

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

IN THE MATTER OF:
HUMBERTO LOSADA
Applicant

Humberto Losada
For the Application

*
*
*
*
*
*
*

OZAH Case No. CU 18-04

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

HEARING EXAMINER'S REPORT AND DECISION

TABLE OF CONTENTS

I. STATEMENT OF THE CASE	2
II. FACTUAL BACKGROUND	4
A. SUBJECT PROPERTY AND SURROUNDING NEIGHBORHOOD.....	4
B. THE PROPOSED USE, LANDSCAPING, LIGHTING AND SIGNAGE	6
C. OPERATIONAL CHARACTERISTICS.....	8
D. COMMUNITY REACTION	15
E. THE ENVIRONMENT.....	15
III. FINDINGS OF FACT AND CONCLUSIONS OF LAW	15
A. NECESSARY FINDINGS (SECTION 59.7.3.1.E.)	16
B. DEVELOPMENT STANDARDS OF THE ZONE (ARTICLE 59.4)	24
C. USE STANDARDS FOR A CHILD DAY CARE CENTER - 13 TO 30 PERSONS (§59.3.4.4.E.2.)	25
D. GENERAL DEVELOPMENT STANDARDS (ARTICLE 59.6).....	28
1. Site Access Standards.....	28
2. Parking Spaces Required, Parking Setbacks and Parking Lot Screening	28
3. Site Landscaping, Screening and Lighting	30
4. Signage	33
IV. CONCLUSION AND DECISION	34

I. STATEMENT OF THE CASE

On February 15, 2018, the Applicant, Humberto Losada, filed an application seeking approval of a conditional use to operate a Day Care Center for up to 20 children in his home at 2311 Dennis Avenue, Silver Spring, Maryland. The property is owned by Applicant, as evidenced by Maryland real property records - Tax Account No. 13-01103985 (Exhibit 12), and it is located in the R-60 zone.

Mr. Losada has been operating a licensed child care business since January 4, 2011. Initially, it was a “Family Day Care” for up to 8 children, which then expanded to a Group Day Care for up to 12 children after the Hearing Examiner granted him a special exception for that purpose (SE 14-03) on February 6, 2014 under the old (*i.e.*, 2004) Zoning Ordinance.¹ It is called “Mis Primeros Pasitos Day Care.”

Having adding more space to his home, Mr. Losada now seeks to expand the number of children in his care to 20, which requires a conditional use for a Day Care Center (13 - 30 Persons) under Section 59.3.4.4.E. of the new Zoning Ordinance, enacted in 2014.² The breakdown of differing day care facilities under the new Zoning Ordinance is similar to that which existed under the old Zoning Ordinance, except the Day Care Center category is now broken down into two categories – one for 13 - 30 Persons (the kind of conditional use sought here) and one for over 30 Persons.³

Parents of children currently cared for by Mr. Losada wrote in support of the application

¹ The operative portion of the Hearing Examiner’s 2014 decision is appended to the Staff Report (Exhibit 16) as Attachment 10.

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

³ There are four types of “Day Care Facilities” defined in Zoning Ordinance §59.3.4.4. – “Family Day Cares (Up to 8 Persons)”; “Group Day Cares (9 -12 Persons)”; “Day Care Centers (13-30 Persons)”; and “Day Care Centers (Over 30 Persons).”

(Exhibit 2(h)). One of the writers is a next door neighbor, who lives at 10303 Gardiner Avenue, in Silver Spring. There has been no opposition to this application.

On May 4, 2018, the Office of Zoning and Administrative Hearings issued a notice that the public hearing would be held before the Hearing Examiner on June 18, 2018, at 9:30 a.m., in the Second Floor Hearing Room of the Stella B. Werner Council Office Building (Exhibit 15).

The Technical Staff of the Maryland-National Capital Park and Planning Commission (“M-NCPPC”) reviewed the application and, in a report dated May 17, 2018, recommended approval with conditions (Exhibit 16). At its regular meeting on May 31, 2018, the Planning Board voted unanimously (5-0) to recommend approval (Exhibit 17).

The hearing was convened, as scheduled, on June 18, 2018, and testimony was presented in support of the petition by Applicant Humberto Losada, who appeared *pro se*. There were no other witnesses. Applicant adopted the findings in the Technical Staff report (Exhibit 16) and agreed to Staff’s proposed conditions, as well as those suggested by the Hearing Examiner. Tr. 12-15. He also identified his plans and photos of the site (Tr. 22-26), and he submitted an Affidavit of Posting (Exhibit 19). The record was held open until June 22, 2018, to receive a copy of Mr. Losada’s current child care license from the State Board of Education and a sample of Applicant’s contract language calling for staggered arrivals of children being dropped off or picked up by vehicle.

On June 18, 2018, Applicant filed a copy of his license (Exhibit 20), and on June 19, copies of contracts with parents specifying arrival and departure times, in accordance with the Hearing Examiner’s instructions. Exhibits 21 and 21(a)-(g). The record closed, as planned, on June 22, 2018.

There is no opposition in this case, and the application meets all the standards for approval of the conditional use set forth in the Zoning Ordinance. The Hearing Examiner has therefore granted the application, with the conditions imposed in Part IV of this Report and Decision.

II. FACTUAL BACKGROUND

A. Subject Property and Surrounding Neighborhood

The subject site is located at 2311 Dennis Avenue, Silver Spring, Maryland. The legal description of the property is Lot 33, Block D of the Carroll Knolls Subdivision, and it is zoned R-60. The property is well described by Technical Staff (Exhibit 16, p. 3):

The 9,162-square foot Property is located on the northeast corner of Dennis Avenue and Gardiner Avenue in the R-60 Zone. The Property is described as Lot 33, Block D of the Carroll Knolls Subdivision and is improved with a detached house. The front door to the house faces the intersection of Dennis Avenue and Gardiner Avenue, with two walkways leading to the front entrance. The Property has one other walkway from Dennis Avenue to the basement at the rear of the house. The walkways are paved with concrete and are well-lit. Ground lights are located near each path and along the stone wall. The front yard is well-landscaped with trees, shrubs and perennials.

A driveway with space to park [three]* cars side-by-side is accessed from Gardiner Avenue. A carport is attached to the northwest side of the house and is accessed via the driveway and pavers over the lawn. A portion of the carport is fenced off and used as a covered play area, leaving enough space available to park one car.

