

I. STATEMENT OF THE CASE

Petition No. S-2799, filed on December 10, 2010, seeks a special exception, pursuant to §59-G-2.00 of the Zoning Ordinance, to permit an accessory apartment use in the basement of an existing single-family home located at 5811 Wilson Lane, Bethesda, Maryland, on land in the R-90 (Residential, One-family, Detached) Zone. The property's legal description is Lot 11, Block 3 of the Bradley Woods Subdivision of Bethesda. The tax account number is 00652328.

The Hearing was scheduled for March 14, 2011, by notice dated December 21, 2010 (Exhibit 11). Technical Staff at the Maryland-National Capital Park and Planning Commission (M-NCPPC), in a report issued March 1, 2011, recommended approval of the special exception, with conditions. Exhibit 12.¹

The Department of Housing and Community Affairs (DHCA) inspected the property on March 3, 2011. Housing Code Inspector Lynn McCreary reported her findings in a memorandum dated March 7, 2011 (Exhibit 13). Attached to her report were numerous photographs of the premises (Exhibit 13(a)- (p)). The inspector concluded that occupancy must be limited to two persons, in habitable space of 355.45 square feet. Also submitted by DHCA was a memorandum dated March 11, 2011, from Ada DeJesus of DHCA listing one accessory apartment and six registered living units in the neighborhood. Exhibit 14.

A public hearing was convened on March 14, 2011, as scheduled, and Petitioners appeared *pro se*. Also testifying was Inspector Lynn McCreary of the Department of Housing and Community Affairs. Petitioners executed an affidavit of posting (Exhibit 15), and supplied a copy of their deed (Exhibit 16). They adopted the findings in the Technical Staff Report (Exhibit 12) and in the Housing Code Inspector's Report (Exhibit 13), as Petitioners' own evidence (Tr. 7). They also agreed to meet all the conditions set forth in both reports. Tr. 7.

¹ The Technical Staff report is frequently quoted and paraphrased herein.

The record was held open till March 24, 2011, to await the filing of the transcript. While the record was open, Petitioners submitted an e-mail (Exhibit 17) correctly asserting that the one other accessory apartment listed in the DeJesus memo of March 11, 2011 (S-2566 at 5613 Oldchester Road) was not actually within the neighborhood, as defined by Technical Staff.

The record closed, as scheduled, on March 24, 2011.

There is no opposition to this special exception, and the petition meets all of the statutory criteria. The Hearing Examiner therefore recommends that the petition be granted, with conditions.

II. FACTUAL BACKGROUND

A. The Subject Property and the Neighborhood

The subject property is located at 5811 Wilson Lane, Bethesda, Maryland, in the Bradley Woods Subdivision, between Oldchester Road and Radnor Road. The home is in the R-90 Zone, on a 9,000 square-foot lot, as is depicted in the site plan (Exhibit 4). As noted, the shed has been removed:



The home can be seen in the following photographs provided by Petitioners (Exhibit 9):

