



## I. STATEMENT OF THE CASE

Petition No. S-2788, filed on October 13, 2011, seeks a special exception, pursuant to §59-G-2.00 of the Zoning Ordinance, to permit an accessory apartment use in the basement of Petitioner's home at 12301 Bradbury Drive, Gaithersburg, Maryland, on land in the R-200 Cluster Zone. The property's legal description is Lot 48, Block F of the Quince Orchard Valley Subdivision.

This matter was originally scheduled for a hearing on February 24, 2011. Exhibit 11. It was rescheduled at the Petitioner's request to April 11, 2011. Exhibit 13. The only community response has been one opposition letter from neighbors Ed and Jean Mitchell of 12308 Bradbury Drive, who expressed concern about operation and maintenance of the property and the number of vehicles parked on the site. Exhibit 12.

Technical Staff of the Maryland-National Capital Parks and Planning Commission (M-NCPPC), in a report issued February 15, 2011, recommended approval of the special exception, with conditions. Exhibit 14.<sup>1</sup>

By memorandum dated March 8, 2011, Housing Code Inspector Unray Peters of the Department of Housing and Community Affairs (DHCA), indicated that he had inspected the premises on February 18, 2011, and that there were a number of issues, which he listed. Exhibit 15(a). Mr. Peters stated in his memorandum that, based upon a habitable space of 240 square feet, the accessory apartment could house a maximum of one occupant.

A public hearing was convened as scheduled on April 11, 2011, and Petitioner Ivy Yimo Wu appeared *pro se*. She was accompanied by her mother Ling Li, who is also an owner of the property. Ms. Li does not speak English, and the Hearing Examiner offered to postpone the hearing to obtain a translator or to allow Petitioner's mother to supplement the record with a statement after the hearing. Petitioner elected to proceed with the hearing. Tr. 3-6. The only other witness to appear was Lauren

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<sup>1</sup> The Technical Staff report is frequently quoted and paraphrased herein.

Cary, of the Department of Housing and Community Affairs, who substituted for Mr. Peters because he could not be present.

Petitioner testified in support of her petition. She adopted the findings in the Technical Staff Report (Exhibit 14) and in the Housing Code Inspector's Report (Exhibit 15(a)), as Petitioner's own evidence, and agreed to meet all the conditions set forth in both reports. Tr. 11-15. Testimony was received, as well, from Ms. Cary.

The record was held open until May 2, 2011, to give Petitioner time to file a copy of her deed, photos of the home and a statement from her mother, if she elected to file one. Petitioner timely filed a copy of her deed (Exhibit 18) and photos of the home's exterior (Exhibit 19). The record closed, as scheduled, on May 2, 2011.

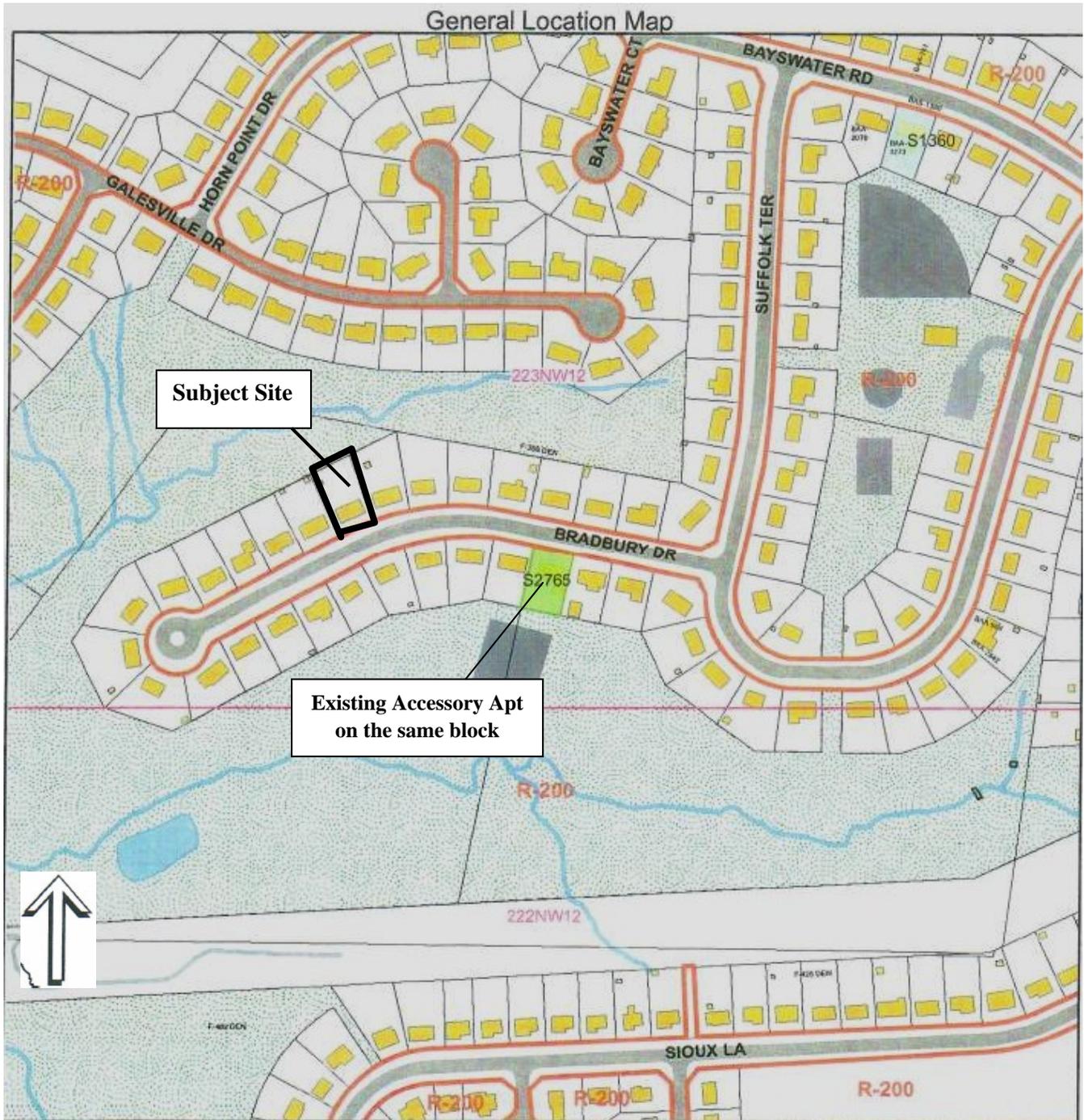
Since Petitioner has satisfied all the requirements for the special exception, the Hearing Examiner recommends that it be granted, subject to the conditions set forth in Part V of this report.

