

**BEFORE THE MONTGOMERY COUNTY
BOARD OF APPEALS
OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660**

IN THE MATTER OF:	*	
STEPHEN D. SHIFFLETT AND	*	
JAMES K. BALLOU	*	
	*	Board of Appeals No. S-2840
Petitioners	*	(OZAH No. 12-30)
Stephen Shifflett and James Ballou	*	
For the Petition	*	

Robert Goff	*	
Department of Housing and	*	
Community Affairs	*	

Matthew Nechin	*	
Support for the Petition	*	

Before: Tammy J. CitaraManis, Hearing Examiner

**HEARING EXAMINER'S REPORT AND RECOMMENDATION
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I. STATEMENT OF THE CASE

In Petition No. S-2840, Stephen D. Shifflett and James K. Ballou seek approval of a Special Exception under Zoning Ordinance §59-G-2.00 to allow an accessory apartment on property located at 505 Ellsworth Drive, Silver Spring, Maryland in the R-60 (Residential, One-family, Detached) Zone. The legal description of the property is Lot 18 and Part of Lot 19, Block H, in the South Woodside Park Subdivision. The tax account number is 01056110.

On March 22, 2012, the Board of Appeals issued a notice of a public hearing before the Hearing Examiner for July 26, 2012. Exhibit 11(b). Technical Staff of the Maryland-National Capital Park and Planning Commission (M-NCPPC), in a report dated July 18, 2012, recommended approval of the special exception, with four (4) conditions. Exhibit 16.¹

A Housing Inspector from the Department of Housing and Community Affairs (DHCA) inspected the property on July 13, 2012. Housing Code Inspector Robert Goff reported his findings in a memorandum dated July 17, 2012, (Exhibit 13). The inspector found the accessory apartment had 639.54 square feet of habitable space and as a result, concluded that occupancy in the unit must be limited to no more than two (2) occupants. Exhibit 13. DHCA submitted a memorandum dated July 6, 2012, from Ada DeJesus of the DHCA, Licensing and Registration Unit, reporting one accessory apartment and no registered living units (RLU's) in direct vicinity of the subject property. Exhibit 14.

The hearing went forward as scheduled on July 26, 2012, and Petitioners Stephen D. Shifflett and James K. Ballou appeared *pro se*. Petitioners executed an Affidavit of Posting (Exhibit 17). Petitioners testified in support of the petition and adopted the findings in the Technical Staff Report (Exhibit 16) and in the Housing Code Inspector's Report (Exhibit 13), as

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

Petitioners' own evidence and agreed to meet all the conditions set forth in both reports. Tr. 10-14. Matthew Nechin, Petitioners' neighbor, testified in support of the petition. Housing Code Inspector Robert Goff also testified. One resident, John Floyd, who resides on Dale Drive, submitted a letter dated March 6, 2012, opposing the petition. Exhibit 12. Mr. Floyd was not present at the hearing. No opposition appeared at the hearing.

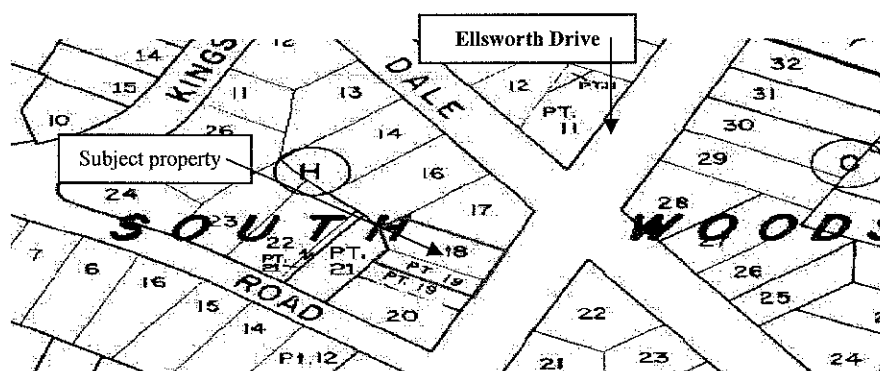
The record was held open until August 3, 2012, to give time to the Court Reporter to complete the hearing transcript and for Petitioners to submit a copy of their deed. The record closed on August 3, 2012, with no further documents other than Petitioners' deed (Exhibit 18) and the transcript being received.

For the reasons set forth below, the Hearing Examiner recommends approval of the requested special exception, subject to the conditions set forth in Section V of this Report.

II. FACTUAL BACKGROUND

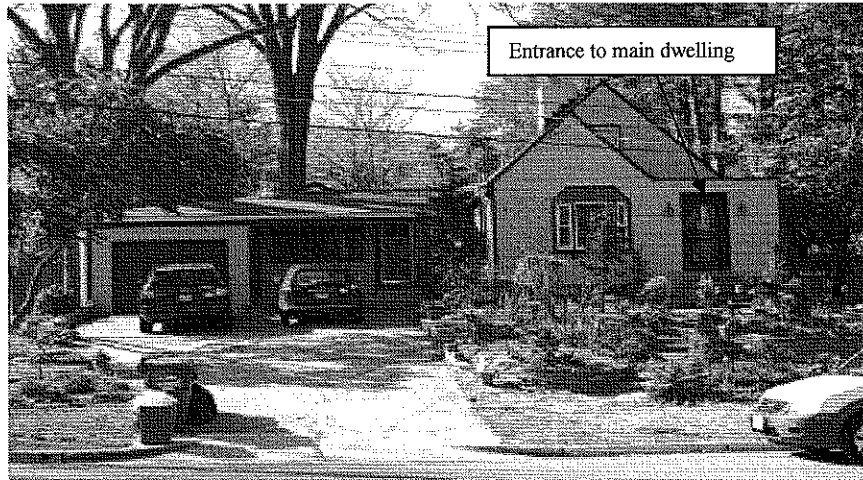
A. The Subject Property and Its Current Use

The subject property is located at 505 Ellsworth Drive, Silver Spring, Maryland, on the west side of Ellsworth Drive near its intersection with Dale Drive to the north as shown below on the tax map of the property (Exhibit 16, p. 4):²