The play area is located in the rear of the property closest to Gardiner Avenue. It is fenced in with a white picket fence, approximately four-foot in height, along the Gardiner Avenue property line and on the eastern boundary of the play area; an approximately six-foot tall wooden privacy fence along the lot line shared with a neighboring property to the north; and a chain link fence, approximately four feet in height, on the property line shared with the abutting lot to the east.

[* The Staff report said “two” cars, but the parking pad was expanded to hold three cars.]

Photos of the home from the Staff report are reproduced below (Exhibit 16, p. 4):



An aerial photograph of the subject site was also provided by Technical Staff (Exhibit 16, p. 3), and it is reproduced below, followed by a picture of the play area (Exhibit 16, p. 5):



Technical Staff recommended defining the general neighborhood surrounding the subject property as bounded by Evans Drive to the north, Darrow Street to the south, Douglas Avenue to the east, and Haywood Drive to the west. The Hearing Examiner accepts Technical Staff's recommended definition of the general neighborhood, which Staff describes as "zoned R-60 and composed of residential detached houses." The locations of the site and the surrounding neighborhood are depicted in an aerial photo map from the Technical Staff report (Exhibit 16, p. 5):



Staff notes that there are two special exceptions in the general neighborhood, an accessory apartment special exception at 2421 Homestead Drive granted in 1985 (BAS 1110), and a boarding house for 3 or 4 tenants at 2410 Dennis Avenue, granted in 1976 (BAS 439).

B. The Proposed Use, Landscaping, Lighting and Signage

Mr. Losada has been operating a licensed child care business since January 4, 2011. Initially, it was a "Family Day Care" for up to 8 children, which then expanded to a Group Day Care for up to 12 children after the Hearing Examiner granted him a special exception for that purpose (SE 14-03) on February 6, 2014 under the old (*i.e.*, 2004) Zoning Ordinance. Having added a 368 square foot

addition to his home and having extended his carport and expanded his parking pad to hold three cars, Mr. Losada now seeks to expand the number of children in his care to 20 to keep up with the increasing demand for his services. Such an expansion requires a conditional use for a Day Care Center (13 - 30 Persons) under Section 59.3.4.4.E. of the new Zoning Ordinance, enacted in 2014.

The daycare operates in the existing single-family home and in an outside play area, located in the spacious, fenced-in, back and side yards. The outdoor play area is designated on both the Site Plan (Exhibit 6) and the Landscape and Lighting Plan (Exhibit 5). Staff's annotated version of the latter (Exhibit 16, p. 6) is reproduced below:



The locations of the house, its existing addition, trees, play area, site-access, the expanded driveway parking pad which serves as a drop-off/pickup area and other features are shown on the above plan. No signage has been proposed for the site, and the Hearing Examiner has imposed a condition specifying that Applicant may not display a sign for the child care facility unless it is approved by the Department of Permitting Services and a permit is obtained. A sign, if erected, may not exceed two square feet and may not be lighted. A copy of the permit should be filed with OZAH before any sign is posted.

Staff recommended that the Applicant replace the existing, four-foot-high, white picket fence along Gardiner Avenue with a six-foot high privacy fence to improve the screening of the play area when viewed from the abutting roads. Exhibit 16, pp. 2 and 14. Since the Applicant testified that such a change would be desirable from his point of view as well (Tr. 11-12), the Hearing Examiner has imposed a condition similar to the one recommended by Staff, but also requiring that the Applicant first review the materials to be used in the privacy fence with Staff. The Applicant testified that he made slight changes to the play area, but no other external changes to the site, except for the new fence, are proposed. Tr. 25.

Technical Staff found that the site “. . . is well-landscaped with trees, shrubs and perennials,” (Exhibit 16, p. 3), and the lighting is “residential in character and does not result in excessive illumination onto the neighboring properties.” Exhibit 16, p. 11.

C. Operational Characteristics

Applicant currently runs a group day care in his home for up to twelve children. He is licensed by the State Office of Child Care to care for up to 12 children (Exhibit 20), and additional accreditation certifications are in the record as Exhibits 2(f) and (g)). The Applicant also submitted an affidavit affirming that he will comply with all applicable State and County requirements (Ex. 2(i)).

The Applicant's Statement (Exhibit 2, p. 1) provides his "Program Philosophy":

. . . Mis Primeros Pasitos strives to promote quality, early care and learning programs that encourage the development of the whole child from the time they enroll in our program until they depart.

Our program philosophy is founded on a developmental learning model which promotes all areas of a child's development, including emotional, social, linguistic, physical, and cognitive. This model of learning requires that all aspects of our program be focused on learning experiences based on the child's developmental age and interests, their individual needs and learning styles, and on meaningful experiences that reflect the child's cultural background.

Families are an important partner in children's learning. The sharing of information and insight about the individual child's needs and development help to provide consistency and support between the learning center and home, fostering the child's total growth and development. Teacher/family partnerships are essential components of quality programs.

Technical Staff summarized the Applicant's proposed operations in its report (Exhibit 16, pp. 6-7):

. . . The Applicant proposes to care for a total of six infants in addition to 12 children aged 24 months-five years old. . . .

The proposed Day Care Center will be located on the main floor of the house, which is where the existing day care is located. The day care will occupy 951 square feet, and the Applicant plans to renovate the first-floor bathroom to remove the tub and add an extra toilet. Entrance to the day care is through the house's front door. There is an entrance to the kitchen and an entrance to the basement in the rear of the house. The Applicant will continue to use the basement as his personal residence.

The Applicant will bring infants outside to play for approximately 15-20 minutes both in the morning and afternoon, while the older children will be allowed to play outside for approximately one hour in both the morning and afternoon.

The proposed Day Care Center will maintain the existing day care's hours of operation and will be open from Monday through Friday 7:30 a.m. to 5:30 p.m. The Applicant intends to maintain a staggered schedule at the proposed Day Care Center between 7:30 a.m. and 8:30 a.m. for drop-offs and 4:00 p.m. and 5:30 p.m. for pick-ups. Currently, five children that attend the daycare live nearby and walk each day. The Property has a driveway/parking pad that contains three off-street parking spaces, and space for two cars in the carport, although a portion of the carport is currently used as a covered play area. Unrestricted on-street parking is available on both Dennis Avenue and Gardiner Avenue. During the day care's hours of operation, the parking

pad is reserved for parent drop-off and pick-up. The Applicant expects that the day care will continue to attract families in the area so many of the children will live close enough to be walked to the day care by their parents.