## **II. FACTUAL BACKGROUND**

### **A. The Subject Property and the Neighborhood**

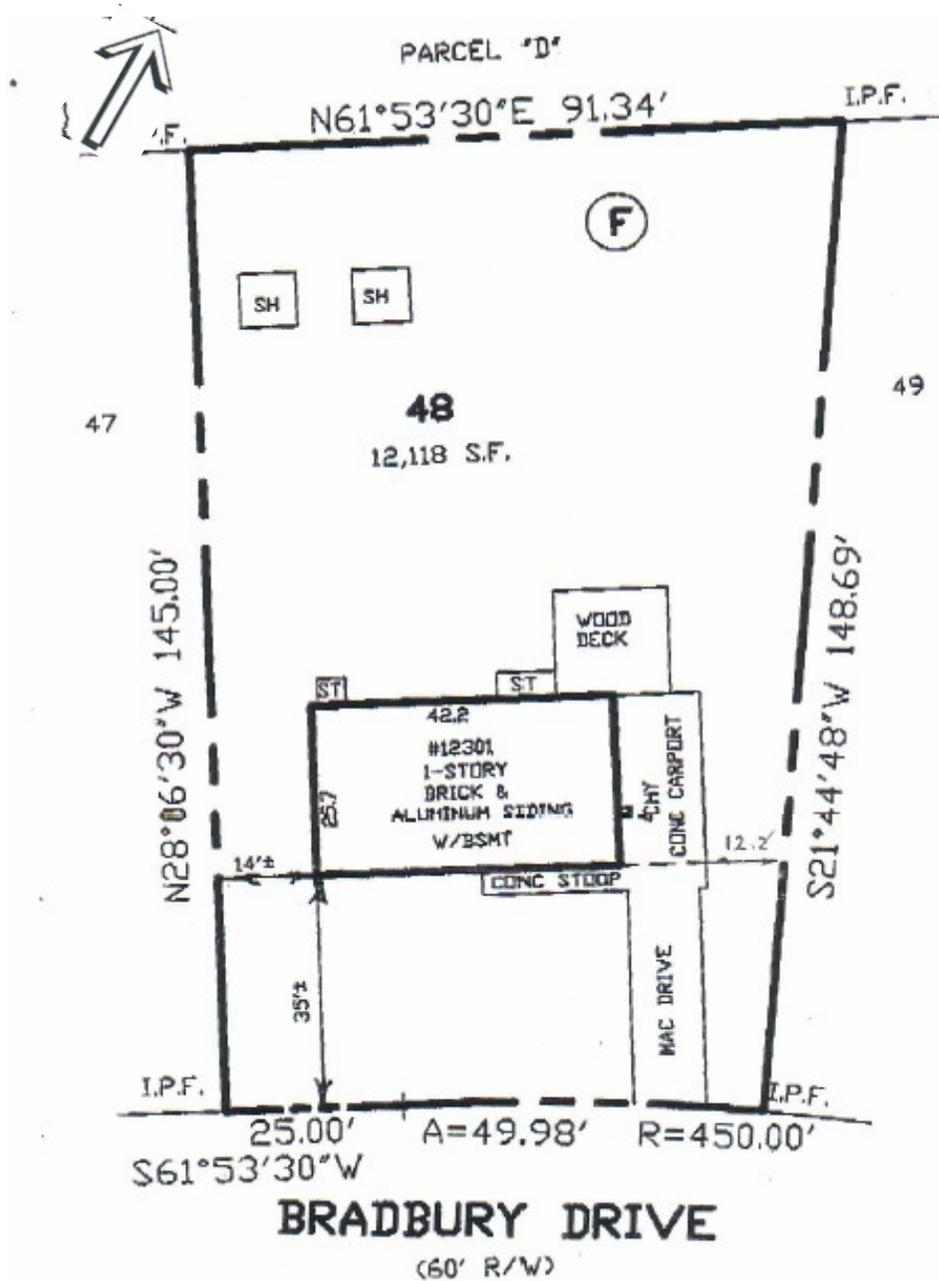
The subject property consists of 12,118 square feet in the R-200 zone. As pointed out by Technical Staff (Exhibit 14, p. 2), the standard lot size in the R-200 zone is 20,000 square feet; however, this subdivision is a cluster development that allows for variation in lot sizes in order to preserve open space within the subdivision. The subject property fronts onto Bradbury Drive, and it is developed with a detached single-family dwelling that consists of one-story in the front and two stories in the rear. Staff reports that the lot slopes significantly downward from front to rear. The dwelling was constructed in 1971, and is set back approximately 35 feet from Bradbury Drive. The dwelling has a left side yard of approximately 14 feet, a right side yard of approximately 12 feet, and a rear yard of approximately 80 feet. The location of the site can be seen on the following General

Location Map provided by Technical Staff:



There is a one-car garage attached to the right side of the dwelling, and there is a paved driveway that measures approximately 15 feet wide by 35 feet deep. It extends from Bradbury Drive to the front of the dwelling, and according to Technical Staff, it can accommodate at least

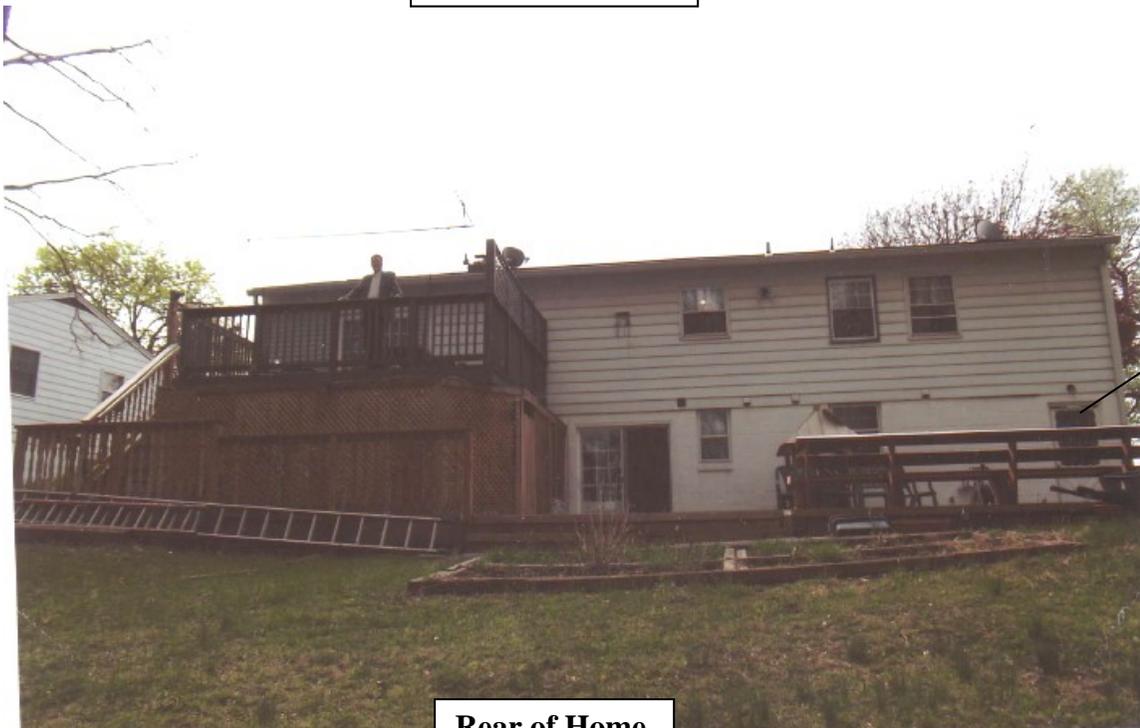
three vehicles. The Petitioner and the Housing Code Inspector indicate that the driveway can actually hold four vehicles. Tr. 21 and 28; Exhibit 15(a).<sup>2</sup> A concrete walkway, located along the right side of the attached garage, provides access to an existing rear deck. The property is depicted in the following Site Plan (Exhibit 4) and photos (Exhibit 19):



<sup>2</sup> The March 8, 2011 report from Housing Code Inspector Peters indicated that “the property can accommodate 4 vehicles for off street parking” on a driveway measuring 16 feet by 24 feet. Exhibit 51(a). At the hearing, Housing Code Inspector Cary clarified that the four-car capacity referred to the driveway alone (*i.e.*, not including the garage). Tr. 28.