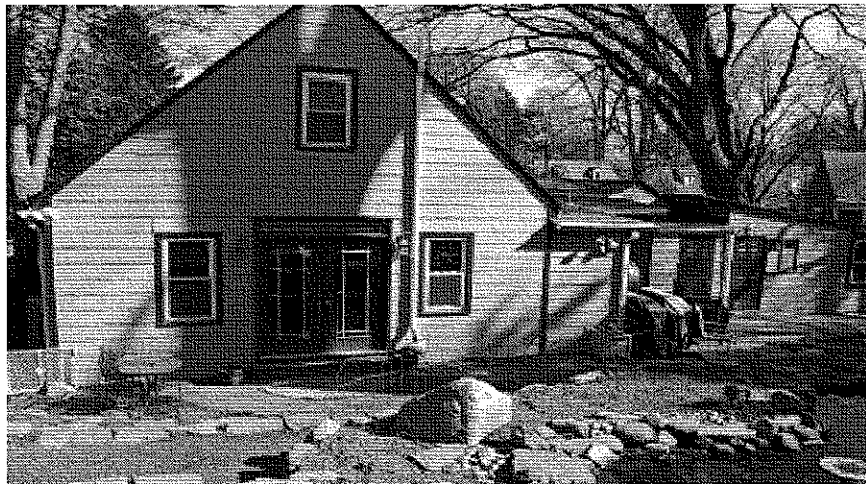


² Technical Staff reports: "The subject property contains a lot and a part of a lot created by deed. The house is located primarily on Lot 18, but the garage is located on Part of Lot 19. . . . Since both [lots] are owned by [Petitioners], for zoning purposes related to this application for an accessory apartment within an existing dwelling the two pieces of property are considered one lot." Exhibit 16, p. 2.

The front and rear of the home can be seen in the following photographs from the Technical Staff report (Exhibit 16, p. 5):



View of Main Dwelling from Ellsworth Drive

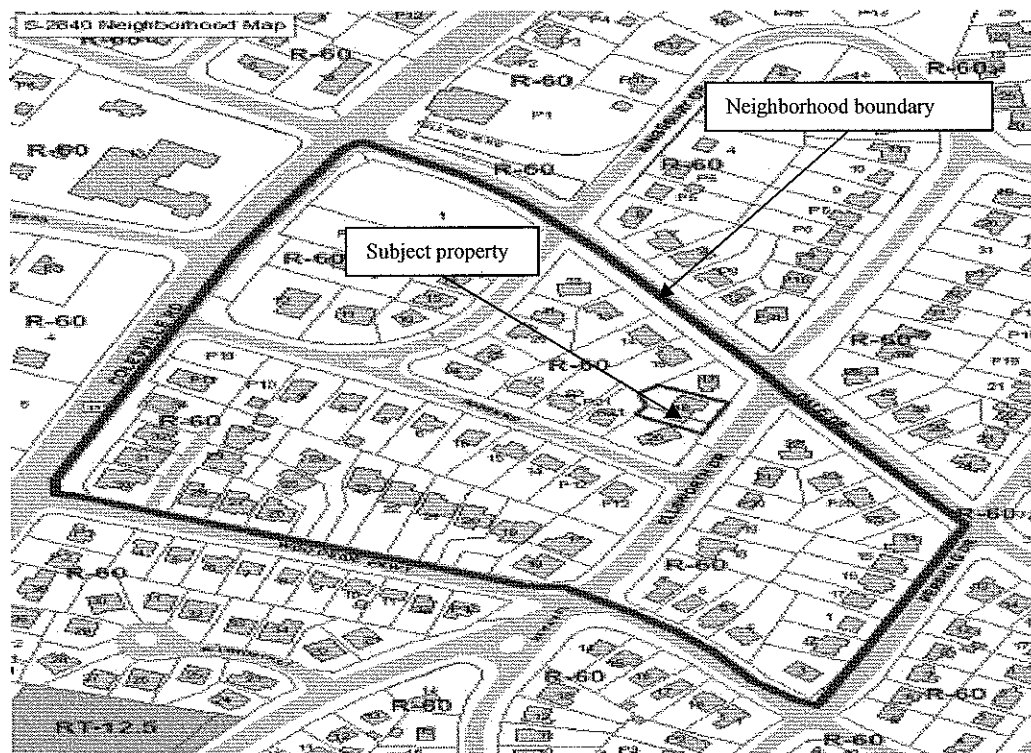


View of Main Dwelling from rear yard

B. The Surrounding Neighborhood

Technical Staff defined the general neighborhood as “bounded by Pershing Drive to the east, Colesville Road to the West, Dale Drive along the north, and Woodside Parkway towards the south.” Exhibit 16, p. 6. Having no evidence to the contrary, the Hearing Examiner accepts Staff’s definition of the general neighborhood.

The neighborhood boundary, which is depicted with a solid line on the location map shown below (Exhibit 16, p. 8), has been drawn by Technical Staff to include any nearby properties that may be affected by a potential increase in density or traffic:



According to Technical Staff, the “neighborhood consists of approximately 68 one-family homes which are zoned R-60.” Exhibit 16, p. 7. Staff reports there are no other special exceptions within the defined neighborhood boundary.³

C. The Master Plan

The subject property lies within the geographic area covered by the *North and West Silver Spring Master Plan*, approved and adopted in 2000. Technical Staff reports: “The subject property was not recommended for any changes in the Master Plan which reconfirmed the R-60

³ In a memorandum to the Housing Code Inspector dated July 6, 2012, Ada DeJesus with the DHCA, Licensing and Registration Unit, reported one accessory apartment located at 615 Bennington Lane which is 0.33 miles northeast of the subject property. Exhibit 14. Based on the address, the accessory apartment is located outside the defined neighborhood boundary.

zoning for the subject site. The proposed use reinforces the Plan's recommendation of retaining the one-family detached character in north Silver Spring." Exhibit 16, p. 11. Hence, Staff concluded that the subject application is consistent with the Master Plan.

The Hearing Examiner agrees with Technical Staff because the Plan supports the R-60 zoning which permits accessory apartments by special exception. In addition, this accessory apartment is not visible from the street and therefore does not change the existing structure's appearance as a single-family dwelling consistent with the surrounding neighborhood. Since the exterior of Petitioners home will not be changed and there is sufficient off-street parking to accommodate the proposed use and main dwelling, it will retain the residential appearance and compatibility sought by the Master Plan. The Hearing Examiner finds that the proposed use is consistent with the *North and West Silver Spring Master Plan*.