The Applicant currently employs two non-resident full-time staff members, and plans to add one additional non-resident staff member if the conditional use is approved. The employees arrive between 7:15 and 7:30 a.m. and depart between 5:30 and 5:45 p.m. The current employees do not drive to work and, in his seven years in operation as a day care provider, the Applicant says his staff rarely, if ever, drive cars to the facility. Instead employees are typically dropped off or they use public transportation.

The floor plan for the day care center (Exhibit 8) is reproduced below, followed on the next page by photographs of some of the child care rooms (Exhibit (2)(d)):





In order to facilitate drop-offs and pickups of children, the Applicant has provided an amended Transportation Statement (Exhibit 14(a)) showing child drop-offs and pickups and staff arrivals and departures. It is reproduced below:

TRANSPORTATION STATEMENT FOR DAY CARE

Morning Peak Period Drop-Off and Staff Arrivals (6:30 am - 9:30 am)		
Time	Children	Staff
6:30-6:45 am	N/A	N/A
6:45-7:00 am	N/A	N/A
7:00-7:15 am	N/A	N/A
7:15-7:30 am	N/A	3
7:30-7:45 am	3	N/A
7:45-8:00am	3	N/A
8:00-8:15am	3	N/A
8:15-8:30 am	4	N/A
8:30-8:45 am	3	N/A
8:45-9:00 am	4	N/A
9:00-9:15 am	N/A	N/A
9:15-9:30 am	N/A	N/A

Evening Peak Period Pick-Up and Staff Departures (4:00pm-7:00PM)		
Time	Children	Staff
4:00-4:15pm	3	N/A
4:15-4:30pm	4	N/A
4:30-4:45pm	4	N/A
4:45-5:00pm	4	N/A
5:00-5:15pm	3	N/A
5:15-5:30pm	2	N/A
5:30-5:45pm	N/A	3
5:45-6:00pm	N/A	N/A
6:00-6:15pm	N/A	N/A
6:15-6:30pm	N/A	N/A
6:30-6:45pm	N/A	N/A
6:45-7:00pm	N/A	N/A

How many staff do you expect will take the bus or carpool?

Staff usually ride the bus, or Uber. One staff rides a scooter.

How many sibling groups do you expect?

2 sibling groups

Based in part on Technical Staff's recommendation, a condition has been imposed in Part IV of this Report and Decision providing:

Vehicular arrival and departure times for the children must be staggered, through contractual agreement between the operator of the daycare center and the parents, so that a maximum of four vehicles may arrive every 15 minutes to drop-off and pick-up children. In no event may a child be dropped off before Applicant or 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.

The Transportation Statement shown above demonstrates that the Applicant will follow the formula of no more than four vehicles arriving every 15 minutes to drop off and pick up children.

Zoning Ordinance §59.6.2.4 requires that a day care center provide three parking spaces for every 1,000 square feet of gross floor area (GFA) devoted to the use, and another two parking spaces for the residence. As noted above, the floor area devoted to the conditional use is 951 square feet, which means that 3 parking spaces are required for its operations, plus 2 for the residence.

In addition, Section 59.3.4.4.E.2.b. requires that "An adequate area for the discharge and pick

up of children [be] provided.” However, Section 59.3.4.4.E.2.c. allows the required number of spaces to be provided on the street abutting the site:

- c. The number of parking spaces under Division 6.2 may be reduced if the applicant demonstrates that the full number of spaces is not necessary because:*
- i. existing parking spaces are available on abutting property or on the street abutting the site that will satisfy the number of spaces required; or*
 - ii. a reduced number of spaces would be sufficient to accommodate the proposed use without adversely affecting the surrounding area or creating safety problems.*

Technical Staff confirmed, that there is ample parking on the streets abutting the subject site, Dennis Avenue and Gardiner Avenue. As stated in the Technical Staff report (Ex. 16, p. 11),

The Property has relatively large frontages on both Gardiner Avenue and Dennis Avenue, and space is available to park at least three cars along each frontage (assuming a 21-foot-long space). The Property can accommodate four of the required five parking spaces onsite, and the remaining required space is readily available on the street abutting the Property. . . .

The photographic evidence included in the Hearing Examiner’s Decision (at p. 12) granting a Group Home Special Exception SE 14-03 on February 6, 2014, supports this conclusion, and those photos are reproduced below. Mr. Losada testified that they still accurately portray the area. Tr. 24.



In light of these circumstances, the Hearing Examiner concludes that the parking spaces for the non-resident employees required by the Zoning Ordinance may be located on the street abutting the site rather than on the site itself. The Applicant testified that neither of his current non-resident employees drives to the facility, and if the third one he plans to hire drives, he will park on the street.

Tr. 9. Since there is limited space on the site available for drop offs and pickups, the following condition has also been imposed:

The Applicant may have up to three non-resident staff members on site at any given time, and if they drive, they must park on the street abutting the site, to leave the area of the on-site parking pad available for pick-ups and drop-offs of children. In light of this condition, the parking spaces for the non-resident employees required by the Zoning Ordinance are hereby allowed to be located on the street abutting the site rather than on the site itself.

Based on this record, the Hearing Examiner finds that the subject site satisfies the Code requirements for parking spaces and that the drop-off/pickup spot will provide a safe area for the discharge and pick-up of children accessing the site by automobile. The minimal impact of the proposed conditional use on the County's transportation facilities will be discussed in Part III.A. of this Report and Decision.

Technical Staff evaluated the potential impact of the condition use, saying "it will not result in any unacceptable noise, traffic, or environmental impacts on surrounding properties." Ex. 16, p. 15.

Given the fencing, landscaping and configuration of the site, as well as Staff's evaluation, the Hearing Examiner finds that allowing Applicant to have up to twelve children in outdoor play at any given time would cause no disruption to the neighborhood. A condition limiting outdoor play to 12 children and allowing outdoor play no earlier than 9:00 a.m. has been imposed in Part IV of this Report and Decision. As is generally the case with this type of conditional use, other conditions prohibit the use of a public address system or amplified music outside the building and require the Applicant to maintain the grounds in a clean condition, free from debris, on a daily basis.

D. Community Reaction

There was no opposition to the proposed day care center. On the contrary, five letters of support were filed by parents utilizing the existing group day care, one of whom, Brendan Abbott, is a next door neighbor. Exhibit 2(h). They uniformly extol the virtues of Applicant's child care operation.