**Front of Home**

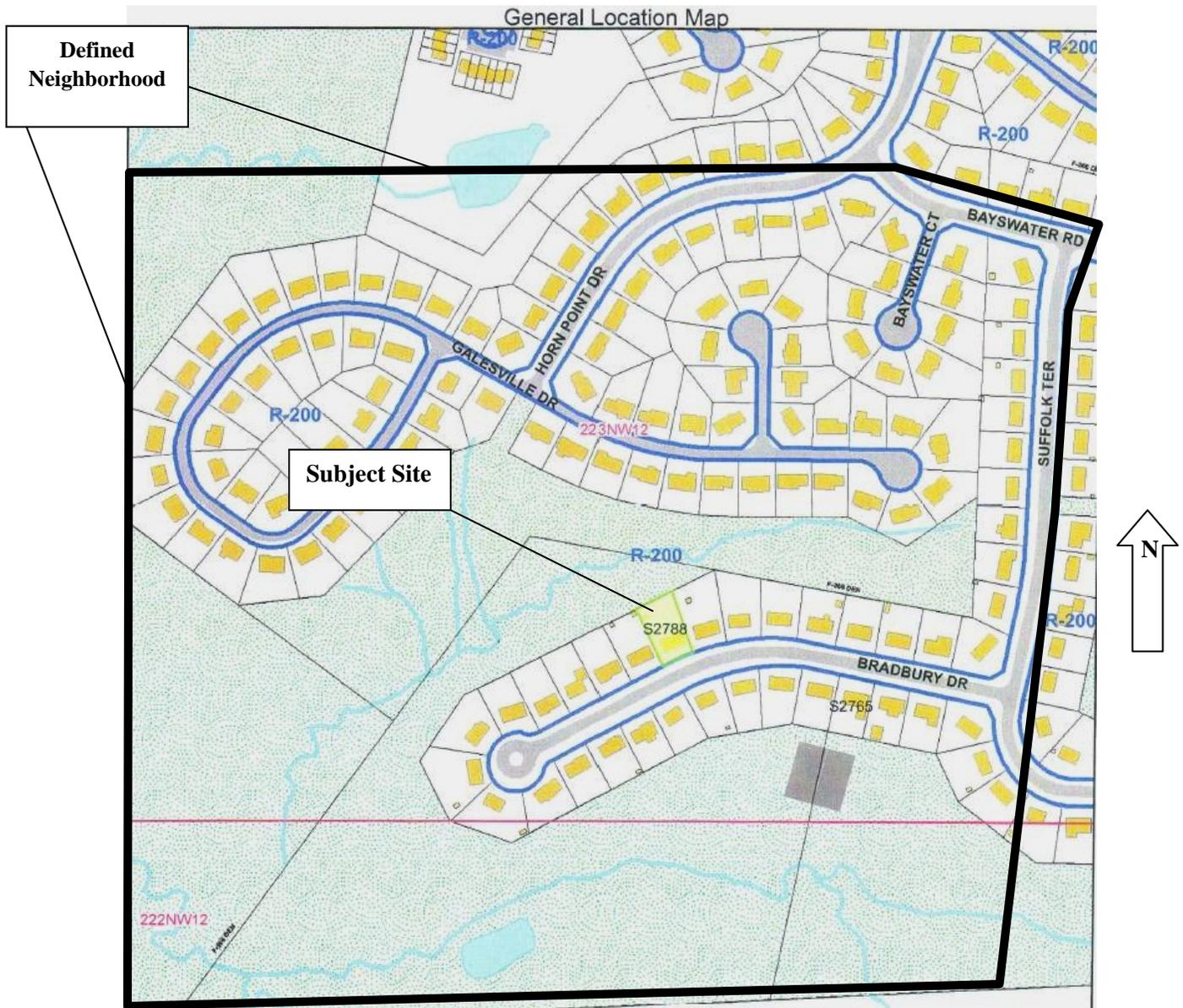


**Accessory  
Apartment  
Entrance**

**Rear of Home**

As can be seen, the rear deck includes a stairway that provides access to the ground level patio and to the rear entrance of the accessory apartment. The applicant does not plan any exterior modifications.

For the purposes of this application, Technical Staff defined the neighborhood by the following boundaries, which are accepted by the Hearing Examiner: Bayswater Road to the north, Suffolk Terrace to the east, Quince Orchard Valley Park to the south, and Seneca Creek State Park to the west. The defined neighborhood is depicted below in a Neighborhood Map provided by Technical Staff (Exhibit 14, Attachment 1):



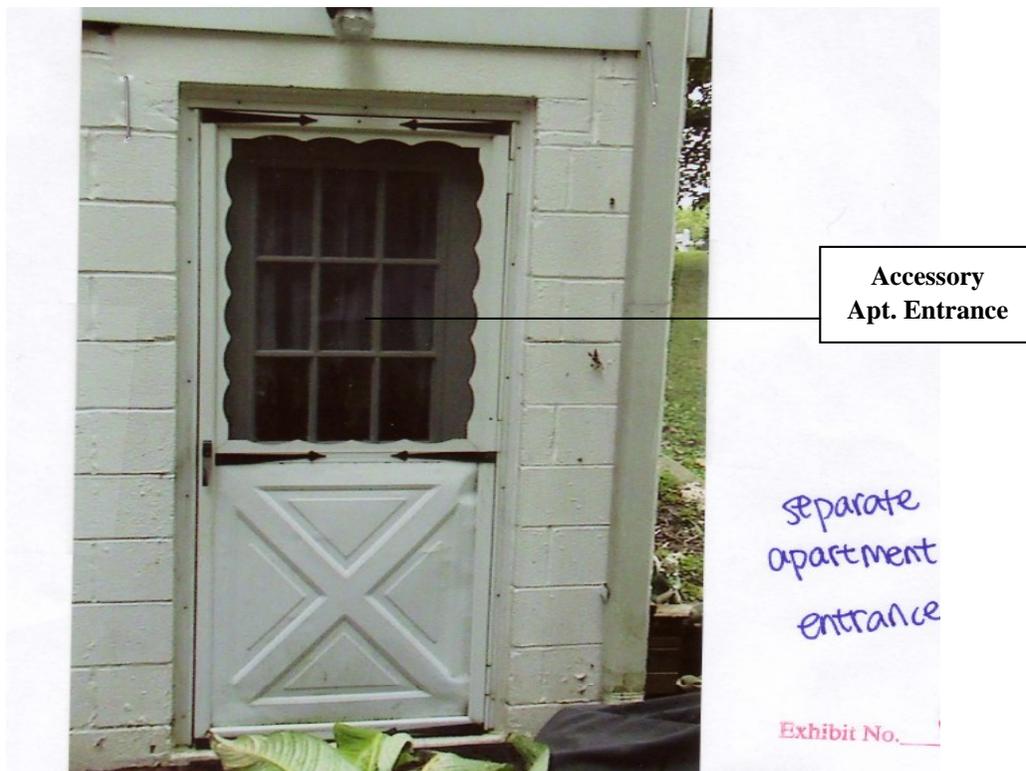
The neighborhood is primarily zoned R-200 for detached single-family dwellings. Technical Staff reports that single-family detached homes extend to the east and west of Bradbury Drive on

both sides of the street. Exhibit 14, pp. 2-3. Parking is permitted on both sides of Bradbury Drive. Property records show that an accessory apartment (S-2765) was approved by the Board of Appeals at 12212 Bradbury Drive (Lot 30) on October 7, 2010.

