

**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**

<b>IN THE MATTER OF:</b>	*	
<b>EDWARD A. BUBERT</b>	*	
	*	Board of Appeals No. S-2860
Petitioner	*	(OZAH No. 13-09)
Edward A. Bubert	*	
For the Petition	*	
*****		
Robert Goff	*	
Department of Housing and	*	
Community Affairs	*	
*****		

Before: Tammy J. CitaraManis, Hearing Examiner

**HEARING EXAMINER'S REPORT AND RECOMMENDATION  
TABLE OF CONTENTS**

I. STATEMENT OF THE CASE .....	2
II. FACTUAL BACKGROUND .....	3
A. The Subject Property and Its Current Use .....	3
B. The Surrounding Neighborhood.....	6
C. The Master Plan .....	7
D. The Proposed Use .....	8
E. Traffic Impacts .....	12
F. Environmental Impacts.....	13
G. Community Response .....	13
III. SUMMARY OF THE HEARING .....	13
A. Petitioner's Case .....	13
B. Public Agency Testimony .....	15
IV. FINDINGS AND CONCLUSIONS .....	16
A. Standard for Evaluation .....	17
B. General Standards .....	19
C. Specific Standards .....	25
D. Additional Applicable Standards .....	31
V. RECOMMENDATION .....	31

## I. STATEMENT OF THE CASE

In Petition No. S-2860, Petitioner, Edward A. Bubert, seeks approval of a Special Exception under Zoning Ordinance §59-G-2.00 to allow an accessory apartment on property located at 4111 Elby Street, Silver Spring, Maryland, in the R-60 (Residential, One-family, Detached) Zone. The legal description of the property is Lot 25, Block 13, in the Stoneybrook Estates Subdivision. The tax account number is 01339984.

On October 9, 2012, the Board of Appeals issued a notice of a public hearing before the Hearing Examiner for March 7, 2013. Exhibit 11(b). Technical Staff of the Maryland-National Capital Park and Planning Commission (M-NCPPC), in a report dated February 21, 2013, recommended approval of the special exception, with five (5) conditions.<sup>1</sup> Exhibit 13.

The Department of Housing and Community Affairs (DHCA) inspected the property on March 4, 2013. Housing Code Inspector Robert Goff (Mr. Goff) reported his findings in a memorandum dated March 5, 2013. Mr. Goff reported that the accessory apartment is 442.3 square feet in size with 302.79 square feet of habitable space.<sup>2</sup> Based on the habitable space, Mr. Goff concluded that occupancy of the unit is limited to no more than two unrelated persons or a family of two. Exhibit 14. DHCA submitted a memorandum dated March 7, 2013, from Ada DeJesus, Licensing and Registration Unit, reporting there are two accessory apartments and two registered living units (RLU's) in the direct vicinity of Petitioner's property.<sup>3</sup> Exhibit 17.

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

<sup>2</sup> Technical Staff relied on Petitioner's measurements that the accessory apartment was 750 square feet in size. Exhibits 3 and 13.

<sup>3</sup> Ms. DeJesus reported a licensed accessory apartment located at 4114 Conger Street [0.12 miles south of 4111 Elby St.] and an exempt accessory apartment (10/14/ 2003), located at 4205 Harvard Street [0.10 miles Northwest of 4111 Elby St.]. Exhibit 17.

The hearing went forward as scheduled on March 7, 2013, and Petitioner, Edward A. Bubert, appeared *pro se*. Petitioner testified in support of the petition and adopted the findings and conclusions set out in the Technical Staff Report (Exhibit 13) as his own evidence and agreed to meet all the conditions set forth in staff's report. Tr. 8 and 12. Petitioner reviewed the Housing Code Inspection report (Exhibit 14) and agreed to comply with the conditions and issues noted in the report including completing the necessary improvements and repairs to the unit. Tr. 12-13.

Petitioner executed an Affidavit of Posting (Exhibit 15) and submitted a copy of his driver's license (Exhibit 16) and change of address card (Exhibit 18). During the hearing, Petitioner identified the photographs of his house (Exhibit 9) and modified the Site Plan (Exhibit 4), Landscape and Lighting Plan (Exhibit 6) and Floor Plan (Exhibit 5). The Housing Code Inspector, Robert Goff, also testified. No opposition appeared at the hearing.

The record was held open until March 18, 2013, to give Petitioner time to submit a copy of his deed to the property and for the Court Reporter to complete the hearing transcript. Petitioner submitted a copy of the Deed of Trust to the property (Exhibit 19) on March 11, 2013, and a copy of his deed (Exhibit 20) on March 12, 2013. The record closed as scheduled with no further documents being received.

