

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

IN THE MATTER OF:
DAMARIS TOVAR
Applicant

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OZAH Case No. CU 17-10

Before: Lynn Robeson Hannan, Hearing Examiner

HEARING EXAMINER'S REPORT AND DECISION
ADMINISTRATIVELY APPROVING MINOR MODIFICATION

I. STATEMENT OF THE CASE

On April 14, 2017, the Hearing Examiner approved a conditional use application permitting Damaris Tovar (Applicant or Ms. Tovar) to operate a group daycare for up to 12 children under §59.3.4.4.D. of the Zoning Ordinance at 6015 Johnson Avenue, Bethesda, Maryland. The subject property is described as Lot 9 in the Ayrlawn Subdivision and is zoned R-60. Exhibit 18. The conditional use approval was made subject to the following conditions:

1. The day care facility is limited to up to 12 children and 3 non-resident employees.
2. The hours of operation are Monday through Friday from 6:45 a.m. to 6:00 p.m.
3. Outside play time may not start prior to 9:00 a.m. and may not extend beyond 5:00 p.m.
4. The Applicant must enter into an agreement with each parent and to specify assigned arrival and departure times that must be staggered into separate groups. Parent arrival and departure must at all times meet the following requirements:
 - a. Group A (up to 5 cars) 6:45 a.m. – 8:00 a.m.; 4:00 p.m. – 4:30 p.m.
 - b. Group B (up to 5 cars) 8:30 a.m. to 9:00 a.m.; 4:30 p.m. to 5:00 p.m.
 - c. Group C (up to 5 cars) 9:00 a.m. to 9:30 a.m.; 5:00 p.m. – 6:00 p.m.
Morning drop-off may extend beyond 9:30 a.m., but must not begin

- before 6:45 a.m.; afternoon pick-up may begin before 4:00 p.m. but must not extend beyond 6:00 p.m.
- d. No parent drop-off is permitted on Johnson Avenue on weekdays between 7:15 a.m. and 8:45 a.m.
5. The Applicant must keep a copy of the license plate number of all vehicles permitted to drop-off and pick-up children and employees and must provide this information to inspectors from the Department of Permitting Services upon their request.
 6. The Applicant must not erect a sign on the subject site.
 7. The Applicant must comply with and satisfy all applicable State and County requirements for operating a Group Day Care for children, and must correct any deficiencies found in any government inspection.
 8. The Applicant must not use a public address system of any kind outside the building, and must not allow any amplified music to be played outside the building.
 9. The Applicant must maintain the grounds in a clean condition, free from debris, on a daily basis. 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.

Hearing Examiner's Report and Decision, CU 17-10, Application of Damaris Tovar, p. 31 (April 14, 2017) (Hearing Examiner's Report).

On June 17, 2021, Ms. Tovar submitted a request for a minor modification to amend Condition No. 4 (above) to permit drop-offs between 8:00 and 8:30 a.m. during the week. She stated:

Our childcare center opened up early in the COVID-19 pandemic to serve essential personnel. We have felt very fortunate to be able to support the front-

line essential workers during this challenging time. Our families have requested an additional drop-off window in the mornings to better accommodate work schedules and the unexpected challenges that often arise with getting young children ready and dropped off on a workday (traffic, temper tantrums, work schedule changes). Therefore, we would like to request a minor amendment to the conditional use license to allow for drop-offs during the 8:00-8:30AM window, which will provide families with a greater level of flexibility during an already stressful time.

In order to minimize the impact for the neighborhood, this request will not exceed 5 cars. Parents will be required to park in the driveway, or on Ewing Avenue. Parking on Johnson Avenue will remain prohibited during 7:15 a.m. – 8:45 a.m. In addition, many of the families live and/or work in the neighborhood and walk to our center, and adjustment of the drop-off window is not expected to increase traffic.

The Hearing Examiner referred this request to Staff of the Planning Department for a recommendation on whether the requested modification was major or minor. Exhibit 34. On August 12, 2021, Staff responded that, in their opinion, it was minor. Exhibit 35.

II. FACTUAL BACKGROUND

With the original decision, the Hearing Examiner approved a waiver of the minimum number on-site parking spaces required for the use. The parking arrangements are described in (*Hearing Examiner's Report*, p. 13):

The property has a one-car garage and up to two spaces in the driveway. Staff confirms that there are up to four on-street parking spaces abutting the property (two along Johnson Avenue and two along Ewing Drive). Four of the spaces, the two in the driveway and the two on Johnson Avenue, are used for parent drop-off and pick up rather than for non-resident employee parking. Exhibit 27, p. 2; Exhibit 10. Staff advises that employees do not park at the site because they are dropped off and picked up by car. Ms. Tovar testified that her husband generally leaves at 5:30 a.m., thus leaving a space in the driveway for parent drop-off as well.

