

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

**IN THE MATTER OF:**  
**SAMINA ALI ZAI, d/b/a**  
**SMART-ED EARLY LEARNING CENTER**  
Applicant

Samina Ali Zai  
Nea Maloo

Jude Wikramanayake, Esquire  
Attorney for the Applicant

For the Application

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

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OZAH Case No. CU 15-08

**HEARING EXAMINER'S REPORT AND DECISION**

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

This case involves an application for a conditional use to operate a child Day Care Center for over 30 persons pursuant to Zoning Ordinance §59-3.4.4.F.<sup>1</sup> The subject property is Parcel N120, in the White Oak Gardens Apartments, located at 11624 Lockwood Drive, in Units T-1, T-2 and T-3, and in an adjoining building, 11628 Lockwood Drive, in Units T-2 and T-3, Silver Spring, Maryland 20904. The property's Tax Account Number is 05-00277577 (Exhibits 26 and 97), and it is owned by 72 Barrow Street Realty, which has authorized this application through its agent, Scott Fixell (Exhibits 17 and 24). The subject site is in the R-20 Zone (Exhibit 7), and a conditional use is required for a child care facility for 9 or more children in that zone.

The Applicant, Samina Ali Zai, is currently operating a child Day Care Center (Smart-Ed Early Learning Center) consisting of four apartment units in the two aforementioned adjoining buildings, 11624 Lockwood Drive (Units T-1, T-2 and T-3) and 11628 Lockwood Drive (Unit T-2). Units T-1, T-2 and T-3 at 11624 Lockwood Drive have a total of 53 children; and the Unit T-2 located in 11628 Lockwood Drive currently serves an additional 20 children.

The previous operator of the Day Care Center was Kamini Wayal, under the name of "ABC Scholar." Ms. Wayal operated her Day Care Center under two special exceptions – S-82, granted by the Board of Appeals, governing operations at 11624 Lockwood Drive;<sup>2</sup> and SE 03-4, granted by the Office of Zoning and Administrative Hearings (OZAH), governing operations at 11628 Lockwood Drive.

On November 18, 2012, Ms. Ali Zai purchased the child care business from Ms. Wayal. Exhibit 18. On April 8, 2015, the Ms. Ali Zai filed the subject conditional use application (CU

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<sup>1</sup> All citations in this Decision are to the 2014 Zoning Ordinance for Montgomery County, adopted September 30, 2014 (Ordinance No. 17-52), as amended.

<sup>2</sup> The Child Care use in 11624 Lockwood Drive actually predates the grant of S-82 on 6/7/72. It existed under various operators per special exceptions CBA-2315 (12/21/67) and CBA-2710 (12/18/69). See Exhibits 41 and 101, p. 6.

15-08) for permission to operate a Day Care Center in the additional site of Unit T-3 at 11628 Lockwood Drive (Exhibit 1). A notice was issued on April 14, 2015, scheduling a hearing for August 6, 2015 (Exhibit 28).

On May 14, 2015, the Applicant requested that the Board of Appeals transfer Special Exception S-82 from ABC Scholar to Smart-Ed Early Learning Center (Exhibit 42(e)), with the previous special exception holder, Ms. Wayal, consenting to the transfer (Exhibit 42(f)). The Board of Appeals issued a Resolution transferring Special Exception S-82 to Ms. Ali Zai, effective June 23, 2015 (Exhibit 43(a)).

After an exchange of emails among the Applicant's attorney, OZAH's Director, the Executive Director of the Board of Appeals, the Planning Department and the Department of Permitting Services, it was agreed that the best way to evaluate the new request for expansion of the operations and to regulate the overall operations of the combined day care facility was for the Applicant to amend her application in CU 15-08 to request that all the day care operations be consolidated under this new conditional use application. A new OZAH hearing date would be set. If the new combined conditional use were approved, consolidating all operations, then existing special exceptions S-82 and SE 03-4 will be revoked, as abandoned. Exhibits 44 to 68. On February 5, 2016, the Applicant moved to amend her application (Exhibits 69 and 85), and on February 9, 2016, the amended application (Exhibit 70) was accepted for filing by OZAH.

Approval of this amended conditional use application would increase the number of children by 20, for a total of 93, with the additional children to be located in Unit T-3, at 11628 Lockwood Drive. The addition of Unit T-3 at 11628 Lockwood Drive would also bring to five the total number of apartment units in the subject site. The proposed child Day Care Center would operate as one unified facility located in the five apartments, and thus would include all of

the units in the existing special exceptions S-82 and SE 03-4, as well as the new Unit T-3 at 11628 Lockwood Drive. Exhibit 70.

At the request of the Applicant (Exhibit 96), a notice for a rescheduled hearing date was issued on April 15, 2016, setting the OZAH hearing for June 24, 2016 (Exhibit 98). It also gave notice of the motion to amend the application. In addition, the Applicant issued a notice, on May 17, 2016, of her intention to request a waiver of the requirement to provide the number of parking spaces called for by Zoning Ordinance §59.6.2.10. (Exhibit 99(a)).<sup>3</sup> Instead, the Applicant seeks permission to provide only 6 parking spaces (Exhibit 99(b)).

The Technical Staff of the Montgomery County Planning Department (Technical Staff or Staff) issued a report on May 20, 2016, recommending approval of the application and the parking waiver, subject to seven conditions. Ex. 101. The Planning Board met on June 2, 2016, and voted unanimously to recommend approval of the parking waiver and the conditional use, with the conditions recommended by Staff, as stated in the Chair's letter of June 7, 2016. Ex. 102.

On June 23, 2016, the Hearing Examiner emailed the Applicant's attorney a list of possible additional conditions he might impose if the application were granted. Exhibit 103.

The public hearing proceeded as scheduled on June 24, 2016. The Applicant testified, as did her architect, Nea Maloo. No opposition witnesses appeared at the hearing, and there have been no opposition submissions in this case. Eight parents of children served by the Applicant's Day Care Center filed letters of support for the facility (Exhibit 20(a) – (h)).

At the beginning of the hearing, the Hearing Examiner noted that the motion to amend the application was unopposed and was granted, Tr. 5. The Applicant's attorney indicated that the Applicant accepted the findings of Technical Staff and the 7 conditions recommended by

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<sup>3</sup> Technical Staff calculates that the number of parking spaces required under the Zoning Ordinance is 13, not 12 as suggested by the Applicant, but Staff supports the Applicant's request to grant a waiver and lower the requirement to 6 spaces. See discussion of the waiver request in Part II.C.2, of this Report and Decision, on pages 14 to 16.

Technical Staff and the Planning Board. Tr. 6, 24. The Applicant also testified that she would comply with the additional 11 conditions listed by the Hearing Examiner in Exhibit 103 (up to a total of 18 conditions). Tr. 24. Applicant's affidavit of posting was filed as Exhibit 104.

At the conclusion of the hearing, the record was left open for the Applicant to file, by July 6, 2016, a revised site plan, clarifying where some items are located. These included:

1. Adding a north-south arrow to the plan for ease of reference;
2. Noting the locations of signs identifying the Day Care Center (No new signs are proposed);
3. Noting where the bus stops are located because the Day Care provides staff at these stops to escort children;
4. Noting where another bus with preschoolers lets off children in the parking lot; and
5. Noting the location of the fence to be placed on the play area behind the newly included apartment (the proposed fence was already included in other plans submitted by the Applicant).

Technical Staff was given until July 13, 2016, to comment if they wished to, and the Applicant was given until July 18, 2016 to reply to any comments by Staff. The record was set to close on July 18, 2016. Tr. 66-67 and Exhibit 105.

The Applicant timely filed her amended site plan (Exhibit 106(a)) on July 6, 2016, along with some additional photos and electronic copies. No further comments were filed by Technical Staff, except an acknowledgment that the revised site plan contained the additions specified at the hearing (Exhibit 108). The record closed, as scheduled, on July 18, 2016.

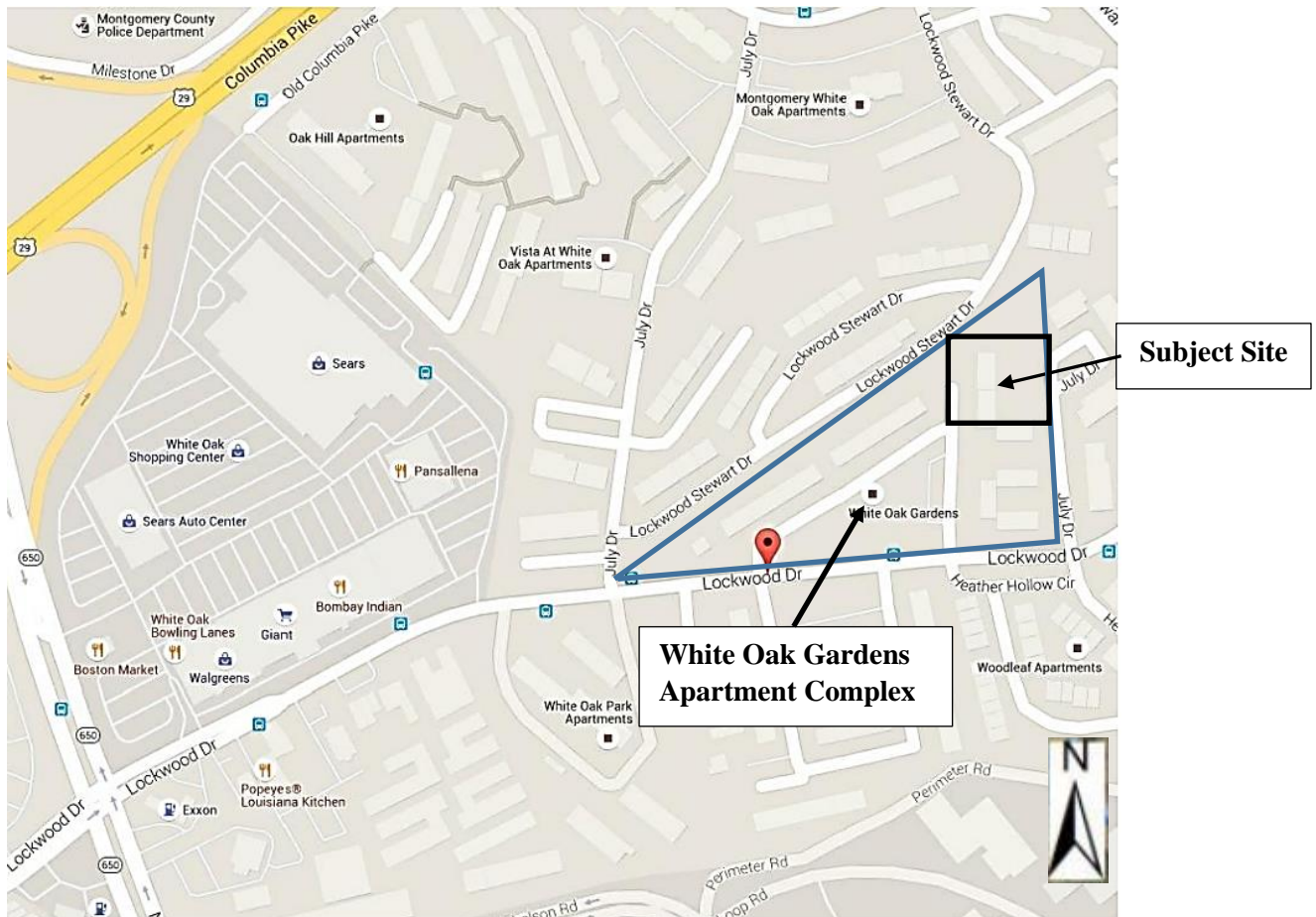
For the reasons set forth at length in this Report and Decision, the Hearing Examiner approves the conditional use application, subject to the conditions listed in Part IV.