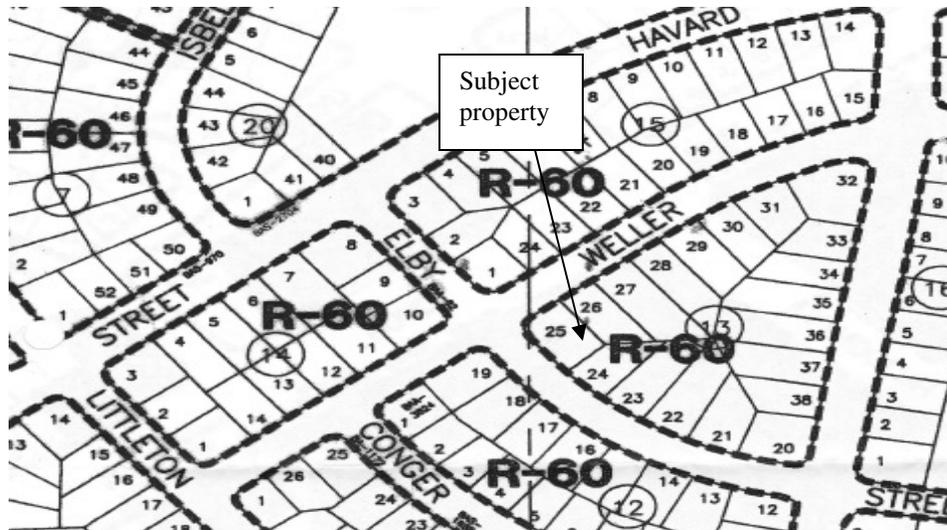
For the reasons set forth below, the Hearing Examiner recommends approval of the requested special exception, subject to the conditions set forth in Section V of this Report.

## **II. FACTUAL BACKGROUND**

### **A. The Subject Property and Its Current Use**

The subject property is located at 4111 Elby Street Silver Spring, Maryland, in the Stoneybrook Estates Subdivision. It is zoned R-60. The property is an 8,542 square foot

corner lot located at the eastern corner of Elby Street and Weller Road, as shown below on a Zoning Map of the area (Exhibit 10):



The lot is improved with a two-story split level single-family dwelling. According to the Maryland Department of Taxation and Assessment records (SDAT) for the property the dwelling was built in 1960 with an enclosed area of 1,882 square feet. Exhibit 12. The main dwelling faces Elby Street. Vehicular access to the property is via a single lane concrete driveway from Elby Street. The accessory apartment entrance is located on the east side of the dwelling at the end of the driveway and before the fence to the rear yard. Technical Staff reported that “[t]he existing landscaping is well maintained and the backyard is mostly clear and fenced on three sides.” Exhibit 13, p. 3.

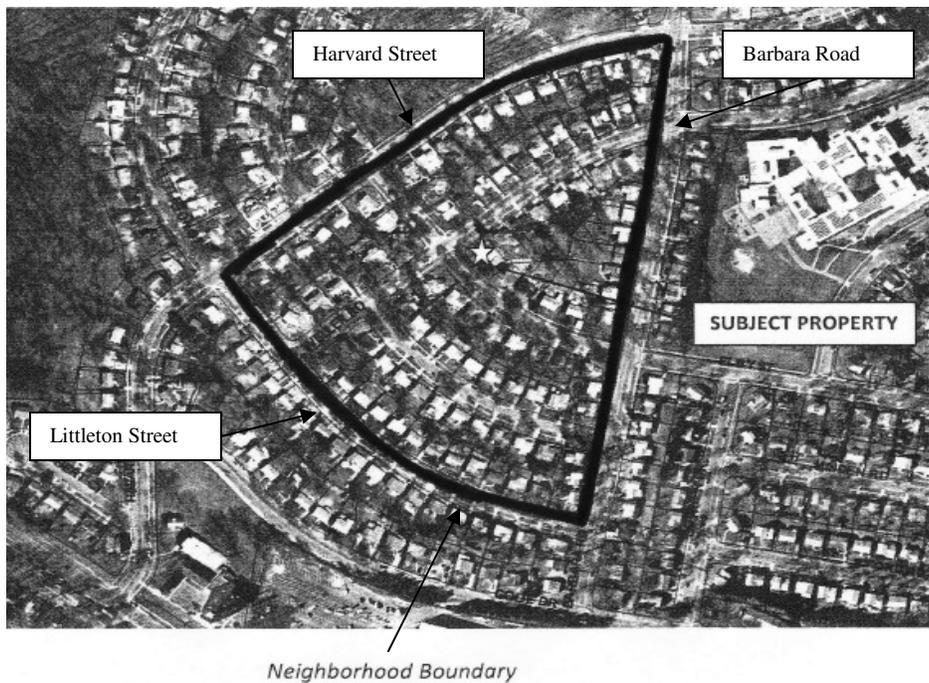
The Site Plan (Exhibit 4) modified to show the location of the accessory apartment entrance, and photographs of the front and side of the house, taken from the Technical Staff report, are shown on the next page of this report (Exhibit 13, Attachment 2):



### B. The Surrounding Neighborhood

Technical Staff defined the general neighborhood, which consists of approximately 102 one-family detached homes in the R-60 Zone, as bound by “Harvard Street to the north and northwest, Barbara Road to the east, and Littleton Street to the south and southwest.” Exhibit 13, pp. 2 and 7. 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 13, p. 3), has been drawn by Technical Staff to include any nearby properties that may be affected by a potential increase in density or traffic:



Technical Staff reports there is one accessory apartment located in the staff-defined neighborhood. Exhibit 13, p.7. DHCA reported there are two accessory apartments and two RLU’s in the vicinity of the subject property. One of the accessory apartments is located at

4114 Conger Street which is 0.12 miles South of Elby Street. DHCA reported that the second accessory apartment was “Exempt 10/14/2003” and located at 4205 Harvard Street which is outside the staff-defined neighborhood. Exhibit 17.

