

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

**IN THE MATTER OF:** \*  
**NAMALIE BENTOTA D/B/A** \*  
**PLAYPEN4KIDS** \*  
\*  
Applicant \* OZAH Case No. CU 17-11  
\*  
Namalie Bentota \*  
Saman Bentota \*  
\*  
For the Application \*  
\*

\*\*\*\*\*

Before: Lynn A. Robeson, Hearing Examiner

**HEARING EXAMINER’S REPORT AND DECISION**

**TABLE OF CONTENTS**

**I. STATEMENT OF THE CASE** .....2  
**II. FACTUAL BACKGROUND** .....4  
    **A. The Subject Property** .....4  
    **B. Surrounding Neighborhood** .....5  
    **C. Proposed Use** .....7  
        **1. Site Plan, Lighting and Signage** .....7  
        **2. Operations** .....8  
        **3. Parking for Employees and for Parent Drop-Off and Pick-Up**.....9  
    **D. Community Response** .....10  
**III. FINDINGS OF FACT AND CONCLUSIONS OF LAW**.....10  
    **A. Necessary Findings (Section 59-7.3.1.E.)**.....11  
    **B. Development Standards of the Zone (Article 59-4)**.....18  
    **C. Use Standards for a Group Day Care for 9 to 12 Persons (Section 59-3.4.4.D.)**.....21  
    **D. General Development Standards (Article 59-6)**.....22  
        **1. Parking Spaces Required** .....22  
        **2. Site Landscaping and Screening** .....23  
        **3. Signage**.....24  
**IV. CONCLUSION AND DECISION** .....24

## I. STATEMENT OF THE CASE

On December 16, 2016, the Applicant, Namalie Bentota, filed an application seeking approval of a conditional use to operate a Group Day Care for up to 12 children in her home at 11009 Nicholas Drive, Silver Spring, Maryland. She owns the property with her husband, Saman Bentota. Exhibit 13. Mr. Bentota filed a letter consenting to this application and appeared at the public hearing in support of the application. Exhibit 2. The subject property is described as Lot 2, Block 4 of the Parklawn Subdivision, which is zoned R-90. Exhibit 6. The Applicant currently runs a Family Day Care with eight children in her home, a use permitted by right. T. 6. Child care facilities for up to 12 individuals must be approved as a conditional use under §59-3.4.4.D of the Montgomery County Zoning Ordinance.<sup>1</sup>

On March 13, 2017, the Office of Zoning and Administrative Hearings (OZAH) sent notice of a public hearing to be held on April 14, 2017. Exhibit 19. Technical Staff of the Montgomery County Planning Department (Technical Staff or Staff) issued its report on March 2, 2017, recommending approval of the application subject to the following conditions (Exhibit 21(a), p. 2):

1. The proposed group day care must be limited to 12 children and up to three non-resident staff.
2. The Applicant must schedule staggered drop-off and pick-up of children with no more than four vehicles entering and exiting the site in any 30-minute period.
3. The hours of operation are limited to Monday through Friday, 7:00 a.m. to 6:30 p.m.
4. Outdoor play time may not start before 10:00 a.m. and must end by 5:00 p.m.

The Planning Board considered the application on March 16, 2017, and voted unanimously to recommend approval with the conditions recommended by Staff. The Board also recommended

---

<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.

approval of Ms. Bentota's request to waive a requirement to provide one permanent bicycle space on-site because it is "unlikely that a bicycle parking space would be needed at the Site based on the current and expected employment at the day care." Exhibit 21.

The public hearing proceeded as scheduled on April 14, 2017. Mr. and Mrs. Bentota testified in support of the application. Mr. Bentota mentioned several corrections to the Staff Report. T. 6. He stated that the schedule of parent drop-off and pick-ups listed as Attachment 1 were not really a set schedule; the attachment just listed the times that the children had arrived for a two-week period. Each child comes in a different vehicle. He submitted an updated list of parent arrival and pick-up times. T. 7-8; Exhibit 27. Mrs. Bentota testified that the limitations on drop-offs and pick-ups recommended by Staff were acceptable to her. T. 8. Mr. and Mrs. Bentota agreed to a condition requiring parent drop-off and pick-up to occur on Constance Street (adjacent to the daycare entrance). They also agreed to a condition that not more than two vehicles may drop-off or pick-up at one time so that children do not have to cross the street to reach the daycare. T. 11-12. According to Mr. Bentota, they did apply for and receive a building permit for the fence in the rear yard surrounding the children's play area. T. 13.