D. The Proposed Use

The Petitioners are seeking a special exception to allow a 742 square-foot, accessory apartment in the basement of their existing home.⁴ The apartment is a separate living unit with its own exterior entrance located on the north side of the home.

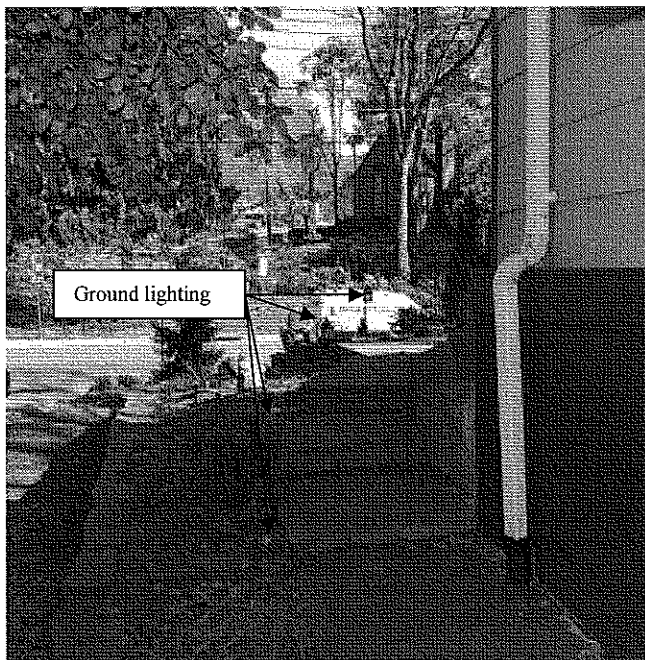
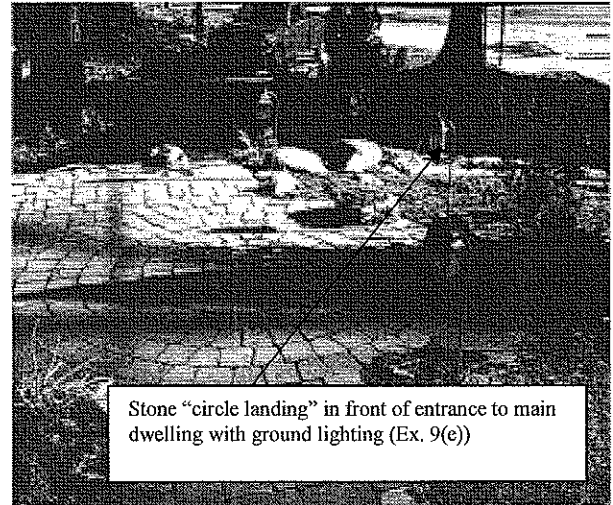
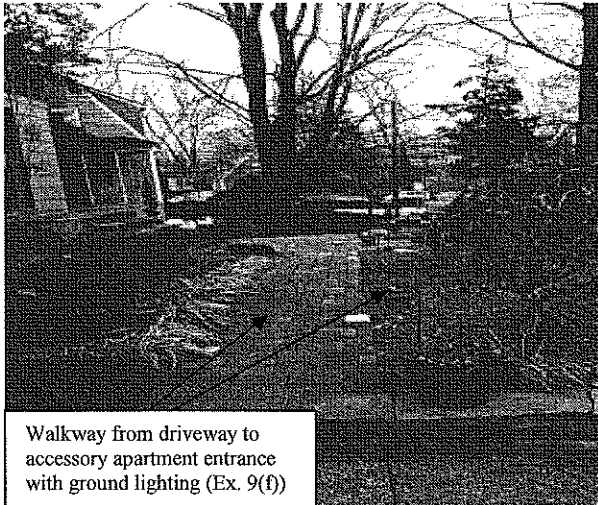
Technical Staff reports (Exhibit 16, p. 9):

A separate entrance to the apartment is located along the north side of the house and is distinct from the entrance to the main dwelling. To reach the entrance for the proposed accessory apartment, one would walk on a stone path alongside the driveway towards the front door of the home and then continue on the path to the north side of the house to reach the door. As the photograph on page 8 suggests, the accessory apartment is virtually hidden unless a viewer is in close proximity to the home. At close proximity, the entrance has the appearance of a basement door and does not detract from the appearance of a one-family dwelling. Adequate lighting, residential in character, is located along the stairway leading to the rear of the property and

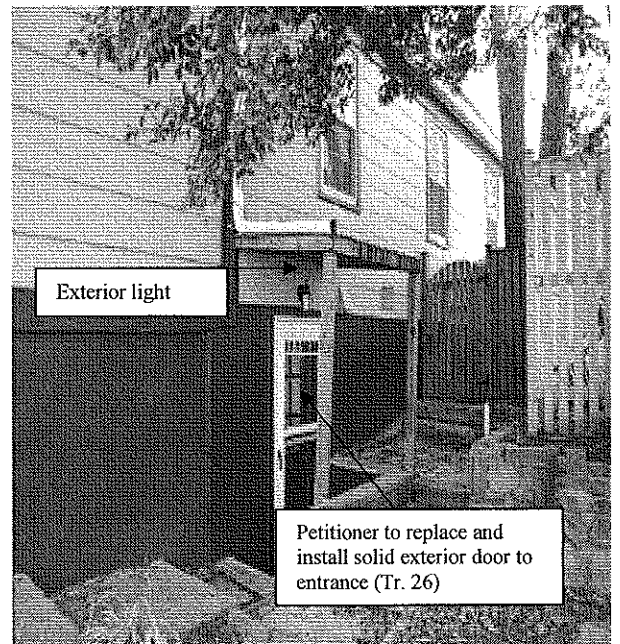
⁴ Technical staff refers to the location of the accessory apartment as the "basement level" of the home (Exhibit 16, p. 9), while the Housing Code Inspector's report refers to "the cellar of the house." Exhibit 13. Petitioners testified that the accessory apartment was in existence when they purchased the property in 2001. Tr. 34; and Exhibit 3.

is also located above the apartment's entrance door.