The Hearing Examiner concurs with Technical Staff’s conclusion that the addition of an accessory apartment special exception use at the subject property will not result in an excessive concentration of similar uses or adversely affect the residential character of the neighborhood.

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

The subject property lies within the geographic area covered by the *Master Plan for the Communities of Kensington-Wheaton*, approved and adopted in April 1989 (Amended 1990). Technical Staff advises that there are no Master Plan recommendations relevant to this site. However, Technical Staff found the proposed accessory apartment was consistent with the following Land Use and Zoning Goals and objectives stated on page 28 of the Master Plan (Exhibit 8): 1) to protect and stabilize the extent, location, and character of existing residential and commercial land uses; and 2) to maintain the well established low-to medium-density residential character which prevails over most of the planning area. Exhibit 13, p. 4.

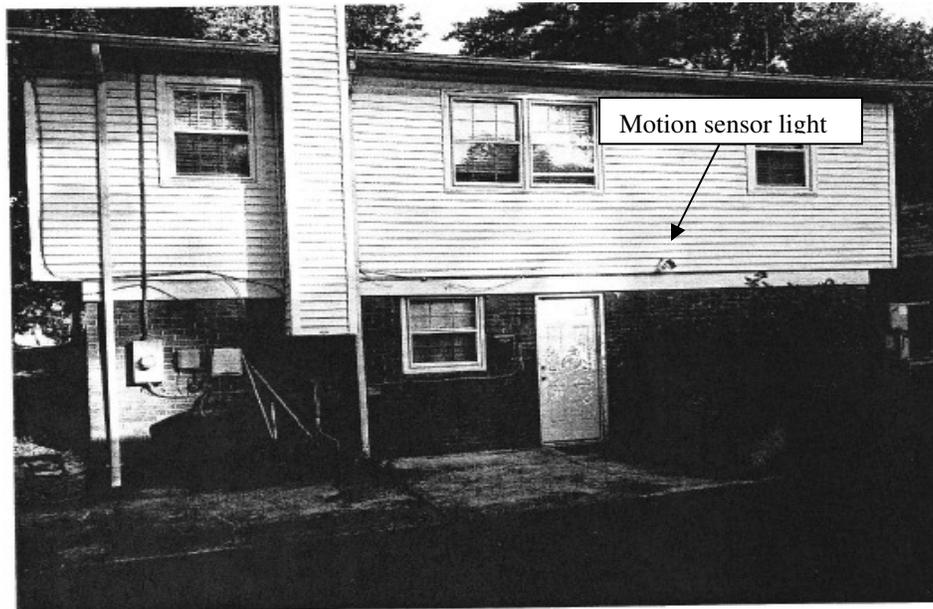
The Hearing Examiner concurs with Technical Staff because the Master Plan supports the R-60 zoning in which accessory apartments are a special exception use. According to Technical Staff, the accessory apartment entrance “has the appearance of a typical side entry into a single-family house.” Exhibit 13, p. 3. Further, no structural modifications or changes to the property are proposed or necessary to accommodate this special exception use. Thus, the single-family dwelling will retain the residential appearance and compatibility sought by the Master Plan. Accordingly, the Hearing Examiner concurs

with Technical Staff and finds that the proposed use is consistent with the *Master Plan for the Communities of Kensington-Wheaton*.

#### **D. The Proposed Use**

The Petitioner is seeking a special exception to allow an existing one-bedroom accessory apartment located in the lower level (basement) of his split-level two-story house. Mr. Goff reported that the accessory apartment is 442.3 square feet in size, 302.79 square feet of which is habitable space. Exhibit 14. The accessory apartment is located on the east side of the house with its own separate entrance. Access to the entrance is via the concrete driveway which extends from the street to the accessory apartment entrance. An existing motion sensor light located to the right of the accessory apartment entrance will illuminate the driveway access and entrance to the accessory apartment.