At the Hearing Examiner's request, Mr. Bentota brought a scaled house location survey to the public hearing, sealed by an engineer. In order to determine whether the property met the development standards of the R-90 Zone, Mr. Bentota measured yard setbacks, the width at the front building line, and the width of the front lot line. T. 16-19. Mr. Bentota testified that the floor plan, site plan, and photographs they had submitted still accurately depicted the property. T. 20. They stated they would be willing to replace the existing banner sign with a permanent sign. Mrs. Bentota marked two locations on the site plan (Exhibit 8) where she would like to place the sign if permitted by the Department of Permitting Services (DPS). T. 22. No one appeared in

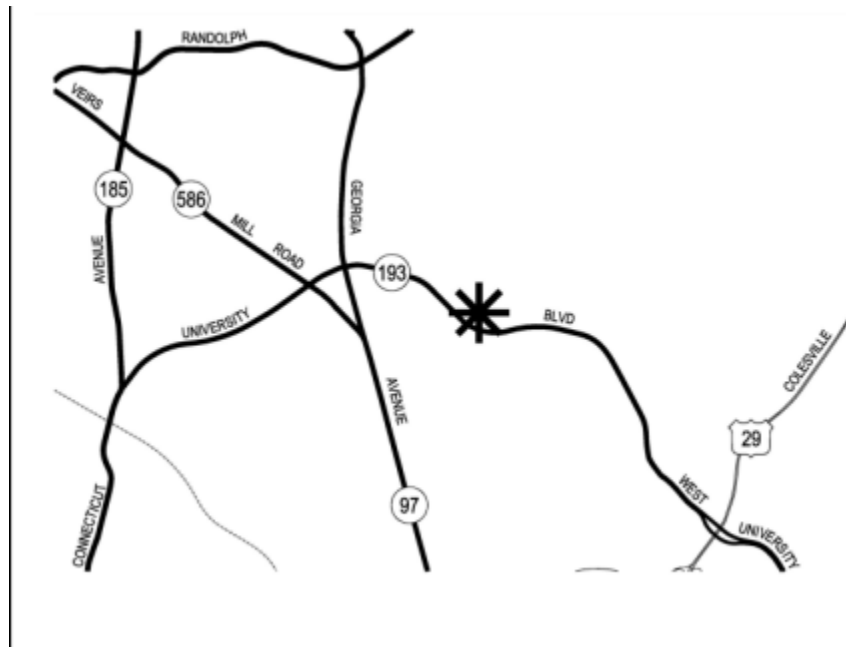
opposition to the application.

The record closed on April 24, 2017. For the following reasons, the Hearing Examiner approves the conditional use application as well as the waiver from the requirement to provide an on-site bicycle storage space, subject to the conditions listed in Part IV.

## II. FACTUAL BACKGROUND

### A. The Subject Property

The subject lot contains approximately 9,900 square feet located in the southwest quadrant of the intersection of Nicholas Drive and Constance Street in Silver Spring. Below is a vicinity map showing the property's general location (Exhibit 21(a), p. 1):



The property is improved with a one-story, detached house built in 1958. It has no garage, but does have a driveway wide enough to accommodate two cars parked side by side. Exhibit 21(a), p. 2. Staff advises that the existing driveway is approximately 20-feet in length by 21-feet wide. *Id.* The main entrance faces Nicholas Drive. Access to the entrance from the day care is

from a four-foot wide concrete sidewalk on Constance Street that connects to a door on the rear of the house. Both Nicholas Drive and Constance Street are two-way residential streets with parking permitted on both sides. A board-on-board privacy fence surrounds the northern and eastern yards. An aerial photograph of the property (which does not show the fence), from the Staff Report, is shown below (Exhibit 21(a), p. 2):



## B. Surrounding Neighborhood

For the purpose of determining the compatibility of the proposed use, it is necessary to delineate and characterize the “surrounding neighborhood” (*i.e.*, the area that will be most directly impacted by the proposed use). Staff delineated the neighborhood as “generally bounded by other single-unit houses on Ladd Street to the north, Inwood Avenue to the east, University Boulevard



West to the south, and Reedie Drive to the west. Exhibit 22, p. 3. The “surrounding area” as defined by Staff is depicted in an aerial photograph from the Staff Report (Exhibit 21(a), p. 4):