E. The Environment

There are no environmental issues because there will be no exterior changes. A Forest Conservation Exemption is in the record as Exhibit 2(c). As stated by Staff (Exhibit 16, p. 9):

The Property contains no forest, streams, wetlands, or environmental buffers and is located in the Lower Rock Creek (Use I) watershed. The proposed conditional use is in compliance with the Environmental Guidelines and it is not subject to Chapter 22A, Montgomery County Forest Conservation Law as the Site is less than 40,000 square feet in size.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A conditional use is a zoning device that authorizes certain uses provided that pre-set legislative standards are met. Pre-set legislative standards are both specific and general. General standards are those findings that must be made for almost all conditional uses. *Zoning Ordinance*, §59.7.3.1.E. Specific standards are those which apply to the particular use requested, in this case, a child day care center for up to 20 children. *Zoning Ordinance* §59.3.4.4.E.

Weighing all the testimony and evidence of record under the "preponderance of the evidence" standard specified in *Zoning Ordinance* §59.7.1.1, the Hearing Examiner concludes that the conditional use proposed in this application, 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:⁴

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 Hearing Examiner approved a special exception (SE 14-03) on February 6, 2014 under the old (*i.e.*, 2004) Zoning Ordinance⁵ which authorized the existing Group Home at the subject site. It is called "Mis Primeros Pasitos Day Care," and it is run by the current Applicant. Since the Hearing Examiner is approving the instant conditional use application for a day care center on this property, he has also included a provision in Part IV of this Report and Decision requiring the revocation of SE 14-03, as superseded by CU 18-04.

- 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;***⁶

Conclusion: This subsection requires an analysis of the standards of the R-60 Zone contained in Article 59-4; the use standards for Child Day Care Centers for 13 to 30 Persons contained in Article 59-3; and the applicable development standards contained in Article 59-6. Each of these Articles is discussed below in separate sections of this Report and Decision (Parts III.B, C, and

⁴ 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.

⁵ The operative portion of the Hearing Examiner's 2014 decision is appended to the Staff Report (Exhibit 16) as Attachment 10.

⁶ 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).

D, respectively). Based on the analysis contained in those discussions, the Hearing Examiner finds, as did Technical Staff (Exhibit 16, pp. 7-15), that the application satisfies the requirements of Articles 59-3, 59-4 and 59-6.

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

The subject site is within the area covered by the Kensington-Wheaton Master Plan, approved and adopted in 1989. Technical Staff reports that the Master Plan does not specifically discuss the subject site, but its Community Facilities section notes a growing need for more child day care facilities in the area, and the Master Plan encourages the development of such facilities.

Technical Staff quotes the Master Plan (Exhibit 16, p. 7):

One of its policies is to “Support efforts to utilize County zoning and development plan review processes to promote greater day care opportunities,” (p. 139). Furthermore, the Master Plan cites a 1987 Montgomery County Planning Board study which, “...suggested that none of the small-child care centers serving 7-20 children that were studied had a significant negative impact on the surrounding residential community,” (p.139).

Conclusion: The Hearing Examiner notes that a separate section of the Master Plan is devoted to “Child Day Care Facilities.” Plan, pp. 137-139. The Plan observes that there is “a need for additional child day care facilities and opportunities” (Plan, p. 137) in Kensington-Wheaton, and states as the Plan’s objective, “To promote greater day care opportunities through appropriate land use recommendations and associated policies.” Plan, p. 139. The Master Plan also recommends continuation of the R-60 Zone for the subject site (Plan, p. 69), and the R-60 Zone permits day care centers by conditional use.

Staff found that the proposed conditional use for a day care center is consistent with the objectives of the Master Plan since it will increase the number of child day care facilities near major employment and commercial developments in the plan area.

In light of all these factors, the Hearing Examiner finds that the proposed use substantially conforms with the objectives and recommendations of the 1989 Kensington-Wheaton 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 (Exhibit 16, p. 13):

The proposed group day care will be in harmony with the general character of the surrounding neighborhood. There are no exterior modifications being proposed to the detached house, or to the yard which is already attractively landscaped. The increased parking needs can be accommodated onsite and on the street abutting the Property. As conditioned, the increased intensity of activity and traffic will be staggered so it will not disrupt the neighborhood's residential character. Further, the Property has frontage on roads that are wide enough to accommodate parking on both sides while allowing enough space for two-way vehicular movement. The existing day care at this location is well integrated into the neighborhood and will continue to provide an important service to the community.

The Hearing Examiner agrees with Technical Staff and concludes that the proposed use “*is harmonious with and will not alter the character of the surrounding neighborhood*” because it will remain a single-family, detached residence in a neighborhood of single-family, detached residences, and no additional external modifications to the building are planned.

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, the neighborhood contains two special exception uses: an accessory apartment special exception at 2421 Homestead Drive, granted in 1985 (BAS 1110); and a boarding house special exception for 3 or 4 tenants at 2410 Dennis Avenue, granted in 1976 (BAS 439). Exhibit 16, p. 5.

Technical Staff found that “The expansion of the existing day care will not adversely affect

or alter the residential nature of the area. The proposed use also furthers the goals of the Sector Plan and thus does not alter the nature of the area.” Exhibit 16, p. 13. The Hearing Examiner agrees on both points. The proposed use, housed in an existing single-family home, will not alter the residential character of the neighborhood, and it will be 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: According to Technical Staff, the application does not require approval of a preliminary plan of subdivision. Exhibit 16, p. 13. 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. Technical Staff expressly found that “the existing public facilities are sufficient to serve the proposed group day care.”⁷ Exhibit 16, p. 13.

⁷ The Hearing Examiner assumes that Staff actually meant to say “Day Care Center,” not “group day care.”

Staff also specifically explored the impacts on transportation facilities of the proposed use (Exhibit 16, p. 8):

Parking and Drop-Off/Pick-Up

Parking spaces for parent drop-off and pick-up are available on the existing three-car parking pad and on the streets abutting the Property. Assuming the worst-case parking scenario, the Applicant could park in the carport and three employees could park vehicles on one of the streets abutting the house, and at least four spaces would be available for drop-off and pick-up (three spaces on the parking pad and one space on the street abutting the Property). Thus, Staff recommends a condition limiting the number of vehicles that can drop-off or pick-up children to four per 15-minute period.