**B. The Proposed Use**

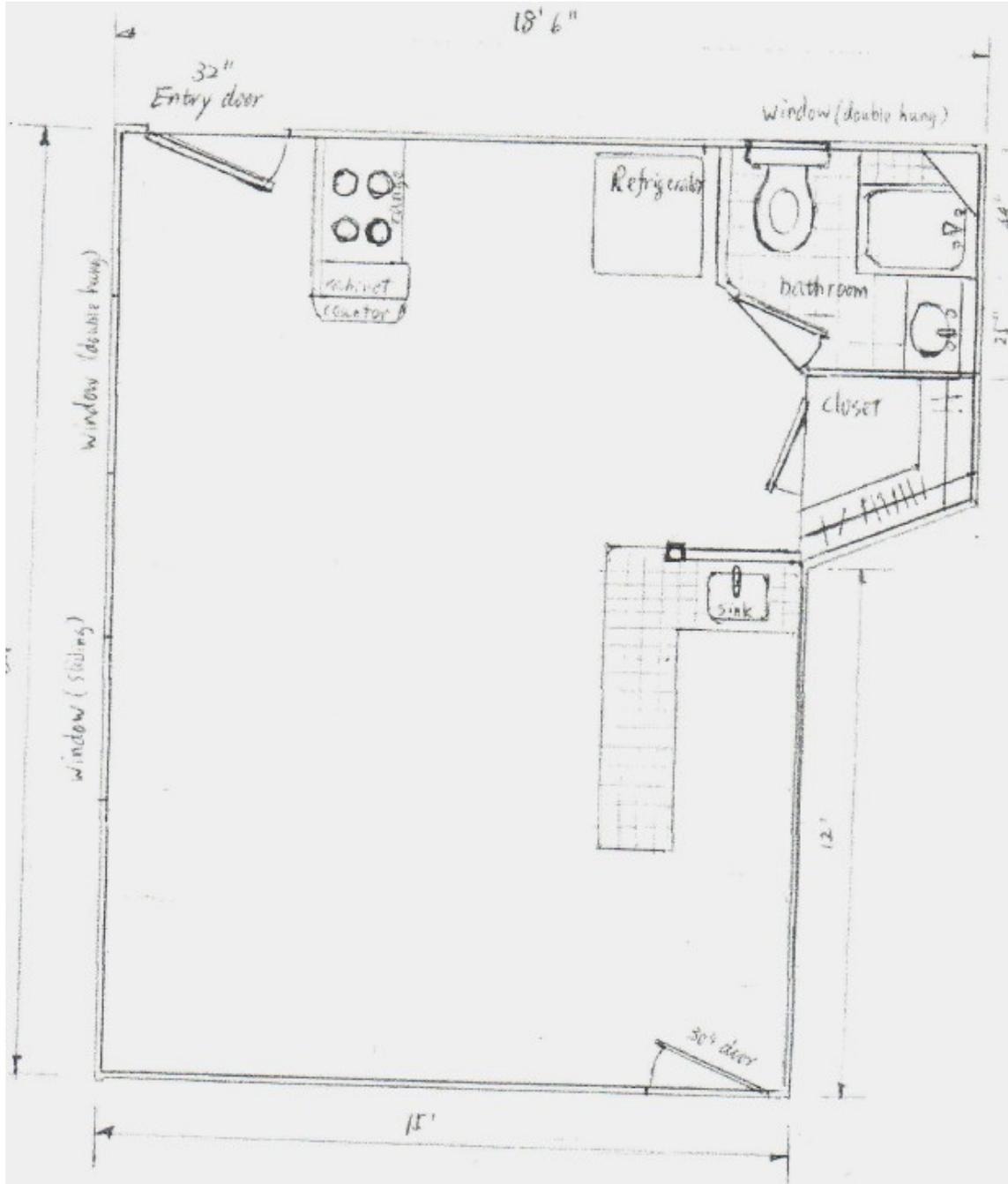
The Petitioner is requesting approval of an existing 348 square foot accessory apartment located in the basement of her home.<sup>3</sup> Petitioner lives in the main part of the home, and the accessory unit is a studio apartment currently occupied by a single tenant. Tr. 23.

Since the accessory apartment is located in the basement of the home and will not require any addition or structural changes, it does not detract from the single-family residential appearance of the neighborhood. As the photograph below illustrates, the apartment entrance, on the rear of the home, appears to be part of a normal residential entry to the basement. (Exhibit 9, lower photo):



<sup>3</sup> Petitioner’s statement in support of their petition (Exhibit 3) indicates that the apartment is 348 square feet, but the Housing Inspector’s measurements reveal 240 square feet of habitable space. Exhibit 15(a), Item # 3.

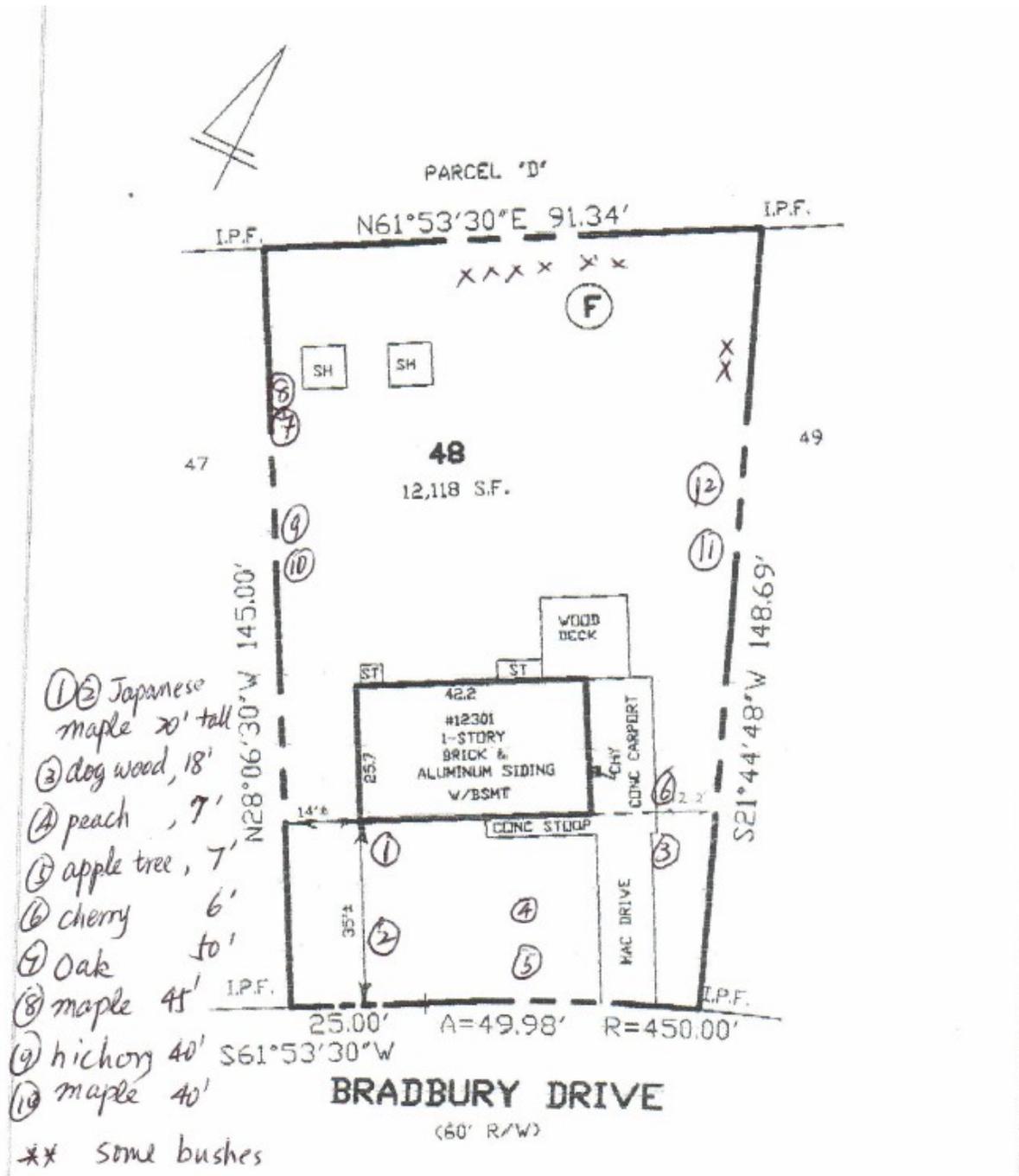
The apartment's floor plan (Exhibit 6) is shown below:



There is a single living area, which also contains kitchen equipment. Since it is a studio apartment, the only room separated from the living area is the bathroom.

According to Technical Staff, the doorways (front and basement entrance) are well lighted. At the front of the house, a light is on the side of the main door, at a height of about six feet. A light

also hangs over the rear entrance to the apartment. Exhibit 14, p. 3. However, Staff found that due to its residential nature, the lighting would not cause any objectionable illumination or glare. Exhibit 14, p. 7. Staff also noted that the property is well landscaped with a wide array of mature trees in addition to various shrubs and flowers. Exhibit 14, p. 2. The Landscape Plan (Exhibit 5) is reproduced below:



The March 8, 2011 memorandum from Housing Code Inspector Unray Peters (Exhibit 15(a)), sets forth the following comments:

The preliminary inspection was conducted on February 18, 2011. The accessory apartment is located in the cellar of the house. The issues regarding accessory apartment standards are as follows:

1. Double cylinder door lock must be removed from entry way door or replaced with a single cylinder door lock.
2. A window located in the unit has to meet code for emergency egress. The window on the right (closest to the door) measures at 13.2 inches in length and 32 inches in width. Neither window meets code egress requirements. Windows shall be at least five square in net clear opening. Must be openable without the use of a tool with a minimum net clear opening height of 24 inches and a minimum net clear opening width of 20 inches, with the bottom of the opening not more than 44 inches above the floor.
3. The enclosed square footage of the entire property is 1,092 square feet. The proposed accessory unit contains 240 square feet of habitable space, 1 unrelated occupant can reside in unit.
4. The property can accommodate 4 vehicles for off street parking, the measurements are 16 feet in width and 24 feet in length. The property also allows for on street parking.

The Hearing Examiner recommends a condition limiting occupancy and requiring all repairs as specified by DHCA. Petitioner has agreed to make all required repairs. Tr. 14-15. Petitioner does not plan any exterior modifications to the property. Tr. 16. The tenant is permitted to park in the existing driveway, although often prefers not to. Tr. 21. On-street parking is permitted in the area. Exhibit 14, p. 3, and Exhibit 15(a).

The site has been exempted from forest conservation requirements by Technical Staff (Exhibit 7). Staff indicates that there are no environmental issues or concerns. Exhibit 14, p. 4.

Transportation Planning staff found that the proposed accessory apartment would generate only one additional peak-hour trip during the peak periods, and therefore no traffic study is required to satisfy the Local Area Transportation Review (LATR) and the Policy Area Mobility Review (PAMR) tests. Staff concluded that “approval of the subject special exception petition will not adversely affect the surrounding roadway system.” Exhibit 14, p. 3.

### **C. The Master Plan**

Petitioner's property is subject to the 1985 *Gaithersburg Vicinity Master Plan*, as amended in 1990. The Master Plan does not make specific land use and zoning recommendations for the area in which the subject site is located; however, Technical Staff observes that the plan recommend preservation of residential neighborhoods in the area. Exhibit 14, p. 3. A primary objective of the Master Plan is "Increasing the County's total housing stock, and concurrently providing an appropriate mix of affordable housing." Master Plan, p. 1. The accessory apartment special exception application is consistent with this objective.

An accessory apartment would maintain the existing scale and type of housing, while providing for additional affordable housing in the area. Technical Staff found the proposed use to be consistent with the *Gaithersburg Vicinity Master Plan*, as does the Hearing Examiner.

### **D. Neighborhood Opposition**

As noted in the first section of this report, the only community response to this petition was one letter of opposition from neighbors Ed and Jean Mitchell of 12308 Bradbury Drive, who expressed concern about operation and maintenance of the property, out-of-state vehicles parked on site and the high number of vehicles—five or six, including a bulky white van—that have allegedly been parked at the house in the driveway and on the street. There was no opposition testimony at the hearing, and the testimony did not demonstrate maintenance problems or that excessive numbers of vehicles were parked on the site. Petitioner indicated that she has three vehicles, including a van, and the tenant has one. Tr. 21-22. All the evidence adduced at the hearing establishes that there is ample off-site parking to accommodate these vehicles, and both Technical Staff and the Housing Code Inspector reported the availability of additional parking on Bradbury Drive in front of the subject site. Tr. 28-29.

Thus, the Hearing Examiner finds it unlikely that the proposed use will have adverse effects on the neighbors.

The role of the Hearing Examiner in these cases is not to determine whether accessory apartments should be prohibited in the zone, since Zoning Ordinance §59-C-1.531 expressly permits accessory apartments in the R-200 Cluster Zone, as long as they are not “in a townhouse, one-family attached dwelling unit or mobile home.”

Rather, the Hearing Examiner’s role is to determine whether the specific use proposed (*i.e.*, an accessory apartment at this address) would create adverse conditions that are not inherent in this type of use in general (*i.e.*, accessory apartments anywhere in this zone). If the only adverse effects on the community are those that are inherent in this type of use, Zoning Ordinance §59-G-1.2.1. expressly prohibits denial of the special exception petition. “*Inherent adverse effects alone are not a sufficient basis for denial of a special exception.*”

Even if there were some non-inherent adverse effects, a determination must be made as to whether they are sufficient in the particular case to warrant denial of the petition. There is no evidence in this record that this accessory apartment will create excessive traffic, noise or parking problems. Technical Staff indicates that transportation facilities will not be adversely affected (Exhibit 14, p. 3), and the use is not expected to cause excessive noise. Exhibit 14, p. 7.

