

I. STATEMENT OF THE CASE

Petition No. S-2806, filed on March 29, 2011, seeks a special exception, pursuant to §59-G-2.00 of the Zoning Ordinance, to permit an accessory apartment use in the walkout basement of a single-family residential structure located at 7800 Cole Avenue, Takoma Park, Maryland, in the R-60 Zone. The property is identified as Lot 20, Block 18, New Hampshire Gardens Subdivision in Takoma Park, and has a Tax Account No. 03168641.

On April 15, 2011, the Board of Appeals issued a notice that a hearing in this matter would be held before the Office of Zoning and Administrative Hearings on July 8, 2011, at 9:30 a.m., in the Second Floor Hearing Room of the Stella B. Werner Council Office Building (Exhibit 11).

Technical Staff at the Maryland-National Capital Parks and Planning Commission (M-NCPPC), in a report issued May 20, 2011, recommended approval of the special exception, with conditions. Exhibit 14(b).¹

The Department of Housing and Community Affairs (DHCA) inspected the property on June 16, 2011, and reported its issues in a memorandum dated July 6, 2011 (Exhibit 15). The inspector concluded that occupancy must be limited to two unrelated persons or a family of up to three, in habitable space of 422 square feet. By memorandum dated July 5, 2011, DHCA indicated that there was one other accessory apartment in the neighborhood. Exhibit 16.

A public hearing was convened on July 8, 2011, as scheduled, and Petitioner Daniel B. Jessop appeared *pro se*. Also testifying was DHCA Program Manager II, Kevin Martell. Petitioner filed a copy of his deed (Exhibit 17) and executed an affidavit of posting (Exhibit 18). He also adopted the findings in the Technical Staff Report (Exhibit 14(b)) and in the Housing Code Inspector's Report (Exhibit 15), as his own evidence. Tr. 5. Petitioner agreed to meet all the conditions set forth in both reports. Tr. 6-7.

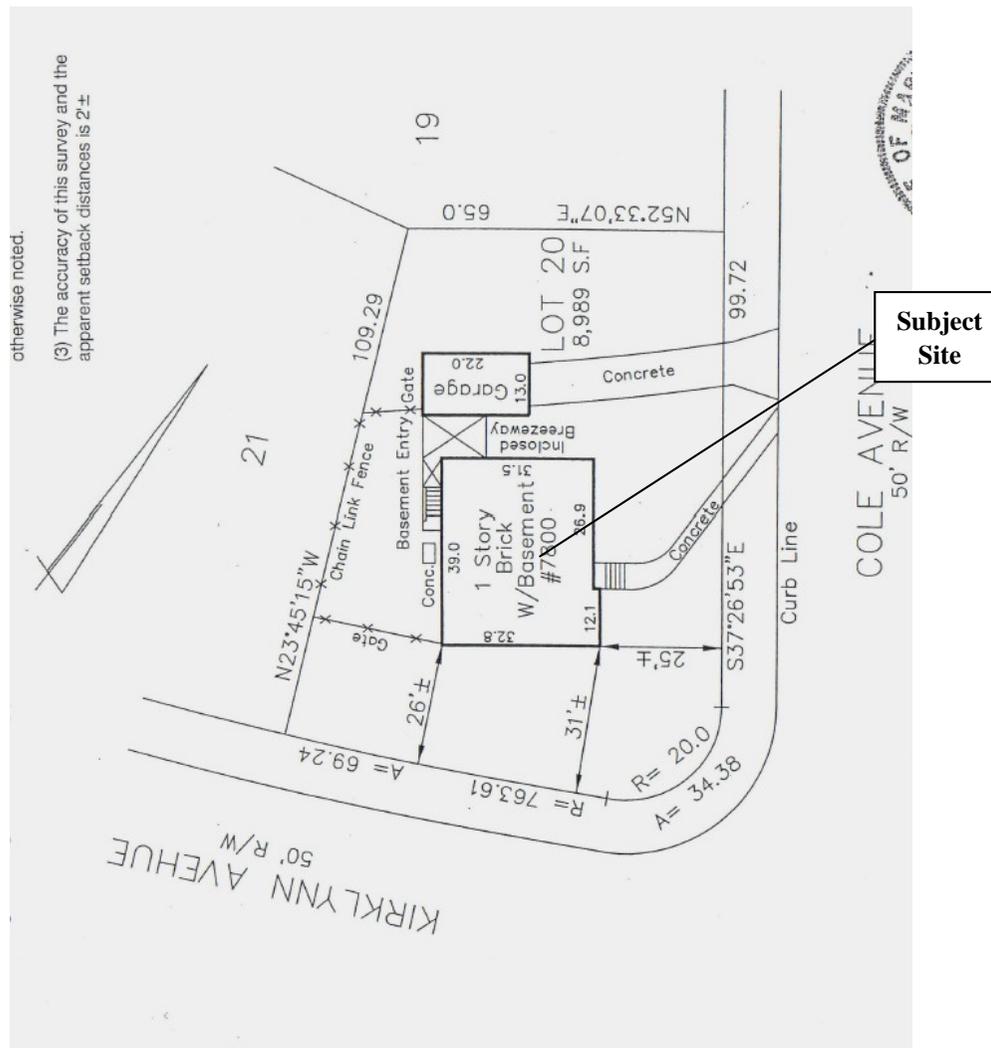
¹ The Technical Staff report is frequently quoted and paraphrased herein.

