ii. traffic, noise, odors, dust, illumination, or a lack of parking; or***
> ***iii. the health, safety, or welfare of neighboring residents, visitors, or employees.***

Conclusion: This standard requires consideration of the inherent and non-inherent adverse effects of the proposed use at the proposed location on nearby properties and the general neighborhood. Inherent adverse effects are "adverse effects created by physical or operational characteristics of a conditional use necessarily associated with a particular use, regardless of its physical size or scale of operations." *Zoning Ordinance*, §59-1.4.2. Non-inherent adverse effects are "adverse effects created by physical or operational characteristics of a conditional use not necessarily associated with the particular use or created by an unusual characteristic of the site." Id. As specified in §59-7.3.1. E.1.g. quoted above, non-inherent adverse effects in the listed categories, alone or in conjunction with inherent effects in those categories, are a sufficient basis to deny a conditional use. Inherent adverse effects, alone, are not a sufficient basis for denial of a conditional use.

Analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a Group Day Care facility. Characteristics of the proposed use that are consistent with the characteristics thus identified will

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

In analyzing potential adverse effects, Staff considered the size, scale, scope, light, noise, traffic and environmental effects of the proposed uses. Staff determined that the following physical and operational characteristics are necessarily associated with (*i.e.,* are inherent in) a Group Day Care facility: (1) vehicular trips to and from the site; (2) outdoor play areas; (3) noise generated by children; (4) drop-off and pick-up areas; and (5) lighting. Exhibit 17, p. 12.

Staff concluded that the conditional use as proposed will have no non-inherent adverse impacts. Staff identified and explained the inherent impacts of the proposed conditional use as follows (Exhibit 17, p. 12):

> The inherent physical and operational characteristics necessarily associated with a Group Day Care facility include: (1) vehicular trips to and from the site; (2) outdoor play areas; (3) noise generated by children; (4) drop-off and pick-up areas; and (5) lighting.
>
> Adequate parking and drop-off/pick-up areas are available on site and adjacent to the Property. The drop-offs and pick-ups will be limited by the conditions of approval of the proposed use to minimize impacts to the neighborhood.
>
> The play area is adequate, and the number of children outside at one time will be limited to no more than eight, with outside play time prohibited prior to 9:00 a.m.
>
> The existing lighting and landscaping on the Site are adequate for the proposal. The existing lighting fixtures are residential in nature and will not intrude on neighboring properties.

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

Conclusion: The Hearing Examiner agrees with Staff's conclusion that there are no non-inherent effects or site characteristics at this location. Moreover, the conditions recommended by Staff and adopted by the Hearing Examiner in Part IV of this Report and Decision will help ensure that the group day care facility will operate safely without causing adverse effects on the neighborhood.

Based on the entire record, the Hearing Examiner finds that the proposed Group Day Care for no more than 12 children, subject to the conditions imposed in Part IV of this Report and Decision, will not cause undue harm to the neighborhood as a result of adverse effects in any of the categories listed in §59-7.3.1.E.1.g.

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

Conclusion: The Applicant does not propose any alteration or expansion of the existing structure. The Hearing Examiner finds this standard is not applicable.

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

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

B. Development Standards of the Zone (Article 59-4)

In order to approve a conditional use, the Hearing Examiner must find that the application meets the development standards of the zone where the use will be located – in this case, the R-90 Zone. Development standards for the R-90 Zone are contained in §59-4.4.8.C of the Zoning Ordinance. Staff compared the minimum development standards of the R-90 Zone to those provided by the application in a table included in the Staff Report (Exhibit 17, pp. 9-10) which is reproduced below:

Development Standard- §59-4.4.8.C.	Required/ Permitted	Proposed
Minimum Lot Area: (Section 59.4.4.8.C.2)	5,000 sq. ft.	12,248 sq. ft.
Minimum Lot Width at Front Building Line (Section 59.4.4.8.C.2)	Determined at site plan	±70 feet
Minimum Lot Width at Front Lot Line (Section 59.4.4.8.C.2)	25 feet	±65 feet
Maximum Density (Section 59.4.4.8.C.2)	1 unit (3.6 dwelling units/acre)	1 unit
Maximum Lot Coverage (Section 59.4.4.8.C.2)	30 percent	±17%
Minimum Front Setback (Section 59.4.4.8.C.3)	25 feet	±26 feet
Minimum Side Setback (Section 59.4.4.8.C.3)	Determined at site plan	±4 feet
Minimum Sum of Side Setbacks (Section 59.4.4.8.C.3)	Determined at site plan	±11 feet
Minimum Rear Setback (Section 59.4.4.8.C.3)	Determined at site plan	±65 feet
Maximum Height (Section 59.4.4.9.B.3)	35 feet	±25 feet

R-90 Zone, Optional Method Cluster Development

According to Plat 10278 (Attachment 3), the Property was part of a subdivision developed under R-90 optional method cluster development. As such, many setbacks were determined at site plan.