Photographs of the stone walkway and entrance to the accessory apartment from the Technical Staff report (Exhibit 16, p. 10) and from Petitioners' submissions (Exhibits 9(e)-(g)), are shown below:



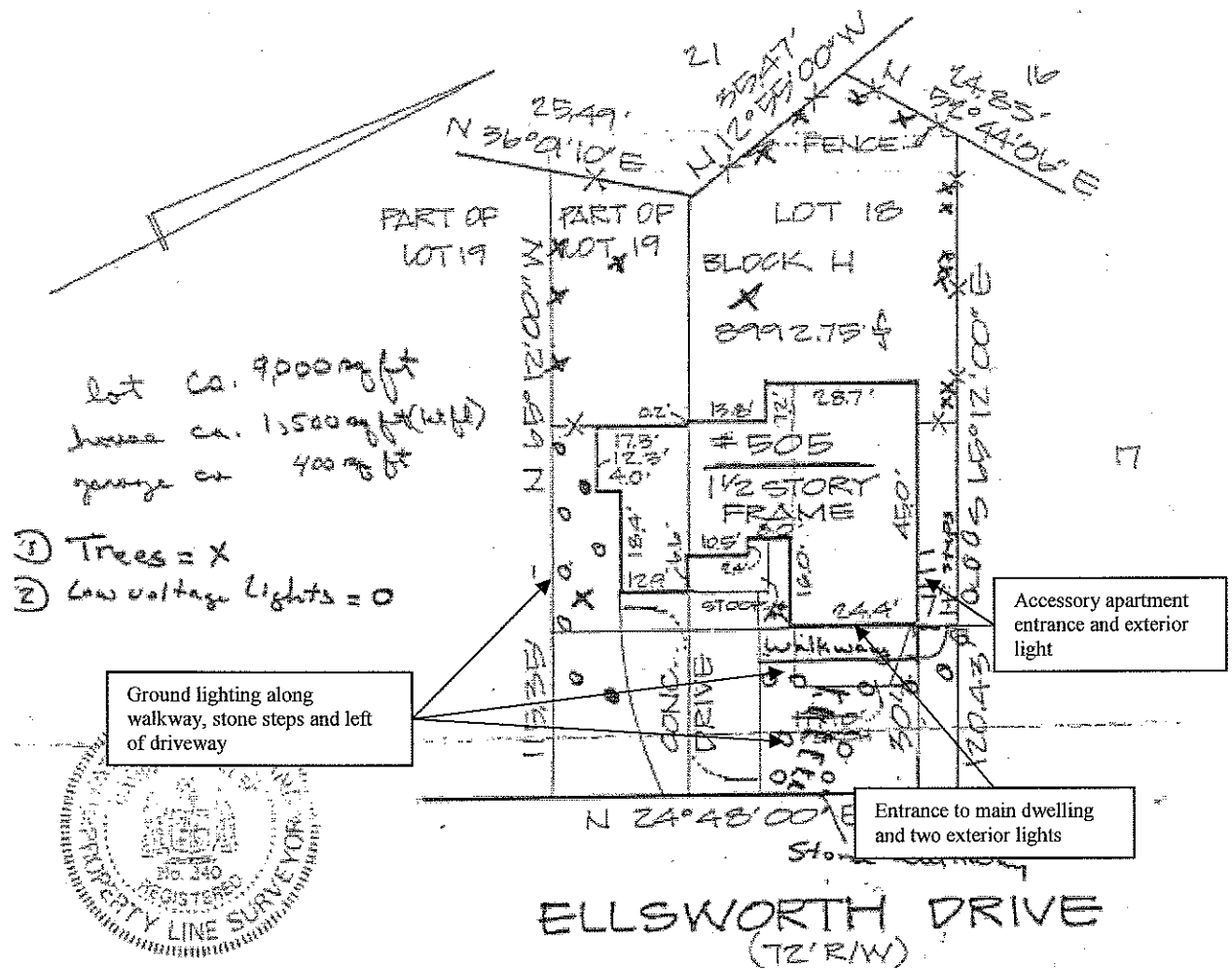
Walkway to Proposed Accessory Apartment



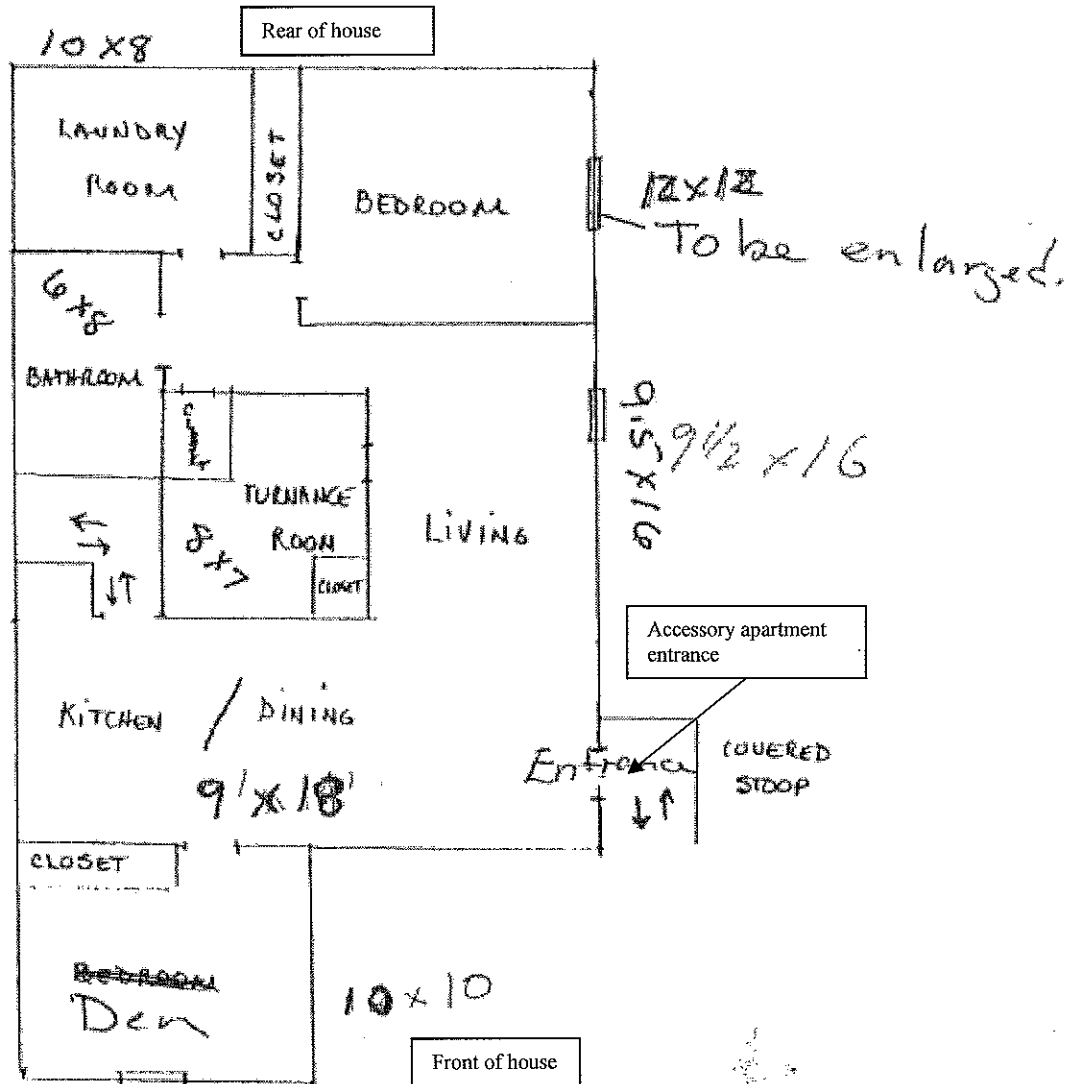
Entrance to Proposed Accessory Apartment