## **II. FACTUAL BACKGROUND**

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

As mentioned above, the subject property is in the White Oak Gardens Apartments, located at 11624 Lockwood Drive, in Units T-1, T-2 and T-3, and in an adjoining building,

11628 Lockwood Drive, in Units T-2 and T-3, in Silver Spring. The location of the site can be seen on the map supplied by the Applicant as part of the cover sheet for her amended plan submittals (Exhibit 76). It is reproduced below, with site locations noted:



Technical Staff described the site (Exhibit 101, p. 2):

The day care center is located in the 160-unit White Oak Gardens Apartment Complex (the Property) comprising 7.6 acres zoned R-20. The Property is bound by Lockwood Drive to the south, and R-20 zoned medium-density multifamily units along all other sides. It is currently improved with three- to four-story garden apartment structures and generally slopes from south to north.

According to Technical Staff, the total combined square footage of the five units will be 4,270 square feet. Exhibit 101, p. 2. The Applicant provided a photograph of the garden apartments where the child care center is housed in Exhibit 76. It is reproduced on the next page:





Technical Staff provided an aerial photograph showing the garden apartment complex and marking the location of the subject site within it (Exhibit 101, p. 5):

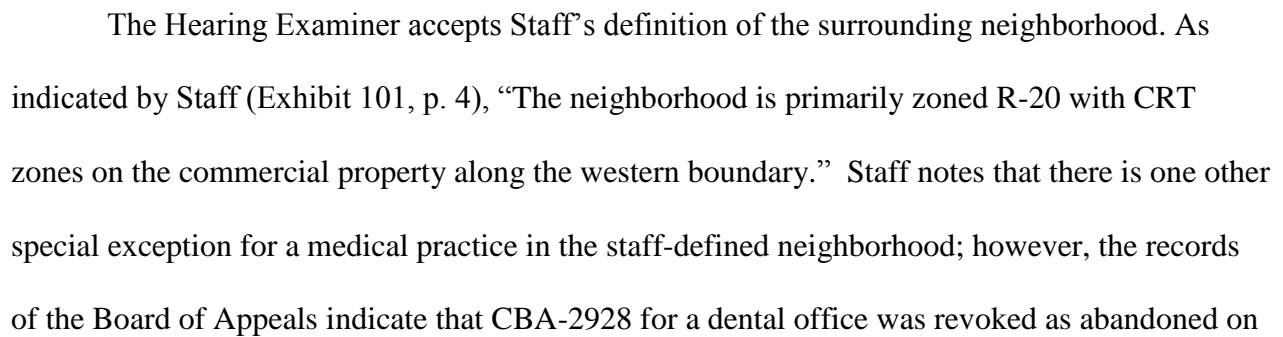


As described by Technical Staff (Exhibit 101, p. 3):

The Property has two existing curb cuts from Lockwood Drive, which provide two-way access and circulation into the parking area for the day care center as well as other apartments in the complex. The main entrance to the day care center, accessed from the parking area via a sidewalk, is one-story below grade due to the sloping topography.

Access to the site is depicted on the Site Plan, reproduced in Part II.C. of this Report, below.

For the purpose of determining the compatibility of the proposed use, it is necessary to delineate and characterize the “surrounding neighborhood” (*i.e.*, the area that will be most directly impacted by the proposed use). Staff proposed defining the boundaries of the surrounding neighborhood as “generally bounded by the Federal Research Center at White Oak to the south, Lockwood Drive to the east, Stewart Lane and Columbia Pike to the north, and White Oak Shopping Center and other commercial uses to the west.” It is depicted below in a map from the Staff report (Exhibit 101, p. 4):





April 23, 1981. The only currently active special exceptions in the defined neighborhood are those that pertain to the subject child care use (S-82 and SE 03-4).

### **C. Proposed Use**

The Applicant seeks approval of a conditional use to operate a Child Day Care Center for up to 93 children in the White Oak Gardens Apartments, located at 11624 Lockwood Drive, in Units T-1, T-2 and T-3, and in an adjoining building, 11628 Lockwood Drive, in Units T-2 and T-3, in Silver Spring. As she explained in Applicant's Amended Statement (Exhibit 72, pp. 2-3):

. . . Currently, Smart Ed serves 73 children. Special Exception Case No. S-82 permits the operation of a day care center in Units T1, T2, and T3 in 11624 Lockwood Drive. Currently, there are 53 children cared for under that special exception. Special Exception Case No. SE 03-04 permit[s] the operation of a day care center for 20 children in Unit T2 in 11628 Lockwood Drive. Smart Ed runs its business from all of those units which share a fenced in area at the rear and are easily accessible as they are next door. In Case No. S-82, the Board of Appeals in 2015, acknowledged that the day care center currently operates from four apartment units in two adjoining buildings. . . .

To meet the continuing demands of the multi-unit apartment complex and the immediate area for child day care, Ms. Zai sought to expand into an existing and vacant adjoining apartment next door- 11628 Lockwood Drive (Unit T-3 (hereinafter "Expanded Unit")). The Expanded Unit has a total gross floor area of approximately 854 Square Feet (SF). In April 2015, she applied for a "new" conditional use which was accepted and captioned as CU-15-08 for 11628 Lockwood Drive, Unit T-3.

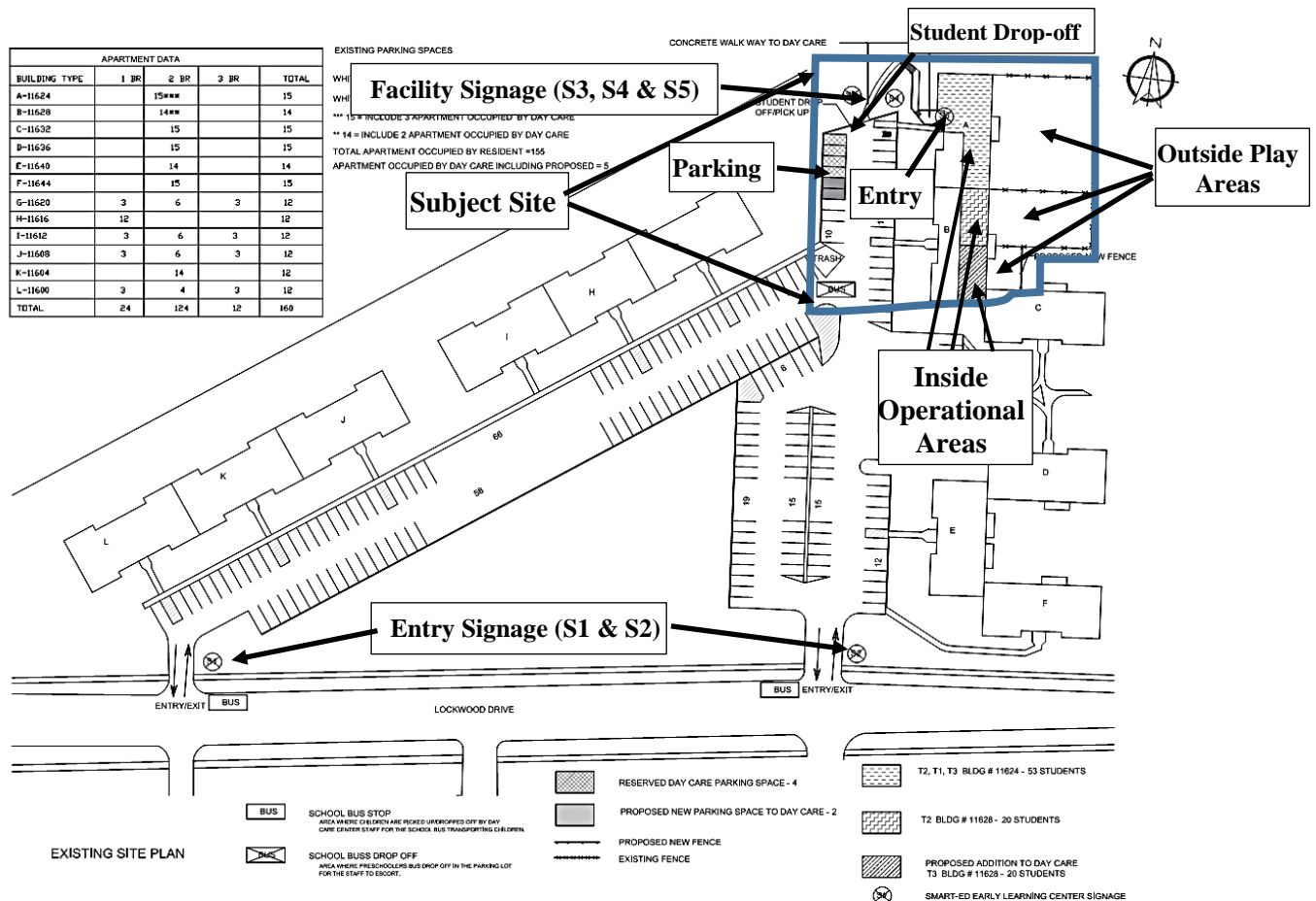
Both the currently used 11628 T-2 unit and the proposed 11628 T-3 unit share a common wall. Ms. Zai seeks permission to have an additional 20 children for the T-3 unit and thus allow Smart Ed to have a total of 93 students for the entire conditional use; however, the issues surrounding the fact that the day care center has in essence at least three special exceptions governing it need to be addressed initially and by motion (Exhibit . . . [85]), the applicant requests that the application be amended to include S-82 and SE 03-04 as part of the consideration and 11624 Lockwood Drive, T-1, T-2, and T-3 along with 11628 Lockwood Drive, T-2 and T-3, be considered as a single conditional use in essence bringing together Case No. S-82, Case No. SE 03-04 and CU-15-08 under one use. The building footprint will not be expanded in any way. Smart Ed's goal and ultimate request will merely convert an existing vacant space into a more constructive purpose. If CU 15-08 is

approved with this amendment and Smart Ed be permitted to operate as a day care facility for over 30 children at 11624 Units T-1, T-2, and T-3 and 11628 Units T-2 along with the new Unit T-3, then the special exception holder will agree to abandon S-82 and SE 03-4 similar to the conditions in the *Tugberg* decision.<sup>4</sup> This would obviate the procedural and legal inefficiency of having a business which has what could be and currently is subject to multiple special exception uses. . . .