Conclusion: As can be seen from the preceding table, the proposed use meets or exceeds the development standards of the R-90 Zone as provided in Zoning Ordinance §59-4.4.8.B. Based on the record in this case, the Hearing Examiner finds that the subject site conforms to the requirement of Article 59-4 of the 2014 Zoning Ordinance to the extent they are applicable.

C. Use Standards for a Group Day Care for 9 to 12 Persons (§59-3.4.4.D.2)

The specific use standards for approval of a Group Day Care for 9 to 12 Persons are set out in §59-3.4.4.D. of the Zoning Ordinance. Standards applicable to this application are:

1. Defined

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

Conclusion: The Applicant will be required to have staffing, operations, and structures compliant with State and local regulations and has submitted an affidavit attesting to this. Exhibit 21. Applicant stated that there is one child who lives at subject property attending the group day care. Exhibit 4. The proposed use will allow a maximum of 12 children to attend the group day care.

2. Use Standards

a. Where a Group Day Care (9-12 Persons) is allowed as a limited use, it must satisfy the following standards:
i. The facility must not be located in a townhouse or duplex building type.
ii. In a detached house, the registrant is the provider and a resident. If the provider is not a resident, the provider may file a conditional use application for a Day Care Center (13-30 Persons) (see § 3.4.4.E).
iii. In a detached house, no more than 3 non-resident staff members are on-site at any time.
iv. In the AR zone, this use may be prohibited under § 3.1.5, Transferable Development Rights.

Conclusion: A Group Day Care requires approval of a conditional use in the R-90 Zone. However, the conditional use standards incorporate the limited use requirements, as discussed in the next paragraph.

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

Conclusion: The Hearing Examiner finds that all of the limited use standards listed in the preceding paragraph are satisfied in this case, in that:

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

Furthermore, as discussed in Part III.A., above, the application meets the "necessary findings" required by §59-7.3.1.

D. General Development Standards (Article 59-6)

Article 59-6 sets the general requirements for site access, parking, screening, landscaping, lighting, and signs. Most of these requirements are not applicable to the subject application.

1. Site Access Standards

Conclusion: Zoning Ordinance §59-6.1 governs "Site Access." §59-6.1.2 states that access requirements do not apply to development in single-family residential zones, such as the R-90 Zone.

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

Conclusion: The standards for the required number of parking spaces, parking lot design and parking lot screening are governed by §59-6.2 of the Zoning Ordinance. These

standards govern the minimum number of spaces, design of on-site parking spaces, parking setbacks, and screening of parking areas. Zoning Ordinance §§59-6.2.3, 6.2.4, 6.2.5. The primary parking requirement applicable to this application is the minimum number of spaces required for the use.

The Zoning Ordinance requires a minimum of four parking spaces—one for each non-resident employee and two for the residence itself. §59-6.2.4.B. On-street parking may be counted toward meeting that requirement if parking is permitted on the street and the spaces abut the property. §59-6.2.3.A.5.

The required number of vehicle parking spaces is established by Zoning Ordinance §59-6.2.4., as shown below in a chart taken from the Staff Report (**Exhibit 17, p. 10**):

	Required Spaces	**Proposed**
Vehicle Parking Requirement (Section 59-6.2.4.B)	Group Day Care: 1 (1/ non-resident employee) Dwelling: 2 **Total: 3**	4 spaces in driveway

As shown in the chart above, the parking requirements for a total of three (3) on-site parking (2 for the single-family dwelling and 1 for the one non-resident full-time employee) are met. Exhibit 17, p. 10. Staff found: "Unrestricted on-street parking is allowed on both sides of Tulip Grove Road in the vicinity of the Property." Exhibit 17, p. 2. Applicant reports there is space to park a bicycle on the unenclosed covered patio located at the back of the house. Exhibit 4.

Based on the record, the Hearing Examiner agrees with Staff and finds the requirements for the minimum number of required parking spaces for the dwelling and proposed use will be satisfied.

3. Site Landscaping, Screening and Lighting

Standards for site lighting are set forth in §59-6.4 of the Zoning Ordinance, and the standards for landscaping and screening are mainly set forth in §59-6.5.

a. Lighting

Zoning Ordinance §59-6.4.4.E. provides:

E. Conditional Uses

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

§59-6.4 does **not** apply to existing, unmodified lighting:

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

<u>Conclusion</u>: No new lighting is planned for this conditional use. Staff found the "existing lighting is residential in nature and will not cause any unreasonable glare on neighboring properties." **Exhibit 17, p. 10**. Based on this record, the Hearing Examiner finds that the existing exterior residential lighting is compliant with the requirements of Division 6.4, regarding lighting.

b. Site Screening and Landscaping

<u>Conclusion</u>: Although some provisions in this portion of the Zoning Ordinance contain very specific requirements, the review of site landscaping and screening for conditional uses in single-family detached homes is limited to an assessment of compatibility. Zoning Ordinance §59-6.5.2B. This language is reinforced by § 59-7.3.1.E.1.b., under which the Hearing Examiner

need only find that the proposed use meets applicable general requirements under Article 59-6 "to the extent the Hearing Examiner finds necessary to ensure compatibility. . . ."

