

**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:
TIMOTHY J. MEALEY AND
BEATRIX M.H. ALBERTS**

Petitioners

Timothy J. Mealey
Beatrix M.H. Alberts
For the Petition

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Board of Appeals Case No. S-2843
(OZAH Case No. 12-32)

Lynn McCreary

Department of Housing and
Community Affairs

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Before: Lynn A. Robeson, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDATION

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I. STATEMENT OF THE CASE

Petition No. S-2843, filed on April 30, 2012, by Timothy Mealey and Beatrix Alberts, seeks a special exception, pursuant to §59-G-2.00 of the Zoning Ordinance, to permit an accessory apartment use in a detached structure located in the rear yard of an existing single-family home located at 6714 Persimmon Tree Road in Bethesda, Maryland, on land in the R-200 Zone. The property is identified as Lot 4, Block F in the Congressional Country Club Estates subdivision. The tax account number is 00434016.

By notice dated May 4, 2012 (Exhibit 12) the public hearing was scheduled for September 20, 2012. Technical Staff at the Maryland-National Capital Park and Planning Commission (M-NCPPC), in a report issued September 10, 2012, recommended approval of the special exception, with conditions. Exhibit 15.¹

The Department of Housing and Community Affairs (DHCA) inspected the property on August 23, 2012. Housing Code Inspector Lynn McCreary reported her findings in a memorandum dated August 27, 2012 (Exhibit 13).

A public hearing was convened on September 20, 2012, as scheduled, and Petitioners Mealey and Alberts appeared *pro se*. Also testifying was Housing Inspector McCreary. Petitioner Mealey executed an affidavit of posting (Exhibit 18). He adopted the findings in the Technical Staff Report (Exhibit 15) as Petitioners' own evidence. T. 6. He also agreed to meet all the conditions set forth in both the Technical Staff Report and the Housing Inspector's report. T. 6, 47.

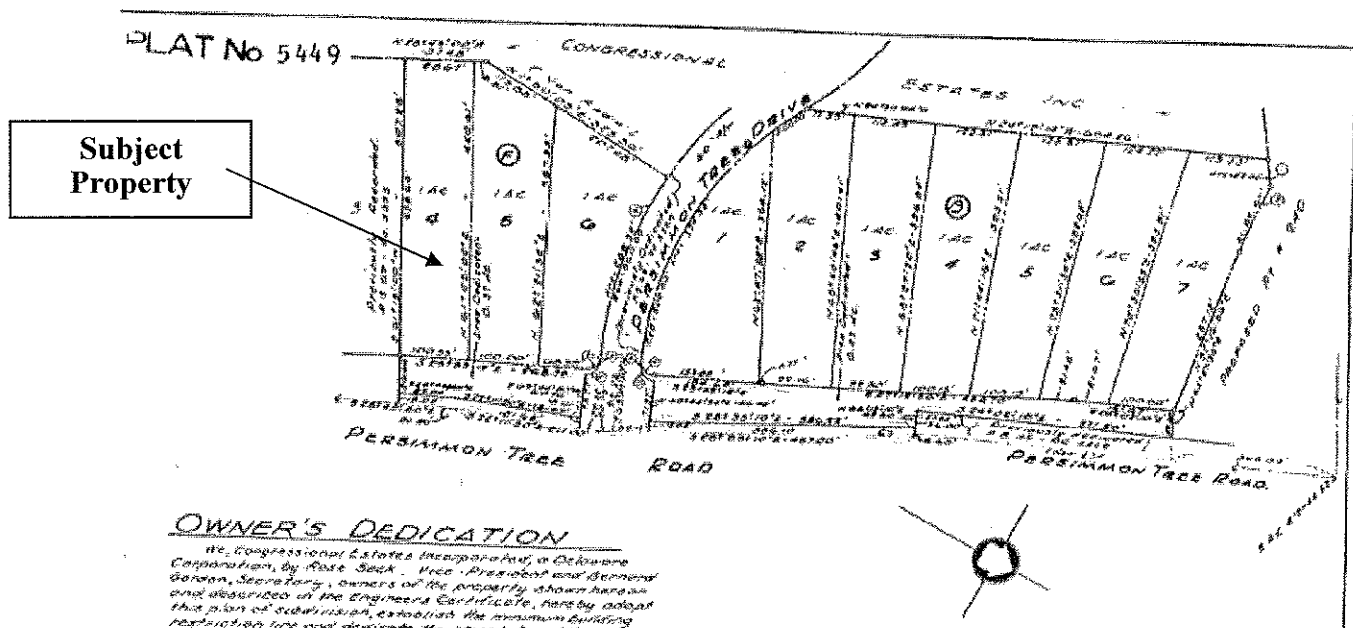
The record was held open till September 27, 2012, to await the filing of the transcript. Based on the evidence submitted, the Hearing Examiner recommends that the petition be granted, with conditions specified in Part V of this report.

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

II. FACTUAL BACKGROUND

A. The Subject Property

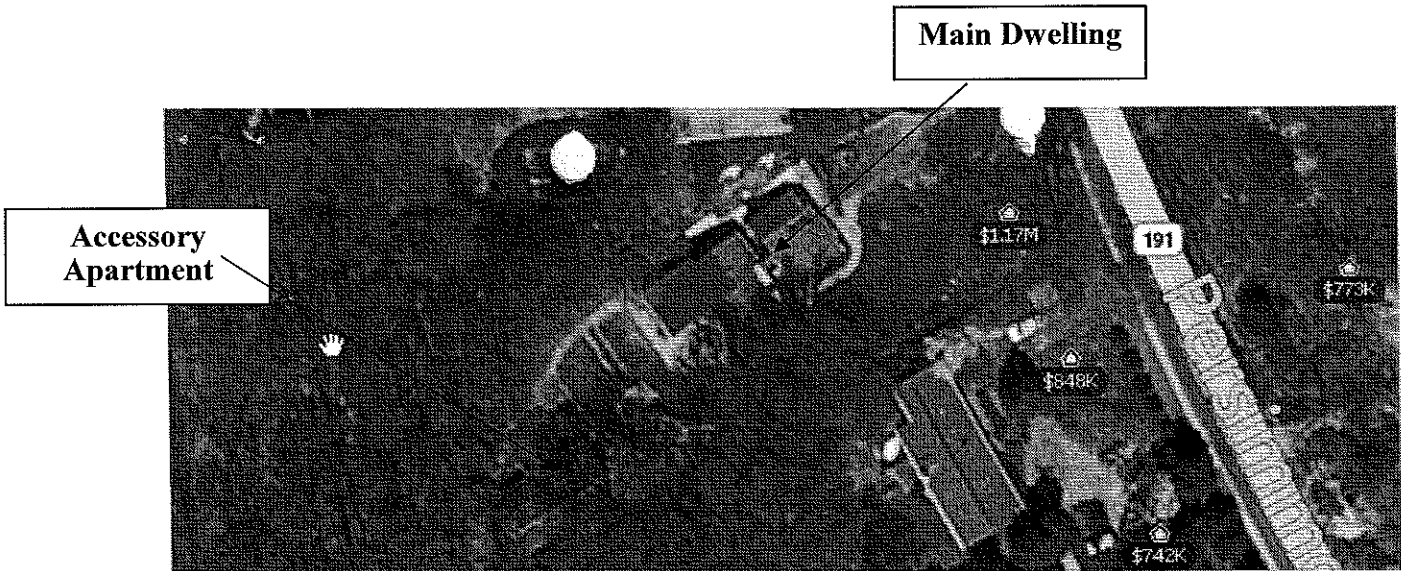
The subject property is located at 6714 Persimmon Tree Road in Bethesda, Maryland, in the Country Club Estates subdivision. The detached accessory apartment is located approximately mid-length of the width of the long, narrow, rectangular lot of approximately one acre.² The shape and alignment of the lot is shown on the original subdivision plat for the property included in the Technical Staff Report (Exhibit 15, Attachment D):