Photos of 5811 Wilson Lane, Bethesda 20817



Front of house. Circular driveway with room for offstreet parking



Side of house; basement window on lower right



Rear of house; basement apartment entrance on lower right



Side of house and egress for basement in picture below next



Egress for basement

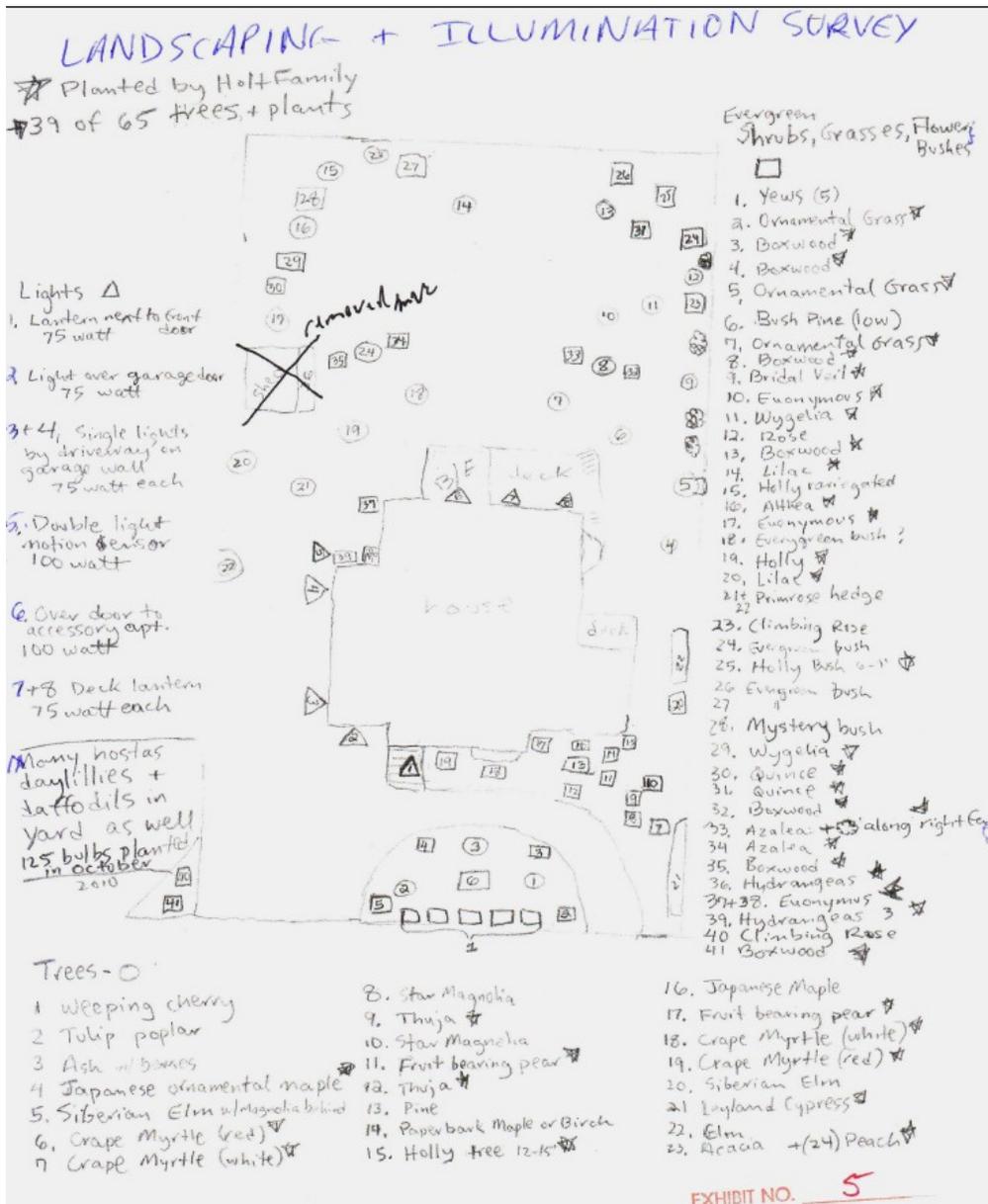


Backyard from house

Technical Staff described the property as follows (Exhibit 12, p. 2):

The subject property is 9,000 square feet in size and is rectangular in shape. It is classified under the R-90 Zone. . . .The existing house was constructed in 1939. The two-story home is 1,372 square feet in size. The house is located on gently-sloping land, decreasing in elevation towards the rear of the property. The backyard is mostly clear and is fenced on all three sides. Existing landscaping is well-maintained. The site has its sole access point from Wilson Lane. The home has a one-car garage, and there is ample space for extra parking on the semi-circular driveway. However, there is no street parking along Wilson Lane. . . .

The location of landscaping and lighting is shown below on the “Landscape and Illumination Survey” (Exhibit 5):



With regard to landscaping and environmental factors, Technical Staff states (Ex. 12, p. 7):

. . . No new plantings are proposed with the application, but it should be noted that the applicant has recently planted four Crape Myrtles, two Hollies, and three Leyland Cypress Spruce trees to the backyard to improve privacy between the subject property and the adjoining neighbors. As noted earlier, and as represented in the photographic evidence shown throughout this report, the property's landscaping is relatively well-maintained. The plan falls within the standards expected for a typical single-family home. There are no environmental issues or concerns associated with the applicant's proposed accessory apartment. The site is exempt from the forest conservation law.