The record was held open till July 18, 2011, to allow for filing of the transcript, and it closed as scheduled. There has been no opposition to this special exception petition, nor response of any kind from the community. The Hearing Examiner recommends that the petition be granted, with conditions as set forth in Part V of this report.

II. FACTUAL BACKGROUND

A. The Subject Property and the Neighborhood

As noted above, the address of the subject property is 7800 Cole Avenue, in the New Hampshire Gardens Subdivision of Takoma Park, Maryland. The home is in the R-60 Zone, and is located on a corner lot in the northwest quadrant of the intersection of Cole Avenue and Kirklynn Avenue, as shown below in the Site Plan (Exhibit 4):



Technical Staff reports (Exhibit 14(b), p. 2):

The subject property is 8,989 square feet in size and is roughly trapezoidal in shape. . . . The existing one-story house was constructed in 1953 and is 1,260 square feet above ground and 2,352 square feet in the structure including the basement. . . . The lot is gently sloping, decreasing in elevation towards Kirklynn Avenue. 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 Cole Avenue. The home has a one-car garage, and there is ample space for extra parking on the driveway. In addition, street parking is available along Cole Avenue and Kirklynn Avenue. . . .

The front and rear of the home are shown in photographs from the Staff report (p. 3):

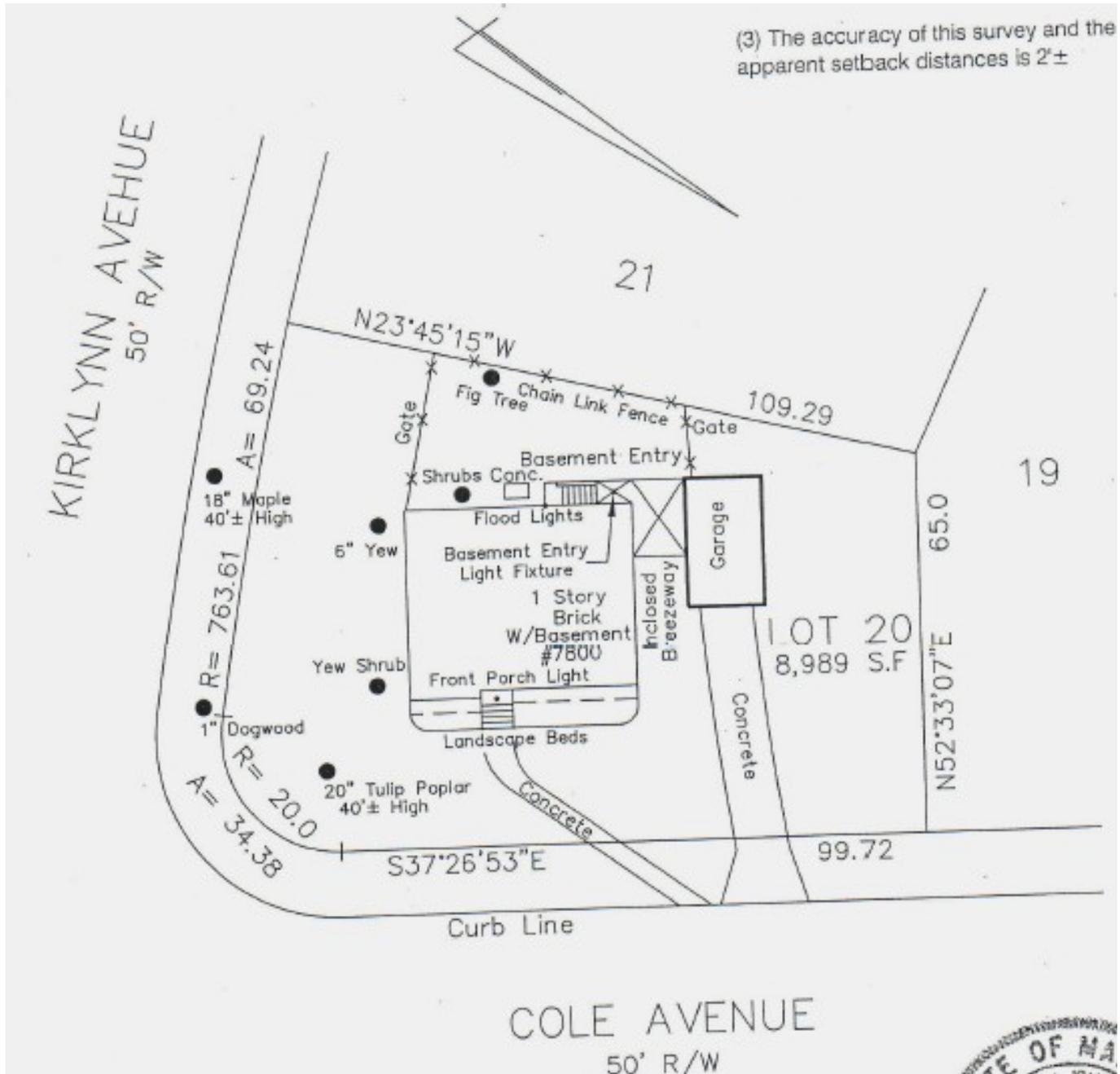
Front of House



Back of House



The locations of landscaping and lighting, all of which are existing and will remain unchanged, are shown below on the Landscape and Lighting Plan (Exhibit 5):



Technical Staff reports that the property's landscaping is relatively well-maintained and falls within the standards expected for a typical one-family home. Exhibit 14(b), p. 6.

Technical Staff defined the neighborhood as bordered by Anne Street to the northwest, Wildwood Drive to the northeast, Jackson Avenue to the southeast, and Glenside Drive to the southwest. The Hearing Examiner accepts this definition of the general neighborhood, which includes any nearby properties that may be affected by a potential increase in density or traffic, and it is outlined below on an aerial photo supplied by Technical Staff (Exhibit 14(b), p. 4):