Technical Staff noted that the Day Care Center will have up to 93 children, ranging in age from infant to twelve years, and 15 non-residential employees. The proposed hours of operation are Monday through Friday, 6:30 a.m. to 7:00 p.m. No weekend or overnight hours are proposed. Exhibits 101, p. 2.

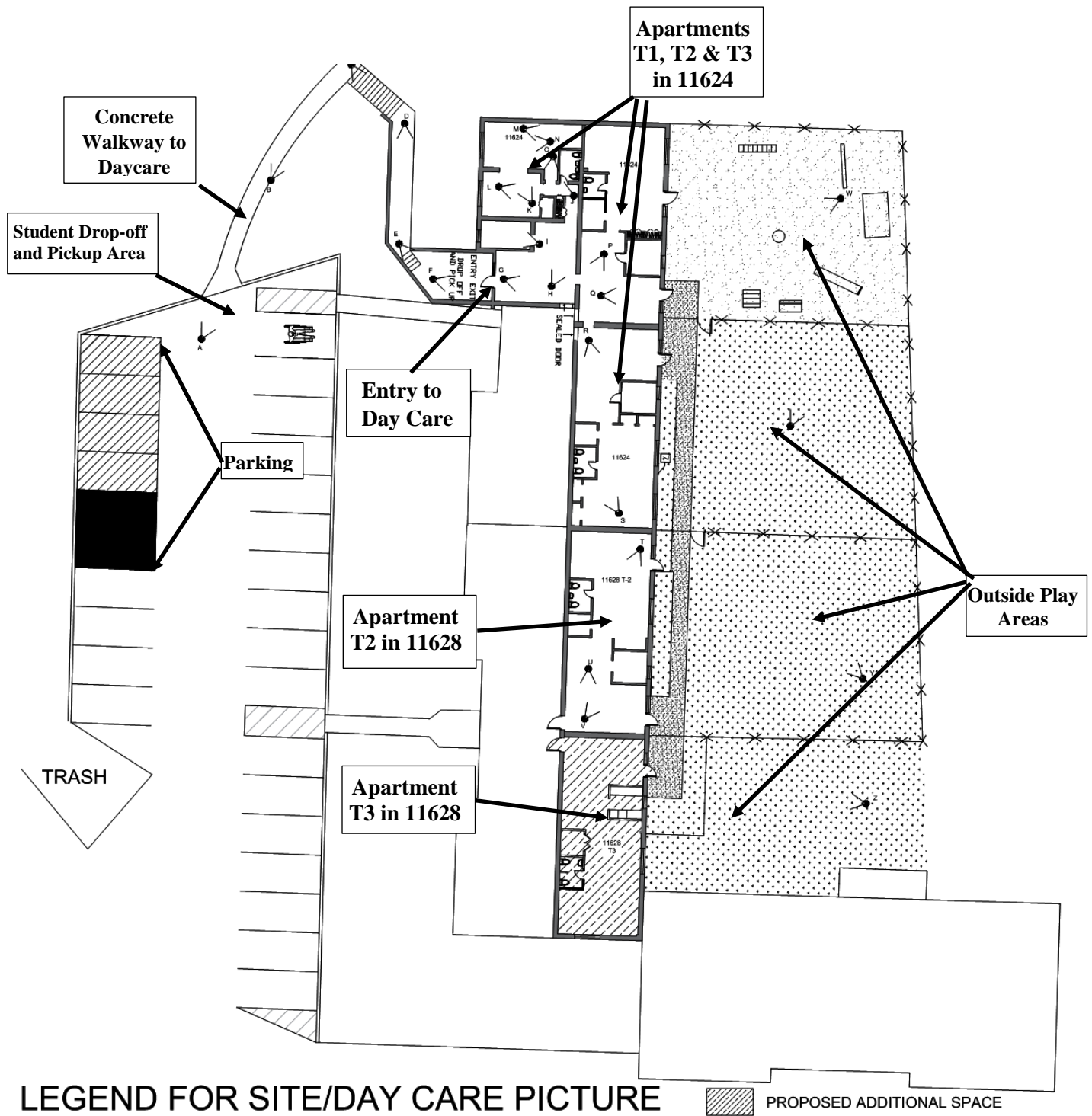
### 1. Site Plan, Access, On-Site Parking and Areas for Drop-off and Pickup of Children

The Applicant's final site plan for the conditional use (Exhibit 106(a)) is set forth below:



<sup>4</sup> See Board of Appeals Opinion in *Faik and Lauren Tugberg*, S-2875 (January 30, 2015) where a professional office use was permitted in a residential property but a prior special exception (CBA 1749) on the site needed to be revoked as abandoned. CBA 1749 was revoked as abandoned by the Board of Appeals effective March 30, 2015.

The subject site details are shown on another plan (Exhibit 81), along with site photos keyed to that plan (Exhibit 83(a) – (z)):





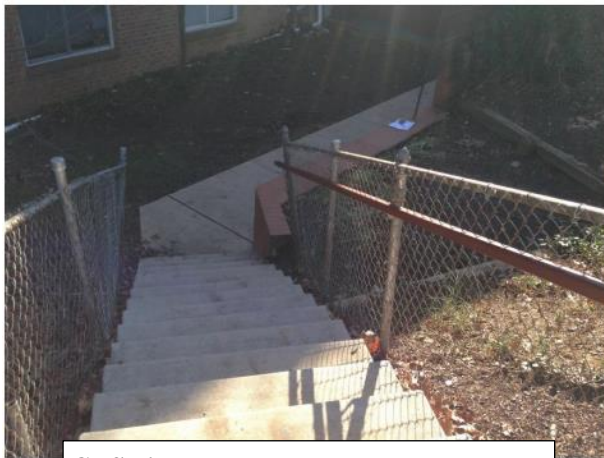
Exterior photos from Exhibit 83 are reproduced below:



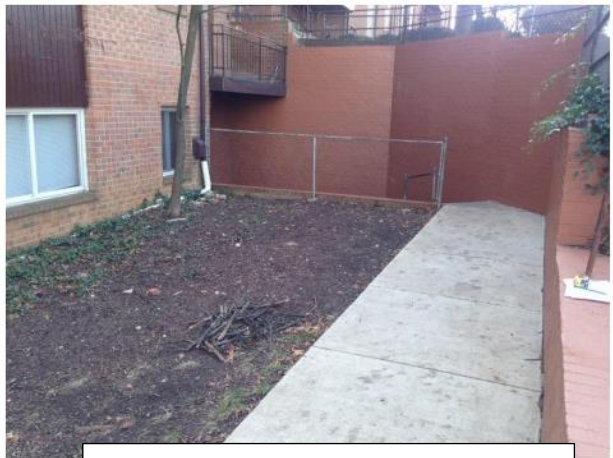
**A. Student Drop-off and Pickup Area**



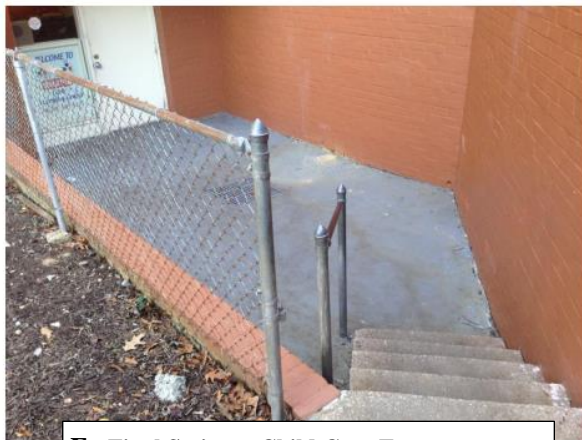
**B. Walkway from Student Drop-off and Pickup Area**



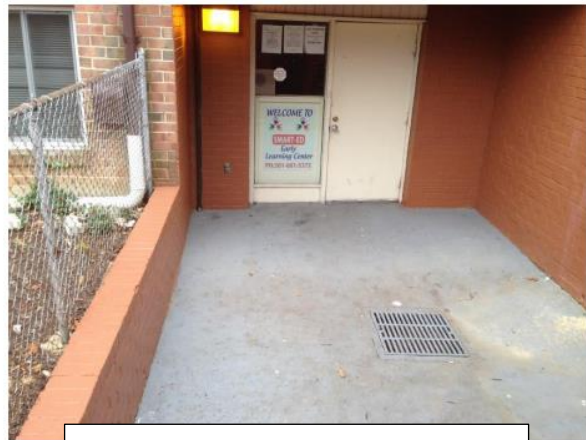
**C. Stairway to Level of Child Care Facility**



**D. Continuation of Walkway to Facility**



**E. Final Stairs to Child Care Entrance**

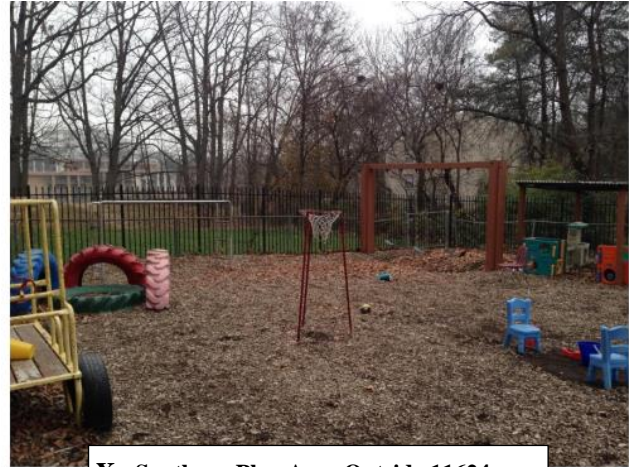


**F. Entrance to Child Care Facility**

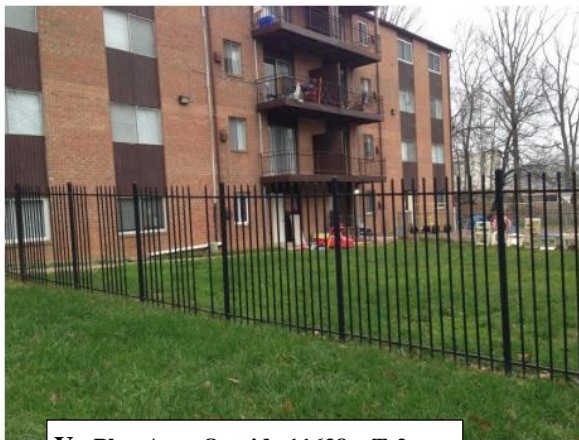




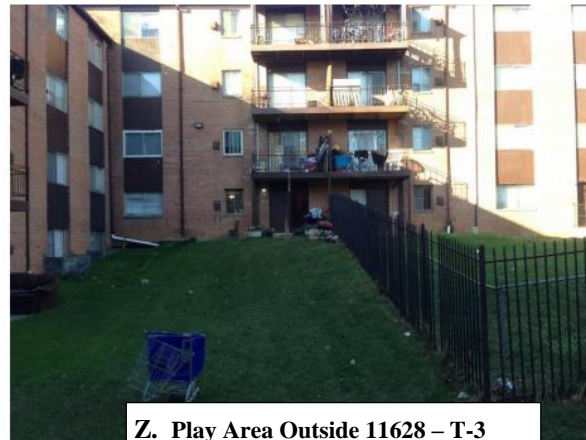
**W. Northern Play Area Outside 11624**



**X. Southern Play Area Outside 11624**



**Y. Play Area Outside 11628 – T-2**



**Z. Play Area Outside 11628 – T-3  
(A Fence will be added, as  
shown on the Final Site Plan)**

Technical Staff reports (Exhibit 101, p. 3):