Technical Staff reports that parking on the property is adequate (Exhibit 14, p. 13), and Ms. Cary of DHCA also confirmed that there is ample parking, in that there are five off-street spaces, including four on the driveway and one in the garage. Tr. 28.

The Hearing Examiner finds that the points raised by the neighbors do not form a basis for denying the special exception petition before the Hearing Examiner, and that the conditions recommended in Part V of this report will sufficiently protect the neighborhood against adverse effects.

### III. SUMMARY OF HEARING

A public hearing was convened as scheduled on April 11, 2011. At the hearing, testimony was heard from Petitioner Ivy Yimo Wu, who appeared *pro se*, and Lauren Cary of the Department of Housing and Community Affairs. There were no other witnesses. Ms. Wu was accompanied by her mother, Ling Li, who is also an owner of the property. Ms. Li does not speak English, and the Hearing Examiner offered to postpone the hearing to obtain a translator or to allow Petitioner's mother to supplement the record with a statement after the hearing. Petitioner elected to proceed with the hearing. Tr. 3-6.

#### A. Petitioner's Case

##### Petitioner Ivy Yimo Wu (Tr. 8-25; 30-33):

Petitioner Ivy Yimo Wu executed an affidavit of posting (Exhibit 16) and adopted the findings in the Technical Staff Report (Exhibit 14) and the Housing Code Inspector's Report (Exhibit 15(a)), as Petitioner's own evidence. She also agreed to meet all the conditions set forth in both reports. Tr. 11-15.

Petitioner testified that the exterior lighting is residential in style and that no lighting would be added. She had erected a three-foot fence to protect some flowers, but that has been removed. Petitioner denied any property management problem. Tr. 17-20.

Petitioner indicated that she has three vehicles, including a van, and the tenant has one. Her garage holds one car and her driveway holds four vehicles, parked in rows of two. The tenant is permitted to park in the existing driveway, although often prefers not to. On-street parking is also permitted in the area. Tr. 20-22.

Petitioner identified the photos in Exhibits 9 and her plans (Exhibits 4, 5 and 6). She also explained why she wants the accessory apartment. Tr. 23-26.

Petitioner indicated she would supplement the record with photos of the front and rear of the

house and a copy of her deed. Tr. 30-33.

### **B. Government Witnesses**

#### DHCA Housing Code Inspector Lauren Cary (Tr. 26-29; 32-33):

Housing Code Inspector Lauren Cary testified that she was testifying from the DHCA records and her conversation with Inspector Unray Peters. The only issues are the ones he identified in his memorandum of March 8, 2001. The March 8, 2011 report from Housing Code Inspector Peters indicated that “the property can accommodate 4 vehicles for off street parking” on a driveway measuring 16 feet by 24 feet. Exhibit 51(a). At the hearing, Housing Code Inspector Cary clarified that the four-car capacity referred to the driveway alone (*i.e.*, not including the garage). Tr. 28. On-street parking is also available. Tr. 28-29.

Ms. Cary also produced a February 28, 2011 memo to Mr. Peters from Ada De Jesus of the DHCA regarding other accessory apartments in the area (Exhibit 17). There is one licensed accessory apartment located at 12212 Bradbury Drive, as well as a registered living unit at 12108 Suffolk Terrace. Those were the only two similar uses in the vicinity. Tr. 32-33.

### **IV. FINDINGS AND CONCLUSIONS**

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions, and the Petitioner has the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Technical Staff concluded that Petitioner will have satisfied all the requirements to obtain the special exception, if she complies with the recommended conditions (Exhibits 14).

Weighing all the testimony and evidence of record under a “preponderance of the evidence” standard (Code §59-G-1.21(a)), the Hearing Examiner concludes that the instant petition meets the general and specific requirements for the proposed use, as long as Petitioner complies with the conditions set forth in Part V, below.

#### **A. Standard for Evaluation**

The standard for evaluation prescribed in Code § 59-G-1.2.1 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.2.1. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with an accessory apartment. Characteristics of the proposed accessory apartment that are consistent with the “necessarily associated” characteristics of accessory apartments will be considered inherent adverse effects, while those characteristics of the proposed use that are not necessarily associated with accessory apartments, or that are created by unusual site conditions, will be considered non-inherent effects. The inherent and non-inherent effects thus identified must then be analyzed to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

The following are inherent characteristics of accessory apartments, as spelled out by Technical Staff (Exhibit 14, p. 5):

- (1) the existence of the apartment as a separate entity from the main living unit but sharing a party wall with the main unit;
- (2) the provision within the apartment of the necessary facilities and spaces and floor area to qualify as a habitable space under the Building Code;
- (3) provision of a separate entrance and walkway and sufficient lighting;
- (4) provision of sufficient parking;
- (5) the existence of an additional household on the site; and
- (6) additional activity from that household, including potential for additional noise from that additional household.

The Hearing Examiner concludes that, in general, an accessory apartment has characteristics similar to a single-family residence, with only a modest increase in traffic, parking and noise that would be consistent with a larger family occupying a single-family residence. Thus, the inherent effects of an accessory apartment would include the fact that an additional resident (or residents) will be added to the neighborhood, with the concomitant possibility of an additional vehicle or two.

Technical Staff found no unusual site conditions, and stated (Exhibit 14, pp. 5-6):

. . . staff finds that the size, scale and scope of the requested use are minimal, and that any noise, traffic, and disruption, or any other environmental impacts associated with the use would be slight. There are no unusual characteristics of the site. Thus, staff finds that there are no non-inherent adverse effects arising from the accessory apartment as detailed in the application.

The Hearing Examiner agrees with Staff. Based on the evidence in this case, and considering size, scale, scope, light, noise, traffic and environment, the Hearing Examiner concludes that there are no non-inherent adverse effects warranting denial of this petition.

### **B. General Conditions**

The general standards for a special exception are found in Zoning Ordinance §59-G-1.21(a). The Technical Staff report, the Housing Code Inspector's report, the exhibits in this case and the testimony at the hearing provide ample evidence that the general standards would be satisfied in this case.

**Sec. 59-G-1.21. General conditions.**

**§5-G-1.21(a)** *A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

*(1) Is a permissible special exception in the zone.*

Conclusion: An accessory apartment is a permissible special exception in the R-200 Cluster Zone, pursuant to Code § 59-C-1.531.

*(2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.*

Conclusion: The proposed use complies with the specific standards set forth in § 59-G-2.00 for an accessory apartment, as outlined in Part C, below.

*(3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.*

Conclusion: Petitioner's property is subject to the 1985 *Gaithersburg Vicinity Master Plan*, as amended in 1990. For the reasons set forth in Part II. C. of this report, the Hearing Examiner finds that the planned use, an accessory apartment in a single-family detached home, is not inconsistent with the goals and objectives of the Master Plan.

*(4) Will be in harmony with the general character of the neighborhood considering population density, design, scale*

*and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*<sup>4</sup>

Conclusion: Technical Staff concluded that the proposed use will be in harmony with the general character of the surrounding residential neighborhood. As stated by Staff (Exhibit 14, p. 7):

Although a similar special exception was recently approved in the neighborhood, staff finds that the proposed use will be in harmony with the general character of the surrounding residential neighborhood. It does not convert the neighborhood into a multi-family zone. The use will be in harmony with the general character of the surrounding residential neighborhood. The accessory apartment will be located in the basement of the existing dwelling and will not require construction of an addition to provide additional floor space. There is adequate parking: in the driveway, and garage. Traffic conditions will not be affected adversely. [Except as noted, t]here are no other similar special exception uses located in the neighborhood.