Local Area Transportation Review

The Applicant submitted a transportation statement [Exhibit 14(a)] that shows the projected number of children and staff arriving and departing, by all modes of travel, during the peak periods in the morning (6:30-9:30 a.m.) and evening (4:00-7:00 p.m.). The traffic statement shows up to 14 children dropped off between 8:00 and 9:00 a.m., and up to 15 children picked up between 4:00 and 5:00 p.m. Based on the transportation statement, the proposed day care generates 28 person trips during the morning peak hour and 30 person trips during the evening peak hour as demonstrated in the table below. Since the proposed daycare generates fewer than 50 weekday peak hour person trips, no further transportation analysis is required.

	AM Peak Hour Trips (8-9 a.m.)			PM Peak Hour Trips (4-5 p.m.)		
	In	Out	Total (Person Trips)	In	Out	Total (Person Trips)
Proposed 20 child Daycare	14	14	28	15	15	30

As previously noted, the Hearing Examiner has imposed a condition in Part IV of this Report and Decision requiring vehicular arrival and departure times for the children to be staggered, through contractual agreement between the operator of the daycare center and the parents, so that a maximum of four vehicles may arrive every 15 minutes to drop-off and pick-up children. The Applicant's Transportation Statement (Exhibit 14(a)) demonstrates that the Applicant will follow the formula of no more than four vehicles arriving every 15 minutes to drop off and pick up children. In sum, LATR is satisfied in this case, and the evidence supports the conclusion that the proposed use,

as conditioned, will not unduly burden the transportation system. Based on this record, the Hearing Examiner concludes 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.*

Conclusion: This standard requires consideration of the inherent and non-inherent adverse effects of the proposed use, at the proposed location, on nearby properties and the general neighborhood.

Inherent adverse effects are “adverse effects created by physical or operational characteristics of a conditional use necessarily associated with a particular use, regardless of its physical size or scale of operations.” Zoning Ordinance, §59.1.4.2. *Non-inherent adverse effects* are “adverse effects created by physical or operational characteristics of a conditional use not necessarily associated with the particular use or created by an unusual characteristic of the site.” *Id.* As specified in §59.7.3.1.E.1.g., quoted above, non-inherent adverse effects in the listed categories, alone or in conjunction with inherent effects in those categories, are a sufficient basis to deny a conditional use. Inherent adverse effects, alone, are not a sufficient basis for denial of a conditional use.

Analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a child 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 child day care facility (Exhibit 16, p. 14): (1) vehicular trips to and from the site; (2) drop-off and pick-up areas; (3) outdoor play areas; (4) noise generated by children; and (5) lighting. Staff did not identify any non-inherent adverse effects associated with the proposed conditional use.

Staff analyzed the potential impacts on the neighborhood as follows (Exhibit 16, p. 14):

The proposed conditional use will generate additional trips, but the Day Care Center tends to attract children from the surrounding neighborhood who are likely to walk to the proposed Day Care Center. If the proportion of the children who currently walk to the day care stays the same (5 out of 12), then eight of the proposed 20 children will likely walk each day. Although the Property's Dennis Avenue frontage does not have a sidewalk, requiring a sidewalk along the Property frontage on Dennis Avenue may create an unsafe condition by encouraging pedestrians to cross Dennis at the eastern property line, rather than at the intersection of Gardiner Avenue and Dennis Avenue where sidewalks, ramps, and a marked pedestrian crossing currently exist. Furthermore, sidewalks are available on both sides of Gardiner Avenue and on the opposite side of Dennis Avenue to promote safe pedestrian circulation. . . .

The surrounding street network is sufficient to accommodate the additional vehicular trips. Both Dennis Avenue and Gardiner Avenue have a pavement width that allows two-way vehicular movement if cars are parked on both sides of the street. With the condition limiting the number of vehicles that can drop-off and pick-up children every 15 minutes, the additional trips will not disrupt vehicular and pedestrian circulation in the neighborhood. The Property has adequate parking on the parking pad and on the abutting streets to accommodate the additional employee and the additional drop-offs and pick-ups resulting from the expansion of the day care.

The Applicant plans to continue using the rear yard for the outdoor play area. Staff recommends a condition of approval allowing only 12 children to play outside at any one time to minimize the disruption to the neighborhood. In addition, Staff recommends that the Applicant replace the four-foot-high fence along Gardiner Avenue with a six-foot high privacy fence to improve the screening of the play area

when viewed from the abutting roads. The existing lighting on the Property is residential in character and will not produce excessive illumination that will disturb neighbors.

The expansion of the day care facility will not create any adverse impacts to the area so it will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or to the general neighborhood.

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

At the hearing, the Hearing Examiner questioned one issue raised by Technical Staff in its report – Staff's recommendation that the existing four-foot white picket fence along Gardiner Avenue be replaced by a six-foot privacy fence. The Hearing Examiner is uncertain whether such a change would actually result in greater residential compatibility since the new fence would merely be concealing a children's play area from a roadway. However, when asked about this issue at the hearing, the Applicant agreed with Technical Staff that the new fence would be beneficial. Tr. 11-12. The Hearing Examiner has therefore imposed a condition similar to the one recommended by Staff, but one that requires the Applicant to get Staff's approval for the materials used in the 6-foot tall privacy fence.

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 the combination of inherent and non-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: The only new structure proposed for this use would be the new privacy fence discussed previously. The Hearing Examiner finds that a privacy fence along Gardiner Avenue would be compatible with the neighborhood, as are the existing structures.

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-60 Zone. Development standards for the R-60 Zone are contained §59.4.4.9.B. of the Zoning Ordinance. Staff compared the minimum development standards of the R-60 Zone to those provided by the application in a Table in the Staff Report (Exhibit 16, p. 10), which is reproduced below.

Development Standards in the R-60 Zone	Required/Allowed	Provided
Minimum Lot Area (§59-4.4.9.B.1)	6,000 sq. ft.	9,162 sq. ft.
Minimum Lot Width at Front Building Line §59-4.4.9.B.1)	60 feet	±95 feet
Minimum Lot Width at Front Lot Line (§59-4.4.9.B.1)	25 feet	±88 feet
Maximum Lot Coverage (§59-4.4.9.B.1)	35%	±18%
Front Setback (Dennis Ave) ¹ (§59-4.4.9.B.2)	25 feet	±29 feet
Side street setback, abutting lot fronts on the side street in a Residential Detached zone (Gardiner Ave) (§59-4.4.9.B.2)	25 feet	±25 feet
Side setback ²	8 feet ²	7 feet ²
Minimum Rear Setback (§59-4.4.9.B.2)	20 feet	±38 feet on Gardiner Ave
Maximum Building Height (§59-4.4.9.B.3)	35 feet	±14 feet

¹ Staff used a drawing approved by DPS for construction of the addition to verify the building setbacks . . .