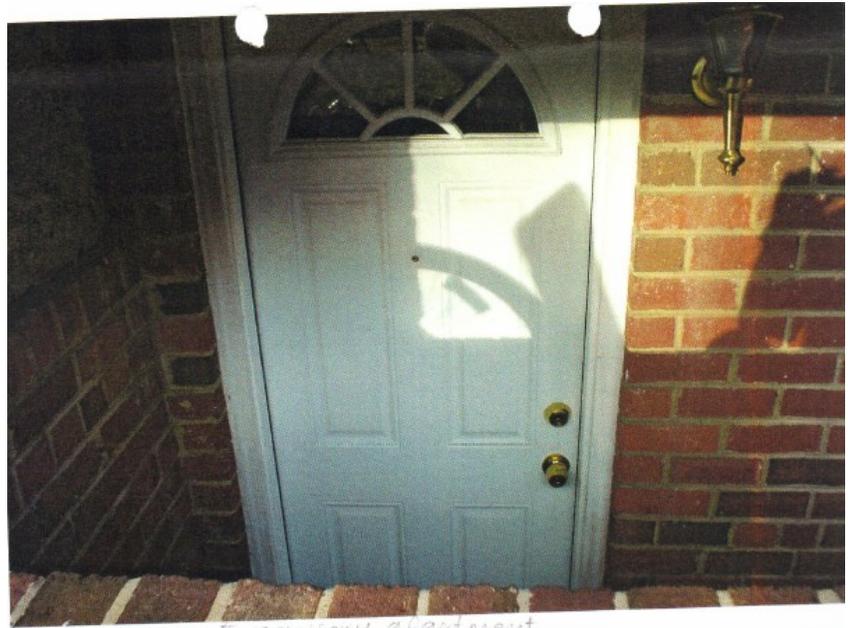
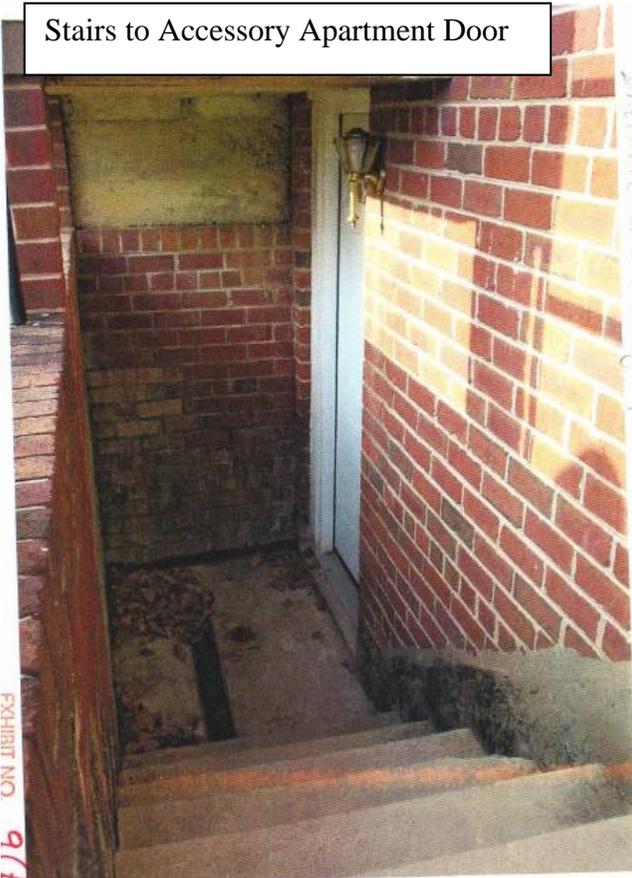
Staff reports that all homes in the neighborhood are one-family detached homes, and the entire neighborhood is zoned R-60. According to Technical Staff, no other special exceptions exist within the neighborhood boundaries, although DHCA listed one other accessory apartment at 7408 Glenside Drive.² Exhibit 16.

² The DHCA memo does not identify a special exception number, and cryptically reports that it is an “Exempt Accessory Apartment.” The Hearing Examiner did not pursue clarification of this language any further because the existence of one other accessory apartment in the neighborhood should have little or no impact on the subject case.

B. The Proposed Use

The proposed accessory apartment will be located in the walk-out basement of the existing dwelling. As depicted on page 4 of this report and in the photos from Exhibit 9(b) reproduced below, it has a separate exterior entrance at the bottom of steps at the rear of the dwelling.