The Applicant is not planning to modify the exterior of the structure, landscaping, or lighting. . . . The Property has two existing curb cuts from Lockwood Drive, which provide two-way access and circulation into the parking area for the day care center as well as other apartments in the complex. The main entrance to the day care center, accessed from the parking area via a sidewalk, is one-story below grade due to the sloping topography. The Applicant proposes to reserve two more parking spaces to the four existing spaces currently serving the existing day care center and located in front of the building.

Staff indicates that the parking spaces “are safe, not detrimental to the neighborhood, accessible, and compatible with surrounding properties.” Exhibit 101, p. 10. In addition (Exhibit 101, p. 10),



There is adequate area for drop-off and pick-up of children. The drive aisle is approximately 21 feet wide connecting to a sidewalk leading to the day care center entrance. In addition to the five of the six designated parking spaces available for discharge and pick up of children, the two-way drive aisle is wide enough for cars to remain parked while children are walked in.

At the hearing, the Applicant testified that a Day Care staff member meets the children when they are dropped off by the bus and accompanies them to the Day Care entrance. Tr. 47 and 59. Children dropped off and picked up by car are escorted by their parents to the entrance of the day care, as are those who are walked to the facility. Tr. 54. Given this record, the Hearing Examiner is satisfied that the drop-off and pickup area is safe and efficient. The number of parking spaces to be provided is discussed in the next section.

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

Technical Staff calculated that 13 automobile parking spaces would be required for the proposed expanded Day Care Center pursuant to Zoning Ordinance §59.6.2.4.B. Under that section, a Day Care Center requires 3 spaces per 1,000 square feet of gross floor area dedicated to the use. In this case, the gross floor area of the combined 5 apartments is 4,270 square feet, according to Staff (Exhibit 101, p. 2). Dividing that by 1,000, gives us a multiplier of 4.27, which when multiplied by 3, results in a requirement for 13 (*i.e.*, 12.81 rounded up) parking spaces, as indicated in the table in the Staff report (Exhibit 101, p. 12).

The Applicant's use currently has four parking spaces, and the Applicant proposes to add two more, for a total of six automobile parking spaces. One bicycle parking space must also be provided per §59.6.2.4.C, and a condition will be imposed, as recommended by Technical Staff, requiring the Applicant to provide a bicycle rack.

Since the Applicant seeks to provide seven fewer vehicle spaces than the 13 that would be called for under the Code, she has requested a waiver of the parking space requirement under

Section 59.6.2.10 of the Zoning Ordinance (Exhibit 99(b)). Section 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.*

The Applicant provided the notice called for in the Code (Exhibit 99(a)), and she argued as follows in support of the waiver (Exhibit 99(b), pp. 2-3):

According to the detailed traffic analysis (Exhibit 7 of the Application), of the 73 current children, 75% are within walking distance, 5% utilize public transportation and the remaining 20% utilize ground transportation – approximately six children come from more than 1 mile away. Currently, the center employs 12 staff members. Seven of those staff members walk to work from their nearby residences. 3 staff members utilize public transportation. 1 staff member is dropped off via car. 1 staff member drives to work and utilizes a parking space.

There is no need for any parent or other parent other than an occasional and infrequent visitor to utilize the four parking spaces that are currently given to the Center by the Landlord under the lease.

\* \* \*

An exception to the parking requirements should be granted because: First, Smart Ed is a day care for the surrounding apartment community, hence, the overwhelming majority of day care staff and students walk to and from the Center – one of the primary purposes of being a day care for the community is to discourage vehicular use and rather have the parents, staff and children walk to the center. Thus, requiring additional parking may encourage unnecessary vehicular traffic. Staff are encouraged to utilize public transportation or walk to the Center. Second, the requirements of the code would not be furthered by requiring strict adherence to the parking space number because only one to two parking spaces of the currently allocated four, are ever utilized. For Smart Ed in particular, parking is not needed as nearly the entire staff does not park a car at the Center and all of its customers are children that are dropped off (mostly by parents who walk them). Third, requiring twelve spaces would not be permitted by the Landlord because there does not appear to be space for such an accommodation. The Center is located within an apartment complex and the property manager/Landlord has a specific limitation on the number of spaces per unit.

Technical Staff supported the waiver request (Exhibit 101, p. 13):

. . . The alternative design (six spaces in the parking lot in front of the building) satisfies Section 6.2.1. Intent, which states:

*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.*

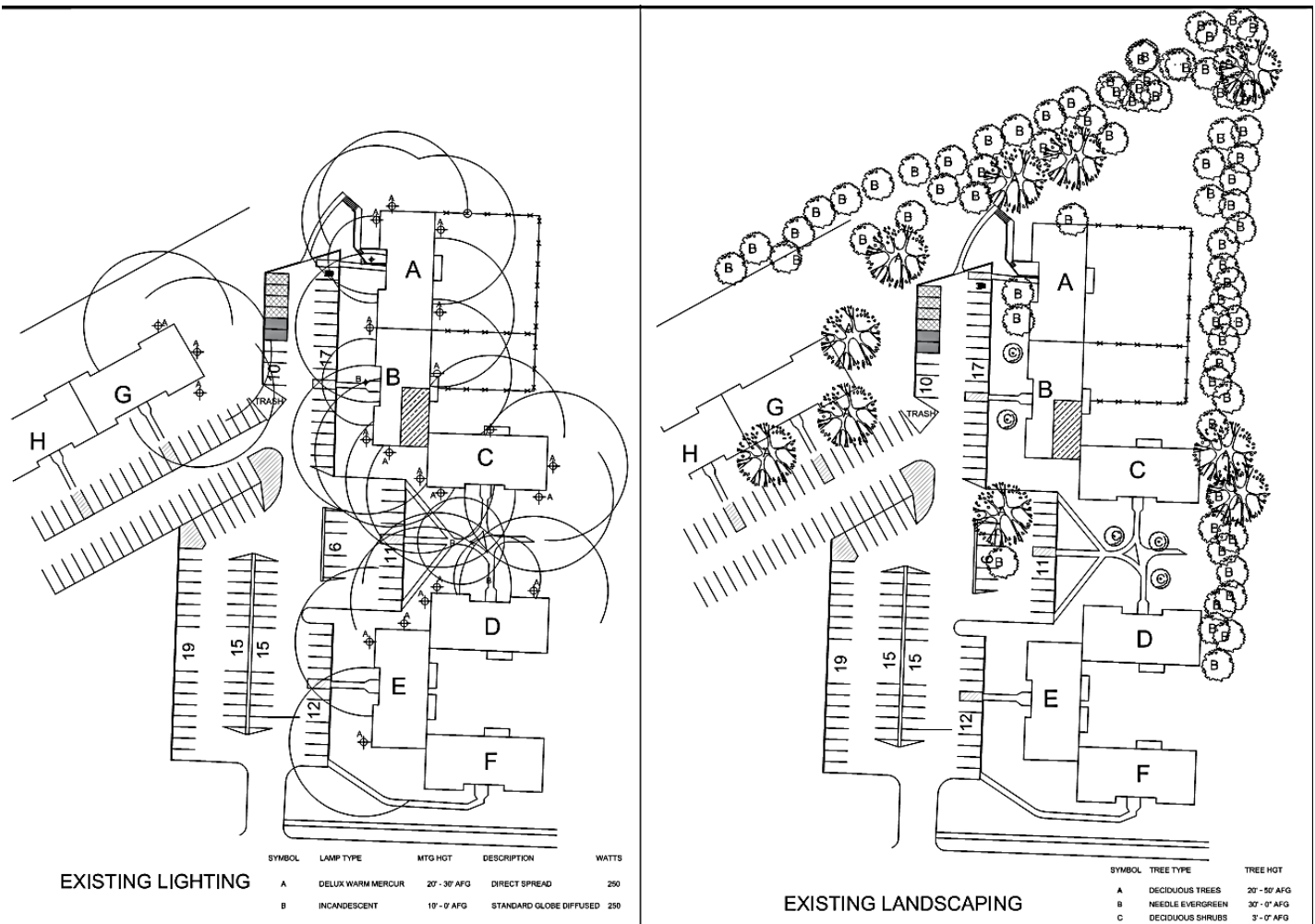
Of the 73 children currently enrolled in the day care center, 75% live within walking distance, 5% use public transportation, and the remaining 20% use private transportation. Ten of the twelve current employees walk or use public transportation. One employee is dropped off by car, and one drives and uses a parking space. The four existing spaces have served the existing use adequately for more than 10 years. The proposed use is expected to continue the current pattern of travel by the children and the employees coming to the site. Of the 20 additional children, approximately 12 will walk to the day care center with their families and eight will be dropped off and picked up by car or bus. With the staff recommended condition of approval, that the Applicant must schedule staggered drop-off and pick-up times with no more than three vehicles every 15 minutes, six parking spaces in the existing parking lot in front of the building will be safe and adequate for the proposed use. Therefore, Staff supports the requested parking waiver.

There is no contrary evidence in the record. The Hearing Examiner agrees with the argument set forth by the Applicant (Exhibit 99(b), p. 3) and endorsed by Technical Staff. Under Section 6.2.10, “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.” Section 6.2.1 provides that the parking requirements are imposed to ensure “adequate parking is provided in a safe and efficient manner.” Staff also found that “There is adequate area for drop-off and pick-up of children.” Exhibit 101, p. 10.