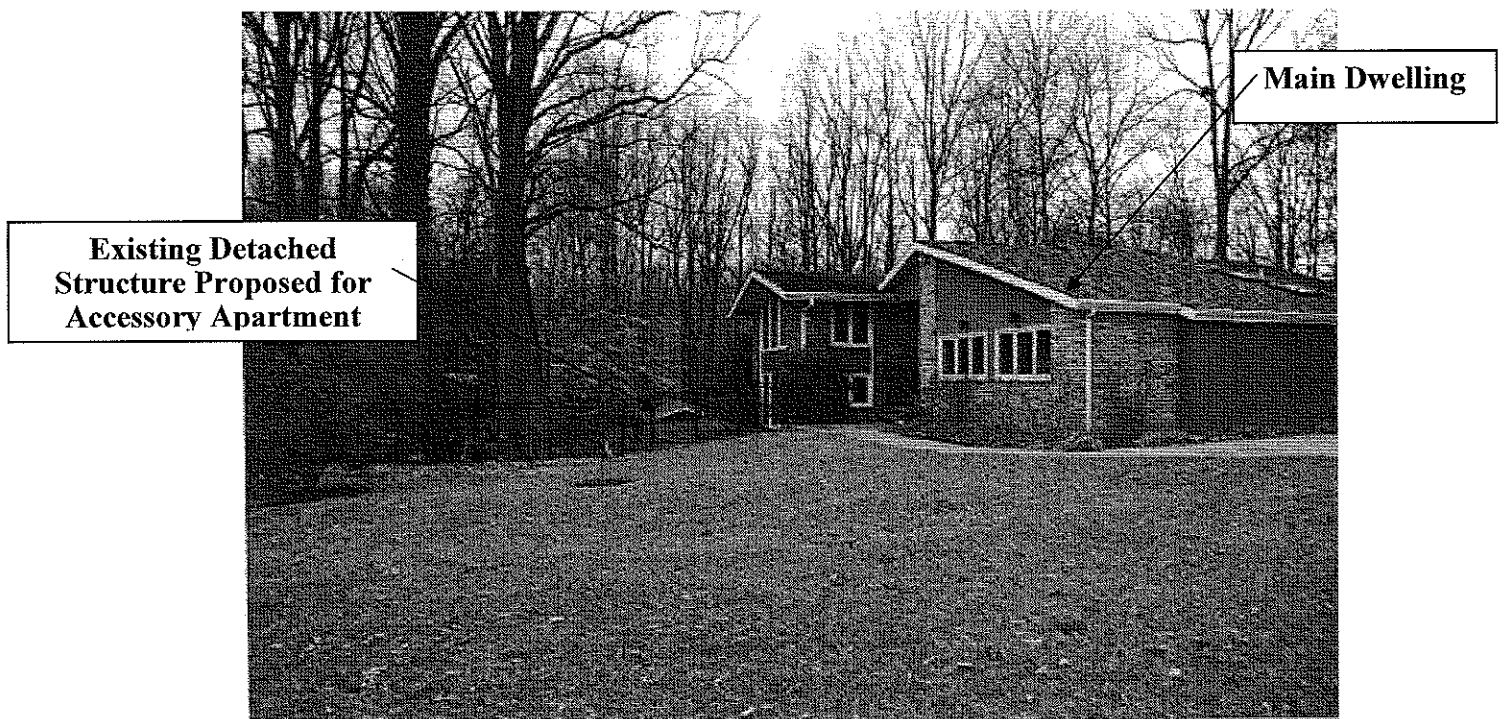
The main dwelling on the subject property was constructed in 1959 and is the closest structure to Persimmon Tree Road. According to Technical Staff, the property slopes down from the road and heavy trees and shrubs surround the dwelling. Staff also advises that the property has a wide driveway, approximately 25 feet in width and 85 feet in length. Staff reports that the driveway may accommodate up to 6 vehicles; the Housing Inspector found that it can accommodate parking

² Whether the lot met the minimum required acreage for a detached accessory structure (1 acre) is an issue in this case and is set forth in Section II.D of this Report (Proposed Use).

for “more than 4 vehicles”. Exhibit 15, p. 3; Exhibit 13. The approximate location of the accessory apartment on the lot, and the locations of the main dwelling and driveway are shown in the aerial photograph submitted by the Petitioners (Exhibit 9(k)):



A photograph submitted by the Petitioners shows the perspective of the main dwelling and the existing detached structure from Persimmon Tree Road (Exhibit 9(a)):



The driveway has space for vehicles to turn around, shown in one of the photographs submitted by the Petitioners (Exhibit 9(b)):



B. The Surrounding Area

The neighborhood boundary is drawn to include nearby properties that may be affected by a potential increase in density or traffic. The Hearing Examiner accepts this neighborhood definition, and it is shown below in a map supplied by Technical Staff (Exhibit 15, p. 3). Technical Staff defined the general neighborhood as bounded by the Beltway to the north, Carlynn Court and River Trail Court to the west, Caraway Street and River Trail Lane to the south and the "property lines" to the east, shown on the aerial photograph from the Technical Staff Report (Exhibit 15, p. 4) reproduced on the following page. Staff described the character of the neighborhood as consisting of approximately 58 single-family homes in the R-200 zone. Having no evidence to the contrary, the Hearing Examiner agrees and so finds.



**Surrounding Area
(Exhibit 15, p. 4)**

Both Technical Staff and DHCA report that there are no other accessory apartments or registered living units in the immediate surroundings. Exhibit 15, p. 13; Exhibit 23.

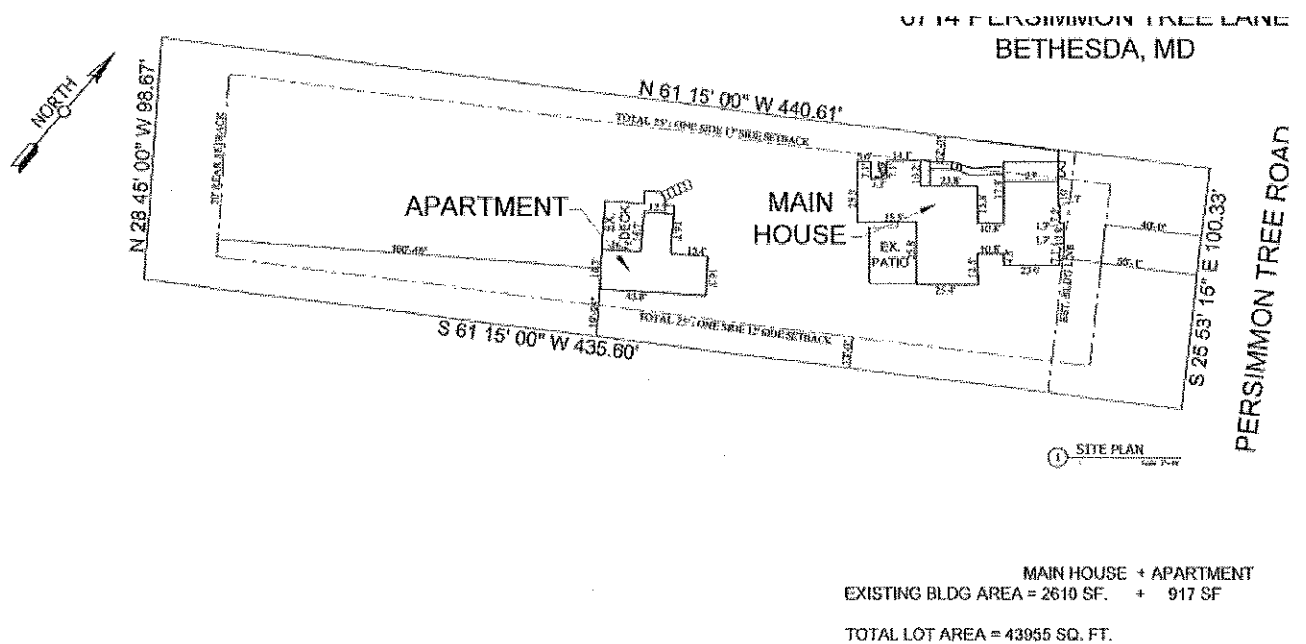
C. The Master Plan

The subject property is within the geographical area covered by the *1990 Bethesda-Chevy Chase Master Plan* (Plan). Exhibit 8(b). Technical Staff advises that the proposed use is consistent with the goals and objectives of the Plan, which included providing more variety in housing options, and in particular, rental housing. Exhibit 15, p. 7. The Plan takes note of a “serious lack” of housing choices other than single-family detached home and supported measures to provide affordable housing. Exhibit 8(b), p. 26. One of the measures suggested by the Plan included the “use of accessory apartments”,

finding that these approaches to providing affordable housing “should be continued and enhanced where possible.” *Id.*