There will be no external changes made to the property if the special exception is granted (Tr. 8), and the external lighting is typical residential lighting. Tr. 19.

Technical Staff defined the general neighborhood as bounded by Aberdeen Road to the north, Radnor Road to the east, the single-family detached homes along the south side of Wilson Lane to the south, and the single-family homes along the west side of Oldchester Road to the west. Exhibit 12, p. 4. The Hearing Examiner accepts this neighborhood definition, and it is shown below on a Map supplied by Technical Staff (Exhibit 12, p. 5):



According to Technical Staff, all homes in the neighborhood are single-family detached homes, and entire neighborhood is zoned R-90. The neighborhood boundary, which is depicted with a dashed line on the above map, has been drawn by Staff to include any nearby properties that may be affected by a potential increase in density or traffic. Staff also reports that no other special exceptions exist within the neighborhood boundaries.² Exhibit 13, p. 4.

B. The Proposed Use

The Petitioners are seeking a special exception to allow an accessory apartment in the basement of their existing home. A separate entrance to the proposed accessory apartment is located in the rear of the residence, on the lower level, as shown in a photograph taken by Technical Staff (Exhibit 12, p. 3).

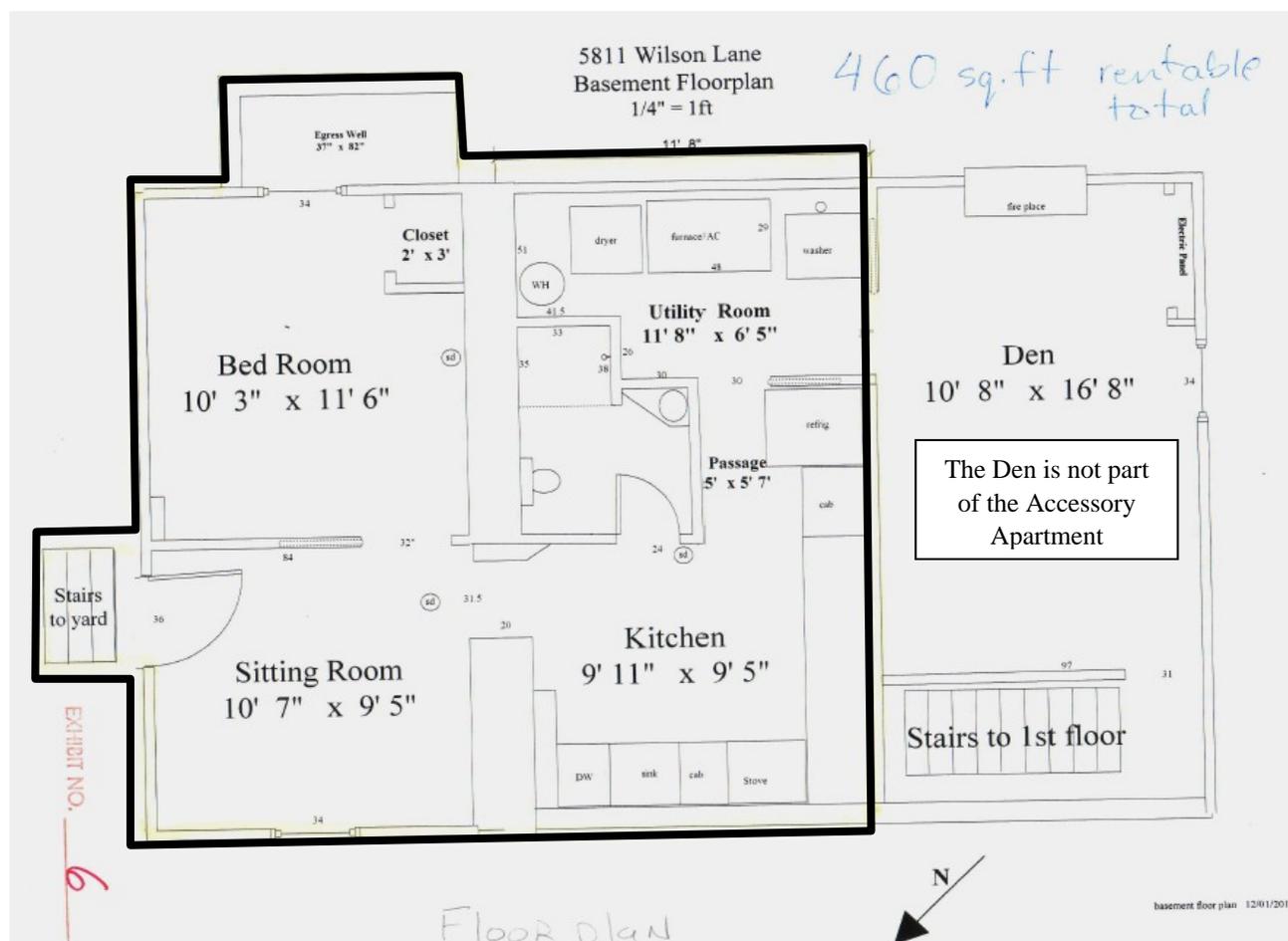
Back of House



² A memorandum from DHCA (Exhibit 14) specified that there was one other accessory apartment in the area. Prior to the record closing, Ms. Holt sent an e-mail asserting that the one other accessory apartment listed in the DeJesus memo of March 11, 2011 (S-2566 at 5613 Oldchester Road) was not actually within the neighborhood, as defined by Technical Staff. The Hearing Examiner checked the location of 5613 Oldchester Road and confirmed that Petitioners are correct. He therefore takes official notice of that fact.