As described by Technical Staff, the Landscape and Lighting Plan (Exhibit 6), shown

below, "depicts the location of existing landscaping vegetation, exterior light fixtures and other features of the site. The site contains a few large trees, terraced lawn areas, landscape beds, the dwelling unit, a concrete driveway and a shed. No landscaping and lighting changes are proposed under the application." Exhibit 16, p.12. The existing exterior lighting includes a front yard post light (at driveway and stone walkway), ground lighting along the stone walkway to the accessory apartment entrance, two porch lights to both sides of the entrance to the main dwelling and a light over the entrance to the accessory apartment door.



The Floor Plan for the accessory apartment (Exhibit 5), modified by Petitioners to show the location of the den and the bedroom window to be enlarged, is shown below:



The overall net floor area of the accessory apartment is approximately 742 square feet, 639.54 square feet of which is habitable, and includes a living room, kitchen/dining room, bathroom, laundry room, den and one bedroom.

DHCA inspected the property on July 13, 2012, and Housing Code Inspector Robert Goff

reported his findings in a memorandum dated July 17, 2012 (Exhibit 13).⁵ The substance of his report is set forth below:

The preliminary inspection was conducted on 7-13-2012. The Accessory Apartment is located in the cellar of the house. The issues regarding Accessory Apartment standards are as follows:

1. Replace keyed dead bolt with thumb turn lock.
2. Install egress window in bedroom. Window must be at least 5 square feet net opening and no more than 44" from floor to window opening.
3. Move bulk head up to 6' 4" from floor to bottom of bulk head going into kitchen.
4. Move bulk head up to 6' 4" from floor to bottom of bulk head going into hallway to bedroom.
5. The Accessory Apartment is 639.54 square feet. 150 square feet per person and 100 square [feet] for each additional person 2 unrelated or a family of 2 may live in the unit.
6. There is off-street parking for 4 cars. Street parking is permit only.

In addition to confirming the issues noted in his inspection report, Mr. Goff testified that the minimum required distance from the floor to the bottom of the bulkhead (items # 3 and 4) is 6' 4". It was Mr. Goff's opinion that the accessory apartment did not change the residential look of the house or neighborhood. Tr. 30-33.

As previously noted Petitioners agreed to comply with all the conditions set forth in the Technical Staff report (Exhibit 16) and in the Housing Code Inspector's report (Exhibit 13). Tr. 10-14. Mr. Ballou testified that they have obtained estimates from a contractor to enlarge the bedroom window (item # 2) and to raise the ceiling going into the kitchen (item # 3) and in the hallway to the bedroom (item # 4). He also testified that they intend to replace and install a solid door to the accessory apartment because the current door has a window. The new door will have

⁵ Technical Staff reported: "The applicant had the proposed apartment inspected earlier this year with the intention of renting the basement as a two bedroom unit if the apartment satisfied the inspection. The unit, however, failed to fully meet the requirements for a window fire escape and ceiling height." Exhibit 16, p. 6. In their Statement in support of their petition, Petitioners stated: "We have contacted contractors, and now know that it is feasible to replace the windows and raise the ceiling, but because of the cost involved, we would replace only one window, and rent the apartment as a one bedroom with den. Therefore, we would limit the number of people who could occupy the apartment to two." Exhibit 3.

a thumb turn lock instead of a keyed deadbolt (item #1). Tr. 11 and 34.

Technical Staff advises the new bedroom window, required for adequate fire escape, “will be compatible with the existing dwelling and surrounding properties. . . . No other external modifications or improvements are proposed.” Exhibit 16, p. 20.

Petitioners confirmed Technical Staff’s finding that the concrete driveway, accessed from Ellsworth Drive, can accommodate parking for four vehicles, and a permit is required for on-street parking.⁶ They confirmed they have a visitor parking permit and will obtain additional parking permits for the accessory apartment tenants or provide them with space on the driveway. Tr. 26-27. Based on this information, the Hearing Examiner concurs with Technical Staff’s finding that there is adequate off-street parking to accommodate the accessory apartment and main dwelling. Exhibit 16, p. 12.

E. Traffic Impacts

Technical Staff found that “The proposed accessory apartment meets the transportation related requirements of the Adequate Public Facilities (APF) Ordinance.” Exhibit 16, p. 11.

Transportation Staff reported (Exhibit 16, p. 24):

Using trip generation rates included in the *Local Area Transportation Review (LATR)/Policy Area Mobility Review (PAMR) Guidelines*, the single-family dwelling on the property is estimated to generate one peak-hour trip during the weekday morning (6:30 a.m. to 9:30 a.m.) and evening (4:00 p.m. to 7:00 p.m.) peak periods. Using the same rates, the accessory apartment is estimated to generate one additional peak-hour trip during the weekday peak periods.

Since the existing house and the accessory apartment together will not generate 30 or more peak-hour trips during the weekday morning and evening peak periods, a traffic study is not required for the subject petition. With documentation of site trip generation as above, the subject petition satisfies the LATR requirements of the APF test.

⁶ The driveway can be seen in a photograph previously shown on page 5 of this report.