Ms. Tovar has requested a waiver of three spaces for the non-resident employees so that the on-site and on-street parking is available for parent drop-off and pick-up. Exhibit 27, p. 5. She is also requesting a waiver of the requirement for one on-site bicycle space. *Id.*

Drop-off and pick-up recommended by Staff permitted staggered arrivals during the morning, including the period between 8:00 a.m. and 8:30 a.m. (Exhibit 27, p. 2):

- i. Group A (up to 5 cars) 6:45 a.m. – 8:30 a.m.; 4:00 p.m. – 4:30 p.m.
- ii. Group B (up to 5 cars) 8:30 a.m. – 9:00 a.m.; 4:30 p.m. – 5:00 p.m.
- iii. Group C (up to 5 cars) 9:00 a.m. – 9:30 a.m.; 5:00 p.m. – 6:00 p.m.

With this schedule, Staff concluded that the proposed use met the requirements of Local Area Transportation Review (LATR). At the time, the LATR Guidelines exempted uses generating fewer than 30 trips from a full Traffic Study.¹

Evidence presented at the public hearing indicated that the subject property is located at the beginning of the block of Johnson Road that ends at the entrance to North Bethesda Middle School. Johnson Avenue is relatively narrow and does not permit two-way traffic. In her original decision, the Hearing Examiner found this was a “non-inherent” characteristic of the use. *Hearing Examiner’s Report*, p. 23. A neighbor who lived across Johnson Avenue expressed concern that he would not be able to back out of his driveway when school opened due to bus traffic entering the school combined with drop-offs along Johnson Avenue for the group day care. Based on this testimony, the Hearing Examiner imposed a condition prohibiting drop-off on Johnson Avenue between 7:30 a.m. and 8:15 p.m. At that time, Ms. Tovar testified that she did not have any parents arriving between 8:00 a.m. and 8:30 a.m. *Hearing Examiner’s Report*, p. 28, fn. 7.

III. FINDINGS AND CONCLUSIONS

¹The current Local Area Transportation Review Guidelines now exempt 50 person trips from full review. *Planning Board’s Local Area Transportation Review Guidelines*, Section II.B., p. 7.

The Zoning Ordinance defines a “minor modification” to an approved conditional use as one that “does not change the nature, character, or intensity of the conditional use to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected, when considered in combination with the underlying conditional use.” *Zoning Ordinance*, §59.7.3.1.K.2.a. A major amendment to a conditional use, on the other hand, “changes the nature, character, or intensity of the conditional use to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected, when considered in combination with the underlying conditional use.” *Id.*, §59.7.3.1.K.1.a.

The Hearing Examiner finds that the modification proposed by Ms. Tovar falls within the definition of a “minor” modification that may be approved administratively. It is clear from the Hearing Examiner’s Report that the primary purposes of the restrictions on drop-offs were to ensure compliance with the County’s LATR Guidelines and to allow the neighbor across the street to exit his driveway during the morning when school opened. It appears that the omission of the 8:00 a.m. to 8:30 a.m. was based on Ms. Tovar’s testimony that, at the time, she had no parents coming between those times, which was not central to the decision approving the proposed use. In fact, other sections of the Hearing Examiner’s Report indicate that parking *could* occur between 8:00 a.m. and 8:30 a.m. (*Id.*, p. 24):

The Hearing Examiner imposes condition that prohibits parent drop-off along Johnson Avenue from 7:15 a.m. to 8:45 a.m. weekday mornings. *Drop-offs may occur during that time, but parents must use the two spaces along Ewing Drive and the space in the driveway to drop-off children during this time frame.* The more general schedule recommended by Staff may remain the same.

* * *

Based on Mr. Neuman’s testimony, the Hearing Examiner, however, imposes a condition prohibiting drop-offs on Johnson Avenue between 7:15 a.m. and 8:45 a.m. on weekdays. With this condition, there will be a total of five parking spaces

between those times: one in the garage (for the residence), *two in the driveway, and two along Ewing Drive*. The four spaces available for drop-off can accommodate Staff's recommended schedule while at the same time eliminating parking on Johnson Avenue during peak school traffic in the morning. This is because Staff's schedule is spread over a longer time than the narrow period in which drop-off is prohibited along Johnson Avenue. (Emphasis supplied).