² Under Section 7.7.1.D.2, a detached house on a platted lot that has not changed in size or shape since June 1, 1958 may be constructed with the side yard required by the zoning in effect when the lot or parcel was first created. The Subject lot was created in 1937, and . . . a lot recorded before 1/1/54 in the R-60 zone has a 7 ft setback . . .

Conclusion: As can be seen from the above Table, the proposed use more than meets all the development standards of the R-60 Zone, as provided in Zoning Ordinance §59.4.4.9.B., except with regard to the side setback. Under the current Zoning Ordinance, the R-60 Zone requires an 8 foot side setback, and the present site has only a 7 foot side setback. Technical Staff correctly points out in a footnote to its Table, that the existing side setback of 7 feet was lawful in the R-60 Zone when the subject lot was created in 1937, and a lot recorded before January 1, 1954 in the R-60 zone therefore may have a 7 foot side setback. The building on the site is a legal structure, and under Section 59.7.7.1.A.1 of the 2014 Zoning Ordinance, it is defined as “conforming.” Under Section 7.7.1.D.2, a detached house on a platted lot that has not changed in size or shape since June 1, 1958 may be constructed with the side yard required by the zoning in effect when the lot or parcel was first created. Thus, the existing 7-foot side setback is permissible.

Based on these factors, the Hearing Examiner finds that the application meets the applicable development standards of the R-60 Zone, contained in Article 59.4 of the Zoning Ordinance, to the extent required by the 2014 Zoning Ordinance.

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

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

2. Use Standards

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

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

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

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

Conclusion: As stated by Technical Staff, “the existing parking pad and spaces on the streets abutting the Property provide an adequate area for the discharge and pick up of children.”

Exhibit 16, p. 10.

Staff discussed the arrangement for drop-offs and pick-ups in more detail in connection with impacts on transportation facilities (Exhibit 16, p. 8):

Parking and Drop-Off/Pick-Up

Parking spaces for parent drop-off and pick-up are available on the existing three-car parking pad and on the streets abutting the Property. Assuming the worst-case parking scenario, the Applicant could park in the carport and three employees could park vehicles on one of the streets abutting the house, and at least four spaces would be available for drop-off and pick-up (three spaces on the parking pad and one space on the street abutting the Property). Thus, Staff recommends a condition limiting the number of vehicles that can drop-off or pick-up children to four per 15-minute period.

As previously noted in Part II.C. of this Report and Decision, the Applicant’s Transportation Statement (Exhibit 14(a)) demonstrates that the Applicant will follow the formula of no more than four vehicles arriving every 15 minutes to drop off and pick up children. With a condition requiring this drop-off/pick-up arrangement, imposed in Part IV of this Report and Decision, the Hearing Examiner finds that the subject site satisfies the Code requirement of an adequate area for the safe discharge and pick-up of children.

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

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

Conclusion: Zoning Ordinance §59.6.2.4 requires that a day care center provide three parking spaces for every 1,000 square feet of gross floor area (GFA) devoted to the use, and another two parking spaces for the residence. As noted above, the floor area devoted to the conditional use is 951 square feet, which means that 3 parking spaces are required for its operations, plus 2 for the residence. However, Section 59.3.4.4.E.2.c., quoted above, allows the required number of spaces to be provided on the street abutting the site, if parking is available there and doing so would not adversely affect the surrounding area nor create safety problems.

Technical Staff confirmed, that there is ample parking on the streets abutting the subject site, Dennis Avenue and Gardiner Avenue. As stated in the Technical Staff report (Ex. 16, p. 11),

“The Property has relatively large frontages on both Gardiner Avenue and Dennis Avenue, and space is available to park at least three cars along each frontage (assuming a 21-foot-long space). The Property can accommodate four of the required five parking spaces onsite, and the remaining required space is readily available on the street abutting the Property. . . .”

The photographic evidence included in the Hearing Examiner’s Decision granting a Group Home Special Exception SE 14-03 on February 6, 2014 (reproduced on page 13 of this Decision), supports this conclusion. In light of these circumstances, the Hearing Examiner concludes that the parking spaces for the non-resident employees required by the Zoning Ordinance may be located on the street abutting the site rather than on the site itself. The following condition has also been imposed:

The Applicant may have up to three non-resident staff members on site at any given time, and if they drive, they must park on the street abutting the site, to leave the area of the on-site parking pad available for pick-ups and drop-offs of children. In light of this condition, the parking spaces for the non-resident employees required by the Zoning Ordinance are hereby allowed to be located on the street abutting the site rather than on the site itself.

Based on this record, the Hearing Examiner finds that the subject site satisfies the Code requirements for parking spaces and that the drop-off/pickup spot will provide a safe area for the discharge and pick-up of children accessing the site by automobile.

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

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

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

Conclusion: Not Applicable. The subject site is in the R-60 Zone.

Conclusion: In sum, the application satisfies all of the use standards in Code §59.3.4.4.E.2.

D. General Development Standards (Article 59.6)

Article 59.6 sets the general requirements for site access, parking, screening, landscaping, lighting, and signs. The applicable requirements, and whether the use meets these requirements, are discussed below.

1. Site Access Standards

Conclusion: Not applicable. Zoning Ordinance Division 59.6.1 governs “Site Access;” however, by its own terms, as stated in §59.6.1.2., Division 59.6.1 does not apply to development in single-family residential zones, such as the R-60 Zone involved in this case. Moreover, access to the site for the drop-off and pick up of children has been thoroughly addressed in previous sections.

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

Conclusion: 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. The vehicular spaces required by Zoning Ordinance §59.6.2.4.B. are referenced in the Table on page 11 of the Staff report (Exhibit 16). As discussed in connection with the previous section, 3 vehicle parking spaces are required for the operation of the conditional use and 2 are required for the residence. Four of these spaces are provided on site (1 space in the carport and 3 on the parking pad). The remaining space will be located on the abutting roadways, as permitted by Zoning Ordinance §59.3.4.4.E.2.c.