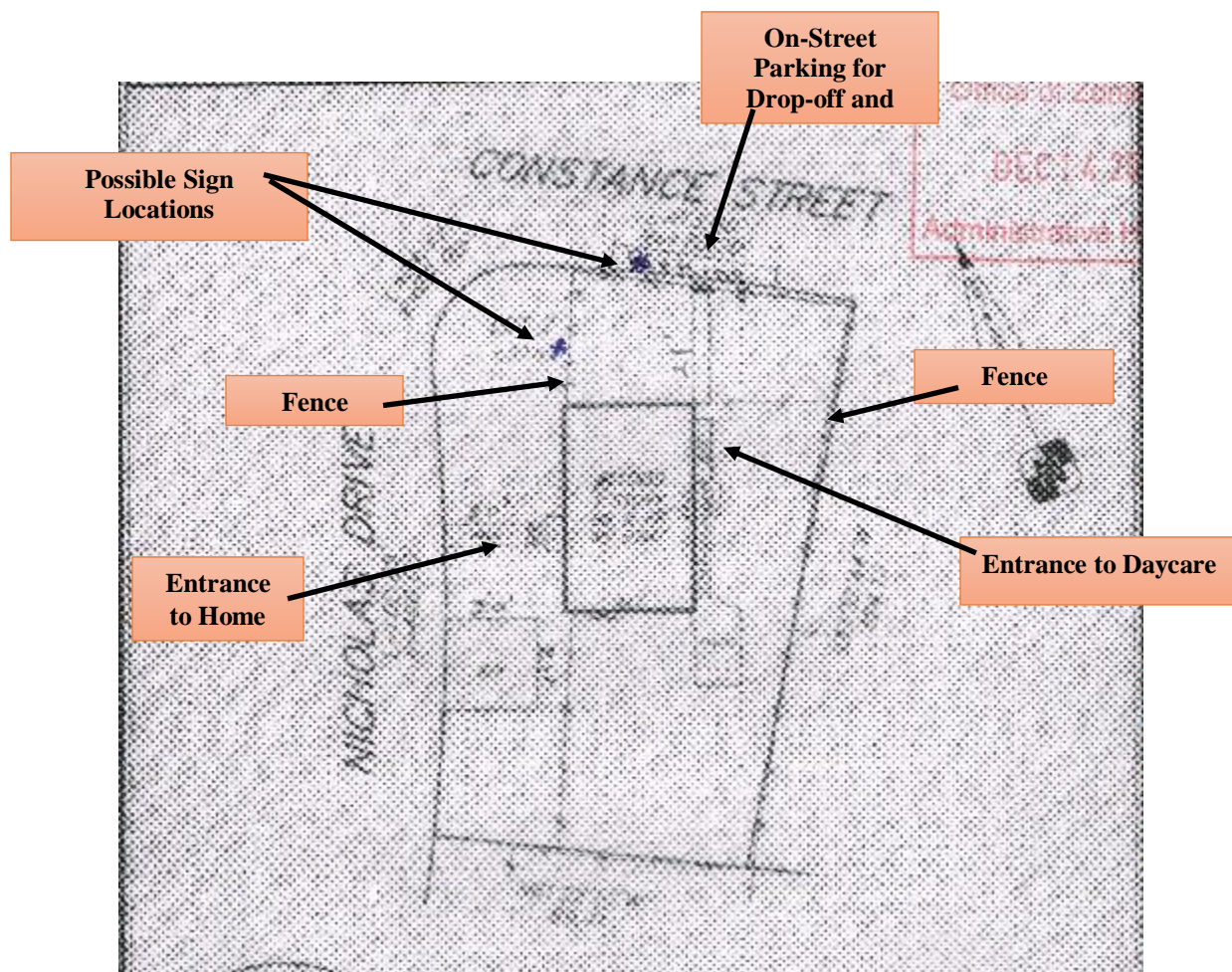
Staff notes that the “Parkway subdivision” consists of single-family detached homes built in the late 1950’s and early 1960’s. The homes are a mix of one-story buildings with no garages and two-story structures with a garage. There are two conditional uses (formerly special exceptions) for accessory apartments in the neighborhood. *Id.* Based on this evidence, the Hearing Examiner characterizes the surrounding area as residential, primarily consisting of single-family detached homes in the R-90 Zone.

### C. Proposed Use

Mrs. Bentota has operated a family day care for 8 children in her home since 2015. Exhibit 21(a); T. 6. She now wishes to increase the number of children to 12 without altering any of the existing physical improvements on the property.

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

A house location survey, with additions by the Applicant to show existing features of the site, serves as the Conditional Use Site Plan in this case.<sup>2</sup> Exhibit 8. It is shown below:



<sup>2</sup> This is the best reproduction of the site plan submitted that could be achieved from the materials submitted into the record.