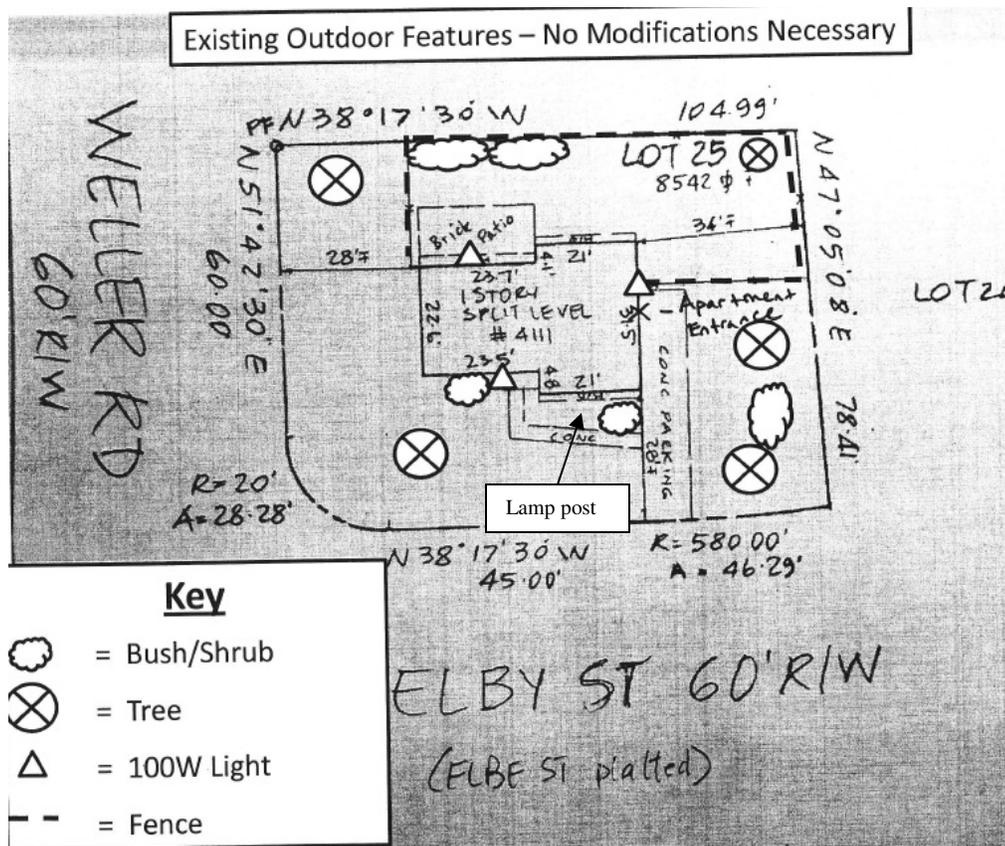
Petitioner provided the following photograph of the accessory apartment entrance (Exhibit 9):



Item B. Side view of 4111 Elby showing accessory apartment entrance.

Technical Staff found that “[t]he accessory apartment entrance is clearly distinct from the entrance to the main dwelling and has the appearance of a typical side-entry into a single-family house.” Exhibit 13, p. 3.

The Landscape and Lighting Plan (Exhibit 6), modified to show the accessory apartment entrance, reflects the existing landscape and lighting on the property and is shown below:



As shown above, the existing exterior lighting on the dwelling also includes a porch light at the front door to the main dwelling, a lamp post in the front yard and light fixture over the patio in the rear yard. Technical Staff found that “[t]he use will cause no objectionable illumination or glare as the provided lighting is residential in character.”

Exhibit 13, p. 7. According to Technical Staff, the existing landscaping was well maintained and no new plantings are proposed. Exhibit 13, p. 4. Petitioner confirmed that no exterior modifications or improvements are proposed. Tr. 19-21.

Technical Staff advises that the driveway can accommodate two vehicles parked end to end with ample unrestricted on-street parking. Exhibit 13, p. 2. Petitioner testified that he parks his only vehicle on the driveway. He stated that there is sufficient space along the side and at the end of the driveway for safe access to the accessory apartment entrance. Tr. 18-19. Technical Staff provided the following photograph (Exhibit 13, Attachment 2) of the available on-street parking on Elby Street:



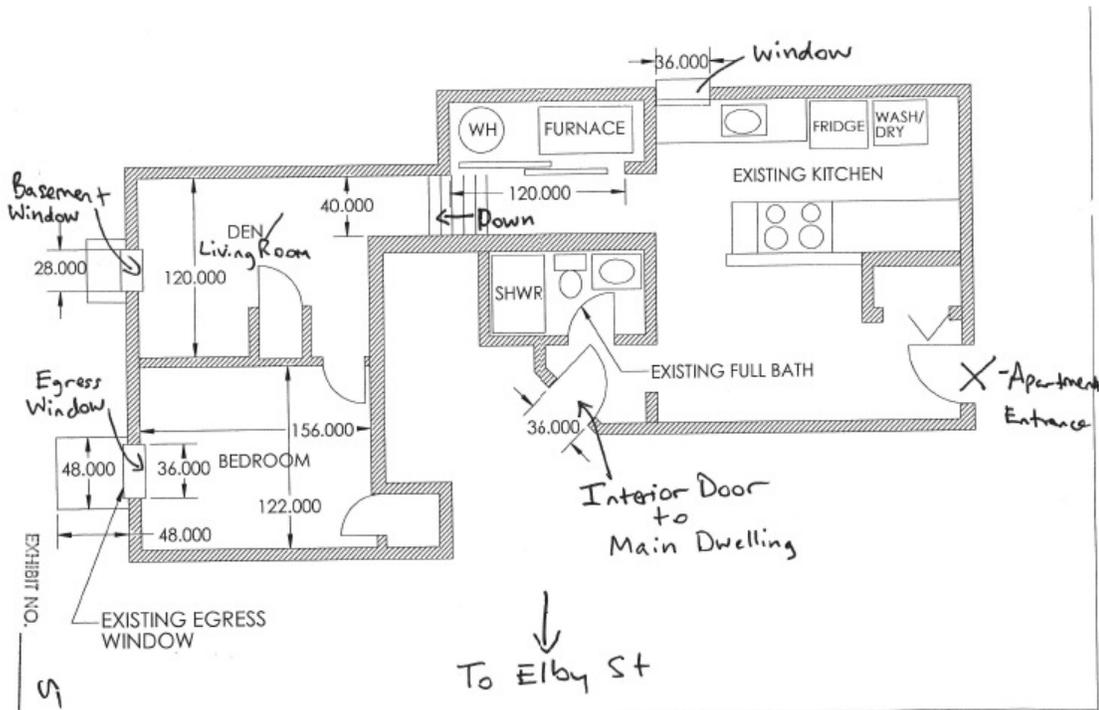
*On street parking on Elby Street*

The Hearing Examiner agrees with Technical Staff's finding that there is adequate parking on the driveway and ample on-street parking to accommodate the main dwelling and accessory apartment use.

The accessory apartment is a separate living unit located on the two lower levels of Petitioner's split-level, two-story house. The ground floor (accessed from the side entrance)

includes a front entrance hallway and closet, a full bath, kitchen and utilities closet. The living room/den and bedroom are down a set of steps to the basement of the house. The bedroom includes a closet and one egress window. Mr. Goff confirmed the bedroom window meets the standards required for an egress window. Tr. 25.

The Floor Plan (Exhibit 5), modified to show the accessory apartment entrance, and other features of the unit, is shown below:



DHCA inspected the property on March 4, 2013. Housing Code Inspector Robert Goff reported his findings in a memorandum dated March 5, 2013 (Exhibit 14). The substance of his report is set forth below:

The Preliminary inspection was conducted on 3-4-2013. The Accessory Apartment is located in the cellar of the house. The issues regarding Accessory Apartment standards are as follows:

1. Remove mail box at Accessory Apartment door.
2. Paint hallway ceiling.
3. The driveway will accommodate 3 cars parked end to end.

4. There is off street parking (No Permit Needed).
5. There is 302.79 sq feet of habitable space. The total sq feet of the accessory apartment is 442.3. 2 unrelated [persons] can live in the unit or a family of 2 can live in the unit.

Mr. Goff testified that he inspected the property sometime prior to the preliminary inspection. At that time, he advised Petitioner not to rent the unit until after he obtained approval from the Board of Appeals. Petitioner rented it shortly after the inspection and the unit is currently occupied. Mr. Goff noted for the record that he did not issue Petitioner a citation. However, Mr. Goff advised Petitioner that if his special exception application is denied he will have thirty (30) days from the date of the Board's decision to remove anything that could be used to cook, heat or warm food and for the tenants to move out of the unit without further notification from DHCA. Tr. 34-36.

#### **E. Traffic Impacts**

Based on a report from Transportation Staff, Technical Staff found that “[t]he proposed accessory apartment meets the transportation related requirements of the Adequate Public Facilities Ordinance (APFO).” Exhibit 13, p. 4.

Transportation Staff reported (Exhibit 13, Attachment 4):

##### Adequate Public Transportation Facilities Review

The proposed accessory apartment will generate one new peak-hour vehicular trip each within the weekday morning peak period (6:30 to 9:30 a.m.) and the evening peak period (4:00 to 7:00 p.m.) (two trips total in a weekday). A traffic study is not required to satisfy the [Local Area Transportation Review] LATR because the proposed land use generates fewer than the 30 peak-hour trips within the weekday morning and evening peak periods.

The Kensington/Wheaton Policy Area is deemed inadequate under the Transit Test, per the 2012-2016 Subdivision Staging Policy. However, because the Accessory Apartment generates three or fewer new peak-hour trips, it is not required to pay the transportation impact tax.

Due to the small scale of the proposed use, the Hearing Examiner agrees with

Technical Staff that the accessory apartment satisfies the LATR and TPAR tests and will have no adverse impact on the area roadways and pedestrian facilities.

#### **F. Environmental Impacts**

Petitioner is not proposing any external changes to the site. Technical Staff advises that: “The property is located within the Lower Rock Creek watershed – a Use I watershed. The proposed project does not have any proposed activities within any streams, wetlands, or environmental buffers and is in compliance with the Environmental Guidelines.” Exhibit 13, p. 4. The property is also exempt from the Forest Conservation Law and “[a] Water Quality Plan is not required because the use is not in a designated Special Protection Area.” Exhibit 13, pp. 4 and 9. Based on this evidence, the Hearing Examiner finds that Petitioner’s request will have no adverse environmental impacts.