The Applicant will also comply with Section 59.6.2.4.C. by providing a bicycle parking space near the entrance to the basement. Based on this record, the Hearing Examiner finds that the Applicant will be compliant with the cited sections of the Zoning Ordinance.

b. Parking Setbacks, Screening and Landscaping

Conclusion: The Hearing Examiner also finds that the Applicant's proposed setbacks for the parking area are compliant with Division 6.2 of the Zoning Ordinance.

Parking lot setbacks for conditional uses in residential zones are specified in Zoning Ordinance §59.6.2.5.K.

K. Facilities for Conditional Uses in Residential Detached Zones

Any off-street parking facility for a conditional use that is located in a Residential Detached zone where 3 or more parking spaces are provided must satisfy the following standards:

1. Location

Each parking facility must be located to maintain a residential character and a pedestrian-friendly street.

2. Setbacks

a. The minimum rear parking setback equals the minimum rear setback required for the detached house.

~~b. The minimum side parking setback equals 2 times the minimum side setback required for the detached house.~~

* * *

The Hearing Examiner has crossed out the side setback requirement of Section 59.6.2.5.K.2.b. because an amendment to the Zoning Ordinance,⁸ now codified in §59.6.2.5.A.1., removed the side setback requirement of that Section with regard to detached houses. The Applicant's parking pad clearly meets the rear setback requirements of Section 59.6.2.5.K.2.a, and continues to maintain a residential character and a pedestrian-friendly street. It thus is compliant with §59.6.2.5.K.

Landscaping and screening requirements for parking facility are set forth in Zoning Ordinance §59.6.2.9.B. By its own terms, the section applies only to "*Conditional Uses Requiring 5*

⁸ ZTA 16-13, Ord. No. 18-15.

to 9 Spaces.” Since the subject site’s parking pad contains only 3 spaces, this section is inapplicable.

In sum, the Hearing Examiner hereby finds that Applicant’s proposed parking facility is in compliance with Division 6.2 of the Zoning Ordinance.

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.

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: Technical Staff notes that “The walkways are . . . well-lit. Ground lights are located near each path and along the stone wall.” Exhibit 16, p. 3. The Applicant does not propose any new lighting or modified lighting on the subject site. Technical Staff found that the existing lighting “. . . is residential in character and does not result in excessive illumination onto the neighboring properties.” Exhibit 16, p. 11.

Based on this record, the Hearing Examiner finds that the existing lighting is compliant with the requirements of Division 6.4, regarding lighting.

b. Site Screening and Landscaping

Zoning Ordinance §59.6.5.2.B. provides:

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

Since the proposed use is in a single-family detached house, the specific requirements of Section 6.5.3. do not apply to this case. The single requirement is that “*All conditional uses must have screening that ensures compatibility with the surrounding neighborhood.*” This language is consistent with the terms of Section 59.7.3.1.E.1.b., which specifies that the Hearing Examiner must find that the proposed use meets applicable general requirements under Article 59-6 “to the extent the Hearing Examiner finds necessary to ensure compatibility. . .”

Technical Staff described the existing landscaping and screening (Exhibit 16, p. 3):

The front yard is well-landscaped with trees, shrubs and perennials. . . .
The play area is located in the rear of the property closest to Gardiner Avenue. It is fenced in with a white picket fence, approximately four-foot in height, along the Gardiner Avenue property line and on the eastern boundary of the play area; an approximately six-foot tall wooden privacy fence along the lot line shared with a neighboring property to the north; and a chain link fence, approximately four feet in height, on the property line shared with the abutting lot to the east.

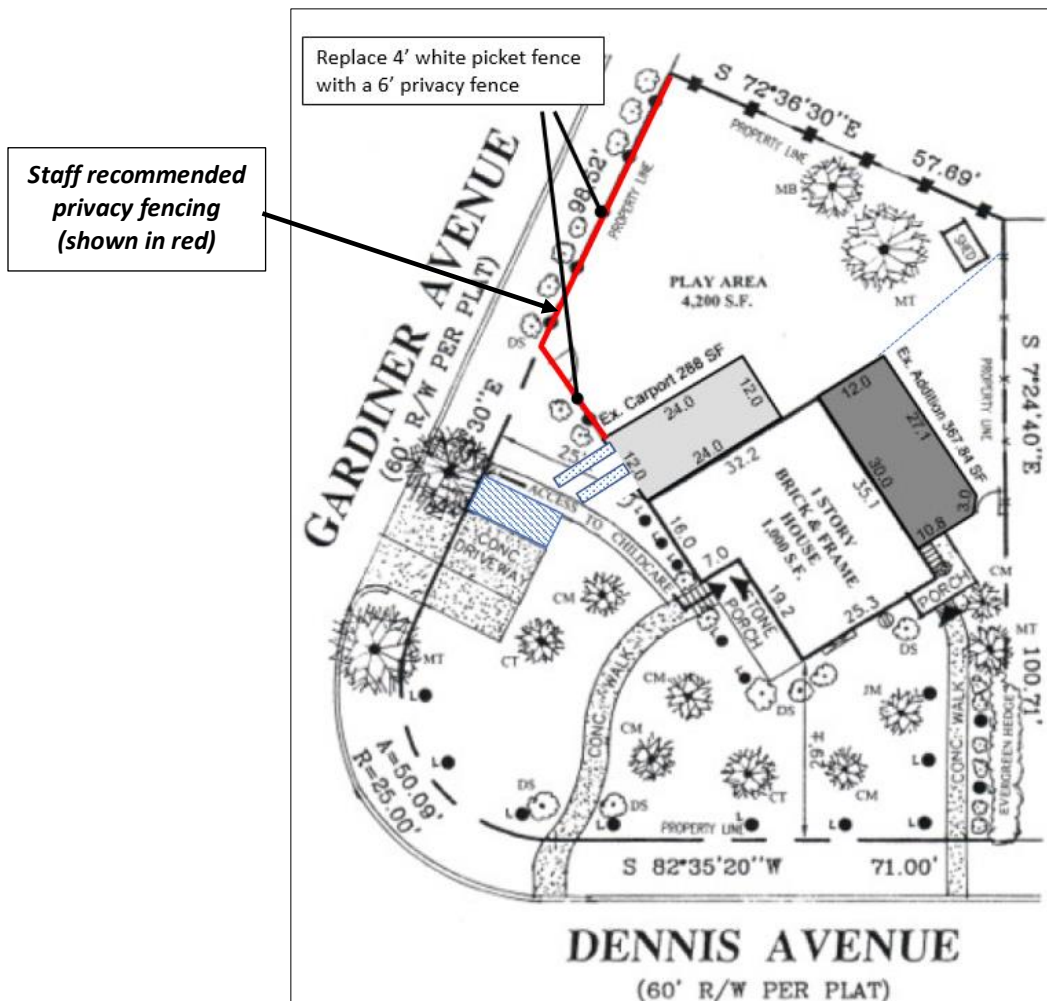
Staff also observed that “There are no exterior modifications being proposed to the detached house, or to the yard which is already attractively landscaped.” Exhibit 16, p. 13.