In this case, given that the majority of staff and children walk to the center, the evidence is that parking has never been an issue. The Hearing Examiner finds that, based on the unusual factors involving the operation of this facility and the persons it serves, six vehicular parking spaces constitute adequate parking. Moreover, as determined by Technical Staff, there is an adequate area for the drop-off and pick-up of children. Therefore, the Hearing Examiner concludes that the requested parking waiver is justified. The Applicant need provide only the six vehicle spaces she proposes for the expanded use.

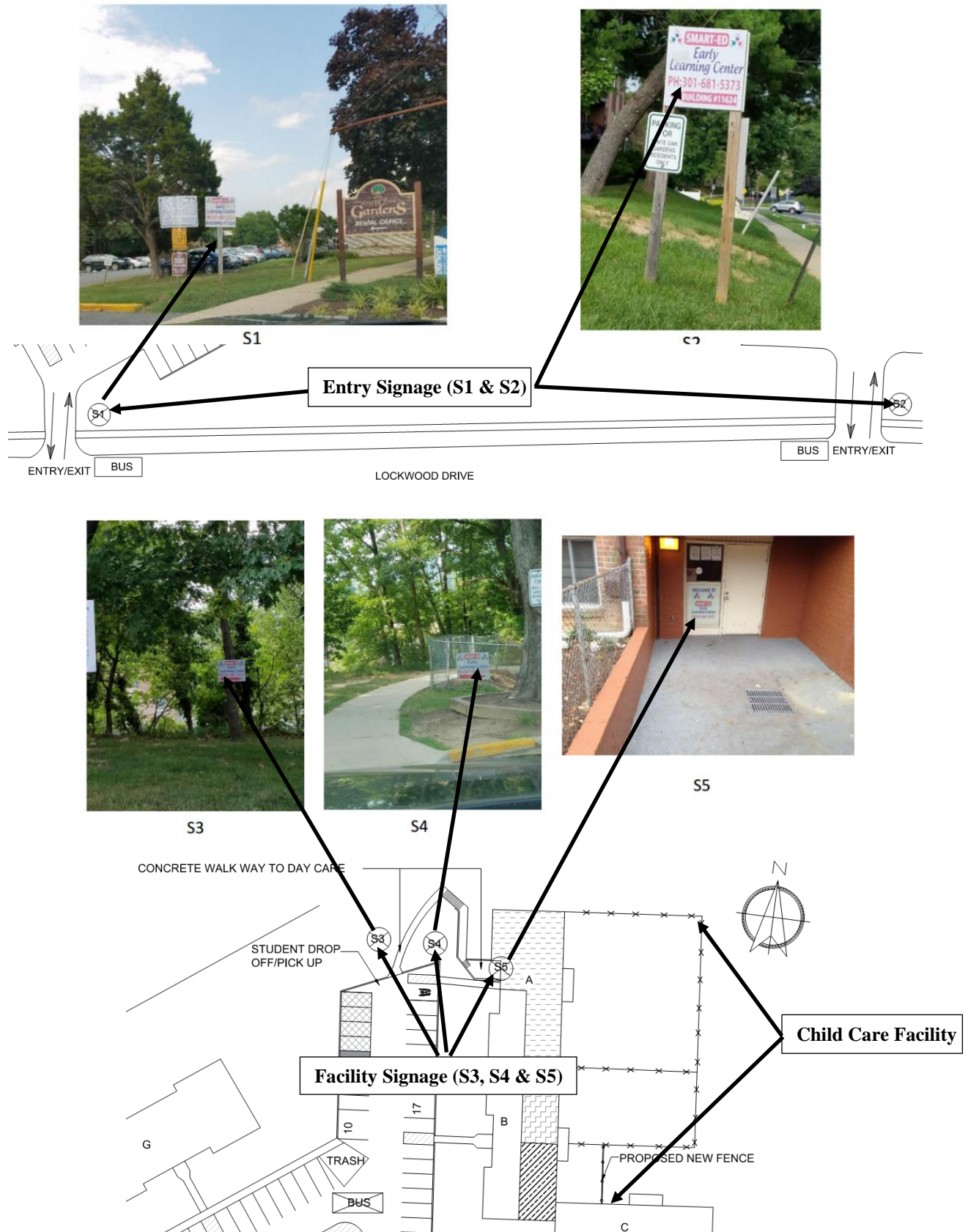
### 3. Site Landscaping, Lighting and Signage

As noted above, the Applicant is not planning to modify the exterior of the structure, landscaping, or lighting (Exhibit 101, p. 3). The Applicant's Landscaping and Lighting Plan (Exhibit 78) shows existing lighting and landscaping, and it is reproduced below:



Technical Staff notes that the Zoning Ordinance does not require any additional landscaping for the proposed use since it is located in a Residential Multi-Unit Medium Density zone and does not abut property in an Agricultural, Rural Residential, or Residential Detached zone. Ex. 101, pp. 13-14. Lighting is also not an issue since, by its own terms (in §59.6.4.2), the requirements of Division 6.4 do not apply to existing, unmodified lighting, which is the case here.

The only signage proposed by the Applicant are the five existing signs depicted below (Exhibit 106(b)(iii)), with their locations as noted on the final site plan (Exhibit 106(a)):





Permanent signs are subject to the sign permitting process. As will be discussed in Part III of this Report and Decision, even though the signs in question already exist, they must be in compliance with the Zoning Ordinance, or be exempted by the Sign Review Board of the Department of Permitting Services.

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

The child care facility will operate in five apartments of the White Oak Gardens Apartments (and their back yards), located at 11624 Lockwood Drive, in Units T-1, T-2 and T-3, and in an adjoining building, 11628 Lockwood Drive, in Units T-2 and T-3. The outdoor play areas are depicted on page 13 of this Report and Decision. The Floor Plan for the child care facility is shown on page 11. Sample photographs of the internal facilities in the apartments are depicted below (Exhibit 83(g), (k), (r) and (v)):



G



K



R



V

## 5. Operations

Proposed operations were summarized by Technical Staff (Exhibit 101, pp. 2-3):

The proposed day care center (the Site or the building) will have up to 93 children, ranging in age from infant to twelve years, and 15 non-residential employees. The proposed hours of operation are Monday through Friday, 6:30 a.m. to 7:00 p.m. No weekend or overnight hours are proposed.

When the weather permits, all classrooms will have 30 minutes of outdoor play time in the morning and 30 minutes in the afternoon in play areas enclosed with a six-foot tall fence on all sides and dense trees and plantings on two sides in the rear that buffer the play areas from surrounding residences. Lighting for the outdoor areas is mostly for security purposes since the day care center will not have any night time activities.

The Applicant expanded on this formula in her Amended Statement (Exhibit 72 pp. 7-10):

. . . In submitting, CU-15-08, Smart Ed sought to operate or more precisely expand the existing day care operations into 11628 Lockwood Drive, T-3 which is next to 11628 Lockwood Drive, T-2. . . . It is requested that permission be granted under CU-15-08 for Smart Ed to operate as a single day care facility from 11624 Lockwood Drive, Units T-1, T-2, and T-3 along with 11628 Lockwood Drive, T-2, and T-3. And if approved as amended, Smart Ed would abandon S-82 and SE 03-04. Thus, at the end of the day, Smart-Ed requests permission to operate as a single child day care facility for up to 93 children, from the hours of 6:30 am to 7:00 pm.

The total number of children permitted on the site will be 93 and Ms. Zai with the addition of T-3 will utilize an additional 854 SF of 11628 Lockwood Drive of current vacant space next to the center.

. . . Indeed, the proposed change will accommodate siblings of current children in the day-care and the majority of the new children will continue to be residents of the White Oak gardens and nearby apartment complexes.

The proposed expansion would involve no exterior changes, no building expansion and would not eliminate or impact any trees or other forestry. Currently, Smart Ed has and will continue to utilize one main entrance. . . . The entrance is located adjacent to the dedicated drop off . . . and pick up area . . . As shown on the site plan . . . , the day care center is located in the two furthest interior buildings in the overall complex known as and shown as Building A (11624) and B (11628). The center is nearly one-quarter mile from the main road on Lockwood Drive and indeed it is at the end of the complex's parking area hence, the probability of any safety issues are minimal to none. The entry/exit area is a large spacious place where children, who will arrive and depart at staggered times, can safely traverse the welcome area and once in the lobby, be escorted by Smart Ed

staff to their designated unit. The children that are assigned to 11628 T-2 and the new proposed space at 11628 T-3 will enter through the main area and access their units through the common fenced in playground area at the rear which traverses all the day care units. . . . The existing hallways and the outside playground area provide adequate ingress/egress and allow the children and staff to move about as set forth in the circulation paths. There is an exit area in each unit for fire safety; however, due to safety concerns, all units will be served by the one main entrance.

As the interior/exterior Exhibit demonstrates, the proposed plan consists of simply renovating 854 SF of existing space at 11628 Unit T-3. Unit T-3 is next to Unit T-2 and both units will be accessed from the outside playground area, which is fenced in. . . . Staff will always accompany children when any child is in the playground area or outside any unit. The unit will model the other units in terms of design, open space and décor. 726 SF will be used as a general use room for up to 20 children. 59SF of the space will be for a snack/kitchen area. 31 SF will be for storage and 38 SF will consist of a restroom area. An existing wall in T-3 will be demolished to convert the apartment unit which separates bedrooms from living area into the open space concept appropriate for a room in a day care facility. There will be one door that opens to the playground area that will be for ingress/egress. . . . Ms. Zai will (as she always has) insure that all recreation areas meet applicable standards and regulations for safety. And following approval, the unit will have to be approved by applicable county agencies for safety and also the child care licensing entity.

The proposed expansion will require the hiring of three additional staff members. Ms. Zai has conducted some preliminary interviews and it appears that the staff similar to the current staffing situation will come from the neighborhood and will walk to work.

To avoid any traffic impacts, the Applicant indicated that she would follow Technical Staff's recommendation to "schedule staggered drop-off and pick-up times with no more than three vehicles every 15 minutes," and the Hearing Examiner's condition which would require the applicant to enter into an agreement with each parent arriving by vehicle specifying an assigned arrival and departure time. Tr. 6, 24.

In addition, conditions will be specified by the Hearing Examiner in Part IV to control operations so as to limit potential disruption for the neighbors. These restrictions limit the hours of operation, the number of staff, the number of children, the number allowed in outdoor play at any one time, the timing of outdoor play, and the use of noise amplification outdoors.

#### **D. Environmental Issues**

There are no environmental issues in this case since the only external change proposed is the addition of a fence in the play area outside the new unit (T3 of 11628 Lockwood Drive) to be included the child care facility. The proposed fence is shown on the revised site plan (Exhibit 106(a)). Technical Staff also found no environmental issues (Exhibit 101, p. 7):

. . . The Property contains no forest, streams, wetlands, 100-year floodplains, steep slopes, or known habitats of rare, threatened or endangered species. The application received an exemption from the requirements of submitting a Forest Conservation Plan under Section 22A-5 (q)(1) of the Forest Conservation Law . . . [Exhibit 6].