Stairs to Accessory Apartment Door

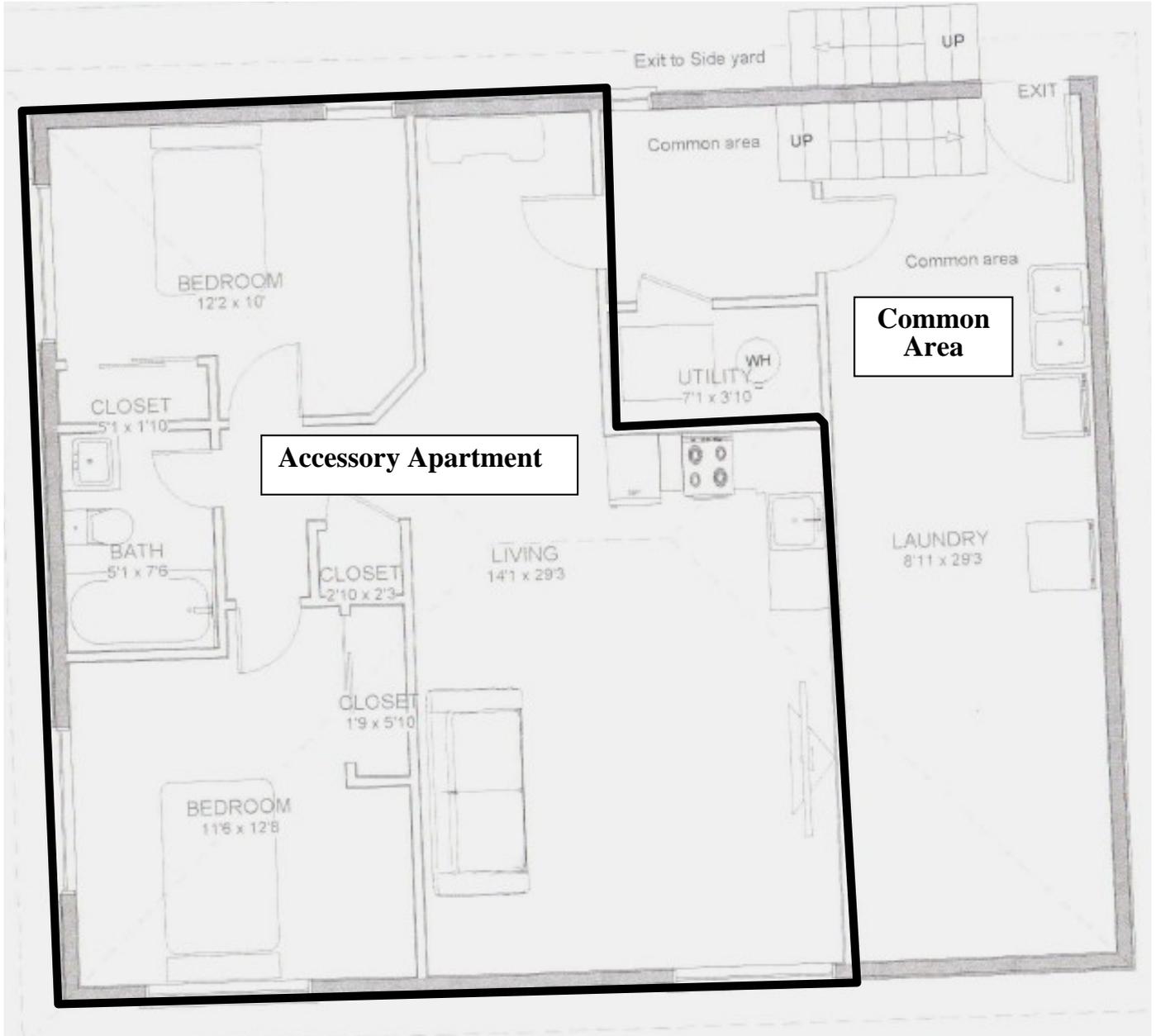


Door to Accessory Apartment

As noted by Technical 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 one-family home. As such, Staff concluded that the accessory apartment entrance should not detract from the appearance of the neighborhood. Exhibit 14(b), p. 5. Staff also found that there was adequate lighting, residential in character, located above the entrance to the accessory apartment.