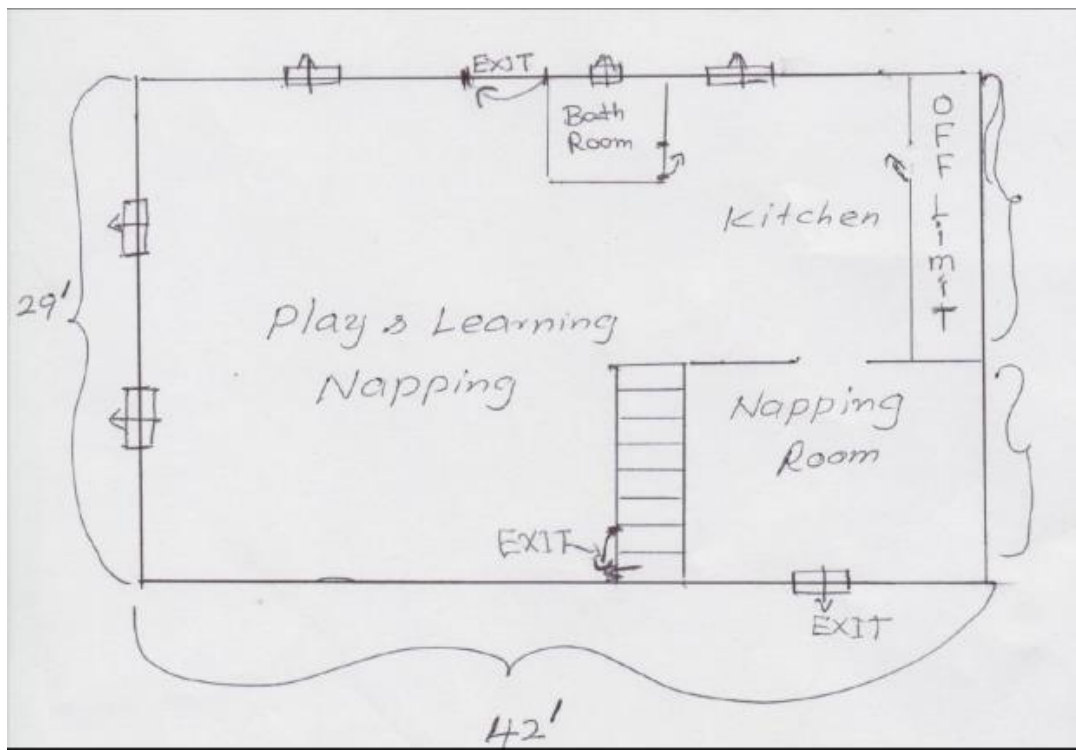


At the time of the public hearing, Ms. Bentota advertised the daycare with a banner sign hanging on the board-on-board fence. Exhibit 21(a). When apprised that banner signs are not permitted, she agreed to file for a permit with the Department of Permitting Services for a permanent sign and marked two desired locations on the site plan (the locations are marked in blue). Exhibit 8; T. 22-24. Ms. Bentota does not propose any changes to the existing lighting. Exhibit 21(a), p. 9.

## 2. Operations

The Applicant proposes no changes to the current hours of operation, which are 7:00 a.m. to 6:30 p.m. Ms. Bentota currently employs one non-resident individual. If the expansion is approved she may add a second non-resident employee. T. 8-9.

Ms. Bentota operates the group day from the lower level of her home and in the fenced back yard. A floor plan of the lower level shows the different areas devoted to the day care (Exhibit 14):





Outdoor play occurs twice a day from 10:30 a.m. and 12:00 p.m. and between 3:00 p.m. and 5:00 p.m. Play periods will be divided between two groups, each with a maximum of six children outdoors at one time. Exhibit 21(a), p. 5. A photograph of the outdoor play area from the Staff Report is reproduced below (Exhibit 21(a), Attachment 2):



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

Parents and children enter the day care from an entrance to the rear of the home accessed from Constance Street. There are two parking spaces along the site's frontage on Constance Street and two on Nicholson Drive. In addition to the on-street parking spaces, there are two on-site parking spaces within the driveway. Exhibit 21(a), p. 3. The two on-street parking spaces on Constance Street are typically used for parent drop-off and pick-up as they are closest to the day care's entrance. Exhibit 8. Mr. Bentota agreed to a condition of approval prohibiting more than two parents to drop-off or pick-up at one time so that children do not have to cross Constance

Street to reach the day care. T. 10-12. Below is a photograph of the Constance Street entrance (Exhibit 21(a), Attachment 2) from the Staff Report:



#### **D. Community Response**

No one appeared in opposition to this application.

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

A conditional use is a zoning device that authorizes certain uses provided that pre-set legislative standards are met. Pre-set legislative standards are both specific and general. General standards are those findings that must be made for almost all conditional uses. *Zoning Ordinance*, §59-7.3.1.E. Specific standards are those which apply to the particular use requested, in this case, a Group Day Care for up to 12 children. *Zoning Ordinance* §59-3.4.4.D.

Weighing all the testimony and evidence of record under the “preponderance of the evidence” standard specified in *Zoning Ordinance* §59-7.1.1, the Hearing Examiner concludes that

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

**A. Necessary Findings (Section 59-7.3.1.E.)**

The general findings necessary to approve a conditional use are found in Section 59-7.3.1.E of the Zoning Ordinance. Standards pertinent to this review, and the Hearing Examiner's conclusions for each finding, are set forth below:<sup>3</sup>

***E. Necessary Findings***

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

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

Conclusion: Technical Staff advises that there are no previously approved conditional uses associated with this site. Exhibit 21(a), 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;***<sup>4</sup>

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 finds that the application satisfies these requirements.

---

<sup>3</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 apply to this application. Section 59-7.3.1.E.1. contains seven subparts, a. through g.

<sup>4</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;***

Conclusion: The subject property lies within the geographic area covered by the 1989 *Communities of Kensington-Wheaton Master Plan* (Master Plan or Plan). The Master Plan does not specifically discuss the subject site, but it does support establishing more child day care facilities in the area. Under the title “Community Facilities,” the Plan’s objective is to, “[P]romote greater child day care, elderly housing and disabled accessibility opportunities through appropriate land use recommendations and policies.” *Plan*, p. 36. Noting the shortage of childcare facilities in the area, the Plan encourages land use policies to promote in-home daycare facilities, and recommends a review of land use policies to encourage more day care opportunities. *Id.* at 139. In addition to encouraging more day care facilities, two of the Plan’s overall land use objectives are, “[T]o protect and stabilize the extent, location, and character of existing residential and commercial land uses,” and to “maintain the well-established low-to medium density residential character which prevails over most of the planning area.” *Id.* at 28.