D. The Proposed Use

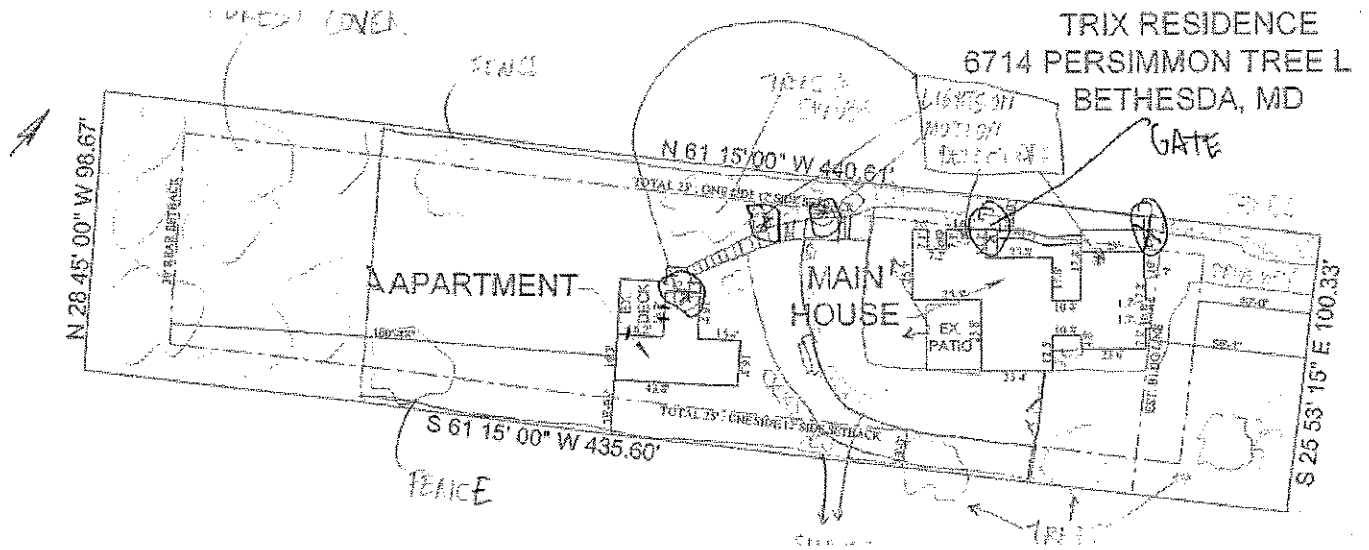
Petitioners propose to convert an existing detached accessory structure in the rear yard of their property to an accessory apartment. As noted, the proposed apartment is located approximately mid-way between the public road and the rear lot line. Technical Staff advises that the structure consists of 920 square feet, based on the floor plans. Exhibit 15, p. 17. The site plan submitted by the Petitioners (Exhibit 4) indicates that the accessory apartment is 917 square feet, which is consistent with Technical Staff’s conclusion. The record is conflicting as to the size of the main dwelling. According to the records of the Maryland State Department of Assessments and Taxation (SDAT), the main dwelling is 3,195 square feet, which is the size upon which Technical Staff relied in their recommendation. The Petitioners’ site plan (Exhibit 4, shown below), however, indicates that the size of the main dwelling is 2,610 square feet.




Regardless of whether the main house is 2,610 or 3,195, the accessory apartment is less than half the size of the main dwelling. As a result, the Hearing Examiner does not find it necessary to resolve the exact size of the main dwelling because under either scenario the proposed apartment is subordinate to the main dwelling.


One threshold issue presented that *is* material to a decision in this case is whether the lot consists of the full one-acre necessary to house a detached accessory apartment pursuant to §59-G-2.00(a)(2). This section permits the conversion of an accessory structure to an accessory apartment if the lot is more than one acre and if the detached structure existed on the same lot as of 1983. *Id.* Once again, the evidence is conflicting. SDAT records state that the lot consists of 43,560 square feet or exactly one acre. Exhibit 14. The Applicants' site plan indicates that the lot is 43,599 square feet, also above the minimum one-acre requirement. Exhibit 4. The Applicant submitted a sealed letter from a professional land surveyor stating that, based on the record plat, the property is actually 43,561.88 square feet, or slightly more than an acre, although field work performed by the surveyor using the property's corner markers resulted in a property area of 43,573.86 square feet. Exhibit 21. The Hearing Examiner finds that the sealed letter is better evidence than the acreage shown on SDAT records or the unsealed site plan. Because the Hearing Examiner finds that even the lowest square footage in the surveyor's letter is above the minimum required, this finding has been met.

Petitioners' propose no alterations to the existing landscaping or lighting as shown on the Landscaping and Lighting Plan (Exhibit 6, shown on the following page). As indicated from the pictures of the property included in this Report, there is quite extensive vegetation buffering the property from adjacent uses, including mature trees, shrubs, and topography. As noted by Technical Staff, the property slopes downward from Persimmon Tree Road; there is a slight rise between the accessory apartment and the adjoining residential home to the rear of the property.