As noted by Staff, the accessory apartment entrance is clearly distinct from the entrance to the main dwelling and has the appearance of a typical rear entry into a single-family home. Technical Staff opined that “[t]he accessory apartment entrance should not detract from the appearance of the neighborhood. Adequate lighting, residential in character, is located above the entrance to the accessory apartment and along a stone pathway that leads from the driveway to the apartment entrance.” Exhibit 12, p. 5. The path around the house can be seen in the photos reproduced in the middle of page 4 of this report.

The proposed accessory unit measures approximately 460 square feet, according to Petitioner (Exhibit 3), although the Housing Code Inspector determined that only 355.45 square feet of the space is habitable (Exhibit 13). The living space includes a sitting room, a kitchen, a bedroom, a bathroom and a utility room with a laundry, as shown on the following Floor Plan ((Exhibit 6):



The Department of Housing and Community Affairs (DHCA) inspected the property on March 3, 2011, and Housing Code Inspector Lynn McCreary reported her findings in a memorandum dated March 7, 2011 (Exhibit 13). Tr. 13-14. Those findings are set forth below:

1. The unit is located on a lot consisting of 9000 square feet.
2. The unit has off street parking consisting of a one (1) car garage and a concrete semi-circular drive with approximate square footage of 1500 which would allow for the parking of more than 4 vehicles on the driveway.
3. The unit consists of 355.45 square feet of habitable space including one (1) sleeping room containing 117.53 square feet which would allow for the occupancy of two people.
4. The sleeping room has an emergency egress window with net clear opening of 8.75 square feet including a concrete window well in depth over 44 inches and which does have a permanently affixed ladder constructed with PVC pipe. The window is located under a bay window. The height from the gravel at the bottom of the window well to the floor of the bay window is 5 feet 1 inch. There is open and clear access to the affixed ladder in the window well.
5. The chipping and peeling paint on the foundation wall of the window well must be eliminated, scraped, prepped and repainted in a professional, workmanlike manner.
6. The door separating the unit from the utility room and the door separating the unit from the main house must be self-closing and self-latching and must have a minimum 20-minute fire protection rating.