Thus, while the prohibition on parking may have been based on the testimony of Ms. Tovar, it was not necessary to address the Hearing Examiner's concerns.

Ms. Tovar's proposed minor modification only seeks to permit parents to park between 8:00 a.m. and 8:30 a.m. but does not change the restriction on parking along Johnson Avenue. Thus, it addresses the Hearing Examiner's concerns in the original special exception while at the same time permitting the Applicant more flexibility to address the varied parent schedules. For this reason, the Hearing Examiner finds that the proposed modification does not "does not change the nature, character, or intensity of the conditional use to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected, when considered in combination with the underlying conditional use. does not change the nature, character, or intensity of the conditional use to an extent that substantial adverse effects on the surrounding neighborhood could reasonably be expected, when considered in combination with the underlying conditional use," and therefore is a minor modification that may be approved administratively.

While current LATR Guidelines permit an exemption for up to 50 trips, there is no updated Traffic Statement in the record. Therefore, the Hearing Examiner modifies Condition No. 4 of the Report to reflect the original condition of approval recommended by Staff:

4. The Applicant must enter into an agreement with each parent and to specify assigned arrival and departure times that must be staggered into separate groups. Parent arrival and departure must at all times meet the following requirements:

- a. Group A (up to 5 cars) 6:45 a.m. – 8:00 a.m.; 4:00 p.m. – 4:30 p.m.
- b. Group B (up to 5 cars) 8:30 a.m. to 9:00 a.m.; 4:30 p.m. to 5:00 p.m.
- c. Group C (up to 5 cars) 9:00 a.m. to 9:30 a.m.; 5:00 p.m. – 6:00 p.m. Morning drop-off may extend beyond 9:30 a.m., but must not begin before 6:45 a.m.; afternoon pick-up may begin before 4:00 p.m. but must not extend beyond 6:00 p.m.
- d. No parent drop-off is permitted on Johnson Avenue on weekdays between 7:15 a.m. and 8:45 a.m.

III. ORDER

Based on the foregoing and review of the record of this case, it is hereby

ORDERED: That the request for a minor amendment to Conditional Use No. CU 17-10, permitting modifications to Condition No. 4 in the Hearing Examiner's Report be, and hereby is, administratively **APPROVED**, and it is further

ORDERED: That Condition No. 4 of the Hearing Examiner's decision dated is hereby modified as follows:

4. The Applicant must enter into an agreement with each parent and to specify assigned arrival and departure times that must be staggered into separate groups. Parent arrival and departure must at all times meet the following requirements:

- a. Group A (up to 5 cars) 6:45 a.m. – 8:30 a.m.; 4:00 p.m. – 4:30 p.m.
- b. Group B (up to 5 cars) 8:30 a.m. to 9:00 a.m.; 4:30 p.m. to 5:00 p.m.
- c. Group C (up to 5 cars) 9:00 a.m. to 9:30 a.m.; 5:00 p.m. – 6:00 p.m. Morning drop-off may extend beyond 9:30 a.m., but must not begin before 6:45 a.m.; afternoon pick-up may begin before 4:00 p.m. but must not extend beyond 6:00 p.m.
- d. No parent drop-off is permitted on Johnson Avenue on weekdays between 7:15 a.m. and 8:45 a.m.

and it is further,

ORDERED: That this amendment and the continued use of the conditional use are subject to all terms and conditions imposed in connection with the initial approval, except as specifically amended by the Hearing Examiner in this Opinion and Order. The Conditional Use holder is directed to comply fully with all applicable county, State, and federal regulations.

Issued this 20th day of August 2021.



Lynn Robeson Hannan
Hearing Examiner

NOTICE

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

COPIES TO:

Damaris Tovar, Applicant
Barbara Jay, Executive Director
Montgomery County Board of Appeals
Stephanie Dickel, Planning Department
Victor Salazar, Department of Permitting Services
Barbara Cox, Department of Permitting Services
Michael Coveyou, Acting Director, Finance Department
Charles Frederick, Esquire, Associate County Attorney
Current abutting and confronting property owners
All parties entitled to notice at the time of the original filing:
Abutting and Confronting Property Owners (or a condominium's council of unit owners or renters, if applicable)
Civic, Renters' and Homeowners' Associations within a half mile of the site
Any Municipality within a half mile of the site