 = TREE

 = SHRUBS

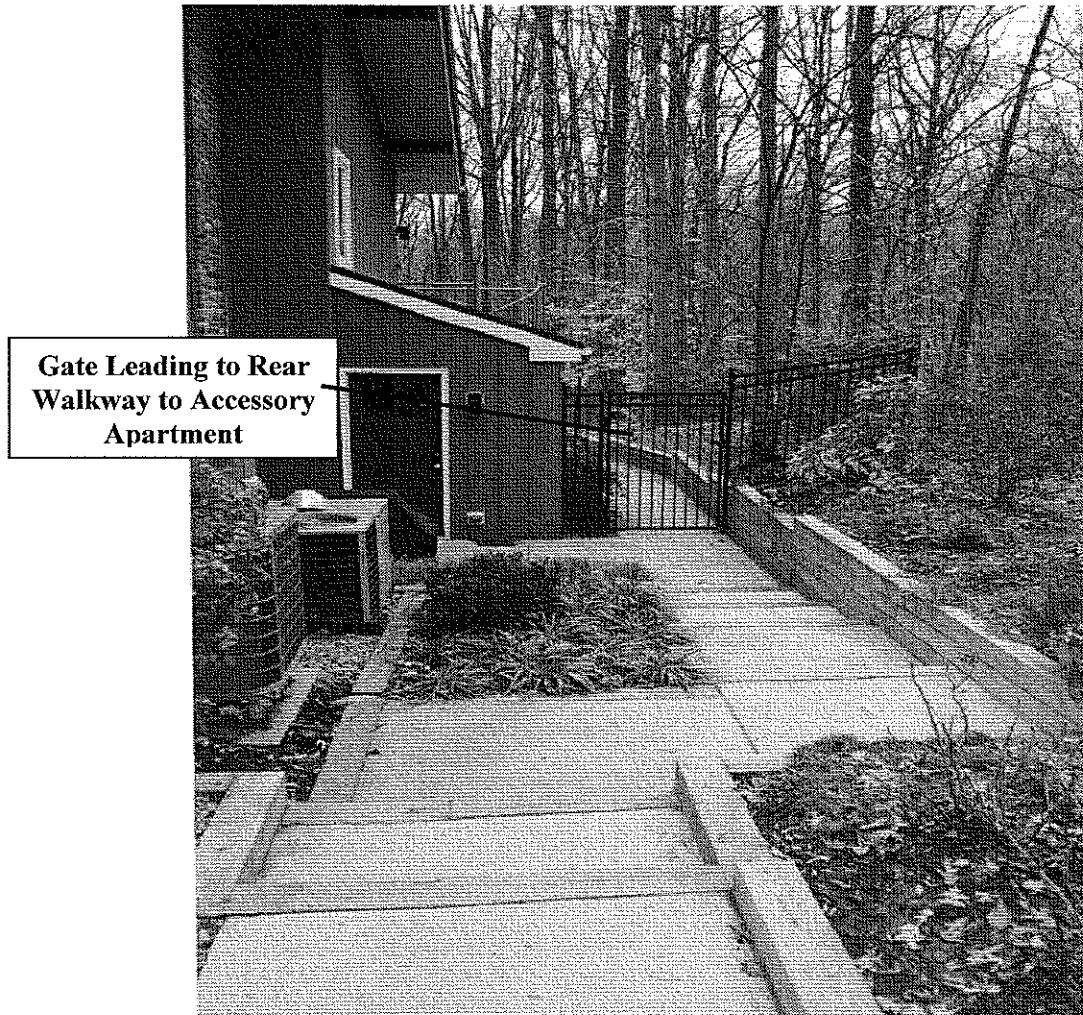
 = LIGHT ON MOTION DETECTOR

 = STEPS

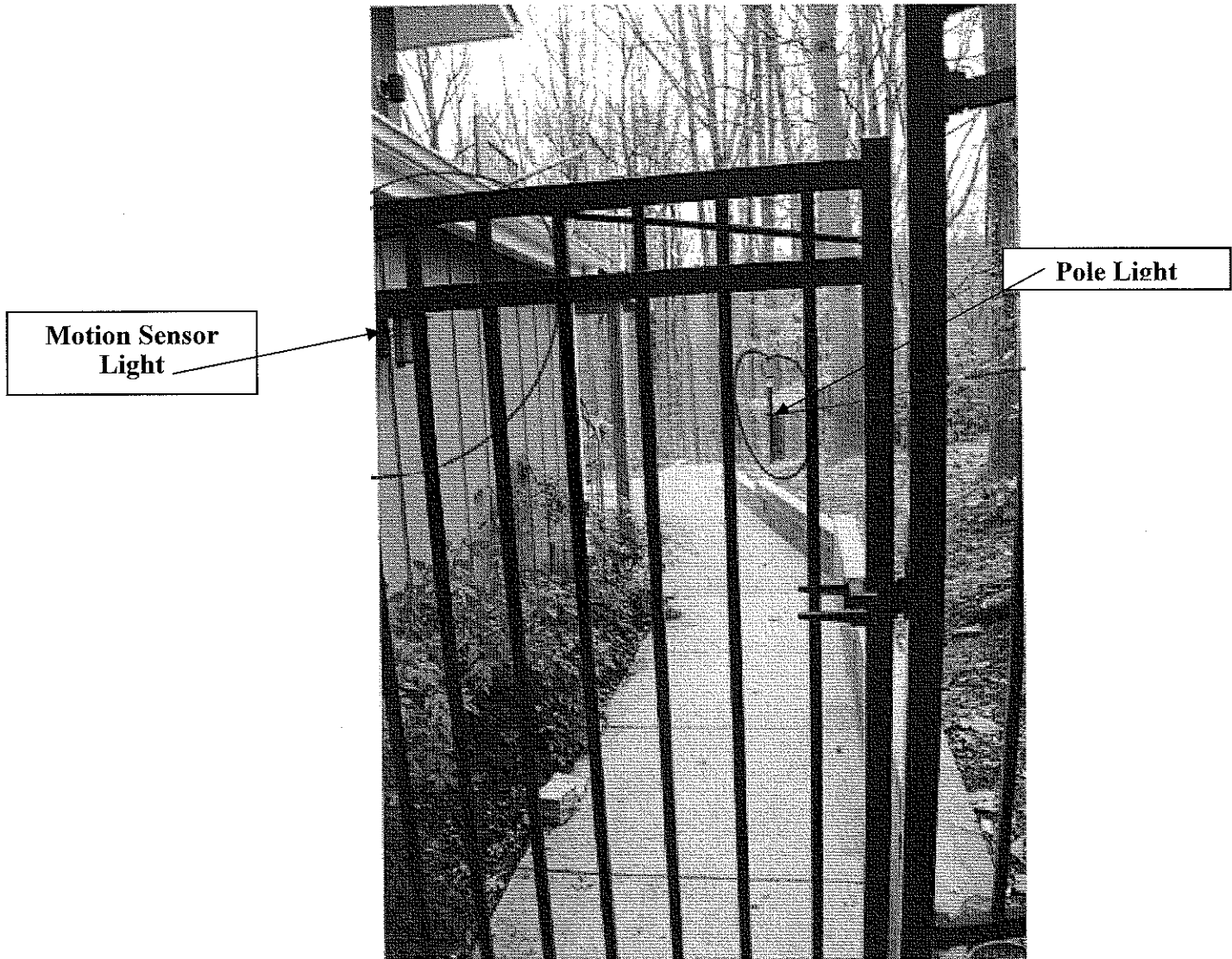
**Landscape and Lighting Plan
(Exhibit 6)**

A walkway from the driveway along the northwest side of the house leads to a gate and then steps down to the accessory apartment. The Applicants submitted a photograph (Exhibit 9(c)) of the walkway along the main dwelling, and the gate and steps, shown on the following page. Other photographs submitted by the Petitioners follow the walkway toward the rear of the property and

the detached accessory structure, and are reproduced below as well.



The motion sensor lights (marked with an asterisk on the Landscape Plan) are approximately 125-150 watts and illuminate the pathway to the side of the main dwelling. Exhibit 6, T. 25. Petitioners submitted photographs of the walkway after passing through the gate in the rear of the property leading to the accessory apartment. Exhibit 9(d) (on the following page) shows the walkway beyond the gate, with a pole light illuminating the pathway. At the public hearing, Mr. Mealey circled the pole light and motion sensor light shown in the picture to clearly identify the lighting.