The Hearing Examiner agrees and so finds.

*(5) Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Technical Staff found the accessory apartment will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood. The Hearing Examiner agrees for the reasons stated in response to the previous provision, and so finds.

*(6) Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: There is no evidence that the special exception would cause objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject

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<sup>4</sup> This section was amended, as set forth here, by Zoning Text Amendment 10-13 (Ord. No. 17-01, effective 2/28/11).

site. Given the indoor and residential nature of the use, the accessory apartment would not produce these effects. Exhibit 14, p. 7.

(7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: Technical Staff reports that the addition of this special exception will “not affect the area adversely, nor does it alter the predominantly single-family residential character of the area. Since no new construction is proposed, the residential character of the neighborhood will not be altered.” Exhibit 14, pp. 7-8. Staff also notes that although the Board approved another accessory apartment in the neighborhood in 2010, “there is no evidence that the proposed special exception will create excessive traffic or parking issues.” Exhibit 14, p. 8.

Because the proposed use is a residential use by definition, the special exception will not alter the predominantly residential nature of the area. The Hearing Examiner finds that the proposed special exception will not increase the number, scope, or intensity of special exception uses sufficiently to affect the area adversely; nor will it alter the predominantly residential nature of the area.

(8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The evidence supports the conclusion that the proposed use would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site. Exhibit 14, p. 8.

- (9) *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.*

Conclusion: Technical Staff indicates that “The subject site is already subdivided and will continue to be adequately served by public facilities.” Exhibit 14, p. 8. The evidence supports this conclusion.

- (A) *If the special exception use requires approval of a preliminary plan of subdivision, the Planning Board must determine the adequacy of public facilities in its subdivision review. In that case, approval of a preliminary plan of subdivision must be a condition of the special exception.*
- (B) *If the special exception:<sup>5</sup>*
- (i) does not require approval of a new preliminary plan of subdivision; and*
  - (ii) the determination of adequate public facilities for the site is not currently valid for an impact that is the same as or greater than the special exception’s impact; then the Board of Appeals or the Hearing Examiner must determine the adequacy of public facilities when it considers the special exception application. The Board of Appeals or the Hearing Examiner must consider whether the available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the application was submitted.*

Conclusion: The special exception sought in this case would not require approval of a preliminary plan of subdivision, and there is no currently valid determination of the of adequacy of public facilities for the site, taking into account the impact of the proposed special exception. Therefore, the Board must consider whether the available public facilities and services will be adequate to serve the proposed development under the applicable Growth Policy standards. These standards include Local Area Transportation Review (LATR) and Policy Area Mobility Review (PAMR). As indicated in Part II. B. of this report, Technical Staff did do such a review, and found that the proposed

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<sup>5</sup> This section was amended, as set forth here, by Zoning Text Amendment 10-13 (Ord. No. 17-01, effective 2/28/11).

accessory apartment use would generate only one additional peak-hour trip during the peak periods, and therefore no traffic study is required to satisfy the Local Area Transportation Review (LATR) and the Policy Area Mobility Review (PAMR) tests. Staff concluded that “approval of the subject special exception petition will not adversely affect the surrounding roadway system.” Exhibit 14, p. 3. Therefore, the Hearing Examiner finds that the instant petition meets all the applicable Growth Policy standards.

- (C) *With regard to public roads, the Board or the Hearing Examiner must further find that the proposed development will not reduce the safety of vehicular or pedestrian traffic.*

Conclusion: Based on the evidence of record, especially the Technical Staff’s conclusion that “the application satisfies transportation related requirements and will not reduce the safety of vehicular or pedestrian traffic,” the Hearing Examiner so finds. Exhibit 14, p. 9.

### **C. Specific Standards**

The testimony and the exhibits of record, especially the Technical Staff Report (Exhibit 14), provide sufficient evidence that the specific standards required by Section 59-G-2.00 are satisfied in this case, as described below.

#### ***Sec. 59-G-2.00. Accessory apartment.***

*A special exception may be granted for an accessory apartment on the same lot as an existing one-family detached dwelling, subject to the following standards and requirements:*

##### ***(a) Dwelling unit requirements:***

- (1) Only one accessory apartment may be created on the same lot as an existing one-family detached dwelling.*

Conclusion: Only one accessory apartment is proposed.

(2) *The accessory apartment must have at least one party wall in common with the main dwelling on a lot of one acre (43,560 square feet) or less. On a lot of more than one acre, an accessory apartment may be added to an existing one-family detached dwelling, or may be created through conversion of a separate accessory structure already existing on the same lot as the main dwelling on December 2, 1983. An accessory apartment may be permitted in a separate accessory structure built after December 2, 1983, provided:*

- (i) *The lot is 2 acres or more in size; and*
- (ii) *The apartment will house a care-giver found by the Board to be needed to provide assistance to an elderly, ill or handicapped relative of the owner-occupant.*

Conclusion: The apartment is located in the walkout basement of an existing dwelling, thus sharing at least one party wall in common with the main dwelling.

(3) *An addition or extension to a main dwelling may be approved in order to add additional floor space to accommodate an accessory apartment. All development standards of the zone apply. An addition to an accessory structure is not permitted.*

Conclusion: No addition or extension will be constructed.

(4) *The one-family detached dwelling in which the accessory apartment is to be created or to which it is to be added must be at least 5 years old on the date of application for special exception.*

Conclusion: The house was built in 1971. Exhibit 14, p. 2. It therefore meets the “5 year old” requirement.

(5) *The accessory apartment must not be located on a lot:*

- (i) *That is occupied by a family of unrelated persons; or*
- (ii) *Where any of the following otherwise allowed residential uses exist: guest room for rent, boardinghouse or a registered living unit; or*
- (iii) *That contains any rental residential use other than an accessory dwelling in an agricultural zone.*

Conclusion: There is only one accessory apartment on the premises, and Petitioner lives in the main unit of the house. Conditions have been recommended specifying that Petitioner may not have a guest room for rent, a boardinghouse or a registered living unit, in addition

to the accessory apartment, and that she must not receive compensation for the occupancy of more than one dwelling unit on the property.

(6) *Any separate entrance must be located so that the appearance of a single-family dwelling is preserved.*

Conclusion: A separate entrance to the accessory apartment is located on the rear of the house.

Technical Staff reports that the appearance of a single-family dwelling unit has been preserved, and the Hearing Examiner so finds.

(7) *All external modifications and improvements must be compatible with the existing dwelling and surrounding properties.*

Conclusion: No external modifications or improvements are proposed.

(8) *The accessory apartment must have the same street address (house number) as the main dwelling.*

Conclusion: The accessory apartment will have the same address as the main dwelling.

(9) *The accessory apartment must be subordinate to the main dwelling. The floor area of the accessory apartment is limited to a maximum of 1,200 square feet.*

Conclusion: The accessory apartment will be subordinate to the main dwelling, as it will occupy approximately 348 square feet of space (of which 240 square feet of space is habitable), in a dwelling which has about 1,092 square feet of space in the main unit. Exhibit 15(a). It also is well within the 1,200 square foot cap for an accessory apartment.