#### **E. Community Response**

No opposition witnesses appeared at the hearing, and there have been no opposition submissions in this case. Eight parents of children served by the Applicant's Day Care Center filed letters of support for the facility (Exhibit 20(a) – (h)). Typical of these letters is the last paragraph of Exhibit 20(a):

I cannot say enough good things about what we are experiencing here. My son is surrounded with love, excellent developmental guidance, and security. It is wonderful to know my son enjoys "school". It gives us great peace of mind since I cannot be home with him myself. I wholeheartedly recommend Smart Ed Learning Center to anyone and everyone!!

The application is also supported by the property owner's manager, Scot Fixell, who writes (Exhibit 17):

This letter is to verify Case Managements intent to lease to the above referenced business owner, 11628 Lockwood Drive unit T3, Silver Spring, Maryland 20904.

My experience with Ms. Zai during her operation of the day care center, has been a positive and rewarding one. Her ability to improve the quality of the care and education the children in her charge receive has impressed me greatly. Ms. Zai has not only upgraded the physical learning environment, but has insured that all the teachers are highly qualified and trained.

Due to the high number of apartment units and population in the immediate area, increasing the size of her facility would be an asset to the community and the Montgomery County Schools system in which the children attend. This would enable more children to be prepared for their elementary school education, while allowing parents to continue working without the worry of quality of day care their children are receiving. . . .

In sum, the evidence is un rebutted that the proposed use is supported by the owner of the garden apartments in which it is located and by the surrounding community.

### **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 over 30 children. *Zoning Ordinance* §59.3.4.4.F.

Weighing all the testimony and evidence of record under the “preponderance of the evidence” standard specified in *Zoning Ordinance* §59.7.1.1, the Hearing Examiner concludes that the conditional use proposed in this application, as governed by the conditions imposed in Part IV of this Report and Decision, would satisfy all of the specific and general requirements for the use.

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

The general findings necessary to approve a conditional use are found in Section 59.7.3.1.E of the Zoning Ordinance. Standards pertinent to this review, and the Hearing Examiner’s conclusions for each finding, are set forth below:<sup>5</sup>

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<sup>5</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.



***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 Day Care Center was previously operated as “ABC Scholar” under two special exceptions – S-82, granted on June 7, 1972 by the Board of Appeals, governing operations at 11624 Lockwood Drive, and SE 03-4, granted on July 16, 2004, by the Office of Zoning and Administrative Hearings (OZAH), governing operations at 11628 Lockwood Drive. The Child Care use in 11624 Lockwood Drive actually predates the grant of S-82. It existed under various operators per special exceptions CBA-2315 (12/21/67) and CBA-2710 (12/18/69). See Exhibits 41 and 101, p. 6. The current proposal would expand the operation and consolidate it under one conditional use. A condition of the granting of the current application is that the Applicant file motions to revoke all prior existing special exceptions on the site as abandoned. Therefore, the Hearing Examiner finds that the application is in compliance with this standard.

***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>6</sup>**

Conclusion: This subsection requires an analysis of the standards of the R-20 Zone contained in Article 59-4; the use standards for Child Day Care Centers for over 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 that analysis, the Hearing Examiner finds, as did Technical Staff (Ex. 101, pp. 9 and 18), that the application satisfies the requirements of Articles 59-3, 59-4 and 59-6.

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<sup>6</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).

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

The subject property lies within the geographic area covered by the 2014 White Oak Science Gateway Master Plan. Technical Staff reports that the Master Plan contains no specific recommendations for the proposed use or other potential conditional uses on the Subject Property. Exhibit 101, p. 15. As stated by Staff,

. . . The Master Plan recommends retaining the R-20 zoning for this neighborhood primarily to maintain the current stock of market affordable housing stock in the area. . . . The proposed day care center will support the Master Plan's goal of maintaining the market affordable housing by providing a service needed for this community. By providing the day care service in a densely developed area with multifamily apartments, the proposed use reduces the reliance on cars and helps achieve the Sector Plan goal of reducing the single occupancy mode of travel since over 75% of its children live within walking distance, and many of its employees use transit.

The Hearing Examiner agrees. One of the main goals of the Master Plan is to reduce reliance on automobiles – “This Plan’s overriding goal is to transform the built environment from auto-oriented single purpose nodes into vibrant mixed-use centers.” Plan page 23. The evidence in this case is that the operation of a child care facility within a garden apartment development has resulted in very little automobile use, as most of the children and staff walk to the facility. Exhibit 99(b), pp. 2-3. Staff notes that “It is the only day care center within the Staff-defined neighborhood boundary.” Exhibit 101, p. 15.

Conclusion: Given this record, the Hearing Examiner finds that the proposed conditional use substantially conforms with the recommendations of the applicable master plan.

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

Conclusion: Technical Staff found that the proposed use meets this standard (Ex. 101, p. 15):

The proposed day care center is contained within an existing apartment building. It does not propose any additions or modifications to the existing building. Therefore,

the existing building containing the proposed use will continue to be in harmony with the surrounding neighborhood. The proposed use will be harmonious with, and will not alter, the character of the surrounding neighborhood in a manner inconsistent with the Master Plan.

The Hearing Examiner concludes that the proposed use “*is harmonious with and will not alter the character of the surrounding neighborhood*” because the use has existed harmoniously in this general location for decades; it will not change the outside of the buildings in which it is housed; nor will it substantially alter the outside activities of the facility’s operations.

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

Conclusion: According to Technical Staff, there is one other special exception for a medical practice in the staff-defined neighborhood (Ex. 101, pp 4-5); however, the records of the Board of Appeals indicate that CBA-2928 for a dental office was revoked as abandoned on April 23, 1981. Thus, the only currently active special exceptions in the defined neighborhood are those that pertain to the subject child care use (S-82 and SE 03-4). As noted by Staff (Ex. 101, p. 15):

The proposed use is the only child day care in the defined neighborhood. The proposed expansion from 73 to 93 children will increase pedestrian and vehicular activity in and around the Subject Property. But the intensity of vehicular and pedestrian activity associated with the proposed increase is minimal. The proposed use will not, when evaluated in conjunction with existing and approved conditional uses, increase the number, intensity, or scope of conditional uses sufficiently to adversely affect the area or alter the predominately residential nature of the area.

The Hearing Examiner agrees. Moreover, the provision in question also provides that “*a conditional use application that substantially conforms with the recommendations of a master plan does not alter the nature of an area,*” and as noted above, the proposed use is consistent with the Master Plan. Thus, the Hearing Examiner finds that this standard has been met.

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

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

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

Conclusion: There is nothing in the Technical Staff report indicating that the application would require approval of a preliminary plan of subdivision; nor would such a requirement be logical since the proposed use is located inside units of a long-established garden apartment complex. Therefore, the Hearing Examiner must determine whether the proposed development will be served by adequate public services and facilities.

Technical Staff opined (Exhibit 101, p. 16):

The Subject Property is currently served by public services and facilities. The proposed use will not impact public schools. The existing roads and sidewalks, police and fire protection, water, sanitary sewer, and storm drainage currently serving the site will remain adequate. The existing and planned public services and facilities are adequate for the proposed use.

The only public facilities issue that could be created by the proposed expansion of this existing child care center relates to potential impacts on the transportation system occasioned by the addition of 20 children and 3 staff to the site. Staff addressed this issue (Ex. 101, pp. 8-9):

### Local Area Transportation Review

The 2012-2016 Subdivision Staging Policy (County Council's Resolution No. 17-601) states that if the use and occupancy certificate for 75% of the originally approved development was issued more than 12 years ago (April 2004, in this case), the traffic study for the proposed uses must be based on the increased number of peak-hour vehicular trips rather than the total number of peak-hour trips. Therefore, the six vehicular trips generated by the existing 73-child day care center in each of the weekday peak hours (morning or evening) are considered existing trips already on the road network and only the traffic generated by the additional 20 children and three employees is analyzed for trip generation purposes.

According to the Applicant's traffic statement, within the weekday morning (6:30 to 9:30 a.m.) and evening (4:00 to 7:00 p.m.) peak periods, 58 of the 73 existing children walk with their parents to the existing day care center, the other 15 are driven to the center. Eleven of twelve existing employees walk or take transit, only one drives to the site. This pattern of travel has existed since at least the approval of SE 03-04 in April 2004, and is expected to continue with the proposed addition of 20 children and three employees. Therefore, with the arrivals and departures to be staggered with no more than three vehicles every 15 minutes, as recommended by Staff as a condition of approval, the proposed addition of 20 children and three employees will result in no more than two additional vehicular trips in any peak hour within each of the weekday morning and evening peak periods.

A traffic study is not required to satisfy the Local Area Transportation Review (LATR) test because two new peak hour vehicular trips generated by the proposed addition of 20 children and three employees during each of the weekday peak period is below the threshold of 30 vehicular peak hour trips during any of the weekday peak periods. Although not relevant for the LATR analysis purposes, Staff notes that if the same day care center (with up to 93 children) was not located in such walkable, dense development of garden apartments, it would generate approximately 43 peak hour trips in the morning and 47 peak hour trips in the evening during weekday peak periods, and require a traffic study (as compared to eight in the morning and eight in the evening at the current location).

\* \* \*

### Policy Area Review

Under the current Transportation Policy Area Review (TPAR) controls, no TPAR payment will be required because the proposed use will not increase the square footage of the existing apartment building.

There is no evidence in the record to dispute Staff's conclusion that the proposed expansion of the existing use will result in only two new peak-hour trips in the morning and



evening peak hours and that transportation facilities will not be adversely affected. In order to ensure this result, a condition is imposed in Part IV of this Report and Decision that requires the Applicant to enter into an agreement with each parent arriving by vehicle, specifying an assigned arrival and departure time, staggering drop-off and pick-up times to no more than three vehicles every 15 minutes.

In sum, both LATR and TPAR are satisfied in this case, and the Hearing Examiner finds that the proposed development will be served by adequate public services and facilities.

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

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

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, 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 Day Care Center for more than 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 have determined that the following physical and operational characteristics are necessarily associated with (*i.e.*, are inherent in) a child Day Care center (Exhibit 101, p. 16): (1) vehicular trips to and from the site; (2) drop-off and pick-up areas; and (3) noise generated by children in the outdoor play areas.

Staff analyzed the potential impacts on the neighborhood as follows (Ex. 101, p. 16):

There will be no adverse traffic impacts caused by the proposed use since a majority of the children will be walked to the day care by their families, and many of the employees will take transit. There will be adequate area for drop-off and pick-up of children. Outdoor play areas are adequate, and Staff is recommending as a condition of approval that outdoor play time be limited to 30 minutes for each group of no more than 19 children during two hours in the morning and two hours in the afternoon. Each of the play areas is enclosed by a six-foot tall fence. The landscaping and lighting on the property will not be modified and is adequate and consistent with the residential character of the neighborhood.