The apartment contains a kitchen area, a living room, two bedrooms and one bathroom. It also has access to the laundry room and utility room, shared with the main unit, as depicted in the

floor plan, Exhibit 6, reproduced below:



Petitioner reports that the apartment has 741.8 square feet of floor area (Exhibit 3), and Technical Staff agrees. Exhibit 14(b), p. 5. The Housing Code Inspector, Kevin Martell, measured the habitable apartment floor space as about 422 square feet. Tr. 18 and Exhibit 15. Mr. Martell reported the following in his memorandum of July 6, 2011.

The preliminary inspection was conducted on June 16, 2011. The accessory apartment is located in the cellar of the house. The issues regarding accessory apartment standards are as follows:

1. The unit contains 422 square feet of habitable space. Two unrelated persons or a family of three may reside in the unit. The unit is subordinate to the main dwelling.
2. Install egress windows in both cellar bedrooms to meet Montgomery County Code, 5.0 square feet net clear opening. Please find attached standards for emergency egress windows and required window wells.
3. The property has adequate off street parking. Four vehicles can be parked off street, parked end to end. The property has a one car garage.

Thus, the only repair required is for Petitioner to bring the egress windows up to code, and Petitioner is agreeable to doing the repairs required to make the accessory apartment habitable. Tr. 6-7. As indicated by the Housing Code Inspector, given the habitable space of the apartment, it may be occupied by a maximum of two unrelated persons or a family of up to three. Exhibit 15. Mr. Martell also estimated that the parking area (driveway and garage) can accommodate a minimum of four vehicles, as did Technical Staff. Exhibit 15 and Exhibit 14(b), p.6. There is also on-street parking available, according to Mr. Martell. Tr. 21.

Technical Staff found that the proposed use will have no adverse effects on the transportation system, and that both Local Area Transportation Review (LATR) and Policy Area Mobility Review (PAMR) are satisfied without the need for a traffic study because the use will generate only one additional trip in both the morning and evening peak hours. Exhibit 14(b), p. 6.

Petitioner is not proposing any new construction or modifications to the exterior of the dwelling. Therefore, the appearance of a single-family, detached dwelling will be maintained. There are no environmental issues associated with the proposed use, and the site is exempt from the forest conservation law. Exhibit 7 and Exhibit 14(b), p. 6.

C. Neighborhood Response

As mentioned at the beginning of this report, there has been no response from the community to this petition, negative or positive.

D. The Master Plan

The property is located within the area covered by the *Takoma Park Master Plan*, approved and adopted in December 2000. The Plan does not explicitly address the question of accessory apartments, but it does emphasize revitalizing housing and accepting a diversity of housing types in the community. Master Plan, pp. 28-29. The Plan also supports the R-60 zoning, which permits accessory apartments as special exceptions. Plan Appendix B, at p.11 (Map 45). The Technical Staff concluded that the proposed accessory apartment would be consistent with the Master Plan because it will contribute to the housing objectives of the Plan, including the expansion of housing choices in the area. Exhibit 14(b), p. 5.

The Hearing Examiner agrees. Because Petitioner plans no external structural modifications to the subject property and because there is sufficient parking to accommodate the proposed use, the requested special exception will maintain the residential character of the area. 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 *Takoma Park Master Plan*.

III. SUMMARY OF HEARING

At the hearing, testimony was heard from Petitioner Daniel B. Jessop and from the Housing Code Inspector, Kevin Martell.

Daniel B. Jessop (Tr. 1-16; 18):

Daniel B. Jessop filed a copy of his deed (Exhibit 17) and executed an affidavit of posting (Exhibit 18). He also adopted the findings in the Technical Staff Report (Exhibit 14(b)) and in the Housing Code Inspector's Report (Exhibit 15), as his own evidence. Tr. 5. Petitioner agreed to meet all the conditions set forth in both reports. Tr. 6-7.

Mr. Jessop testified that the lighting was all residential in nature and that no additional lighting was being added. In fact, he will be making no changes to the exterior of the premises unless asked to do so in this case. Tr. 11.

Mr. Jessop identified the plans and photographs in the file, and stated that the utility room and laundry room are not part of the apartment, but are in a shared area. Tr. 12.