Ms. McCreary testified that the egress window referenced in paragraph numbered 4 of her report does meet Code requirements, and that the habitable space in the accessory apartment is 355.45 square feet, which would allow for the occupancy of no more than two people. Tr. 14-15. According to Ms. McCreary, there is room on the driveway for at least four vehicles. Tr. 15.

Ms. McCreary also identified photos of the premises, internal and external, that she took during her inspection (Exhibits 13(a) through (p)). Tr. 21-25. Some photos of the inside of the apartment are reproduced on the next page. Ms. McCreary saw no reason to deny the special exception. Tr. 27.

Petitioners testified that they would take the steps required to make the accessory apartment habitable (Tr. 7), and that the peeling paint noted in the Housing Inspector's report (Paragraph numbered 5) had already been repaired. Tr. 11.

The following photographs (Exhibits 13(e), (n), (o) and (p)) depict the rooms specified in

their captions:



Sitting Room, as seen from the Entrance



Kitchen



Utility Room, from the Kitchen



Bathroom

Technical Staff discussed the transportation issues at page 6 of their report (Exhibit 12), stating:

The proposed accessory apartment meets the transportation related requirements of the Adequate Public Facilities (APF) Ordinance. The existing single-family dwelling is estimated to generate one peak-hour trip during the weekday morning and evening peak-periods. Since the number of peak hour trips, when combined, will generate fewer trips than the threshold figure requiring a traffic study (30 peak-hour trips), the proposed accessory apartment passes the Local Area Transportation Review (LATR). Policy Area Mobility Review (PAMR) is not required because the accessory apartment will generate less than four new peak-hour trips within the weekday morning and evening peak periods.

Vehicular access to the existing house and accessory apartment will be through a semi-circular driveway on site. Parking for the main dwelling and the accessory apartment can be accommodated through the one-car garage and driveway, which together provide at least three parking spaces. The special exception will not have an adverse effect on vehicular and pedestrian access or pedestrian safety.

The Housing Inspector's report (Exhibit 13, ¶ 2) indicates that the driveway can hold at least four cars, in addition to the space for one car in the garage, and Housing Code Inspector Lynn McCreary confirmed this at the hearing. Tr. 15. Petitioners indicated at the hearing that they have only one car and that they would make a space available on their driveway for the tenant. Tr. 28.

Given this evidence, the Hearing Examiner finds that the proposed accessory apartment will not unduly burden local transportation facilities and that there is adequate off-street parking to accommodate both the owners and the accessory apartment tenant.

Based on this record, the Hearing Examiner finds that the proposed special exception will not cause non-inherent adverse effects on the neighborhood warranting denial of the petition.

C. Neighborhood Response

There has been no response from the community, either positive or negative to the subject petition. There is no opposition in the case.

D. The Master Plan

The subject property lies within the *1990 Bethesda Chevy Chase Master Plan*. Exhibit 8.

Technical Staff advises that there are no Master Plan recommendations specific to this site. Exhibit 12, p. 6. However, the Master Plan does recommend special exception uses "that contribute to the housing objectives in the Master Plan" (p. 31, ¶ numbered 4). In fact, the Plan specifically "endorses expanding choices of housing types by provision of accessory apartments" (p. 33, ¶ numbered 4).

An accessory apartment would maintain the existing scale and type of housing, while

providing for additional housing in the area. Technical Staff therefore found the proposed use to be consistent with the *Bethesda-Chevy Chase Master Plan*, as does the Hearing Examiner.

This accessory apartment would not be visible from the street and therefore would not change the existing structure's appearance as a single-family dwelling compatible with the surrounding neighborhood.

Thus, it is fair to say that the planned use, an accessory apartment in a single-family, detached home, is not inconsistent with the goals and objectives of the *Bethesda Chevy Chase Master Plan*.

III. SUMMARY OF HEARING

At the hearing, testimony was heard from Petitioners Tyler and Anne Holt and from Housing Code Inspector Lynn McCreary.