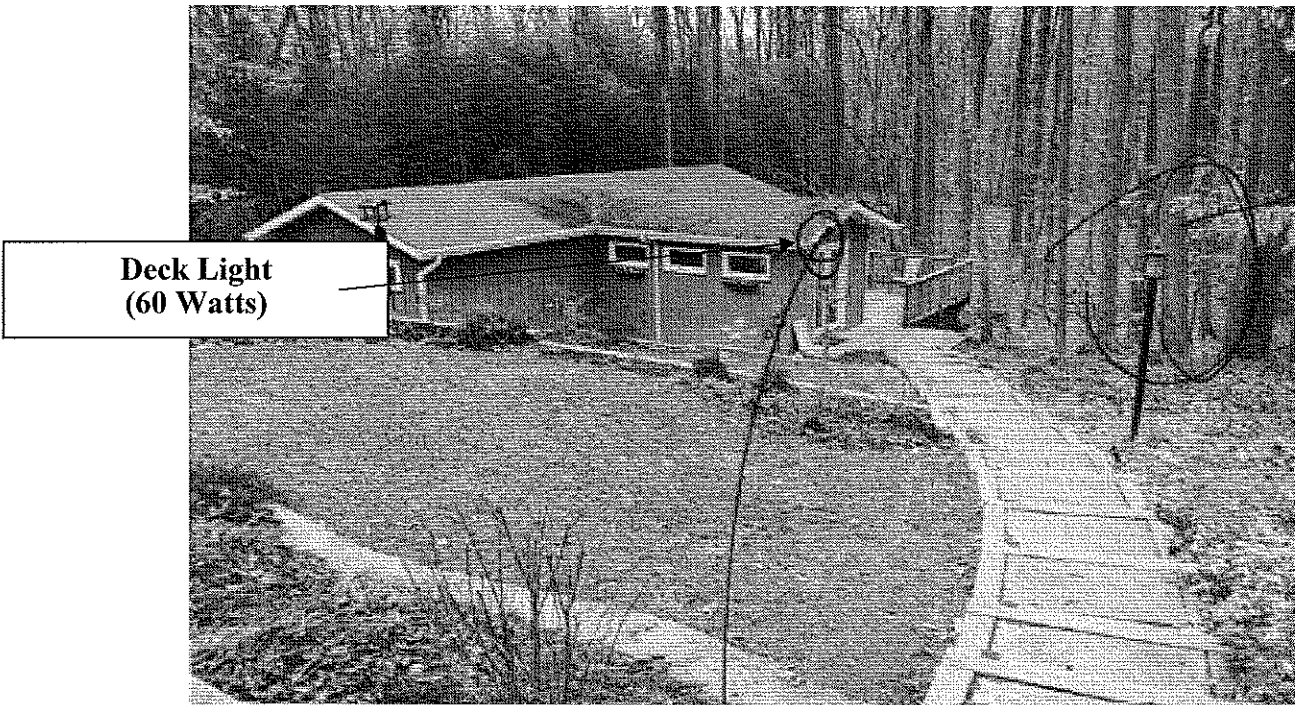


**Gate Looking at Rear
Walkway
(Exhibit 9(d))**

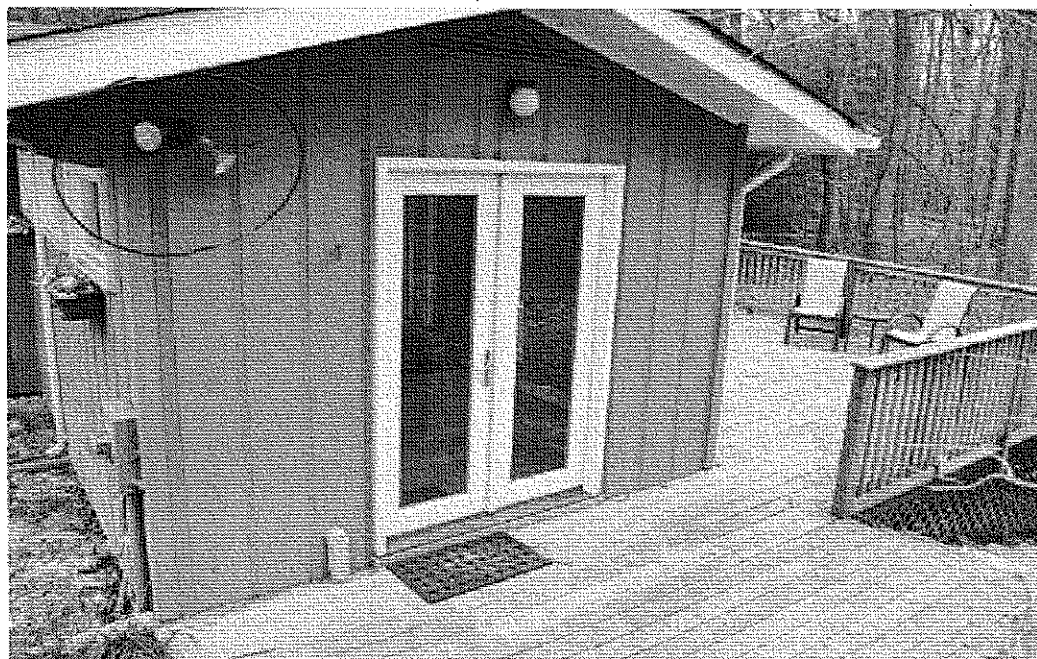
The remaining area of walkway leading to the accessory apartment is shown in photographs submitted by the Petitioners (Exhibit 9(e)). The Petitioners also circled the lights shown on the photograph for ease of identification. These photographs are reproduced on the following page.



**Patio in Rear of Main Dwelling
(Foreground) Showing Accessory
Apartment (Ex. 9(e))**



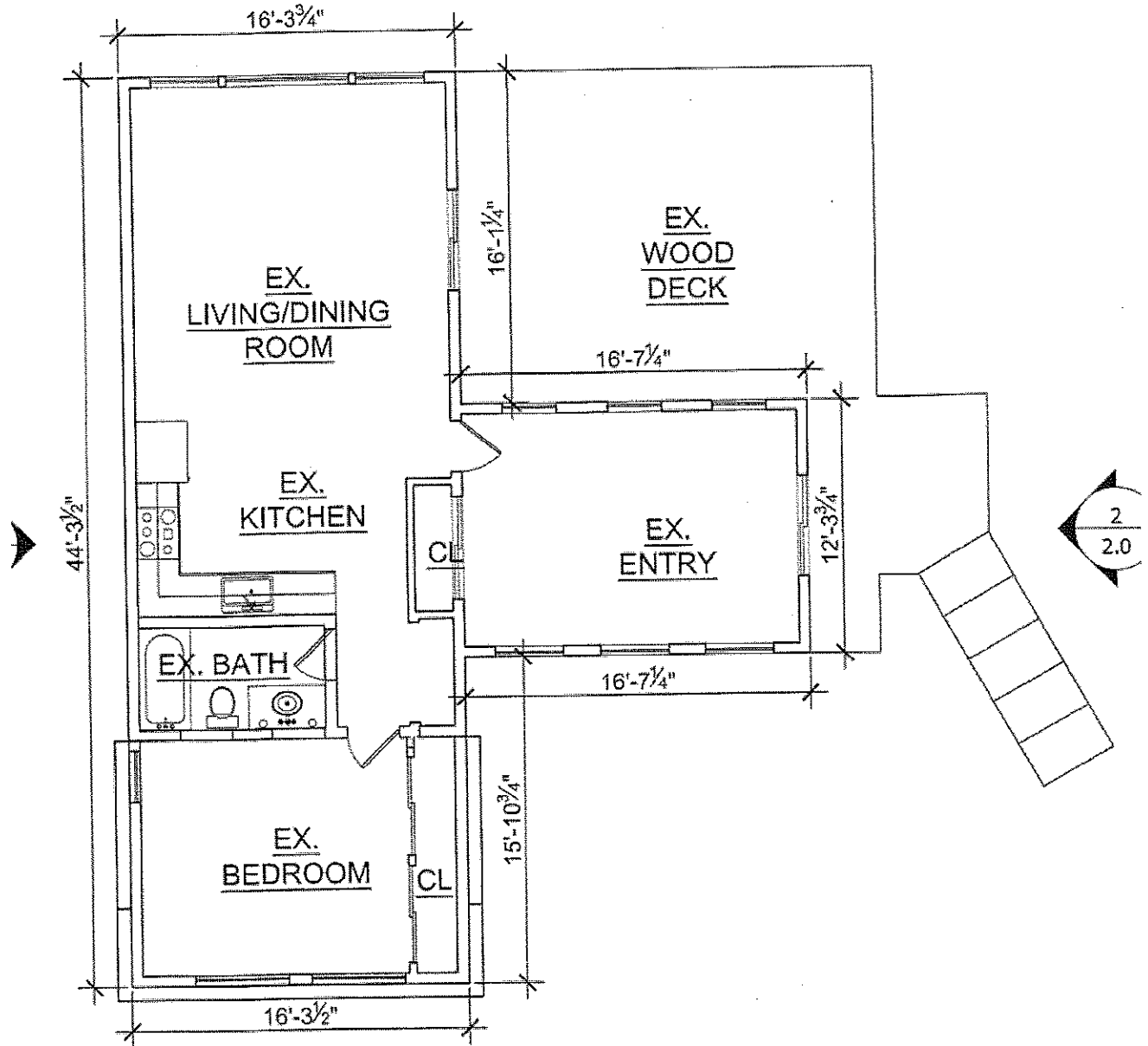
The deck on the outside of the accessory apartment and one of the two entrances, are shown on Petitioners' photograph, Exhibit 9(f):



A motion light (circled in the photograph above) and a light above the entrance illuminate the deck and entranceway. A view from the deck entranceway looking northwest toward the adjacent property, submitted by the Petitioners, is shown below (Exhibit 9(g)):



The apartment itself will consist of a living room/dining room area, a kitchen, bath, and bedroom, as shown on Petitioners' Floor Plan (Exhibit 5(a)):



Technical Staff determined that the use as proposed meets all of the general and specific standards for the grant of the special exception, provided it complies with the following conditions of approval (Exhibit 15, p. 2):

1. The applicant is bound by all submitted statements and materials of record.

2. Per §59-G-2.00(b)(1) of the Zoning Ordinance, the applicant must occupy one of the dwelling units on the lot on which the accessory apartment is located.
3. Per §59-G.2.00(b)(3) of the Zoning Ordinance, the applicant must not receive compensation for the occupancy of more than one dwelling unit.
4. The Petitioners must satisfy all applicable Montgomery County building code requirements prior to obtaining a certificate of occupancy for the accessory apartment. Exhibit 15, p. 2.

