

**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>ALLISON AND MICHAEL LEOTTA</b>	*	
Applicants	*	
Allison Leotta	*	
For the Petition	*	OZAH Case No. CU 16-05
*****		
Cesar Ivan Eloisa	*	
Department of Housing and	*	
Community Affairs	*	
*****		

Before: Martin L. Grossman, Hearing Examiner  
Director, Office of Zoning and Administrative Hearings

**HEARING EXAMINER’S REPORT AND DECISION**

**TABLE OF CONTENTS**

<b>I. STATEMENT OF THE CASE</b> .....	2
<b>II. FACTUAL BACKGROUND</b> .....	4
<b>A. The Subject Property</b> .....	4
<b>B. Surrounding Neighborhood</b> .....	7
<b>C. Proposed Use</b> .....	8
<b>D. Community Response</b> .....	11
<b>III. FINDINGS OF FACT AND CONCLUSIONS OF LAW</b> .....	11
<b>A. Application Requirements Regarding Ownership of the Subject Property</b> .....	12
<b>B. Use Standards for Accessory Apartments, in General (Section 59.3.3.3.A.)</b> .....	14
<b>C. Use Standards for Attached Accessory Apartments (Section 59.3.3.3.B)</b> .....	20
<b>IV. CONCLUSION AND DECISION</b> .....	22

## I. STATEMENT OF THE CASE

On October 23, 2015, the Applicants, Allison and Michael Leotta, filed an application seeking approval of a conditional use to allow an Attached Accessory Apartment in the basement of a one-family, detached home at 6043 Broad Street, Bethesda, Maryland. The subject property is identified as Lots 1-5, Block 15, Brookmont Subdivision, located in the R-60 Zone and bearing the Tax Account Number 07-00448310. The Applicants' ownership of the property is established by Maryland Real Property Records (Exhibit 15).

Ordinarily, an applicant can obtain a license to establish an accessory apartment within a dwelling by applying to the Department of Housing and Community Affairs (DHCA) for a license pursuant to Section 29-19 of the Montgomery County Code; however, approval of a conditional use is required, under Zoning Ordinance §59. 3.3.3A.2.b.i., for an attached accessory apartment when the site cannot meet the on-site parking requirements for a limited use found in Section 59.3.3.3A.2.a.iii.(b) of the Zoning Ordinance<sup>1</sup> and/or the requirement for a 300-foot separation from other accessory apartments in the R-60 Zone, as specified in Section 59.3.3.3.B.2.d.<sup>2</sup>

The Applicants filed a license application for a Class 3 Accessory Apartment with DHCA (Reference No. 86943), but it was rejected on July 2, 2015, because there is an accessory apartment in the abutting property and therefore the subject site does not meet the separation requirement cited above. Exhibit 1. The Department of Housing and Community Affairs (DHCA) therefore referred the Applicants to the Office of Zoning and Administrative Hearings

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<sup>1</sup> Zoning Ordinance §59.6.2.4.B. specifies that a detached single-family home must have two parking spaces, and an additional parking space is required for an accessory apartment, meaning that 3 on-site parking spaces are required in this case.

<sup>2</sup> All citations in this Decision are to the 2014 Zoning Ordinance for Montgomery County, adopted September 30, 2014 (Ordinance No. 17-52), as amended effective December 25, 2015, in ZTA 15-09 (Ordinance No. 18-08, adopted December 1, 2015).

(OZAH) to apply for a conditional use to deviate from the distance standards for an accessory apartment use, as provided in the Zoning Ordinance. Exhibit 2. In addition to the issue regarding the required separation from other accessory apartments, the subject site has only one on-site (*i.e.*, off-street) parking space, and therefore does not meet the minimum on-site parking requirements for an attached accessory apartment.