Tyler and Anne Holt:

Petitioners executed an affidavit of posting (Exhibit 15), and supplied a copy of their deed, which was recorded on March 22, 2010. Exhibit 16. They adopted the findings in the Technical Staff Report (Exhibit 12) and in the Housing Code Inspector's Report (Exhibit 13), as Petitioners' own evidence. Tr. 7. They also agreed to meet all the conditions set forth in both reports. Tr. 7.

Petitioners identified their site, landscape, lighting and floor plans, as well as the photos in Exhibits 9(a) and (b). Tr. 17 - 21. The site plan (Exhibit 4) and the landscape and lighting plan (Exhibit 5) were modified during the hearing to note that the shed had been removed from the back yard. Tr. 17-19. Ms. Holt testified at the hearing that no external changes are planned for the property (Tr. 8), and Mr. Holt testified that the peeling paint noted in the Housing Inspector's report (¶5) had been repaired. Tr. 11. Mr. Holt also outlined why Petitioners want the accessory apartment. Tr. 11-12. Ms. Holt indicated that the external lighting is typical residential lighting and that nothing would be added thereto. Tr. 19.

Although parking is not permitted on Wilson Lane, Petitioners have only one car and they would make a space available on their driveway for the tenant. Tr. 28.

Housing Code Inspector Lynn McCreary:

Housing Code Inspector, Lynn McCreary, testified that she inspected the premises on March 3, 2011, and that her findings are set forth in her report of March 7, 2011 (Exhibit 13). Tr. 13-14. Ms. McCreary noted that the egress window referenced in paragraph numbered 4 of her report does meet Code requirements and that the habitable space in the accessory apartment is 355.45 square feet, which would allow for the occupancy of no more than two people. Tr. 14-15. According to Ms. McCreary, there is room on the driveway for at least four vehicles. Tr. 15.

Ms. McCreary also identified photos of the premises, internal and external, that she took during her inspection (Exhibits 13(a) through (p)). Tr. 21-25. She also referenced a DHCA memo listing six registered living units and one other accessory apartment in the area (Exhibit 14); however, Mr. Holt noted that the Technical Staff reports no other accessory apartments in the neighborhood. Tr. 26-27.³

Ms. McCreary saw no reason to deny the special exception. Tr. 27.

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

³ Prior to the record closing, Ms. Holt sent an e-mail asserting that the one other accessory apartment listed in the DeJesus memo of March 11, 2011 (S-2566 at 5613 Oldchester Road) was not actually within the neighborhood, as defined by Technical Staff. The Hearing Examiner checked the location of 5613 Oldchester Road and confirmed that Petitioners are correct. As mentioned in an earlier footnote, he took official notice of that fact.

the Petitioners have the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Technical Staff concluded that Petitioners will have satisfied all the requirements to obtain the special exception, if they comply with the recommended conditions (Exhibit 12).

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 Petitioners comply 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.

Technical Staff lists the following inherent characteristics of accessory apartments (Exhibit 12, p. 9):

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

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 (Exhibit 12, pp. 9-10):

In the instant case, there are no adverse effects that will negatively impact the community above and beyond those necessarily inherent to an accessory apartment. The apartment will be located in the basement of the main dwelling and is non-identifiable from the street. The apartment is set up to provide all the spaces and facilities necessary for an apartment use.

The accessory unit has a separate entrance apart from the main dwelling. The apartment entrance is typical of a rear-entry to a single-family house, making it difficult to distinguish from any other neighborhood home. The walkway and grounds of the accessory apartment will be safe and illuminated while consistent with typical residential standards.

Parking for the accessory apartment will be sufficient. Here, in addition to one available space in the attached garage, there is ample space for vehicles to park along the property's semi-circle driveway. There are adequate choices to ensure sufficient neighborhood parking even with the existence of an additional household on the block.

Based on these findings, Staff concluded (Exhibit 12, p. 10):

The operational and physical characteristics of the proposed accessory apartment are consistent with the inherent characteristics of an accessory apartment use. There are no non-inherent adverse effects present in this case.

The Hearing Examiner agrees with Staff's assessment. Considering size, scale, scope, light, noise, traffic and environment, the Hearing Examiner concludes, as did the Technical Staff, that there would be no non-inherent adverse effects from the proposed use.