#### **G. Community Response**

There has been no response from the community to the subject petition.

### **III. SUMMARY OF THE HEARING**

Petitioner Edward A. Bubert testified at the public hearing in support of the petition. DHCA Housing Code Inspector, Robert Goff, also testified. There was no opposition at the hearing.

#### **A. Petitioner’s Case**

##### Petitioner Edward A. Bubert:

Petitioner executed an Affidavit of Posting (Exhibit 15) and submitted a copy of his driver’s license and change of address card (Exhibits 16 and 18). Petitioner agreed to provide a copy of his deed prior to the close of the record (March 18, 2013). Petitioner adopted the findings and conclusions in the Technical Staff report (Exhibit 13) as his own evidence and

agreed to be bound by the conditions of approval stated therein. He also agreed to comply with the conditions and issues noted in the Housing Code Inspector's report (Exhibit 14). Petitioner confirmed that he will reside in the main dwelling. Tr. 6-13.

Petitioner modified the Site Plan (Exhibit 4) to show the location of the accessory apartment entrance located on the side of the house. The entrance is at the end of the driveway and before the fence to the rear yard. The driveway can accommodate two, possibly three, vehicles parked end to end. Petitioner parks his only vehicle on the driveway which is wide enough to provide pedestrian access to the main dwelling and accessory apartment entrance. He will provide sufficient space at the end of the driveway for access to the accessory apartment entrance. Tr. 15-19.

Petitioner testified that the photographs marked as Exhibit 9 and those contained in the Technical Staff report (Exhibit 13, Attachment 2) accurately depict the front and side views of his property and the on-street parking on Elby Street. Tr. 17-19 and 28-29.

Petitioner identified the existing exterior lighting noted on the Landscape and Lighting Plan (Exhibit 6), including the motion sensor flood light to the right of the accessory apartment entrance. He stated no exterior modifications or changes to the existing landscaping are proposed. Tr. 19-21.

Petitioner modified the Floor Plan (Exhibit 5) to show the location of the accessory apartment entrance, and noted other features of the unit. The accessory apartment is a separate living unit located on the two lower levels of the two-story house which has four levels. He will reside in the main dwelling (two upper levels). The ground floor (accessed from the side entrance) includes a front entrance hallway and closet, a full bath, kitchen, utilities closet and stairs down to the basement where the living room and bedroom are

located. The bedroom includes a closet and one egress window. The living room and kitchen also have windows. He included a side elevation drawing of the accessory apartment entrance (Exhibit 5(a)). Tr. 21-27.

Petitioner purchased the house in April 2011. He provided a letter and copy of the listing from his real estate agent to show that the kitchen in the accessory apartment existed when he purchased the property. He is seeking to correct the failure of the prior owner to obtain the required approval and license for the accessory apartment use. He will limit occupancy to no more than two unrelated persons or a family of two. He will remove the mailbox outside the accessory apartment door and no interior modifications are proposed. There is ample on-street parking with no restrictions. He will park his small car on the driveway. He accepted Mr. Goff's determination that the unit is approximately 442.3 square feet in size.

Petitioner acknowledged Mr. Goff's advice that if his special exception request is denied he will have thirty (30) days from the date of the Board's decision to remove the tenants and anything that can cook, heat or warm food without further notification. Tr. 29-33.

### **B. Public Agency Testimony**

#### Housing Code Inspector Robert Goff:

Housing Code Inspector Robert Goff testified that he inspected the property on March 4, 2013, and reported his findings in a memorandum dated March 5, 2013. Exhibit 14. Based on Petitioner's question, he clarified that in order to maintain the residential appearance of a single-family dwelling Petitioner must remove the mailbox at the accessory apartment door. He submitted a copy of the March 7, 2013, memorandum from Ada DeJesus with DHCA

Licensing and Registration (Exhibit 17). Tr. 11-13. Mr. Goff confirmed the bedroom window meets the standards required for an egress window. Tr. 25.

Mr. Goff testified that he inspected the property sometime prior to the preliminary inspection. At that time, he advised Petitioner not to rent the unit until after he obtained approval from the Board of Appeals. Petitioner rented it shortly after the inspection and the unit is currently occupied. Mr. Goff noted for the record that he did not issue Petitioner a citation. However, Mr. Goff advised Petitioner that if his special exception application is denied he will have thirty (30) days from the date of the Board's decision to remove anything that could be used to cook, heat or warm food and for the tenants to move out of the unit without further notification from DHCA. Tr. 34-36. In Mr. Goff's opinion, the accessory apartment will not have a negative effect on the residential character of the neighborhood. Tr. 39.

#### **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 Petitioner has the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Technical Staff concluded that Petitioner will have satisfied all the requirements to obtain the special exception if he complies with the recommended conditions. Exhibit 13.