Policy Area Mobility Review

As noted above, the single-family dwelling and the accessory apartment on the property together will generate less than four peak-hour trips during the weekday morning and evening peak periods. The subject petition is therefore not subject to the PAMR requirements of the APF test.

Due to the small scale of the proposed use, the Hearing Examiner agrees with Technical Staff that the accessory apartment satisfies the LATR and PAMR tests and will have no adverse impact on the area roadways and pedestrian facilities. Exhibit 13, p. 12.

F. Environmental Impacts

Petitioners do not propose any external changes to the site, other than to enlarge the rear bedroom window to comply with County requirement for adequate fire escape. Technical Staff advises that the property is exempt from the Forest Conservation Law. Exhibit 16, p. 12. Based on this evidence, the Hearing Examiner finds that Petitioners' request will have no adverse environmental impacts.

G. Community Response

There has been one letter of opposition from a resident in the community. Exhibit 12. In his letter date March 16, 2012, Mr. John Floyd, who resides on Dale Drive, stated he was opposed to "any zoning changes for [the] neighborhood. . . ." Exhibit 12. The basis for Mr. Floyd's opposition was that the area was not a "rental neighborhood." Mr. Floyd did not appear at the hearing.

Matthew Nechin, Petitioners' next door neighbor on the north side of the property, testified in support of the Petition. Mr. Nechin testified that his property is approximately 10 feet from the accessory apartment entrance which he can see when using the side-entry to his basement. He noted that the accessory apartment had been rented for sometime prior to the Petitioners purchase of the property. Mr. Nechin said: "I have never had a problem having it

there. It does not impact anything to do with me or my property.” Tr. 28-29.

While it is clear that Mr. Floyd does not want an accessory apartment rental in the neighborhood, the Hearing Examiner must assess this case based on the statutory criteria for approving an accessory apartment special exception, not on whether the idea of having an accessory apartment in the neighborhood is unpopular. The decision on a zoning application “is not a plebiscite.” *Rockville Fuel v. Board of Appeals*, 257 Md. 183, 192, 262 A.2d 499, 504 (1970). The Hearing Examiner finds that the points raised by Mr. Floyd do not form the basis for denying the special exception petition before the Hearing Examiner.

III. SUMMARY OF THE HEARING

Petitioners Stephen D. Shifflett and James K. Ballou testified at the public hearing in support of the petition. Petitioners’ neighbor, Matthew Nechin, testified in support of the petition. DHCA Housing Code Inspector, Robert Goff, also testified as to compliance with the Housing Code. There was no opposition at the hearing.

A. Petitioner’s Case

Petitioners Stephen D. Shifflett and James K. Ballou:

Petitioners executed an Affidavit of Posting (Exhibit 17) and agreed to submit a copy of their deed after the hearing and before the record closed. They confirmed their home is located on Lot 18 and part of Lot 19. Tr. 7-8. Petitioners adopted the findings and conclusions in the Technical Staff Report (Exhibit 16) and in the Housing Code Inspector’s Report (Exhibit 13) as their own evidence and agreed to comply with all the conditions set forth in both reports. Petitioners have obtained estimates to make the required changes noted in the Housing Inspection Report. Petitioners acknowledged and agreed with the Housing Code Inspector’s finding that occupancy is to be limited to no more than 2 unrelated persons or a family of two based on a total

habitable space of 639.54 square feet. Tr. 10-14.

Petitioners identified the Site Plan (Exhibit 4), Landscape and Lighting Plan (Exhibit 6), photographs of the property (Exhibit 9 (a)-(j)), and the Floor Plan (Exhibit 5).

Mr. Ballou reviewed and described the photographs he took of the property (Exhibit 9(a)-(j)). He also reviewed the photographs of the property in the Technical Staff Report (Exhibit 16). He testified that the photographs accurately depict the property as it exists. Tr. 16-19.

Mr. Ballou modified the Site Plan (Exhibit 4) to show the walkway (stone pavers) from the driveway to the accessory apartment entrance located on the north side of the home. He identified a "circle landing" directly in front of the main dwelling door, steps to the accessory apartment and the accessory apartment entrance. Referring to Exhibit 6 (Landscape and Lighting Plan), Mr. Ballou identified the many "circles" as ground lighting along the driveway and stone walkway to the circle landing which connects the steps to the accessory apartment entrance. Tr. 20-23.

Mr. Ballou modified the Floor Plan (Exhibit 5) to show the "den" formerly identified as a bedroom (10 x 10) located in the front of the house, and the window to be enlarged in the bedroom (12 x 12) located in the rear of the house. The accessory apartment does not share any space with the main dwelling. Petitioners will occupy the main dwelling (upper level). Tr. 23-25.

Mr. Ballou testified the driveway can accommodate up to four vehicles and on-street parking requires a permit. Petitioners have one visitor parking permit. Petitioner will provide space on the driveway for the accessory apartment tenants and indicated they will pay for additional parking permits for the accessory apartment tenants. The only exterior modification to the home will be the enlargement of the bedroom window. The accessory apartment door will be replaced with a solid door for safety reasons, as the current door has a window and would provide

easy access to the apartment especially if they replace the keyed deadbolt with a thumb lock. Tr. 26-28.

Mr. Shifflett testified that he was present when Mr. Goff inspected the property. Mr. Goff confirmed the issues noted by a prior inspection. Petitioners described the house as a two-story A-frame with a finished basement which was in existence when they purchased the home in 2001. Tr. 34-35.

B. Community Support

Matthew Nechin:

Mr. Nechin resides on the lot adjacent to Petitioners property (800 Dale Drive) and testified in support of the Petitioners' application. He has testified the apartment existed before the Petitioners moved in and that he has never had a problem with it being there. He explained that his side-entry basement door is about 10 feet away from the accessory apartment door. He frequently uses this door when he takes his dogs for a walk. He feels certain he would be aware of any problems caused by the accessory apartment if they existed. Tr. 28-29.

C. Public Agency Testimony

Housing Code Inspector Robert Goff:

Housing Code Inspector Robert Goff testified that he inspected the property on July 13, 2012. He identified the six issues, including four items that needed to be corrected or repaired as follows: 1) replace the key deadbolt with thumb turn key; 2) install egress window in the bedroom; 3) raise the bottom of the bulkhead going into the kitchen up 6' 4" from the floor; 4) raise the bottom of the bulkhead in the hallway to bedroom up 6' 4" from the floor; 5) there is 639.54 square feet of habitable space (150 square feet per person, and 100 square feet for each additional person) in the accessory apartment; and 6) two unrelated persons or a family of two

may reside in the unit. Tr. 30. In his opinion, the accessory apartment does not change the residential character or look of the house or neighborhood.