B. General Conditions

The general standards for a special exception are found in Zoning Code §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-90 Zone, pursuant to Code § 59-C-1.31.

(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: The subject property is covered by the *Bethesda Chevy Chase Master Plan*, approved and adopted in 1990. Technical Staff advises that there are no Master Plan recommendations specific to this site. Exhibit 12, p. 6. However, the Master Plan does recommend special exception uses “that contribute to the housing objectives in the Master Plan” (p. 31, ¶ 4). In fact, the Plan specifically “endorses expanding choices of housing types by provision of accessory apartments” (p. 33, ¶ 4). An accessory apartment would maintain the existing scale and type of housing, while providing for additional housing in the area. Technical Staff therefore found the proposed use to be consistent with the *Bethesda-Chevy Chase Master Plan*, as does the Hearing Examiner.

- (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.*⁴

Conclusion: The accessory apartment will be located in an existing dwelling and will not require any external changes. It therefore will maintain its residential character. There will be

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

sufficient parking, considering the driveway and garage space. Traffic conditions will not be affected adversely, according to Transportation Planning Staff. There are no other accessory apartments in the neighborhood, and the addition of this use will not affect the area adversely. Based on these facts and the other evidence of record, the Hearing Examiner concludes, as did Technical Staff, that the proposed use will be in harmony with the general character of the neighborhood.

(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: For the reasons set forth in answer to the previous section of this report, the special exception will not be detrimental to the use, peaceful enjoyment, economic value, or development of the surrounding properties or the defined neighborhood, provided that the special exception is operated in compliance with the listed conditions of approval.

(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: Technical Staff found that “The use will cause no objectionable illumination or glare as the provided lighting is residential in character.” Exhibit 12, p. 12. Since the use will be indoors and residential, it will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site. The Hearing Examiner so finds.

(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: As discussed above, 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 or 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.

- (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 will be adequately served by existing public services and facilities (Exhibit 12, p. 13), and 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:⁵*
- (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.*

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

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 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, Transportation Planning Staff did do such a review, and concluded that the proposed accessory apartment use would add one additional trip during each of the peak-hour weekday periods. Exhibit 12, p. 13. Since the existing house, combined with the proposed accessory apartment, would generate fewer than 30 total trips in the weekday morning and evening peak hours, the requirements of the LATR are satisfied without a traffic study. Since the proposed use is estimated to generate only one additional peak-hour trip, PAMR is also satisfied. Therefore, the Transportation Staff concluded, as does the Hearing Examiner, 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 proposed use is not likely to negatively impact the safety of vehicular or pedestrian traffic as the use will not generate a substantial increase in either form of traffic," the Hearing Examiner so finds. Exhibit 12, p. 13.

C. Specific Standards

The testimony and the exhibits of record, especially the Technical Staff Report (Exhibit 12), 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 basement of an existing house, and therefore shares a wall in common, as required for a lot of this size (under an acre).

- (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 new addition or extension of the main dwelling is proposed. The accessory apartment will be located in an existing dwelling.

- (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 1939. Exhibit 12, 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: The proposed use does not violate any of the provisions of this subsection.

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

Conclusion: Access to the accessory apartment is through an existing back entrance to the home, on the lower level. There will thus be no change to the home’s residential appearance.

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

Conclusion: Petitioners are not proposing any new construction or modifications to the exterior of the dwelling.

- (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 is clearly subordinate to the main dwelling and under 1,200 square feet, as it occupies approximately 460 square feet of space (355.45 square feet of which is habitable space) in Petitioners’ existing 1,372 square-foot home. Exhibit

3; Exhibit 12, p. 2; and Exhibit 13.

59-G § 2.00(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: The Petitioners will live in one part of the dwelling.

(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: According to the deed (Exhibit 16), Petitioners' purchase of the home was recorded on March 22, 2010. The one-year rule has therefore been satisfied.

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

Conclusion: The Petitioners will receive compensation for only one dwelling unit as a condition of the special exception.

(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 Petitioners 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.