Staff's findings are summarized in detail in Section IV of this Report.

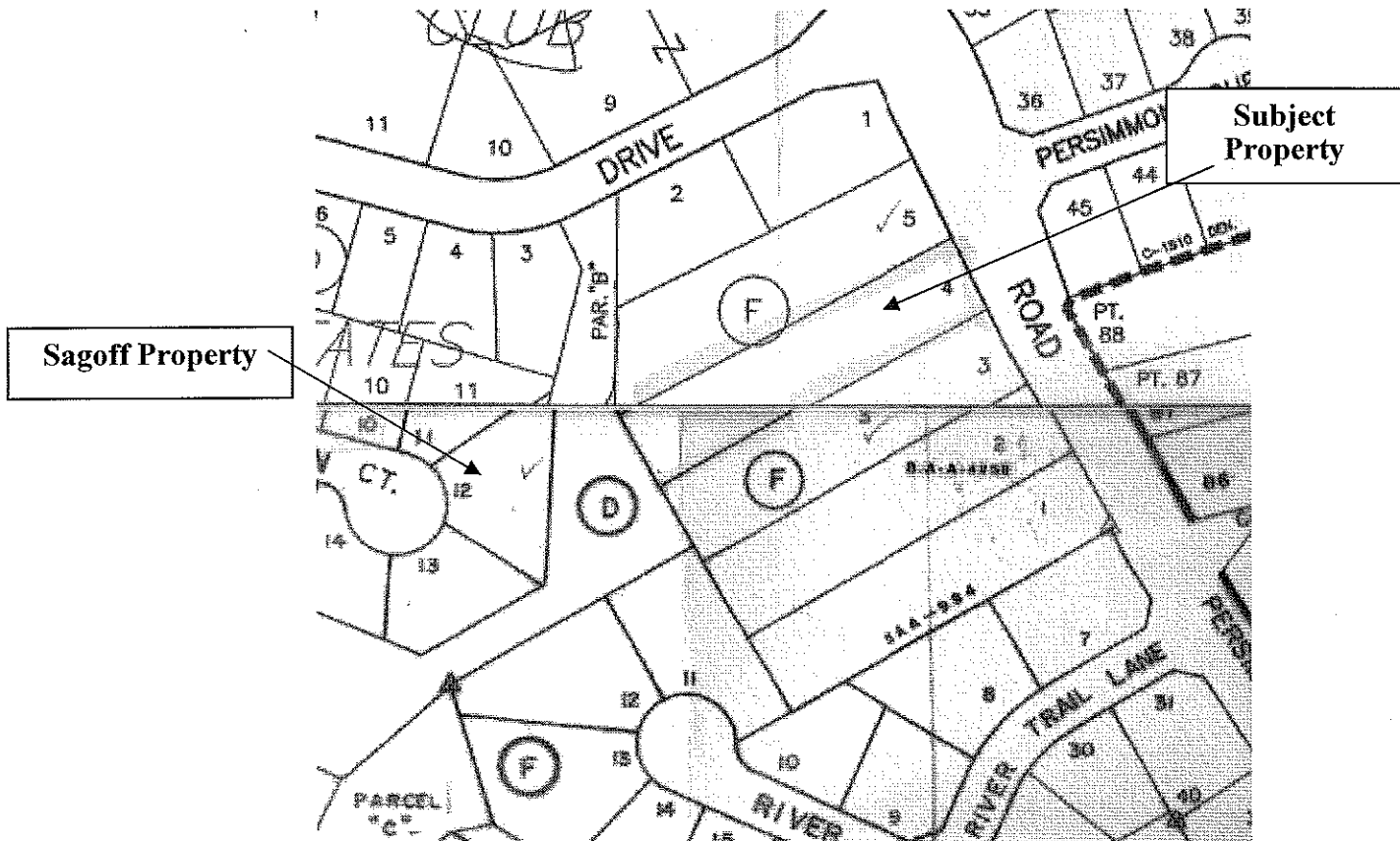
Housing Inspector McCreary reports that the unit consists of 617.72 square feet of habitable space, which permits occupancy by 2 unrelated people or a family of no more than 4 people. Exhibit

13. She also noted (in Exhibit 13) that:

There appears to be a leak or some type of moisture seepage into the walls and ceiling of the utility room that houses the furnace causing the growth of what appears to be mold and mildew. The source of the moisture must be determined and eliminated and all resultant damage must be repaired in a professional, workmanlike manner.

E. Opposition

No opposition to the proposed accessory apartment appeared at the hearing, however, nearby neighbors, Mark and Kendra Sagoff, submitted a letter expressing their "concerns" about the proposed use. According to the Sagoffs, their property is separated from the subject property by "parkland" owned by the homeowner's association. Exhibit 16. When purchasing their home, the Sagoffs state that they expected this property to remain free of additional buildings to be used as residences. They are concerned because (1) the structure is "plainly visible" from inside their home for much of late fall to early spring, (2) there is a potential for excessive noise and lights, and (3) there is potential for additional intrusion on the "small but unique space" which they had believed was protected. The location of the Sagoffs' property (Lot 12 of the Country Club Estates subdivision) in relation to the subject property is shown on the Zoning Vicinity Map (Exhibit 11), on the following page.



The Sagoffs requested that any approval of the special exception would include a requirement for prevention and mitigation of potential disturbance. The Sagoffs also assert that the detached accessory structure was originally much smaller than what exists today, and has been significantly enlarged in recent years. *Id.*

In response to the Sagoffs' letter, the Petitioners proposed that approval of the special exception should be conditioned upon incorporating the following requirements in Petitioners' lease agreement: (1) compliance with the County's noise ordinance, (2) installation of curtains over the existing shades in the windows facing the Sagoffs' property, along with a requirement that these curtains be closed at sundown. Exhibit 22; T. 33-34. In addition, Mr. Mealey testified that the structure was enlarged in the 1970's, with a smaller portion (i.e., 185 square feet) added more recently. Exhibit 22; T. 41-43. He pointed out the topography of the land separating the proposed apartment and the Sagoff's property includes a small rise before dropping toward a stream on the

HOA land, further obstructing the view from the Sagoffs' home, shown best in the following photograph which had been previously submitted by the Petitioners (Exhibit 9(h)):



The fence shown in Exhibit 9(h) is not the property boundary; the detached accessory structure is located approximately midway between Persimmon Tree Road and the rear lot line. Exhibit 6.

Based on the evidence and testimony adduced at the hearing, the Hearing Examiner finds there is *insufficient* evidence to impose the condition proposed by Mr. Mealey at the public hearing, although he may do so by private lease agreement should he so choose. A special exception approval does not require that a proposed use be invisible from neighboring properties; rather, it mandates that the use be compatible with surrounding properties. The only evidence before the Hearing Examiner on the impact of lighting is that it will be residential in character, consistent with that of the surrounding area. In addition, the Hearing Examiner would have safety concerns were renters to enter the unit after dark if there were no lights permitted on the deck. Nor is there any evidence that any light from these residential fixtures will impact the existing level of foot candles at the property line, a circumstance which appears unlikely given the amount and topography of the intervening land, and the existing vegetation. The Court of Appeals instructs us that conditions should be based on the

evidence presented, rather than speculation about future problems, such as noise, lights, and disruptive tenants. *Cf., Miller v. Kiwanis Club of Loch Raven, Inc.*, 29 Md. App. 285, 295-296 (1975) (unsubstantiated fears of possible adverse impacts can not justify denial of a special exception).