Conclusion: Based on this record, the Hearing Examiner finds that the site landscaping is residential in character and is compatible with the neighborhood.

The situation is not quite as clear cut with regard to screening. Technical Staff recommends that some of the existing screening, a four-foot white picket fence along Gardiner Avenue, be replaced with a six foot privacy fence (Exhibit 16, p. 11):

The existing six-foot high board on board fence along the northern lot line screens the play area from the neighboring Property to the north. The play area is approximately 20 feet away from the lot line of the neighboring property to the east and screened by the house and two trees on the Subject Property. To screen the view of the children and the play area from the abutting roads, Staff recommends that the Applicant replace the four-foot high white picket fence along the Gardiner Avenue lot line, and next to the carport, with a six-foot tall privacy fence. [Emphasis added.]

Staff's recommendation in this regard is shown on an annotated version of the landscaping plan (Exhibit 16, p. 12), reproduced below:



Conclusion: As previously mentioned, the Hearing Examiner did not necessarily believe that the change in the fence recommended by Technical Staff was a needed improvement, but acceded to the recommendation of Staff, since it was also supported by the testimony of the Applicant. Tr. 11-12. Based on this record, the Hearing Examiner finds that the existing screening on the site, whether or not supplemented with a six-foot privacy fence along the west side, is compatible with the neighborhood and sufficient to screen the neighbors from any significant adverse effects.

4. Signage

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

A. Base Sign Area

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

1. Freestanding Sign

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

Conclusion: The Applicant does not currently display any sign regarding the existing Group Day Care use, and he has not proposed any sign for the proposed Day Care Center. Tr. 15.

Nevertheless, a condition is imposed in Part IV of this Report and Decision which will require the Applicant to obtain a permit from the Department of Permitting Services (DPS) before erecting any sign. The condition also limits any future sign to no more than two square feet in size and prohibits any lighted sign. With that notation, the Hearing Examiner finds that the proposed use is compliant with all the requirements of Article 59-6 of the Zoning Ordinance.

IV. CONCLUSION AND DECISION

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

Based on the foregoing findings and conclusions and a thorough review of the entire record, the application of Humberto Losada (CU 18-04), for a conditional use under Section 59.3.4.4.E. of the Zoning Ordinance, to operate a child day care center for up to 20 children in his home at 2311 Dennis Avenue, Silver Spring, Maryland, is hereby **GRANTED**, subject to the following conditions:

1. Special Exception S.E. 14-03 must be revoked as superseded by Conditional Use CU 18-04. An Order so stating will be issued, upon the request of the special exception holder, directly in the SE 14-03 case file.
2. The day care facility is limited to 20 non-resident children in the Applicant's care at any one time. All children must be under the direct supervision of a staff member at all times. The number of children on site must not exceed the number authorized by State licensing authorities, and the ages of the permitted children will be determined by State licensing authorities.
3. The Applicant shall be bound by the Affidavit of Compliance submitted in connection with this case, Exhibit 2(i), in which Applicant certified that he will comply with and satisfy all applicable State and County requirements, correct any deficiencies found in any government inspection, and be bound by the affidavit as a condition of approval for the conditional use.
4. The hours of operation are Monday through Friday from 7:30 a.m. to 5:30 p.m.
5. No more than 12 children are permitted to play outdoors at any one time. Outside play time may not start prior to 9:00 a.m. and may not extend beyond 5:00 p.m. All gates or other access to the outside play area must be secured during outdoor play in a manner that will prevent any of the children present from opening such access and wandering off.
6. The Applicant may have up to three non-resident staff members on site at any given time, and if they drive, they must park on the street abutting the site, to leave the area of the on-site parking pad available for pick-ups and drop-offs of children. In light of this condition, the parking spaces for the non-resident employees required by the Zoning Ordinance are hereby allowed to be located on the street abutting the site rather than on the site itself.
7. The applicant must provide one long-term bicycle parking space on site.

8. Vehicular arrival and departure times for the children must be staggered, through contractual agreement between the operator of the daycare center and the parents, so that a maximum of four vehicles may arrive every 15 minutes to drop-off and pick-up children. In no event may a child be dropped off before Applicant or 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.
9. The Applicant must not display a sign for the child care facility unless it is first approved by the Department of Permitting Services (DPS) and a permit is obtained. A sign, if erected, must not exceed two square feet and must not be lighted. A copy of the permit must be filed with OZAH before any sign is posted.
10. Physical improvements are limited to those shown on the site plan and landscape plan submitted with the application, except that the Applicant must replace the existing, 4-foot tall white picket fence of the west side of the house with a 6-foot tall privacy fence made of materials approved by Technical Staff.
11. The Applicant must comply with and satisfy all applicable State and County requirements for operating a Child Day Care Center, and correct any deficiencies found in any government inspection.
12. Children must be accompanied by an adult to and from the child-care entrance.
13. The Applicant shall not use a public address system of any kind outside the building, nor shall any amplified music be played outside the building.
14. The Applicant shall maintain the grounds in a clean condition, free from debris, on a daily basis.
15. 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 26th day of June, 2018.



Martin L. Grossman
Hearing Examiner

NOTICE OF RIGHT TO REQUEST ORAL ARGUMENT

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

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

The Board of Appeals may be contacted at:

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

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

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

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

Copies To:

Humberto Losada
Barbara Jay, Executive Director
Montgomery County Board of Appeals
Emily Tettelbaum, Planning Department
All parties of record
Ehsan Motazed, Department of Permitting Services
Greg Nichols, Manager, SPES at DPS
Alexandre A. Espinosa, Director, Finance Department
Charles Frederick, Esquire, Associate County Attorney
Gwen Wright, Director, Planning Department