Staff concluded that the Applicant’s proposed group daycare conformed to these Plan objectives (Exhibit 21(a), p. 6):

The Applicant’s proposal conforms to the general recommendations, objectives and policies of the Master Plan because it will be a continuation of the use of the house as a primary residence with a conditional use for a group day care facility. The Applicant’s request for an expansion of the existing day care facility will augment the Plan’s stated policy of promoting day care uses in the area.

The Hearing Examiner has no evidence contradicting Staff’s conclusion and further finds that the ample parking, fenced rear yard, and direct entrance from Constance Street go far to minimize any adverse impacts related to the day care. Thus, the day care as proposed will further the two applicable goals of the Master Plan: to provide a needed service in the area and to maintain the residential character of the area.

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

Conclusion: Technical Staff found that the proposed use meets this standard (Exhibit 27(a), p. 11) because the use already exists and there will be no physical changes to the site. Staff writes (Exhibit 21(a), p. 10):

The proposal is harmonious with, and will not alter the character of the surrounding residential neighborhood in a manner inconsistent with the Master Plan. The Applicant's residence has a well-maintained appearance and the expansion of the day care facility will not detract from the residential character of the neighborhood. The existing outdoor play area will not be expanded and it is enclosed by a safe and secure wood fence that creates a private and safe play area for the children. The existing fence screens view of the play area from surrounding properties.

The Hearing Examiner agrees with Staff that the proposed use will not alter the existing character of the neighborhood. She found (in Part II.B) that the character of the area consists primarily of single-family one- and two-story detached homes. The Applicant does not propose any changes to the single-family detached structure. The board-on-board fence surrounding the play area screens the exterior impacts of the daycare. Existing landscaping and screening (including the privacy fence in the rear) adequately maintain the residential character of the property. There is more than sufficient parking on the street and in the driveway to support parking by the owner, non-resident employees, and parent drop-off and pick-up. The Hearing Examiner has already found that the proposed use complies with the Master Plan. This standard has been met.

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



Conclusion: The “surrounding area” defined by Staff in this case is relatively large. The only two conditional uses in the surrounding area are accessory apartments. The impact of the accessory apartments on the neighborhood is typically so minor that they are now permitted as a limited use in most circumstances. *See, Zoning Ordinance, §59-3.3.3.* Accessory apartments, like the daycare proposed here, are also contained within single-family detached homes. The Hearing Examiner finds that the number and type of conditional uses in the surrounding area do not alter the residential character of the neighborhood. Exhibit 21(a), p. 10.

*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: Staff reports that the application does not require approval of a preliminary plan. Exhibit 21(a), p. 12. Therefore, the Hearing Examiner must determine whether the proposed development will be served by adequate public services and facilities.

By its nature, a small child care facility operating within an existing single-family residence will not ordinarily create significant additional burdens for schools, police and fire protection,

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

The adequacy of transportation facilities is evaluated under the Planning Board's Guidelines (Guidelines) for Local Area Transportation Review (LATR) and Transportation Policy Area Review (TPAR), adopted January 24, 2013.<sup>5</sup> Applications that are expected to generate fewer than 30 trips are exempt from LATR review.

Staff concluded that the use will generate up to five new and eight total peak-hour trips during the weekday morning and evening peak periods. (i.e., 6:30 a.m. to 9:30 a.m. and 4:00 p.m. to 7:00 p.m., respectively). Staff's analysis was based on having up to three non-resident employees, so that estimate may be high. Exhibit 21(a), p. 7. Under either scenario, a traffic study is not required under the Planning Board's Local Area Transportation Review Guidelines because the use will generate fewer than 30 trips. Exhibit 27(a), p. 7. The second test (i.e., Transportation Policy Area Review (TPAR) is intended to ensure that roadway and transit facilities in a larger geographic "policy area" are adequate to serve the facility. If inadequate, a tax is assessed based on the square footage of new development. Because the Applicant is proposing no new square footage, the TPAR test is inapplicable and no tax will be assessed.

***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;***

---

<sup>5</sup> After this application was filed but before the Planning Board's review, the Council adopted a new Subdivision Staging Policy (SSP). *Council Resolution 18-671*, adopted November 15, 2016. The new SSP applies to *preliminary plans* filed after January 1, 2017, but is silent on its application to conditional uses. Because the adequate public facilities determination under the preliminary plan is still valid, the question of which SSP applies is irrelevant except to whether any taxes will be due at the time of building permit. Because any taxes due will be assessed at building permit, the Hearing Examiner need not make a finding on this.

- ii. traffic, noise, odors, dust, illumination, or a lack of parking; or*
- iii. the health, safety, or welfare of neighboring residents, visitors, or employees.*

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

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

Technical Staff determined that the following physical and operational characteristics are necessarily associated with (*i.e.*, are inherent in) a Group Day Care facility (Exhibit 21(a), p. 11):

(1) vehicular trips to and from the site; (2) noise generated by children in outdoor play areas; (3) noise generated by children; (4) drop-off and pick-up areas; and (5) lighting. The Hearing Examiner agrees with that listing of inherent characteristics of a Group Day Care.