59-G § 2.00(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 approximately 9,000 square feet in size, and therefore satisfies this requirement. Although the site does not meet the current R-90 development standards for minimum lot width at the front building line and side-yard setbacks, the home was constructed on a lot legally recorded before 1958 (the property was platted in 1938), and therefore the home is “not a nonconforming building,” under Zoning Ordinance §59-B-5.3, as it meets the standards of the 1928 Zoning Ordinance. The following table summarizes the relevant development standards for the application. Ex. 12, p. 8.

Development Standard	Min/Max Required	Provided	Applicable Zoning Provision
Maximum Building Height	2.5 stories	2 stories	§ 59-C-1.327
Minimum Lot Area	9,000 sq. ft.	9,000 sq. ft.	§ 59-C-1.322(a)
Minimum Lot Width at Front Building Line	75 ft. (Current) 50 ft. (1928)	60 ft.	§ 59-C-1.322(b)
Minimum Lot Width at Street Line	25 ft.	60 ft.	§ 59-C-1.322(b)
Minimum Setback from Street	30 ft.	32 ft.	§ 59-C-1.323(a)
Minimum Side Yard Setback	8 ft. one side; sum of 25 ft. both sides (Current) 7 ft. (1928)	13 ft northwest side; 8 ft. southeast side; 21 ft. sum of both	§ 59-C-1.323(b)(1)
Minimum Rear Yard Setback	25 ft.	Approx. 80 ft.	§ 59-C-1.323(b)(2)
Maximum Building Coverage	30 percent	Approx. 14 percent	§ 59-C-1.328
Maximum Floor Area for Accessory Apartment	1,200 sq. ft.	460 sq. ft.	§ 59-G-2.00(a)(9)

As a not-nonconforming building, the proposed use satisfies the applicable development standards.

- (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: As previously stated in this report, the Hearing Examiner concludes that the proposed special exception will not create an excessive concentration of similar uses since there are no other accessory apartments in the 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 discussed in Part II.B. of this report, there are at least four spaces on Petitioners' driveway and one in their garage. Petitioners own only one car, and there is therefore ample off-street parking available. Since on-street parking is not permitted on Wilson Lane, the Hearing Examiner recommends the following condition to avoid creation of a parking problem in the neighborhood: "Petitioners must make parking spaces available on their driveway and/or in their garage for the number of cars maintained in the neighborhood by themselves and the accessory apartment tenants."

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 report (Exhibit 13) notes certain

issues, and recommends that occupation of the accessory apartment be limited to no more than two persons. As mentioned above, Petitioners have agreed to meet all conditions, and will make the repairs required by the Housing Code Inspector.

V. RECOMMENDATION

Based on the foregoing analysis, I recommend that Petition No. S-2799, which seeks a special exception for an accessory apartment to be located at 5811 Wilson Lane, Bethesda, Maryland, be GRANTED, with the following conditions:

1. The Petitioners are bound by their testimony, representations and exhibits of record;
2. The Petitioners must make the repairs needed to comply with the conditions set forth in the Memorandum of Lynn McCreary, Housing Code Inspector, Division of Housing and Code Enforcement (Exhibit 13):
 - a. The chipping and peeling paint on the foundation wall of the window well must be eliminated, scraped, prepped and repainted in a professional, workmanlike manner.⁶
 - b. The door separating the unit from the utility room and the door separating the unit from the main house must be self-closing and self-latching and must have a minimum 20-minute fire protection rating.
3. Based on habitable space in the apartment (355.45 square feet), no more than two persons may reside in the accessory apartment;
4. Petitioners must occupy one of the dwelling units on the lot on which the accessory apartment is located;
5. Petitioners must not receive compensation for the occupancy of more than one dwelling unit;
6. Petitioners must make parking spaces available on their driveway and/or in their garage for the number of cars maintained in the neighborhood by themselves and the accessory apartment tenants; and

⁶ Petitioners testified that they have already completed this task. Tr. 11.

7. Petitioners 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. Petitioners 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: March 31, 2011

Respectfully submitted,

Martin L. Grossman
Hearing Examiner