**(b) Ownership Requirements**

(1) *The owner of the lot on which the accessory apartment is located must occupy one of the dwelling units, except for bona fide temporary absences not exceeding 6 months in any 12-month period. The period of temporary absence may be increased by the Board upon a finding that a hardship would otherwise result.*

Conclusion: Petitioner occupies the main unit of the home. Exhibit 14, p. 11.

- (2) *Except in the case of an accessory apartment that exists at the time of the acquisition of the home by the Petitioner, one year must have elapsed between the date when the owner purchased the property (settlement date) and the date when the special exception becomes effective. The Board may waive this requirement upon a finding that a hardship would otherwise result.*

Conclusion: Petitioner acquired the property in 2006, according to the deed. Exhibit 18. Thus, more than one year has elapsed.

- (3) *Under no circumstances, is the owner allowed to receive compensation for the occupancy of more than one dwelling unit.*

Conclusion: A condition to this effect is recommended in Part V of this report, as discussed in answer to subsection (a)(5) above. It appears from the record that Petitioner is receiving compensation for only one dwelling unit at this time.

- (4) *For purposes of this section owner means an individual who owns, or whose parent or child owns, a substantial equitable interest in the property as determined by the Board.*

Conclusion: The Petitioner and her mother are the owners of the property.

- (5) *The restrictions under (1) and (3) above do not apply if the accessory apartment is occupied by an elderly person who has been a continuous tenant of the accessory apartment for at least 20 years.*

Conclusion: Not applicable

### **(c) Land Use Requirements**

- (1) *The minimum lot size must be 6,000 square feet, except where the minimum lot size of the zone is larger. A property consisting of more than one record lot, including a fraction of a lot, is to be treated as one lot if it contains a single one-family detached dwelling lawfully constructed prior to October, 1967. All other development standards of the zone must also apply, including setbacks, lot width, lot coverage, building height and the standards for an accessory building in the case of conversion of such a building.*

Conclusion: The subject lot is 12,118 square feet in area, well over the 6,000 square foot minimum.

The following chart from the Technical Staff Report (Exhibit 14, p. 4) demonstrates

compliance with all development standards for the R-200 Cluster Zone, as stated by Staff:

<i>Development Standard</i>	<i>Required</i>	<i>Provided</i>
Minimum Lot Area (square feet)	10,000	12,118 sq. ft.
Minimum lot width (feet) at front building line for 1-family detached dwelling	N/A	76 feet
At existing street line	25	76 feet
Minimum street setback (feet)	25	35 feet
Minimum Setback from adjoining lot (feet)		
--One side	10	12
--Sum of both sides	25	26
--Rear	40	Approx. 80
Maximum Building Height	50	One-story
Maximum Coverage	25%	12% approx.

(2) *An accessory apartment must not, when considered in combination with other existing or approved accessory apartments, result in excessive concentration of similar uses, including other special exception uses, in the general neighborhood of the proposed use (see also section G-1.21 (a)(7) which concerns excessive concentration of special exceptions in general).*

Conclusion: According to the Technical Staff report (Exhibit 14, pp. 3 and 12) and a memorandum from DHCA (Exhibit 17), there is only one other approved accessory apartment

currently in the defined neighborhood. The proposed accessory apartment, if granted, therefore will not result in an excessive concentration of similar uses in the general neighborhood.

(3) *Adequate parking must be provided. There must be a minimum of 2 off-street parking spaces unless the Board makes either of the following findings:*

- (i) *More spaces are required to supplement on-street parking; or*
- (ii) *Adequate on-street parking permits fewer off-street spaces.*

*Off-street parking spaces may be in a driveway but otherwise must not be located in the yard area between the front of the house and the street right-of-way line.*

Conclusion: As previously discussed there are five off-street parking spaces available on the site (four in the driveway and one in the garage). Thus, there is more than adequate space for parking.

(d) ***Data to accompany application.** The Board may waive for good cause shown any of the data required to accompany an application for special exception upon written request of the applicant. The Board may accept plans or drawings prepared by the applicant so long as they are substantially to scale and provide information the Board determines is adequate.*

Conclusion: Not applicable.

(e) *Any accessory apartment approved by the Board between December 2, 1983, and October 30, 1989, in accordance with the standards in effect during that period, is a conforming use and it may be continued as long as the accessory apartment complies with the conditions imposed by the Board and all provisions of Division 59-G-1.*

Conclusion: Not applicable.

(f) ***Notice by sign required for continuation of use by new property owner.** If a new property owner applies to continue an existing accessory apartment as a minor modification, a sign giving notice of the application must be erected and maintained as required by Sec. 59-G-1.3(c).*

Conclusion: Not applicable.

### **D. Additional Applicable Standards**

Not only must an accessory apartment comply with the zoning requirements as set forth in 59-G, it must also be approved for habitation by the Department of Housing and Community Affairs. As discussed in Part II. B. of this report, the Housing Code Inspector's memorandum (Exhibit 15(a)) notes the repairs that are needed, and that occupation of the accessory apartment must be limited to no more than one person. As mentioned above, Petitioner has agreed to meet all conditions. Those conditions are reflected in the following recommendations.

### **V. RECOMMENDATION**

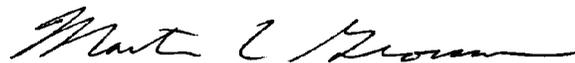
Based on the foregoing analysis, I recommend that Petition No. S-2788 for a special exception to permit an accessory apartment located at 12301 Bradbury Drive, Gaithersburg, Maryland, be GRANTED, with the following conditions:

1. The Petitioner shall be bound by all of her testimony, representations and exhibits of record identified in this report;
2. Petitioner must comply with DHCA's determination of the maximum permitted occupancy for the accessory apartment (*i.e.*, the accessory apartment may be occupied by no more than one person) and the other DHCA directives needed to ensure that the accessory apartment is maintained up to Code, as listed in Exhibit 15(a):
  - a. Double cylinder door lock must be removed from entry way door or replaced with a single cylinder door lock.
  - b. A window located in the unit has to meet code for emergency egress. The window on the right (closest to the door) measures at 13.2 inches in length and 32 inches in width. Neither window meets code egress requirements. Windows shall be at least five square in net clear opening. Must be openable without the use of a tool with a minimum net clear opening height of 24 inches and a minimum net clear opening width of 20 inches, with the bottom of the opening not more than 44 inches above the floor.
  - c. The enclosed square footage of the entire property is 1,092 square feet. The proposed accessory unit contains 240 square feet of habitable space, 1 unrelated occupant can reside in unit.

3. Petitioner must occupy one of the dwelling units on the lot on which the accessory apartment is located;
4. Petitioner must not have a guest room for rent, a boardinghouse or a registered living unit, in addition to the accessory apartment, and she must not receive compensation for the occupancy of more than one dwelling unit;
5. The accessory apartment must not be located on a lot that is occupied by a family of unrelated persons;
6. Petitioner must make off-street parking spaces available for all vehicles she permits her accessory apartment tenant to house on the premises; and
7. Petitioner 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 special exception premises and operate the special exception as granted herein. Petitioner shall at all times ensure that the special exception 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.

Dated: May 17, 2011

Respectfully submitted,



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Martin L. Grossman  
Hearing Examiner