Based on a letter dated July 6, 2012, from Ada DeJesus with DHCA (Licensing and Registration), Mr. Goff confirmed that there is one active accessory apartment located at 615 Bennington Lane. He noted it was not located within the staff defined neighborhood. Tr. 32-33.

IV. FINDINGS AND CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards and conditions 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 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 16.

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 recommended conditions set forth in Part V, below.

A. Standard for Evaluation

The standard for evaluation prescribed in Code Section 59-G-1.2.1 requires consideration of the inherent and non-inherent adverse effects of the proposed use at the proposed location, on nearby properties and in the general neighborhood. 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 Section 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 16, p. 14):

- (1) The existence of the apartment as a separate entity from the main living unit but sharing a party wall;
- (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 another household on the site with resulting additional activity including greater 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 that there are no non-inherent adverse effects arising from the accessory apartment. In support of this conclusion, Technical Staff summarized the evidence as follows (Exhibit 16, pp. 14-15):

Under the subject application, there are no adverse effects that will negatively impact the community above those necessarily inherent to an accessory apartment. The apartment will be located in the basement of the main dwelling and is not identifiable from the street. The apartment will provide adequate space and facilities necessary for an apartment use.

The accessory unit has its own entrance separate from the entry to the main dwelling. The apartment entrance appears typical of a side basement entrance to a one-family house, as such it is difficult to distinguish it from any other neighborhood home. The entrance of the accessory apartment will be illuminated consistent with typical residential standards.

Vehicular parking for the accessory apartment will be located either in the driveway or on the public street.

Based on these findings, Staff concluded (Exhibit 16, p. 15):

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.

Based on the evidence in this case, and considering size, scale, scope, light, noise,

traffic and environment, the Hearing Examiner concurs with Technical Staff and concludes that there are no non-inherent adverse effects from the proposed use.

B. General Standards

The general standards for a special exception are found in Section 59-G-1.21(a). The Technical Staff report and the Petitioners written evidence and testimony provide sufficient evidence that the general standards would be satisfied in this case, as outlined below.

Sec. 59-G-1.21 General conditions.

§59-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(a).

(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 *North and West Silver Master Plan*, approved and adopted in 2000. For reasons set forth in Part II.C of this report, the Hearing Examiner finds that the planned use, an accessory apartment in a one-family detached home located in the R-60 zone, is consistent with the goals and objectives of the *North and West Silver Spring 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 proposed special exception would be in harmony with the general character of the neighborhood. The only exterior modification proposed is the enlargement of the bedroom window which is required for adequate fire escape. According to Technical Staff the “window will be compatible with the existing dwelling and surrounding properties.” Exhibit 16, p. 20. It therefore will maintain its residential character. The accessory apartment is fully contained in the basement of an existing dwelling with a separate entrance typical of a side basement entrance for a one-family home. Occupancy will be limited to no more than two people and therefore will have only minimal impact on population density. There is sufficient off-street parking for at least four vehicles on the concrete driveway to accommodate the main dwelling and accessory apartment. According to Transportation Staff, the proposed special exception will not have an adverse effect on vehicular traffic or pedestrian access or safety in the immediate area.

There are no other accessory apartment uses within the Staff-defined neighborhood. The Hearing Examiner finds that the addition of the proposed accessory apartment to the neighborhood will not be excessive or change the residential character of the neighborhood. 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 surrounding residential 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 the answer to the previous section of this report, the Hearing Examiner agrees and 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 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: "Based on the nature of the use, the proposed special exception will cause no objectionable noise, vibrations, fumes, odors, dust, or physical activity. The use will cause no objectionable illumination or glare as the provided lighting is residential in character." Exhibit 16, p. 16. Since the use will be indoors and residential, the Hearing Examiner finds it will cause no

objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site.

- (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 previously discussed, there are no other approved special exceptions or accessory apartments located within the staff-defined neighborhood. DHCA reported one accessory apartment located at 615 Bennington Lane, approximately 0.33 miles northeast of the subject property and outside the neighborhood boundary. Because the proposed use is a residential use by definition, and permitted by special exception in the R-60 Zone, the special exception will not alter the predominantly residential nature of the area. The Hearing Examiner concurs with Technical Staff and 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 will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area of 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 “[t]he proposed special exception will be adequately served by existing public services and facilities.” Exhibit 13, p. 18. 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*
 - (i) the determination of adequate public facilities for the site is not currently valid for an impact that is the same 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 special exception application was submitted.*

Conclusion: The special exception sought in this case will not require approval of a preliminary plan of subdivision. 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. E. of this report, Transportation

Planning Staff made such reviews and concluded that the proposed accessory apartment use would add one additional trip during each of the peak-hour weekday periods. 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. For the same reason, 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 availability of adequate off-street parking and the limited number of additional trips generated by the special exception, the Hearing Examiner concurs with Technical Staff and finds that the proposed use will not reduce the safety of vehicular or pedestrian traffic.

C. Specific Standards

The testimony and the exhibits of record, especially the Technical Staff Report (Exhibit 16), 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 accessory apartment is located in the basement of an existing one-family detached dwelling and therefore shares a wall in common, as required for a lot of this size (under one 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 the basement of 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 1940. Exhibit 15. 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 use as proposed does not violate any of the provisions of this subsection.

Also, a requirement that the occupancy of the main dwelling and the accessory apartment meet all these standards will be a condition of this approval.

- (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 separate side entrance located on the north side of the dwelling. The entrance is distinct and separate from the main dwelling and according to Staff, "has the appearance of a typical rear-entry to a single-family home." Exhibit 16, p. 20. Thus, 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: Petitioners are not proposing any new construction or modifications to the exterior of the dwelling, with the exception of enlarging the bedroom window on the north side of the property required by DHCA to provide adequate fire escape. As previously noted, Technical Staff indicated the "window will be compatible with the existing dwelling and surrounding properties." Exhibit 16, p. 20.