Weighing all the testimony and evidence of record under a "preponderance of the

evidence” standard (Code 59-G-1.21(a)), the Hearing Examiner concludes that the instant petition meets the general and specific requirements for the proposed use as long as Petitioner complies with the 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 physical and operational characteristics of accessory apartments (Exhibit 13, p. 5):

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

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

Technical Staff found (Exhibit 13, p. 5):

. . . that the size, scale, and scope of the requested use are minimal, and that any noise, traffic, neighborhood disruption, or environmental impacts associated with the use would be slight. There are no unusual characteristics of the site. Staff concludes that there are no non-inherent, adverse effects arising from the accessory apartment sufficient to form a basis for denial.

The accessory apartment will be fully contained in the two lower levels of an existing single-family split-level dwelling with its own separate exterior entrance located on the east side of the dwelling. The apartment entrance is typical of a side-entry into a single-family dwelling. Thus, the residential appearance of the single-family dwelling is maintained and

compatible with the surrounding neighborhood. There is space for at least two vehicles on the driveway and ample off-street parking in front of the dwelling to accommodate the main dwelling and accessory apartment use. Occupancy will be limited to no more than two persons.

Based on these circumstances, and considering size, scale, scope, light, noise, traffic and environment, the Hearing Examiner agrees with Technical Staff and finds that there are no non-inherent adverse effects arising from the proposed accessory apartment warranting denial of this petition.

### **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 Petitioner's 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 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 *Master Plan for the Communities of Kensington-Wheaton*, approved and adopted in 1989 (Amended 1990). Exhibit 8. 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 *Master Plan for the Communities of Kensington-Wheaton*.

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*

Conclusion: The accessory apartment is fully contained in the lower level (basement) of an existing split-level dwelling with a separate entrance typical of a side-entry into a single-family dwelling. No exterior modifications or improvements are proposed. It therefore will maintain its residential character. Occupancy will be limited to no more than two persons. Thus, the accessory apartment use

“will have only a slight impact on population density and result in a modest increase in the intensity of use of the property with no change to the [residential] character of the area.” Exhibit 13, p. 6. There is sufficient off-street and on-street parking to accommodate the main dwelling and accessory apartment use. 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 two accessory apartments (one is exempt) in the general neighborhood. Thus, the special exception, if granted, will not result in an excessive concentration of similar uses 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 with Technical Staff 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: Since the use will be indoors and residential and the existing exterior lighting is residential in character, the Hearing Examiner agrees with Technical Staff and finds that the proposed use will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site. Exhibit 13, p. 7.

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

Conclusion: Based on a combined reading of the reports by Technical Staff (Exhibit 13) and DHCA (Exhibit 17), there are two accessory apartments and two RLU's within the general neighborhood. The accessory apartment located on the west side of Harvard Street is identified as "Exempt 10/14/2003" and outside the staff-defined neighborhood of approximately 102 single-family dwellings. Because the proposed use is a residential use by definition, and permitted by special exception in the R-60 Zone, the proposed 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 the proposed special exception use at the subject site will be adequately served by existing public services and facilities. Exhibit 13, p. 8. The Hearing Examiner finds that the evidence of record 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 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, 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 Transportation Policy Area Review (TPAR). 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 (two total trips). Exhibit 13, Attachment 4. 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. Technical Staff found: “The Kensington/Wheaton Policy Area is deemed inadequate under the Transit Test, per the 2012-2016 Subdivision Staging Policy. However, because the Accessory Apartment generates three or fewer new peak-hour trips, it is not required to pay the transportation impact tax.” *Id.* Thus, TPAR 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: The Hearing Examiner concurs with Technical Staff's conclusion that the proposed use "will not have an adverse effect on vehicular and pedestrian access or pedestrian safety in the area." Exhibit 13, p. 4. Based on the evidence of record, especially the availability of adequate on-street parking and the limited number of additional trips generated by the special exception use, the Hearing Examiner 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 13), 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 split-level detached dwelling and therefore shares a wall in common with the main dwelling, 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.

- (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 1960. Exhibit 12. 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 entrance located on the east side of the dwelling. The entrance is distinct and separate from the main dwelling entrance and typical of a side-entry door into a single-family dwelling. Thus, the Hearing Examiner agrees with Technical Staff and finds 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: No external modifications or improvements are proposed.

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

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

- (9) *The accessory apartment must be subordinate to the main dwelling. The floor area of the accessory apartment is limited to a maximum of 1,200 square feet. 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: Based on the information Petitioner provided in his Statement in support of the Petition (Exhibit 3), Technical Staff reported that the accessory apartment is 750 square feet in size. The Housing Code Inspector measured the unit during the preliminary inspection on March 4, 2013, and determined that the

accessory apartment is actually 442.3 square feet in size, 302.79 square feet of which is habitable space. Exhibit 14. Thus, it is well below the 1,200 square foot maximum for an accessory apartment. According to the SDAT records (Exhibit 12) for the property, the enclosed floor area for the two-story split level dwelling is 1,882 square feet. The Hearing Examiner finds, as did Technical Staff, that the proposed 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 Petitioner 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 Petitioner's deed (Exhibit 20) and Deed of Trust (Exhibit 19) Petitioner purchased the property on April 12, 2011. The one-year rule has therefore been satisfied.