Should the Board disagree with the Hearing Examiner's finding and conclusion in this regard, she suggests the following condition:

1. Petitioners shall incorporate into any lease agreements with tenants of the accessory apartment a requirement that:
 - a. All lights located immediately above the deck, with the exception of any lights necessary to illuminate an entrance, must be turned off at sundown. All areas of the walkway leading to an entrance to the accessory apartment must be able to remain lit.
 - b. Curtains shall be installed over the existing shades on the westward facing windows, which must be closed at sundown.
 - c. Tenants shall comply with the Montgomery County Noise Ordinance (Chapter 31B of the *Montgomery County Code*).

III. SUMMARY OF TESTIMONY

Petitioners' Testimony

Mr. Timothy Mealey testified that he reviewed the Technical Staff Report and adopted its findings of fact and conclusions of law as his own testimony. T. 6. He stated that the problem regarding moisture or leakage in the utility room mentioned by the Housing Inspector in her memorandum has already been addressed. According to Mr. Mealey, a contractor had looked at the problem and determined that there was mildew caused by condensation from the air conditioning duct. They cleaned the area with a mold/mildew cleaning agent which eliminated the mildew. T. 7. He submitted photographs of the mildewed area before and after cleaning as well as the Affidavit of Posting. T. 6-11; Exhibit 18.

He explained that when they applied for the special exception, they relied on the property

square footage listed on the architectural plans prepared for an addition to the detached structure done in 2008. T. 18. These plans listed the lot area as 43,955 square feet. When the issue arose during the special exception (due to the acreage listed on the SDAT records), Petitioners contacted the surveyor who had done the survey work for the 2008 building permit. The surveyor calculated the acreage based on the 1959 record plat to be 43,561.88, still above the minimum 1 acre required. T. 17-19. He submitted a sealed letter from the surveyor to this effect.

Mr. Mealey testified that they are not adding additional landscaping because they did “quite a bit of landscaping” after making the improvements in 2008. T. 20-21. He stated that HOA land contains a small creek and the southwest corner of the property reaches almost to the creek. T. 22. The properties surrounding the HOA land generally slope down towards the creek. T. 23.

According to Mr. Mealey, the landscape plan did not reflect some of the current on-site conditions. Particularly, the gate leading to the walkway was not shown in the correct place on the landscape and lighting plan because they decided it was better located on the northwestern side of the property. He corrected the location of the gate and some of the lights. T. 24-26. He testified that the motion sensor lights are approximately 125-150 watts and are marked with an asterisk on the landscape plan. T. 25-26. There are 4 motion detector lights illuminating the walkway and other lights on the structure. T. 28. The lights on the structure are marked on the landscape plan with dashes. T. 29. He did not know the exact wattage of these lights, but they are standard residential 60-watt bulbs.

Mr. Mealey testified that when Ms. Alberts notified the neighbors of the special exception application when the petition was submitted, she spoke with Mrs. Sagoff who did not express any concerns. Afterwards, Mrs. Sagoff contacted Petitioners and they set up a meeting on September 9, 2012, to discuss the application. Mrs. Sagoff told them that they really enjoyed

the park-like atmosphere on their property, so he suggested that Petitioners would include provisions in our lease agreements to ensure they comply with the noise ordinance and to install a curtain in addition to the shades to block the light in the wintertime. They also proposed that they would include a lease provision requiring their tenants to close the curtains when it became dark at all times of the year to reduce any light or noise pollution. T. 33. Mr. Mealey proffered that the condition could also include turning out the deck lights at sundown as well. T. 34.

Mr. Mealey submitted a statement responding to the Sagoffs' concerns into the record of the case. Exhibit 22. Because Petitioners had not received a response to their proffer from the Sagoffs, they felt there was a need to respond to the concerns raised. T. 35-36. He pointed out that the accessory structure is not located adjacent to the strip of HOA land separating their properties but is actually in the middle portion of the lot. In addition, the slope of the land between the apartment and the Sagoffs' residence slopes upward slightly before falling toward the creek. He thought that the Sagoffs may be able to see the roof of the accessory structure, although he wasn't sure. T. 37-39.

He also disagreed with the statement in the Sagoffs' letter that the detached accessory structure had been significantly enlarged in recent years. While they did not know the original owner of the house, he had spoken with the second owner, Mr. Marvin Schneck, who purchased the property somewhere around 1965. Mr. Schneck conveyed that the detached structure was originally built in 1967 at which time it was approximately 206 square feet. Because Mr. Schneck used the structure for woodworking, he later enlarged it to 732 square feet to use it as a woodworking studio. This expansion occurred in the early 1970's. According to Mr. Mealey, Mr. Schneck had the permits both for the original structure and the expansion. T. 41-43.

Ms. Alberts purchased the property in 1999 with her ex-husband. When the property was transferred into Petitioners' names, they added a bathroom, kitchen and extended water to the

property to serve as a bedroom for some of their adult children, which included (combined) 8 children. T. 44-45.

Mr. Mealey stated that he understood that he could accept compensation for only one dwelling unit and that he may rent only to two unrelated people or a family of four and agreed to abide by these conditions of the special exception. T. 47.

Housing Code Inspector Lynn McCreary :

Housing Code Inspector, Lynn McCreary, testified that she inspected the premises, and that her findings are set forth in her report of August 27, 2012 (Exhibit 13). She introduced photographs (Exhibit 17) showing the interior of the premises. T. 49-55. Ms. McCreary found that the apartment has slightly over 617 square feet of habitable space, and that occupancy must be limited to two unrelated persons or a family of up to four persons. Tr. 55-56. Ms. McCreary testified that the driveway is large and may accommodate more than four cars.

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 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 15).

Weighing all the testimony and evidence of record under a “preponderance of the evidence” standard (Code §59-G-1.21(a)), the Hearing Examiner concludes that the instant petition meets the

general and specific requirements for the proposed use, as long as Petitioners comply with the conditions set forth in Part V, below.

A. Standard for Evaluation

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

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

Technical Staff lists the following inherent characteristics of accessory apartments (Exhibit 15, p. 10):

- 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 another 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 disagrees that the first characteristic identified by Technical Staff applies to this case. Because the Zoning Ordinance permits detached accessory apartments, provided the lot exceeds one acre in size, the Hearing Examiner finds that the appropriate inherent characteristic here is the existence of a detached accessory structure, subordinate to the main dwelling and residential in character. In addition, 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 the fact that slightly more persons will occupy a single-family lot. Thus, the inherent effects of an accessory apartment would include the fact that an additional resident (or residents) will be added to the neighborhood, with the concomitant possibility of an additional vehicle or two.

Technical Staff found (Exhibit 15, pp. 10-11):

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 accessory structure behind the primary dwelling and is not visible from the street. This apartment will provide space and facilities necessary for an apartment use.

The accessory unit has its own entrance separate from the entry to the primary dwelling. The entrance of the accessory apartment will be illuminated consistent with typical residential standards. Vehicular parking for the accessory apartment will be located in the driveway of the one-family house.

Based on these findings, Staff concluded (Exhibit 15, p. 11):

[T]he operational and physical characteristics of the proposed accessory apartment are consistent with the inherent characteristics of an accessory apartment use.

The Hearing Examiner agrees generally with Staff's assessment but would add that the apartment is a detached accessory structure with virtually no visibility from the main road and is subordinate to the main dwelling. Considering size, scale, scope, light, noise, traffic and environment, the Hearing Examiner concludes, as did the Technical Staff, that there would be no non-inherent adverse effects from the proposed use.

B. General Conditions

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

Sec. 59-G-1.21. General conditions.