- (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. The 1,200 square feet limitation does not apply to an accessory apartment located in a separate existing accessory structure located on the same lot as the main dwelling. The maximum floor area for a separate existing accessory structure must be less than 50 percent of the total floor area of the main dwelling, or 2,500 square feet, whichever is less.

Conclusion: The accessory apartment, at 742 square feet, 639.54 square feet of which is habitable, is under the maximum 1,200 square feet restriction. Technical Staff estimated the home's total enclosed floor area is approximately 2,691 square feet. Exhibit 16, p. 20. The Hearing Examiner finds, as did Technical Staff, that the accessory apartment is subordinate to the main dwelling.

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 the main dwelling on the property.

(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 submitted into the record, Petitioners purchased the property on November 21, 2001. Exhibit 18. 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 occupancy of 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: Petitioners submitted a deed dated November 21, 2001, evidencing joint ownership of the subject property. Therefore, the Hearing Examiner concludes that this condition has been met.

- (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 9,055 square feet in size and therefore satisfies the 6,000 square feet minimum lot size. According to Technical Staff, the subject property conforms to all the applicable development standards of the R-60 Zone, except for the side-yard setbacks. Technical Staff noted that "since the home was constructed on a lot legally recorded by deed or subdivision plat before June 1, 1958, the home is not non-conforming regarding the side yard setbacks, as it meets

the standards of the 1928 Zoning Ordinance (which was 7 feet at the time of permit release for the original home construction).”⁷ Exhibit 16, p. 13. The following table from the Technical Staff report (Exhibit 16, p. 13), slightly modified by the Hearing Examiner to include the applicable side yard setbacks per the 1928 Zoning Ordinance summarizes the relevant development standards for the application.

Development Standard	Min/Max Required	Existing	Applicable Zoning Provision
Minimum Lot Area	6,000 sq. ft.	9,055 sq. ft.	§59-C-1.322(a)
Minimum Lot Width at Street Line	25 ft.	75.79 ft.	§59-C-1.322(b)
Minimum Lot Width at Front Building Line	60 ft.	69 ft.	§59-C-1.322(b)
Setbacks			
- front	25 ft.	25 ft.	§59-C-1.323
- side	8 ft. min. (7 ft. per 1928 Ordinance) 18 ft. sum of both sides	8 ft. north side 7 ft. south side 15 ft. sum of both sides	§59-C-1.323 1928 Ordinance §III.(C) (3) ⁸
-rear	20 ft. min.	30 ft.	§59-C-1.323
Maximum Building Height	35 ft.	1.5 stories	§59-C-1.327
Maximum Building coverage	35%	Approximately 17%	§59-C-1.328
Maximum Floor Area for Accessory Apartment	1,200 sq. ft.	742 sq. ft.	§ 59-G-2.00(a)(9)

⁷ Zoning Ordinance § 59-B-5.3 states: “Any one family dwelling in a residential zone or agricultural zone that was built on a lot legally recorded by deed or subdivision plat before June 1, 1958, is a not nonconforming building. The dwelling may be altered, renovated, or enlarged, or replaced by a new dwelling, under the zoning development standards in effect when the lot was recorded.” SDAT records for the property confirm the dwelling was constructed in 1940 (Exhibit 15).

⁸ Attachment to Article 59-B, Section III, (C)(3) states “[t]here shall be a side yard of not less than seven (7) feet in width on each side of a dwelling except as provided in Section VIII, 4.”

(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: Based on a combined reading of the reports by Technical Staff (Exhibit 16) and DHCA (Exhibit 14) there is one approved accessory apartment approximately 0.33 miles northeast of the subject property and outside the staff-defined neighborhood. There are no other accessory apartment or special exceptions within the staff-defined neighborhood. The Hearing Examiner concurs with Technical Staff's conclusion and finds 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: As discussed in Part II.B of this report, there is sufficient off-street parking for at least four vehicles on the concrete driveway to accommodate the main dwelling and accessory apartment. The Housing Code Inspector confirmed Staff's finding of adequate off-street parking. On-street parking is by permit. Petitioners have one visitor parking permit and indicated they will obtain additional parking permits for the accessory apartment tenants. The Hearing Examiner finds, therefore, that the minimum requirement of two (2) parking spaces has been met

and there is sufficient off-street parking to accommodate the main dwelling and accessory apartment.

D. Additional Applicable Standards

Not only must an accessory apartment comply with the zoning requirements as set forth in Article 59-G, it must also be approved for habitation by the Department of Housing and Community Affairs. As discussed in Part II. D 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 people. As mentioned above, Petitioners have agreed that no more than two people will live in the accessory apartment and they will meet all conditions, including making the necessary repairs, required by the Housing Code Inspector.

V. RECOMMENDATION

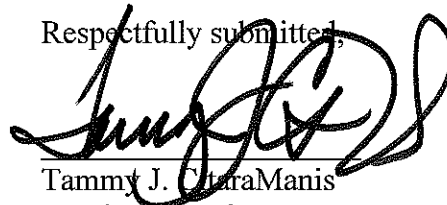
Based on the foregoing analysis, I recommend that the Petition of Stephen D. Shifflett and James K. Ballou, BOA No. S-2840, which seeks a special exception for an accessory apartment to be located at 505 Ellsworth Drive, Silver Spring, Maryland, be GRANTED, with the following conditions:

1. The Petitioners are bound by their testimony, representations and exhibits of record;
2. The Petitioners must comply with the conditions set forth in the Memorandum of Robert Goff, Housing Code Inspector, Division of Housing and Code Enforcement (Exhibit 13):
 - a. Replace keyed deadbolt with thumb turn lock.
 - b. Install egress window in bedroom. Window must be at least 5 square feet net opening and not more than 44" from floor to window opening.
 - c. Move bulk head up to 6' 4" from floor to bottom of bulk head going into kitchen.
 - d. Move bulk head up to 6' 4" from floor to bottom of bulk head going into hallway to bedroom.
 - e. Occupancy is limited to two individuals.

3. The Petitioners must occupy one of the dwelling units on the lot on which the accessory apartment is located;
4. The accessory apartment must not be located on a lot that is occupied by a family of unrelated persons, or where there is a guest room for rent, a boardinghouse or registered living unit;
5. The Petitioners must not receive compensation for the occupancy of more than one dwelling unit; and
6. The 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: September 4, 2012

Respectfully submitted,



Tammy J. C. Manis
Hearing Examiner