Staff found that "[t]he existing fencing in the rear yard provides sufficient screening between the proposed use and the adjacent homes. The rear yard is surrounded by opaque, 6-foot tall fencing along the western, northern, and eastern property lines. The outdoor play area is set back from and bounded by additional fencing on the western and northern property lines." Exhibit 17, p. 10.

The existing landscaping includes landscaped beds along the walkways to the vestibule leading to the backyard day care entrance, a variety of plants along the foundation of the house, small bush or tree in the backyard and a large tree along the rear property line fencing on the north side of the driveway. Exhibit 17, pp. 5-7. No changes to the existing landscaping are proposed or required to accommodate the proposed use.

Based on this record, and having no evidence to the contrary, the Hearing Examiner finds that the existing site landscaping and perimeter screening is residential in character and is compatible with the neighborhood.

4. Signage

Conclusion: No sign is proposed for the conditional use so the Zoning Ordinance provisions governing signage do not apply. The Hearing Examiner will include a condition prohibiting signs for the group day care on the property.

IV. CONCLUSION AND DECISION

As set forth above, the application meets all the applicable standards for approval in Articles 59-3, 59-4, 59-6 and 59-7 of the Zoning Ordinance. This is not an application to establish a new childcare facility on the subject site; rather, it is an application to add 4 children

to an already functioning childcare facility on the site. Adverse effects like noise from outdoor play and traffic related to drop-off and pick-up during the morning and afternoon are inherent for the use. The conditions imposed below (*i.e.*, limited outdoor play time and staggered drop-off and pick up schedule) will minimize the inherent adverse effects of the use.

Based on the foregoing findings and conclusions, the application of Valeriia Brunova (CU 21-04), for a conditional use under §59-3.4.4.D. of the Zoning Ordinance, to operate a Group Day Care for up to 12 children at 9205 Tulip Grove Road, Gaithersburg, Maryland, is hereby ***GRANTED,*** subject to the following conditions:

1. The group day care facility is limited to a maximum of twelve (12) children (including Applicant's child(ren)) and one non-resident employee.

2. The hours of operation are limited to Monday through Friday from 8:00 a.m. to 6:00 p.m.

3. Outside play time may not occur before 9:00 a.m. and is limited to 1.5 hours (90 minutes) in the morning and one hour (60 minutes) in the afternoon.

4. The children must be under the direct supervision of a staff member at all times.

5. To minimize impacts to the neighborhood, parental drop-off and pick-up shall be limited to two vehicles every 15-minutes. Applicant must schedule staggered drop-off and pick-up of children with a maximum of two (2) vehicles dropping off and picking-up during any 15-minute period.

6. The Applicant must not erect a sign on the subject site.

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

8. The Applicant must not use a public address system of any kind outside the building, and must not allow any amplified music to be played outside the building.

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

10. The Applicant must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary

to occupy the conditional use premises and operate the conditional use as granted herein. The Applicant shall at all times ensure that the conditional use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements, including the annual payment of conditional use administrative fees assessed by the Department of Permitting Services.

Issued this 28th (corrected) day of April 2021.

Katherine L. Taylor

Digitally signed by Katherine L. Taylor
Date: 2021.04.27 21:47:57 -04'00'

Katherine L. Taylor
Hearing Examiner

NOTICE OF RIGHT TO REQUEST ORAL ARGUMENT

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

Contact information for the Board of Appeals is listed below, and additional procedures are specified in Zoning Ordinance §59-7.3.1.F.1.c., as amended by Zoning Text Amendment (ZTA) No. 16-16, adopted on February 7, 2017, by Ordinance No. 18-25, effective February 27, 2017. The procedural amendments to the Zoning Ordinance contained in ZTA No. 16-16 have not yet been codified, but you may view them on the Council's website at http://www.montgomerycountymd.gov/COUNCIL/Resources/Files/zta/2017/20170207_18-25.pdf

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/

PLEASE NOTE THE FOLLOWING BOARD OF APPEALS FILING REQUIREMENTS DURING THE COVID-19 PANDEMIC:

The Board of Appeals website sets forth these procedures for filing documents:

Because remote operations may not always allow us to promptly date-stamp incoming U.S. Mail, until further notice, all time-sensitive filings (administrative appeals, appeals of conditional use decisions/requests for oral argument, requests for public hearings on administrative modifications, requests for reconsideration, etc.) should be sent via email to BOA@montgomerycountymd.gov, and will be considered to have been filed on the date and time shown on your email. In addition, you also need to send a hard copy of your request, with any required filing fee, via U.S. Mail, to the Board's 100 Maryland Avenue address (above). Board staff will acknowledge receipt of your request and will contact you regarding scheduling.

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

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

NOTICES TO:
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