The Hearing Examiner is authorized to hear and decide this type of application pursuant to Section 59.7.3.1 of the Zoning Ordinance. The public hearing before the Hearing Examiner was scheduled for February 19, 2016, in a Notice of Hearing issued on October 28, 2015. Exhibit 19.

Staff of the Montgomery County Planning Department (Technical Staff or Staff) issued a report recommending approval of the application on February 11, 2016, subject to four conditions (Exhibit 25, p. 2):

1. The Applicant is bound by all submitted statements and materials of record.
2. The total number of occupants residing in the accessory apartment who are 18 years or older is limited to 2.
3. No other rental Residential uses are allowed to be located on the subject site.
4. The Applicant must remove the existing off-site fencing and cease continued maintenance of the off-site lawn areas to the northeast of the subject site.

No letters of support or opposition were received in this case.

The hearing went forward as scheduled on February 19, 2016, and Applicant Allison Leotta appeared *pro se*. She testified in support of the application and adopted the findings and conclusions in the Technical Staff report (Exhibit 25) as her own evidence of record. Tr. 5. She also agreed to comply with Staff's proposed conditions of approval, except proposed Condition 4, which will be discussed in Part III.A. of this Report and Decision. Tr. 5-8. Mrs. Leotta also submitted an executed Affidavit of Posting (Exhibit 27). Tr. 14. Cesar Ivan Eloisa, a Housing Code Inspector, testified on behalf of DHCA and submitted a report regarding his inspection of the property on February 18, 2016 (Exhibit 26). Tr. 19-21. There were no other witnesses. The

record was held open until February 29, 2016 to allow Applicants time to state their position in writing with regard to the fourth condition proposed by Technical Staff.

On February 22, 2016, the Hearing Examiner emailed the Applicants with a proposed alternative to Staff's fourth condition, which Applicants accepted on the same day. Exhibits 28(a) and (b).

Based on a thorough review of the entire record, and for the reasons stated herein, the Hearing Examiner finds sufficient evidence that there is adequate on-street parking available to grant Applicants' request to deviate from the minimum distance and on-site parking requirements for an attached accessory apartment pursuant to Section 59.3.3.3.A.2.c. Further, the Hearing Examiner finds the standards for a conditional use application for an attached accessory apartment have been satisfied. The Hearing Examiner therefore approves the conditional use application, subject to the conditions listed in Part IV, below.

## **II. FACTUAL BACKGROUND**

### **A. The Subject Property**

The subject site is located at 6043 Broad Street, in Bethesda, and is identified as Lots 1-5, Block 15, in the Brookmont Subdivision. It is well described in the Technical Staff report (Exhibit 25, pp. 2-3):