Technical Staff did not mention finding any non-inherent adverse effects, and Staff concluded (Exhibit 101, p. 16), “The proposed use will not cause undue harm to the neighborhood as a result of non-inherent adverse effect alone or in the combination of inherent and a non-inherent adverse effect of the defined categories.”

Conclusion: It is unusual to have a child Day Care Center of this size occupying individual units of a garden apartment complex, and the Hearing Examiner therefore recognizes this situation as a non-inherent site characteristic; however, the Hearing Examiner agrees with Technical Staff that the proposed expansion of the existing use will not cause any adverse effects or undue harm to the neighborhood. On the contrary, the location of this facility in a garden apartment complex has reduced the amount of vehicular traffic that such a use would ordinarily cause. This use has functioned for decades in the subject garden apartment complex with no apparent adverse effects on the surrounding neighborhood. Rather, it has provided a benefit to the neighborhood in making child care readily available within walking distance. Moreover, the conditions imposed in Part IV of this Report and Decision will keep the noise from outside play to a minimum and will ensure that there will not be an excessive burden placed on the neighboring roads and parking areas. They will also help to ensure that the facility can operate safely and without causing any adverse effects on the neighborhood, undue or otherwise.

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

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

Conclusion: As observed by Technical Staff (Exhibit 101, p. 17), “The proposed use will not modify the exterior of the building, which will continue to be compatible with the character of the residential neighborhood.” The Hearing Examiner so finds.

***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)**

Conclusion: 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-20 Zone. Development standards for the R-20 Zone are contained §59.4.4.15. of the Zoning Ordinance. However, this case is rather different from the ordinary child Day Care Center case because it is located in apartment units of a 7.6 acre garden apartment complex (White Oaks Garden Apartments) that has existed for many years, and the Applicant is not the owner of the property, but merely a business occupant of some of the apartment units.

The Board of Appeals initially approved the first part of the child care center as a special exception in the “White Oak Gardens Subdivision” back in 1967 (Exhibit 41(b), approving CBA 2315). Nothing is proposed by the current Applicant that would modify the floor area, height, footprint, density, setbacks, or any other characteristic of the overall development governed by the standards of the R-20 Zone.

Section 59.7.7.1.A of the Zoning Ordinance provides:

***Section 7.7.1. Exemptions***

***A. Existing Structure, Site Design, or Use on October 30, 2014***

***1. Structure and Site Design***

*A legal structure or site design existing on October 30, 2014 that does not meet the zoning standards on or after October 30, 2014 is conforming and*

*may be continued, renovated, repaired, or reconstructed if the floor area, height, and footprint of the structure are not increased, except as provided for in Section 7.7.1.C for structures in Commercial/Residential, Employment, or Industrial zones, or Section 7.7.1.D.5 for structures in Residential Detached zones.*

**2. Use**

- a. Except for a Registered Living Unit, any use that was conforming or not nonconforming on October 29, 2014 and that would otherwise be made nonconforming by the application of zoning on October 30, 2014 is conforming, but may not expand.*
- b. Any allowed use, up to the density limits established by the current zoning, may be located in a building or structure deemed conforming under Section 7.7.1.A.1.*

Technical Staff noted that “The Application does not propose any modifications to the existing building or landscape.” Exhibit 101, p. 9. Staff therefore concluded, “The existing building will continue to comply with the requirements of the zone.” Exhibit 101, p. 9. There is no contrary evidence in this case, and therefore it appears on this record that the subject site complies with current zoning standards.

Moreover, even if the existing structures were not in conformance with the current R-20 zoning standards, the garden apartments in question are, according to Technical Staff, in compliance with the standards of the prior Zoning Ordinance and are therefore legal structures under the prior Zoning Ordinance. Accordingly, they are defined, at the very least, as “conforming” structures under Section 59.7.7.1.A.1 of the current Zoning Ordinance, quoted above. The proposed use is allowed as a conditional use in the R-20 Zone under Zoning Ordinance §59.3.1.6., and does not increase the density of the development. Therefore, the use may be located as proposed by the Applicant, per Section 59.7.7.1.A.2.b., quoted above.

Based on this record, the Hearing Examiner finds and concludes that the propped use will meet the development standards of the R-20 Zone, to the extent required by the 2014 Zoning Ordinance.

**C. Use Standards for a Child Day Care Center for Over 30 Persons (Section 59.3.4.4.F.2.)**

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

**2. Use Standards**

***a. Where a Day Care Center (Over 30 Persons) is allowed as a limited use, and the subject lot abuts or confronts property zoned Agricultural, Rural Residential, or Residential Detached that is vacant or improved with an agricultural or residential use, site plan approval is required under Section 7.3.4.***

Conclusion: This section is not applicable because the proposed Day Care Center is not allowed as a limited use. It is allowed as a conditional use, as discussed below.

***b. Where a Day Care Center (Over 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:***

***i. All required parking must be behind the front building line; however, required parking may be located between the structure and the street where the Hearing Examiner finds that such parking is safe, not detrimental to the neighborhood, accessible, and compatible with surrounding properties.***

Conclusion: Technical Staff confirmed that all parking spaces are located behind the front building line. In addition, Staff found that the parking spaces “are safe, not detrimental to the neighborhood, accessible, and compatible with surrounding properties.” Exhibit 101, p. 10. The Hearing Examiner therefore finds that the proposed use is compliant with this subsection.

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

Conclusion: According to Technical Staff’s analysis (Exhibit 101, p. 10),

There is adequate area for drop-off and pick-up of children. The drive aisle is approximately 21 feet wide connecting to a sidewalk leading to the day care center entrance. In addition to the five of the six designated parking spaces available for discharge and pick up of children, the two-way drive aisle is wide enough for cars to remain parked while children are walked in.

In addition to Staff's observation, the Applicant testified that children being dropped off at the bus stop will be met by a staff member of the child care center and escorted to the child care entrance. Tr. 47 and 59. Children dropped off and picked up by car are escorted by their parents to the entrance of the Day Care Center, as are those who are walk to the facility. Tr. 54. Given this record, the Hearing Examiner finds that an adequate area for drop-off and pick-up of children is provided.

***iii. The Hearing Examiner may limit the number of children outside at any one time.***

Conclusion: Technical Staff recommended that a maximum of 19 children should be allowed outside for play at any one time to limit noise. The Applicant has agreed to this restriction (Tr. 6, 24), and the Hearing Examiner has adopted it as a condition in Part IV of this Report and Decision. In addition, conditions have been imposed prohibiting amplified noise outside and specifying that outside play time may not start before 9:00 a.m. and must end by 5:30 p.m. Outdoor play will be staggered in 30-minute increments for two hours in the morning and two hours in the afternoon. The Hearing Examiner finds that this provision has been satisfied.

***iv. In the RE-2, RE-2C, RE-1, R-200, R-90, R-60, and R-40 zones, the Day Care Center (Over 30 Persons) must be located on a site containing a minimum of 500 square feet of land area per person. The Hearing Examiner may reduce the area requirement to less than 500 square feet, but not less than 250 square feet, per person where it finds that:***

***(a) the facility will predominately serve persons of an age range that requires limited outdoor activity space;***

***(b) the additional density will not adversely affect adjacent properties; and***

***(c) additional traffic generated by the additional density will not adversely affect the surrounding streets.***

Conclusion: This provision is not applicable because the subject site is in the R-20 Zone, not in any of the zones listed in this provision.



***v. The Hearing Examiner may limit the number of people allowed for overnight care.***

Conclusion: This provision is not applicable because the proposed use does not include any overnight care.

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

Conclusion: This provision is not applicable because the site is not located in the AR Zone.

Conclusion: In sum, the application satisfies all of the use standards in Code §59.3.4.4.F.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, and whether the use meets these requirements, are discussed below.

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

Zoning Ordinance Division 59.6.1. governs “Site Access.” Section 59.6.1.2. provides:

*Division 6.1 applies to development in the Residential Multi-Unit, Commercial/Residential, Employment, Industrial, and Floating zones if:*

- A. an apartment, multi use, or general building type is proposed; and*
- B. a site plan or conditional use approval is required.*

As noted by Technical Staff (Exhibit 101, p. 11), the subject site is zoned R-20, which is a Residential Multi-Unit zone of medium density. Therefore, the site access provisions of Division 6.1 do apply. The general access requirements are contained in Section 59.6.1.3:

*Section 6.1.3 General Access Requirements*

*A. Any development must:*

- 1. Allow a vehicle, pedestrian, or bicycle to enter and exit the property to and from a street or an abutting site safely;*
- 2. Limit vehicle access across a primary pedestrian, bicycle, or transit route wherever feasible;*
- 3. Allow a vehicle to enter and exit any on-site parking area in a forward motion; and*
- 4. Allow a vehicle to access any pad site from within the site.*

Conclusion: The Day Care Center is located in the northeastern corner of a garden apartment complex. Technical Staff found that “The existing drive aisle allows vehicles, pedestrians and bicycles to enter from Lockwood Drive and exit back onto Lockwood Drive safely in a forward motion without crossing a primary pedestrian, bicycle and transit route.” Exhibit 101, p. 11. There is no contrary evidence in the record, and the Hearing Examiner finds that the proposal satisfies the specified general access requirements.

Section 59.6.1.4 specifies the dimensions required for driveway access:

*Section 6.1.4. Driveway Access*

A. *Driveway dimensions must satisfy the following table:*

<b>Zone</b>	<b>Width (min.)</b>	<b>Width (max.)</b>	<b>Radius (max.)</b>
Two-way	20'	24'	10'
Existing Driveway	+/- 21'		Dead end along a driveway

Technical Staff found that the existing driveway dimensions satisfy the required two-way driveway width. Exhibit 101, p. 12. There is no contrary evidence in the record, and the Hearing Examiner finds that the proposal satisfies the specified driveway access dimensions.

B. *The applicable deciding body may require a wider driveway if there is an unusual traffic, grade, or site condition.*

C. *If on-site parking is accessible from an improved alley with a right-of-way of at least 20 feet in width:*

1. *access must be from the alley;*
2. *and new curb cuts along the public right-of-way must be limited, to the extent practicable.*

D. *A maximum of 2 driveways may be permitted for every 300 feet of site frontage along any street.*

E. *Unless the road is classified as a residential road, a vehicle must access a corner lot with only one driveway or a through lot from the street with the lower roadway classification.*

Technical Staff did not address the remaining site access provisions listed above, but since the Applicant is not the owner of the garden apartment complex and the proposed expansion of the

existing use will not affect any of the access provisions quoted above, the Hearing Examiner finds, per his authority under Section 59.7.3.1.E.1.b., that a demonstration of compliance with those standards is not necessary to ensure compatibility.