Staff concluded that the conditional use as proposed will have no non-inherent adverse impacts. In addition to the generous number of on-site and on-street parking spaces, Staff found (Exhibit 21(a), p. 11):

...the proposal will not significantly impact traffic in the neighborhood. The Applicant has proffered a staggered drop-off and pick-up schedule to mitigate transportation impacts. The existing fence sufficiently screens the outdoor play area and is compatible with the residential character of the well-established neighborhood.

The Hearing Examiner agrees with Staff and adds that there is ample on-site and on-street parking to accommodate parking for the residence, non-residential employees, and for a dedicated drop-off and pick-up area close to the day care's entrance. At the public hearing, Ms. Bentota agreed to a condition prohibiting more than two vehicles to drop-off or pick-up children at one time, so that children may enter the daycare without crossing Constance Street. This standard has been met.

***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: This standard is inapplicable because the Applicant does not propose any reconstruction or alteration of the existing home.

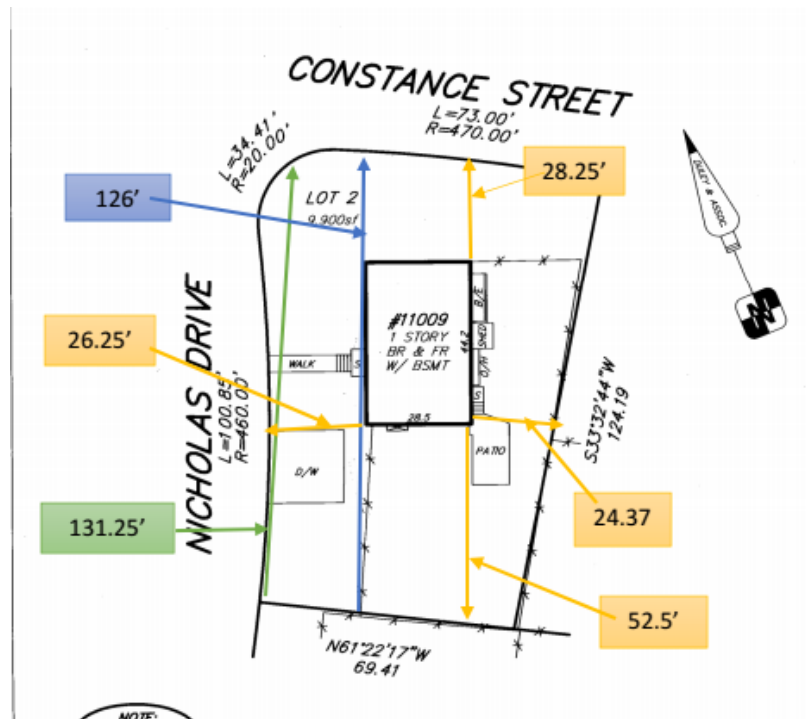
***3. The fact that a proposed use satisfies all specific requirements to approve a conditional use does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require conditional use approval.***

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.

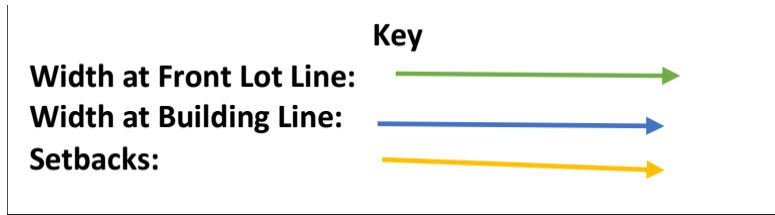
### B. Development Standards of the Zone (Article 59-4)

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.B of the Zoning Ordinance. Because the Staff Report did not list all of the measurements necessary to determine compliance to the R-90 Zone standards, the Hearing Examiner had Mr. Bentota measure the original scaled house location survey. The Hearing Examiner later re-measured these using an engineer's scale.<sup>6</sup> Both measurements were very close and are summarized in the drawing, prepared by the Hearing Examiner (Exhibit 32), shown below and on the following page.



<sup>6</sup> The measurements taken at the public hearing (using a common ruler) were: (1) the building setback from Constance Street is 28.125 feet, (2) the building setback from Nicholas Drive is 26.25 feet, (3) the length of the front building line is 142.5 feet, (4) the length of the front lot line is 131.25 feet. T. 15-19. Because the engineer's scale is more accurate than the ruler used at the public hearing, the Hearing Examiner uses the measurements taken with the engineer's scale.





Based on these measurements, the application does *not* meet the current development standards (in the 2014 Zoning Ordinance) for the R-90 Zone, as illustrated by the highlighted sections of the table below:

Lot Coverage and Density	Required	Proposed
Lot Area	9,000 SF	9,900 SF
Lot Width at the Front Building Line	Minimum 75'	126'
Lot Width at the Front Lot Line	Minimum 25'	131.5'
Lot Coverage	30%	13%
<b>Building Placement</b>		
Front setback	30'	28.25'
Side street setback, abutting lot fronts on the side street and is in a Residential Detached zone	30'	26.25'
Side setback	8'	23'
Sum of Side Setbacks	25'	49.5
Rear Setback	25'	52.5'
<b>Height</b>		
- measured to highest point of roof surface, regardless of roof type; or	35'	18'
- measured to mean height between the eaves and ridge of a gable, hip, mansard, or gambrel roof	30	18'

Conclusion: While the application does not meet the current development standards of the R-90 Zone, Section 59-7.7.1.A of the Zoning Ordinance grandfathers existing structures:

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.