Mr. Jessop testified that his driveway holds three cars back to back and the garage holds one, so there is a total of four off-street spaces. The accessory apartment tenants can park in the driveway if they want to; however, there's lots of parking on Cole Avenue and lots of parking on Kirkland Avenue. Tr. 14-15.

Mr. Jessop feels that a tenant would not, in any way, impact negatively on the neighborhood, and his neighbors don't have a problem with the accessory apartment. Tr. 16.

Housing Code Inspector Kevin Martell (Tr. 16-21):

Housing Code Inspector, Kevin Martell, testified that he had inspected the premises on June 16, 2011, and he listed the items raised in the Housing Code Inspector's report (Exhibit 15).

Mr. Martell stated that the only requirement is for Mr. Jessop to install egress windows in both of the bedrooms. "Other than that, sir, it's a nice unit." Tr. 17. He indicated that three cars can fit in the driveway and one in the garage. Tr. 18.

Mr. Martell further testified that he found 422 square feet of habitable space, which can hold up to a family of three or two unrelated individuals. Tr. 18. He indicated that when Ms. DeJesus of DHCA stated that the one other accessory apartment in the area was exempt, she probably meant that the owner probably was not paying any rental license because it's probably not being rented out. He did not know what she meant by stating that there was "No Jurisdiction; City of Takoma Park." Tr. 19. There is also on-street parking available, according to Mr. Martell. Tr. 21.

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 he complies with the recommended conditions (Exhibit 14(b)).

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.

Technical Staff lists the following inherent characteristics of accessory apartments (Exhibit 14(b), p. 8):

- (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 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, “There are no non-inherent adverse effects present in this case” Exhibit 14(b), p. 9. The Hearing Examiner agrees that there are no unusual, adverse characteristics

of the site. Since there will be no exterior modifications and since ample off-street parking is available on the site, the Hearing Examiner finds that there will be no non-inherent, adverse effects on the neighborhood, as long as all conditions of approval are met. As stated by Staff (Exhibit 14(b), pp. 8-9):

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 one-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. . . . The operational and physical characteristics of the proposed accessory apartment are consistent with the inherent characteristics of an accessory apartment use.

Based on the evidence in this case, and considering size, scale, scope, light, noise, traffic and environment, the Hearing Examiner concludes, as did the Technical Staff, that there are no non-inherent adverse effects from the proposed use warranting denial of this petition.

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-60 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 *Takoma Park Master Plan*, approved and adopted in December 2000. The Plan does not explicitly address the question of accessory apartments, but it does emphasize revitalizing housing and accepting a diversity of housing types in the community. Master Plan, pp. 28-29. The Plan also supports the R-60 zoning, which permits accessory apartments as special exceptions. Plan Appendix B, at p.11 (Map 45). The Technical Staff concluded that the proposed accessory apartment would be consistent with the Master Plan. Exhibit 14(b), p. 5.

Moreover, because Petitioner plans no external structural modifications to the subject property and because there is sufficient parking to accommodate the proposed use, the requested special exception will maintain the residential character of the area.

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 *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.*

Conclusion: The accessory apartment will be located in the walkout basement of an existing dwelling and will not require any external changes. It therefore will maintain its residential character. There will be sufficient parking, considering the driveway space and the garage, and traffic conditions will not be affected adversely, according to Transportation Planning Staff. Technical Staff also found that there will not be an excessive concentration of similar uses in the defined neighborhood. Exhibit 14(b), p. 10. 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: The proposed accessory apartment presents only minimal impacts to the immediate area, and the Hearing Examiner finds that 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 accordance with the recommended 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 special exception would cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site. Staff noted, “The use will cause no objectionable illumination or glare as the provided lighting is residential in character.” Exhibit 14(b), p. 11. Given the nature of the use, and the undisputed evidence that no external changes are planned, the Hearing Examiner agrees with Staff and 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: There is, at most, one other special exception in the neighborhood, based on a combined reading of the reports by Technical Staff (Exhibit 14(b)) and DHCA (Exhibit 16). 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 facilities (Exhibit 14(b), p. 6), 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:*
 - (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 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 14(b), p. 12. 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 special exception "is not likely to negatively impact the safety of vehicular or pedestrian traffic," the Hearing Examiner so finds. Exhibit 14(b), p. 12.