## **2. Parking Spaces Required, Parking Setbacks, Parking Lot Screening and Waivers**

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

### ***a. Number of Parking Spaces Required by Section 59.6.2.4 and the Waiver Request***

The required number of parking spaces for vehicles and bicycles, as specified in Section 59.6.2.4 for this use, are referenced in the Table on page 12 of the Staff report (Exhibit 101):

Floor Area of the proposed Day Care Center: 4,270 SF			
Day Care Center Use	Required	Existing	Proposed
6.2.4.B. 3 Spaces/1,000 SF	13	4	6
6.2.4.C. 1 bicycle parking/5,000 SF	1	0	0

As can be seen from the above table, Technical Staff calculated that 13 automobile parking spaces would be required for the proposed expanded Day Care Center pursuant to Zoning Ordinance §59.6.2.4.B. Under that section, a Day Care Center requires 3 spaces per 1,000 square feet of gross floor area dedicated to the use. In this case, the gross floor area of the combined 5 apartments is 4,270 square feet, according to Staff (Exhibit 101, p. 2). Dividing that by 1,000, gives us a multiplier of 4.27, which when multiplied by 3, results in a requirement for 13 (*i.e.*, 12.81 rounded up) parking spaces, as indicated in the table in the Staff report (Exhibit 101, p. 12).

The Applicant's use currently has four parking spaces, and the Applicant proposes to add two more, for a total of six automobile parking spaces. One bicycle parking space must also be

provided per §59.6.2.4.C., and a condition will be imposed, as recommended by Technical Staff, requiring the Applicant to provide a single bicycle rack.

Since the Applicant seeks to provide seven fewer vehicle spaces than the 13 that would be called for under the Code, she has requested a waiver of the parking space requirement under Section 59.6.2.10 of the Zoning Ordinance (Exhibit 99(b)). Section 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.*

The Applicant provided the notice called for in the Code (Exhibit 99(a)), and she filed an argument in support of the waiver (Exhibit 99(b), pp. 2-3), as summarized in Part II.C.2. of this Report and Decision. Technical Staff supported the waiver request (Exhibit 101, p. 13) for the reasons set forth in Part II.C.2. of this Report and Decision.

Conclusion: The Hearing Examiner agrees with the argument set forth by the Applicant (Exhibit 99(b), p. 3) and endorsed by Technical Staff. Under Section 6.2.10, “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.” Section 6.2.1 provides that the parking requirements are imposed to ensure “adequate parking is provided in a safe and efficient manner.” Staff also found that “There is adequate area for drop-off and pick-up of children.” Exhibit 101, p. 10.

In this case, given that the majority of staff and children walk to the center, the evidence is that parking has never been an issue. The Hearing Examiner finds that, based on the unusual factors involving the operation of this facility and the persons it serves, six vehicular parking spaces constitute adequate parking. Moreover, as determined by Technical Staff, there is an adequate area for the drop-off and pick-up of children. Therefore, the Hearing Examiner

concludes that the requested parking waiver is justified. The Applicant need provide only the six vehicle spaces she proposes for the expanded use. A condition is also imposed requiring the Applicant to provide a bike rack to ensure that at least one bicycle space is available.

***b. Parking Setbacks, Screening and Landscaping***

The proposed expansion of the existing conditional use will not change the overall number of parking spaces available in the garden apartment complex; nor will it change their dimensions, setbacks, screening or landscaping. Instead, the owner of the complex will just be making two additional, existing parking spaces available to the conditional use. Probably in light of this fact, Technical Staff did not address the remaining provisions relating to parking facilities in its report. Since the Applicant is not the owner of the garden apartment complex and the proposed expansion of the existing use will not affect any of the parking lot provisions relating to parking space dimensions, setbacks, screening or landscaping, the Hearing Examiner finds, per his authority under Section 59.7.3.1.E.1.b., that a demonstration of compliance with those standards is not necessary to ensure compatibility.

**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: No new lighting or modified lighting is proposed for the subject site, and therefore

Zoning Ordinance §59.6.4.4.E. is inapplicable to this case.

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

The provisions of Division 6.4 are mostly general and definitional; however, the provisions of Division 6.5 are very specific. Zoning Ordinance §59.6.5.2.C. provides:

#### ***C. Residential Townhouse, Residential Multi-Unit, Commercial/Residential, Employment, and Industrial Zones***

*In the Residential Townhouse, Residential Multi-Unit, Commercial/Residential, Employment, and Industrial zones:*

- 1. The conditional use in a detached house or duplex building type 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.*[Emphasis added.]
  - a. The conditional use standards under Article 59-3 may exempt the development from this requirement.*
  - b. The Hearing Examiner may increase the amount of screening required for conditional use approval under Section 7.3.1.*

Conclusion: Technical Staff points out that although the subject site is in a Residential Multi-

Unit zone, it does not abut property in an Agricultural, Rural Residential, or Residential

Detached zone. Exhibit 101, p. 14. Therefore, the screening and landscaping provisions are not



applicable to the proposed conditional use in this case. The Applicant does not propose any changes to the existing landscaping, which of course is controlled by the garden apartment complex, not the Applicant. Since the Applicant is not the owner of the garden apartment complex and the proposed expansion of the existing use will not affect any of the applicable screening and landscaping provisions, the Hearing Examiner finds, per his authority under Section 59.7.3.1.E.1.b., that a demonstration of compliance with those standards is not necessary to ensure compatibility.

#### **4. Signage**

Conclusion: The only signs proposed by the Applicant are the five existing signs depicted in Exhibit 106(b)(iii)), and reproduced on page 18 of this Report and Decision, with their locations as noted on the final site plan (Exhibit 106(a)). Even though the signs in question already exist, they must be in compliance with the Zoning Ordinance, or be exempted by the Sign Review Board of the Department of Permitting Services.

The use of signage is governed by Division 6.7. Zoning Ordinance §59.6.7.8.A.1 sets the general standards for signs in residential zones; however, some of these limits are relaxed by §59.6.7.8.B.1 and B.2 for signs in multi-unit developments and signs for places of assembly. Because the signs in question are in a multi-unit development and the owner and managers of that development apparently have allowed the signs, as shown, to exist in their current locations, the Hearing Examiner finds they are compatible with the surrounding neighborhood. However, it will be up to the Department of Permitting Services (DPS) and the Sign Review Board to determine whether the existing signs are in compliance with the restrictions of the Zoning Ordinance or whether one or more sign variances are in order.

Thus, before the Applicant can obtain sign permits, she will have to get approval from DPS and possibly the Sign Review Board. A condition is imposed in Part IV of this Report and Decision which will require the Applicant to submit applications to the Department of Permitting Services (DPS), and if required, to the Sign Review Board, for approval of all signs she proposes to keep publically posted regarding the subject child Day Care Center. If permits are obtained, the Applicant should file copies of the permits with OZAH.

#### 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.

Based on the foregoing findings and conclusions and a thorough review of the entire record, the application of Samina Ali Zai, d/b/a Smart-Ed Early Learning Center (CU 15-08), for a conditional use under Section 59.3.4.4.F. of the Zoning Ordinance, to operate a child Day Care Center for up to 93 children in the White Oak Gardens Apartments, located at 11624 Lockwood Drive, in Units T-1, T-2 and T-3, and in an adjoining building, 11628 Lockwood Drive, in Units T-2 and T-3, Silver Spring, Maryland, is hereby **GRANTED**, subject to the following conditions:

1. The Conditional Use must be limited to a child Day Care Center with up to 93 children, from infants to twelve years old, and a maximum of 15 non-residential employees on site at any one time. A five-minute overlap is allowed in staff presence on the site so that children are always fully attended when there is a changeover in staff.
2. The Applicant must schedule staggered drop-off and pick-up times with no more than three vehicles every 15 minutes. To ensure compliance, the Applicant must enter into an agreement with each parent arriving by vehicle specifying an assigned arrival and departure time.
3. The hours of operation are limited to Monday through Friday, 6:30 a.m. to 7:00 p.m.
4. To reduce noise, the number of children playing outside at any one time must not exceed 19.

5. Outside play time may not start before 9:00 a.m. and must end by 5:30 p.m. Outdoor play must be staggered in 30-minute increments for no more than two hours in the morning and two hours in the afternoon.
6. The Applicant must seek to revoke as abandoned all previously approved special exceptions for the existing use that are still valid. To accomplish this, prior to issuance of use and occupancy permit for the combined child Day Care Center, the Applicant must request that the Board of Appeals revoke the existing special exception S-82 on the subject site, as abandoned, and must request that OZAH revoke the existing special exception SE 03-4 on the subject site, as abandoned. If special exceptions CBA-2315 and CBA-2710 still exist, both of which were superseded by special exception S-82, they should be revoked as abandoned as well.
7. The Applicant must provide a minimum of one bike rack on the site.
8. The Applicant shall be bound by her testimony, the testimony of her witnesses, the representations of her attorney, and the exhibits of record.
9. The Applicant must comply with all Maryland State and Montgomery County licensure requirements and standards for the operation of a child Day Care Center, and must correct any deficiencies found in any government inspection.
10. Children shall be escorted to, and supervised at, school bus stops by an adult or a staff member of the Day Care Center.
11. In no event may a child be dropped off before a staff member is present to supervise that child; nor may a child be left alone if a parent is late in making a pick-up.
12. The Applicant shall not use a public address system of any kind outside the building, nor shall any amplified music be played outside the buildings.
13. All children must be under the direct supervision of a staff member at all times, both inside and outside the building.
14. The Applicant shall maintain the grounds in a clean condition, free from debris, on a daily basis.
15. In light of the evidence in this case, the Hearing Examiner hereby grants a waiver, pursuant to Zoning Ordinance §59.6.2.10, reducing the number of required vehicle parking spaces to six; however, the Applicant is required to have at least five of those parking spaces dedicated to dropping off and picking up children for the child Day Care Center at the location shown in the site plan (Exhibit 106(a)), and those spaces must be designated by a small sign reserving the location of the six parking spaces for the use of the child Day Care Center.

16. The Applicant must submit applications to the Department of Permitting Services (DPS), and if required, to the Sign Review Board, for approval of all signs she proposes to keep publically posted regarding the subject child Day Care Center. The Applicant must file a copies of all sign permits with OZAH.
17. 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.

Issued this 2<sup>nd</sup> day of August, 2016.



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Martin L. Grossman  
Hearing Examiner

#### NOTICE OF RIGHT TO REQUEST ORAL ARGUMENT

Any party of record or aggrieved party may file a written request to present oral argument before the Board of Appeals, in writing, within 10 days after the Office of Zoning and Administrative Hearings issues the Hearing Examiner's report and decision. Any party of record or aggrieved party may, no later than 5 days after a request for oral argument is filed, file a written opposition or request to participate in oral argument.

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.

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

#### NOTICES TO:

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