Records from the Maryland State Department of Assessments and Taxation demonstrate that the home was built in 1958. Exhibit 13. This means that the construction would have been governed by the 1955 Montgomery County Zoning Ordinance. Under that Zoning Ordinance, the “front” of a corner lot is the “shortest side that abuts a street.” *1955 Zoning Ordinance*, §107-2(76). Therefore, the portion of the lot bordering Constance Street is actually the “front” of the property for zoning purposes. The two side yards lay between the structure and Nicholas Drive and the structure and the eastern property line. The rear yard lies between the structure and the southern property line. Given this orientation, a review of the development standards from the 1955 Ordinance indicates that the house *did* comply with the R-90 Zone standards at the time it was built, and is therefore a legal structure grandfathered under Section 59-7.7.1.A of the 2014 Zoning Ordinance. The following table compares the existing structure with the development standards of the R-90 Zone contained in the 1955 Zoning Ordinance:

<b>Development Standard</b>	<b>Required</b>	<b>Provided</b>
Front Setback (§107-7(d)(1))	25'	28.25'
Side Setback (§107-7(d)2)		
Minimum	10'	24.37'
Sum of both sides	21'	49.25'
Rear Setback	25'	52.5'
Lot Frontage	75'	Undetermined <sup>7</sup>
Height	2.5 stories or 35'	One-story/18 feet

The Hearing Examiner finds that the development standards of the current R-90 Zone (in the 2014 Zoning Ordinance) are not applicable to the property and the existing structure is a legal structure under Section 59-7.7.1.A of the 2014 Zoning Ordinance.

---

<sup>7</sup> Because the Hearing Examiner did not have Mr. Bentota measure the frontage along Constance Street (she did not know that the 1955 Zoning Ordinance was applicable) Mr. Bentota did not measure the frontage along Constance Street. However, the scaled drawing shows that the southern lot line is 69.41 feet long. The northern lot frontage (along Constance Street) is clearly more than an additional five feet in length and the Hearing Examiner has no reason to assume that the Constance Street frontage did not meet all of the 1955 standards because all of the remaining standards are met.

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

The specific use standards for approval of a Group Day Care for 9 to 12 Persons are set out in Section 59-3.4.4.D. of the Zoning Ordinance. The Hearing Examiner's findings on each standard are outlined below:

**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: There is nothing in the record indicating that the Applicant has a child under six living in the home. The proposed use will allow a maximum of 12 children to use the day care.

**2. Use Standards**

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

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

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

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

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

Conclusion: A Group Day Care requires 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 Section 7.3.1, Conditional Use.***

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

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

Furthermore, as discussed in Part III.A., above, and the application meets the “necessary findings” required by *Zoning Ordinance*, §59-7.3.1. The Hearing Examiner finds that the application satisfies all of the use standards in *Zoning Ordinance* §59-3.4.4.D.

#### **D. General Development Standards (Article 59-6)**

Article 59-6 sets the general requirements for site access, parking, screening, landscaping, lighting, and signs.<sup>8</sup> Many of the standards in Article 59-6 do not apply to the proposed group day care facility. Only standards that are applicable will be discussed below.

##### **1. Parking Spaces Required**

The standards for the number of parking spaces required, parking facility design and parking facility screening are governed by Division 6.2 of the *Zoning Ordinance*. However, because the subject site is a detached home and is not required to have a parking facility with 5 or more parking spaces, the Code sections pertaining to parking facility design and screening do not apply in this case. See *Zoning Ordinance* §§59-6.2.5.A.1 and 59-6.2.9.A.3.

The required number of parking spaces is established by *Zoning Ordinance* §59-6.2.4. That section requires a total of 4 parking spaces for the subject site (2 spaces for the single-family

---

<sup>8</sup> The following provisions do not apply to the proposed use: Section 59-6.1.2 (site access requirements) does not apply in single-family detached zones, such as the R-90 Zone; Section 59-6.4.4.E, governing exterior lighting for conditional uses applies only to new lighting fixtures; Section 59-6.2.5, requiring screening of parking areas, does not apply to conditional uses in single-family detached homes that require fewer than 5 parking spaces; Section 59-6.5, governing site screening and landscaping, has limited application, as discussed in the main text.

dwelling and 2 for the non-resident employees.) According to the Staff Report, the property has a potential for 6 parking spaces: two on the driveway (satisfying the 2 required for the residence), two on Nicholson Drive, and two on Constance Street. The residential requirement can be met in the driveway and the employee parking may be met on Nicholson Drive. This leaves the two spaces on Constance Street for parent drop-off and pick-up, as indicated on the site plan. The Hearing Examiner finds that there is sufficient parking for the proposed use.