C. Specific Standards

The testimony and the exhibits of record, especially the Technical Staff Report (Exhibit 14(b)), 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 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 walkout basement.

- (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 1953. Exhibit 14(b), 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 rear entrance. There will be no change to the residential appearance of the dwelling.

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

Conclusion: Petitioner is not proposing any new construction or modifications to the exterior.

- (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, as it occupies approximately 741 square feet of space in the walkout basement of Petitioner's home, and the home has approximately 2,352 square feet of floor space. Exhibit 14(b), p. 15.

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 Petitioner lives in the main 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 17), Petitioner and his mother have been the joint owners of the premises since 2002. 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 Petitioner 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 Petitioner and his mother are the joint 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 8,989 square feet in size, and it therefore meets the 6,000 square foot minimum. The following chart from the Technical Staff Report demonstrates compliance with all development standards:

Development Standard	Min/Max Required	Provided	Applicable Zoning Provision
Maximum Building Height	2.5 stories	1 story	§ 59-C-1.327
Minimum Lot Area	6,000 sq. ft.	8,989 sq. ft.	§ 59-C-1.322(a)
Minimum Lot Width at Front Building Line	60 ft.	86 ft.	§ 59-C-1.322(b)
Minimum Lot Width at Street Line	25 ft.	69 ft.	§ 59-C-1.322(b)
Minimum Setback from Street	25 ft.	25 ft.	§ 59-C-1.323(a)
Minimum Rear Yard Setback	20 ft.	20 ft.	§ 59-C-1.323(b)(2)
Maximum Building Coverage	35 percent	Approx. 17 percent	§ 59-C-1.328
Maximum Floor Area for Accessory Apartment	1,200 sq. ft.	741 sq. ft.	§ 59-G-2.00(a)(9)

- (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: At most, there is one other accessory apartment in the defined neighborhood, based on a combined reading of the reports by Technical Staff (Exhibit 14(b)) and DHCA (Exhibit 16). The Hearing Examiner therefore concludes that the proposed special exception will not create an excessive concentration of similar uses.

- (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: There are a minimum of four off-street parking spaces in Petitioner's driveway and garage. Petitioner testified that he will make space available on his driveway for use by the tenants. Moreover, ample parking is available on adjacent Cole Avenue and Kirkland Avenue. Tr. 14-15. The Housing Code Inspector confirmed that there is on-street parking available, in addition to the garage and driveway. Tr. 21.

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 15) notes certain issues, and has recommended that occupation of the accessory apartment be limited to no more than two unrelated persons or a family of up to three. As mentioned above, Petitioner has agreed to meet all conditions, and will make the repairs required by the Housing Code Inspector.

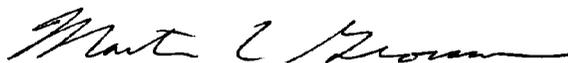
V. RECOMMENDATION

Based on the foregoing analysis, I recommend that Petition No. S-2806, which seeks a special exception for an accessory apartment to be located at 7800 Cole Avenue, Takoma Park, Maryland, be GRANTED, with the following conditions:

1. The Petitioner is bound by his testimony, representations and exhibits of record;
2. The Petitioner must complete repairs to comply with the conditions set forth in the Memorandum of Kevin M. Martel, Program Manager II, Division of Housing and Code Enforcement (Exhibit 15). These conditions require Petitioner to install egress windows in both cellar bedrooms to meet the County Code, including a 5.0 square feet net clear opening;
3. Based on habitable space in the apartment (422 square feet), no more than two unrelated persons or a family of up to three may reside in the accessory apartment;
4. Petitioner must occupy one of the dwelling units on the lot on which the accessory apartment is located;
5. Petitioner must not receive compensation for occupancy of more than one dwelling unit; and
6. 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: July 27, 2011

Respectfully submitted,



Martin L. Grossman
Hearing Examiner