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

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

Conclusion: An accessory apartment is a permissible special exception in the R-200 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 IV. 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 *1990 Bethesda-Chevy Chase Master Plan*. As discussed in Part II. C. of this report, the Master Plan in general sets a goal of maintaining a variety of housing types, and specifically recommends that accessory apartments be utilized as one means of meeting this goal. For these reasons, Technical Staff concluded that the proposed use is consistent with the Master Plan. The Hearing Examiner agrees and so finds.

- (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: Technical Staff concluded that the proposed use will be in harmony with the existing character of the neighborhood, which consists of single-family homes in the R-200 Zone. Technical Staff reasoned that it will have only a slight impact on population density and the intensity of the uses on the property. The Hearing Examiner agrees with Staff's conclusion. The accessory apartment is located in an existing detached accessory structure that was previously modified as a dwelling unit for the owners' adult children. It does not require any external changes. It is only slightly visible from the street, and there is ample parking within the existing driveway to support the proposed use. As a result, the residential character of the property will not change. Traffic conditions will not be affected adversely, according to Technical Staff. Both Technical Staff and DHCA report that there are no other accessory apartments or registered living units in the immediate

vicinity. Exhibits 15 and 22. Based on this evidence, the Hearing Examiner concludes, as did Technical Staff, that the proposed use will be in harmony with the general character of the neighborhood.

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

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

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

Conclusion: Technical Staff found that "Because the proposed accessory apartment presents only minimal impacts to the immediate area, 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 Zoning Ordinance and the listed conditions of approval are satisfied." Exhibit 15, p 12. As noted in Section II.E., there is no evidence in this record that excessive noise or glare will impact nearby properties, although some of the lights may be visible in the wintertime through the trees. The record is devoid of any evidence that these impacts will exceed those inherent in the use, which is a special exception in the R-200 Zone. For these reasons, the Hearing Examiner agrees with Technical Staff's conclusion 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: Technical Staff advises that there are no accessory apartment special exceptions in the defined neighborhood, a conclusion with which DHCA concurs. Exhibit 15, p. 12; Exhibit 22. The Hearing Examiner finds that this standard has been met.

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

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

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

Conclusion: Technical Staff indicates that the subject site will be adequately served by existing public services and facilities (Exhibit 15, p. 14), 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). Technical Staff did such a review, and concluded that the proposed accessory apartment would use one additional weekday morning and evening peak hour trip. Exhibit 15, p. 14. Based on this, Technical Staff concluded that: "This minimal amount of traffic increase can be accommodated by the existing road network in the neighborhood."

Since the existing house, combined with the proposed accessory apartment, would generate only one additional morning and evening peak hour trip, a traffic study is not required for LATR review and the petition is not subject to PAMR review. For these reasons, the Hearing Examiner finds that the existing roadway system is adequate to serve the proposed use.

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

Conclusion: Based on the evidence of record, especially the Technical Staff's conclusion that the proposed use "is not likely to negatively impact the safety of vehicular or pedestrian traffic" the Hearing Examiner so finds. Exhibit 15, p. 14.

C. Specific Standards

The testimony and the exhibits of record, especially the Technical Staff Report (Exhibit 15), 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: As described in Section II.A. of this Report, there is conflicting evidence regarding whether the lot exceeds one-acre as required for a detached accessory apartment. For the reasons set forth in Section II.A., the Hearing Examiner finds that the best evidence is a sealed letter signed by a professional surveyor indicating the lot size is at a minimum (based on the record plat) 43,561.88 square feet. (Exhibit 21). Based on this evidence, the Hearing Examiner finds this the proposed use meets this standard.

(c) 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 is located in an existing detached structure.

- (3) *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 subject house was built in 1959. Exhibit 15, p. 16; T. 41. It therefore meets the “5 year old” requirement.

- (4) *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 will not violate any of the provisions of this subsection and compliance with this section will be made a condition of approval of the special exception.

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

Conclusion: The entrance to the detached structure is in the rear of the property and is only slightly visible from Persimmon Tree Road. It is accessed by a pathway to the side of the main dwelling, through a gate, and is not visible from the road. Based on this evidence, the Hearing Examiner finds that this requirement has been met.

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

Conclusion: No external modifications or improvements are proposed by Petitioners. Exhibit 15.

- (7) *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. Exhibit 15, p. 17.

- (8) *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: While there is conflicting evidence as to the exact size of the main dwelling, the evidence as to the size of the accessory apartment is consistent. SDAT records list the main dwelling as being 3,195 (the number used by Technical Staff) while the site plan (Exhibit 4) lists the main dwelling as being 2,610 square feet. Resolution of the exact size is unnecessary to decide this case as both Technical Staff and the Petitioners site plan conclude that the size of the accessory apartment is between 917-920 feet. Exhibit 4; Exhibit 15, p. 17. Therefore, the accessory apartment is under half the size of the main dwelling, regardless of whether it is 2,610 or 3,195 square feet. The Hearing Examiner finds that this requirement has been met.

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 unit 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 Petitioners' deed (Exhibit 10), Petitioners jointly purchased the property in September of 2008 and Ms. Alberts has owned the property since 1999. T. 42. The one-year rule has therefore been satisfied.

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

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

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

property as determined by the Board.

Conclusion: The Petitioners are the owners of the property. Exhibit 10.

(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 exceeds one acre in area, and therefore satisfies this requirement.

Technical Staff does not advise that there are any violations if the development standards of the R-200 Zone, and Petitioners testified that they received a building permit for the 2008 addition to the accessory structure. Based on this evidence, the Hearing Examiner finds that this requirement has been met.

(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: Technical Staff advises that there are no other accessory apartment special exceptions in the neighborhood, a finding confirmed by DHCA. Based on this evidence, the Hearing Examiner finds this requirement has been met.

(3) Adequate parking must be provided. There must be a minimum of 2

off-street parking spaces unless the Board makes either of the following findings:

- (i) More spaces are required to supplement on-street parking; or*
- (ii) Adequate on-street parking permits fewer off-street spaces. Off-street parking spaces may be in a driveway but otherwise must not be located in the yard area between the front of the house and the street right-of-way line.*

Conclusion: As previously discussed, there is a long driveway which, according to Technical Staff, may accommodate six vehicles. Exhibit 15, p. 19. DHCA confirms that there is sufficient parking for more than 4 cars. Exhibit 13. Therefore, this requirement has been met.

D. Additional Applicable Standards

Not only must an accessory apartment comply with the zoning requirements as set forth in 59-G, it must also be approved for habitation by the Department of Housing and Community Affairs. As discussed in Part II. B. of this Report, the Housing Code Inspector's report (Exhibit 13) specifies certain conditions. Petitioners have agreed to meet all conditions, and will comply with directives of the Housing Code Inspector. Tr. 6.

V. RECOMMENDATION

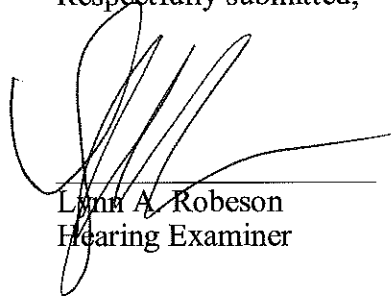
Based on the foregoing analysis, I recommend that the Petition of Timothy J. Mealey and Beatrix M.H. Alberts, BOA No. S-2843, which seeks a special exception for an accessory apartment located at 6714 Persimmon Tree Road, Bethesda, Maryland, be GRANTED, with the following conditions:

1. The Petitioners are bound by their testimony, representations and exhibits of record;
2. The Petitioners must comply with the conditions set forth in the Memorandum of Lynn McCreary, Housing Code Inspector, Division of Housing and Code Enforcement (Exhibit 13), requiring moisture in the utility room, and all resultant damage, be repaired and maintained in a professional, workmanlike manner.
3. No more than two unrelated individuals or a family of four may occupy the accessory apartment;

4. Petitioners must occupy one of the dwelling units on the lot on which the accessory apartment is located;
5. Petitioners must not receive compensation for the occupancy of more than one dwelling unit; and
6. 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: October 16, 2012

Respectfully submitted,



Lynn A. Robeson
Hearing Examiner