Section 59-6.2.4.C of the Zoning Ordinance requires the Applicant to provide one permanent bicycle storage space. The Applicant has requested a waiver of this requirement, which was supported both by Staff and the Planning Board. Staff reasoned that this requirement is not warranted given the low number of non-resident employees commuting to work. Exhibit 21(a), p. 9. The Hearing Examiner agrees with Staff's recommendation and grants the waiver request in Part IV of this Report.

## **2. Site Landscaping and Screening**

The standards for landscaping and screening are set forth in Division 6.5. Although some provisions in this portion of the Zoning Ordinance contain very specific requirements for perimeter site landscaping, conditional uses housed in single-family, detached homes require only an assessment of compatibility. *Zoning Ordinance*, §59-6.5.2.B. This language is reinforced by Section 59-7.3.1.E.1.b., under which the Hearing Examiner need only find that the proposed use meets applicable general requirements under Article 59-6 "to the extent the Hearing Examiner finds necessary to ensure compatibility. . ."

Conclusion: The Applicant proposes no changes to the existing landscaping and screening on-site. This includes various trees, gardens and shrubs, and a 6-foot high privacy fence in the rear yard. Staff concluded that, "[T]he existing on-site landscaping and screening will continue to



ensure the compatibility of this conditional use to the surrounding neighborhood.” Exhibit 27(a), p. 8. The Hearing Examiner finds that the existing landscaping, including the privacy fence, is compatible with the surrounding neighborhood.

### **3. Signage**

The use of signage is governed by Zoning Ordinance Division 6.7. At the time of the public hearing, the Applicant had a banner sign advertising the day care on the outside of the wooden fence. Banner signs are prohibited by the Zoning Ordinance. *Zoning Ordinance*, §6.7.4.E. At the public hearing, the Applicant marked two locations where she would like to install permanent signs. Each location is marked in blue on the site plan (Exhibit 8, shown on page 7).

Conclusion: In residential zones, the Zoning Ordinance limits property owners to one freestanding sign of no more than 2 square feet. *Id.*, §59-6.7.8.A. The Hearing Examiner finds that a small sign at either location is compatible with the surrounding area, provided that other required standards (e.g., minimum setback, maximum height) are met. Should the Applicant desire more than one sign, a larger sign, or a variation from other standards, she must apply for a sign variance from the Sign Review Board under Section 7.4.2. of the Zoning Ordinance. A condition of approval of this conditional use will require the Applicant to seek a permit from the Department of Permitting Services or obtain a variance from the Sign Review Board before placing a permanent sign on the property. She will also have to file a copy of the sign permit with OZAH.

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

As set forth above, the application meets all the standards for approval of the conditional use. Based on the foregoing findings and conclusions and a thorough review of the entire record, the application of Natalie Bentota (CU 17-11), for a conditional use under Section 59-3.4.4.D. of the Zoning Ordinance, to operate a Group Day Care for up to 12 children in her home at 11009

Nicholas Drive, Silver Spring, Maryland, and for a waiver of the requirement of Section 59-6.2.4.C. to provide a permanent on-site bicycle storage space, are hereby **GRANTED**, subject to the following conditions:

1. The proposed Group Day Care facility is limited to 12 children.
2. No more than two non-resident employees may be on-site at any one time.
3. Parent drop-off and pick-up is limited as follows:
  - a. The Applicant must schedule staggered drop-off and pick-up of children with no more than four vehicles entering and exiting the site in any 30-minute period.
  - b. Parent drop-off and pick-up must occur on Constance Street.
  - c. No more than two vehicles may drop-off or pick-up children at one time.
  - d. Schedules for staggered drop-off and pick-up must be incorporated into the Applicant's contract with parents.
4. The hours of operations are limited to Monday through Friday, 7:00 a.m. to 6:30 p.m.
5. Outdoor play time may not start before 10:00 a.m. and must end by 5:00 p.m.
6. The Applicant must submit an application to the Department of Permitting Services (DPS), and if required, to the Sign Review Board, for approval of all signs she proposes to install regarding the subject child Day Care Center. The Applicant must file copies of all sign permits with OZAH.
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. Toys which are designed to be kept outdoors are not considered debris.
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 12th day of May, 2017.



---

Lynn A. Robeson  
Hearing Examiner

#### NOTICE OF RIGHT TO REQUEST ORAL ARGUMENT

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

Contact information for the Board of Appeals is listed below, and additional procedures are specified in Zoning Ordinance §59.7.3.1.F.1.c.

The Board of Appeals may be contacted at:

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

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

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

considered. If your request for oral argument is denied, your case will likely be decided by the Board that same day, at the work session.

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

NOTICES TO:

Namalie Bentota, Applicant  
Saman Bentota, Co-owner  
Barbara Jay, Executive Director  
Montgomery County Board of Appeals  
Lori Shirley, Planning Department  
Ehsan Motazed, Department of Permitting Services  
Alexandre A. Espinosa, Director, Finance Department