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

Conclusion: The Petitioner will receive compensation for the 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: The deed (Exhibit 20) and Deed of Trust (Exhibit 19) submitted into the record reflects that Petitioner is the sole owner 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 property is in the R-60 Zone which permits an accessory apartment as a special exception use. The subject lot is approximately 8,542 square feet in size and therefore satisfies the minimum lot size requirement. According to Technical Staff, the subject property conforms to all applicable development standards of the R-60 Zone. The following table (shown on the next page of this report) taken from the Technical Staff report summarizes and demonstrates compliance of this special exception request with the relevant development standards for the R-60 Zone. The Hearing Examiner modified the table to show the applicable zoning provision and the actual floor area for

the accessory apartment as determined by DHCA. Based on the evidence of record, the Hearing Examiner finds that the proposed special exception request conforms to all applicable development standards of the R-60 Zone.

Development Standards	Min/Max Required	Existing	Applicable Zoning Provision
Maximum Building Height	35 feet or 2.5 stories	25 feet or 2 stories	§59-C-1.327
Minimum Lot Area	6,000 sq. ft.	8,542 sq. ft.	§59-G-2.00(c)(1) §59-C-1.322(a)
Minimum Lot Width at Front Building Line	60 ft.	91 ft.	§59-C-1.322(b)
Minimum Lot Width at Street Line	25 ft.	91 ft.	§59-C-1.322(b)
Minimum Front Yard Setback	25 ft.	28 ft.	§59-C-1.323(a)
Minimum Side Yard Setback	8 ft. at one side, 25 ft. sum of both sides	35 ft. from right side, 62 ft. sum of both sides	§59-C-1.323(b)(1)
Minimum Rear Yard Setback	20 ft.	22 ft.	§59-C-1.323(b)(2)
Maximum Building coverage	35 percent	Approx. 22 percent	§59-C-1.328
Maximum Floor Area for Accessory Apartment	1,200 sq. ft.	442.3 sq. ft.	§ 59-G-2.00(a)(9)

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

**Conclusion:** Based on a combined reading of the reports by Technical Staff (Exhibit 13) and DHCA (Exhibit 17), there are two accessory apartments and two RLU's located in the general neighborhood. Exhibit 17. Because the proposed use is a residential use by definition, and permitted by special exception in the R-60 Zone, the Hearing Examiner concurs with Technical Staff and finds that the

addition of the proposed special exception to the neighborhood will not create an excessive concentration of similar uses in the neighborhood.

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

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

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

Conclusion: As discussed in Part II.B of this report, the driveway can accommodate at least two vehicles and there is ample unrestricted off-street parking on Elby Street. The Hearing Examiner concurs with Technical Staff and finds that there is adequate parking to accommodate the accessory apartment use and main dwelling and the parking requirements of Article 59-E are 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. D of this Report, the Housing Code Inspector's report (Exhibits 14) specifies certain conditions. Petitioner has agreed to meet all conditions and will comply with the directives of the Housing Code Inspector.

#### **V. RECOMMENDATION**

Based on the foregoing analysis, I recommend that the Petition of Edward A. Bubert, BOA No. S-2860, which seeks a special exception for an accessory apartment to be located at 4111 Elby Street, Silver Spring, Maryland, be **GRANTED**, with the following conditions:

1. Petitioner is bound by his testimony, representations and exhibits of record to the extent that such testimony and evidence are identified in this Report and Recommendation;
2. Petitioner must comply with the conditions set forth in the Memorandum of Robert Goff, Housing Code Inspector, Division of Housing and Code Enforcement dated March 4, 2013 (Exhibit 14), as follows:
  - a. Remove mail box at Accessory Apartment door.
  - b. Paint hallway ceiling.
  - c. The driveway will accommodate 3 cars parked end to end.
  - d. There is off-street parking (No Permit needed).
  - e. There is 302.79 square feet of habitable space. The total square feet of the accessory apartment is 442.3 square feet. 2 unrelated [persons] can live in the unit or a family of 2 can live in the unit.
3. Based on habitable space in the accessory apartment (302.79 square feet), no more than two unrelated persons or a family of two may reside in the accessory apartment;
4. Petitioner must comply with the determination of the Housing Code Inspector as to the limits on occupancy in the accessory apartment and must comply with any other directions of the Housing Code Inspector to ensure safe and code-compliant occupancy;
5. Petitioner must occupy one of the dwelling units on the lot on which the accessory apartment is located;
6. 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;
7. Petitioner must not receive compensation for the occupancy of more than one dwelling unit; and
8. Petitioner must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioner shall at all times ensure that the special exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: April 17, 2013

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Tammy J. CitaraManis".

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Tammy J. CitaraManis  
Hearing Examiner