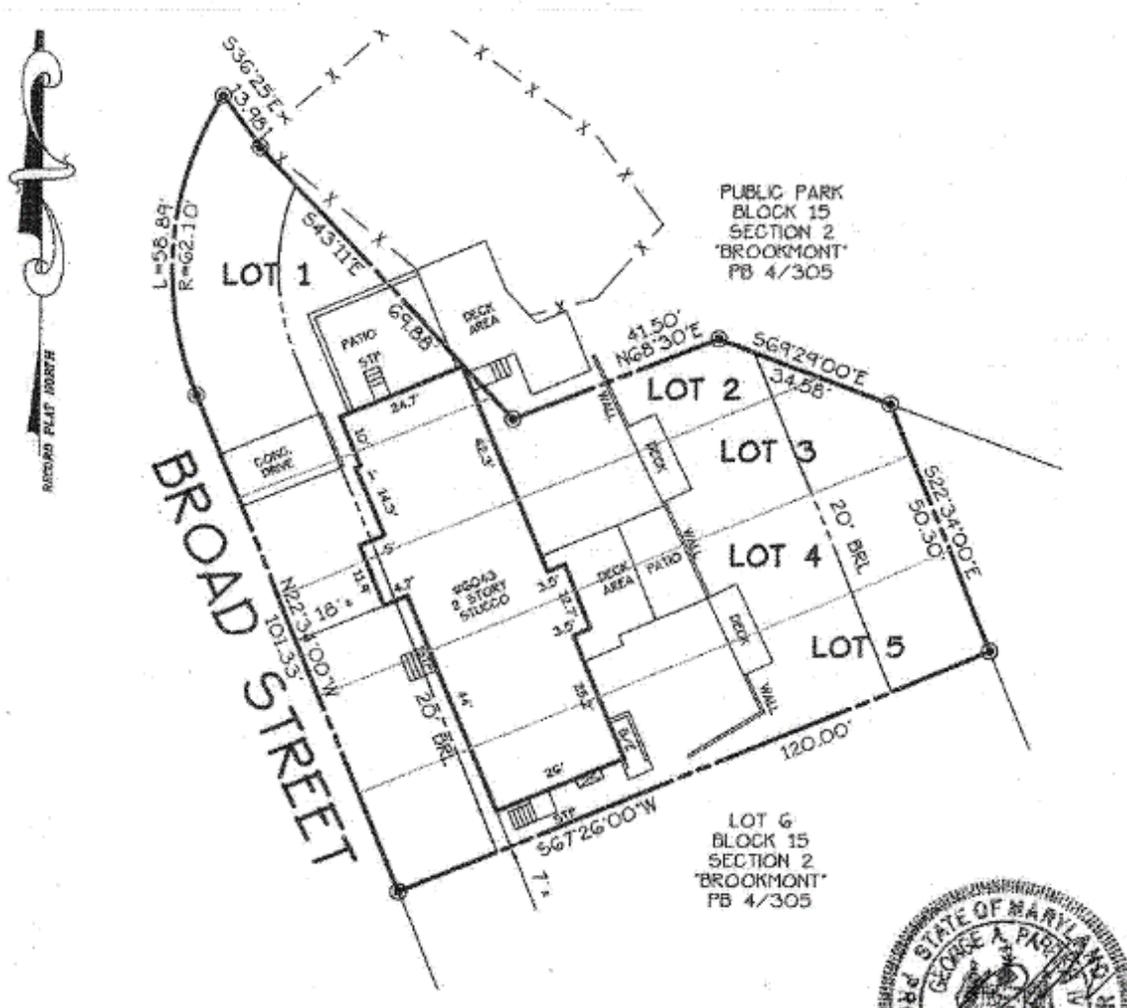
The subject property ("property" or "site") contains 10,936 square feet and is located at the southeast corner of the intersection of Broad and 61st Streets. The property is zoned R-60 with approximately 159 feet of frontage on Broad Street, in the Bethesda/Chevy Chase Master Plan area. The site is improved with a two-story detached house and one on-site parking space located in front of the house.

The dwelling unit was constructed in 1938. Information submitted by the Applicant states that existing one-family house has an enclosed area of 3,624 square feet. The proposed accessory apartment will comprise approximately 479 square feet in the basement. The exterior of the house is in good condition and the landscaping is well maintained. Unrestricted street parking is available in front of the property on Broad Street. . . .

Sliding doors at the rear of the house open onto a large raised deck. Stairs from this deck connect to a lower level patio. Another patio has been constructed in the northern side yard of the property. A gazebo and another deck have been constructed beyond the property and on property that appears to be owned by the United States Department of the Interior, National Park Service (NPS). . . .

According to the Applicant, the house was purchased in May 2015 and these structures were existing. The Applicant supplied a letter dated August 26, 2015, from NPS that acknowledged the encroachment onto federal land from these structures. According to the letter, however, NPS was unable to obtain deed information from their records which established accurate ownership of the federal land. Without this deed information, NPS decided not to pursue legal action against the Applicant for these land encroachments. A copy of the NPS letter is contained in Attachment B [to the Staff Report (Exhibit 25)].

A survey plat for the property is in the record as Exhibit 8, and is reproduced below:

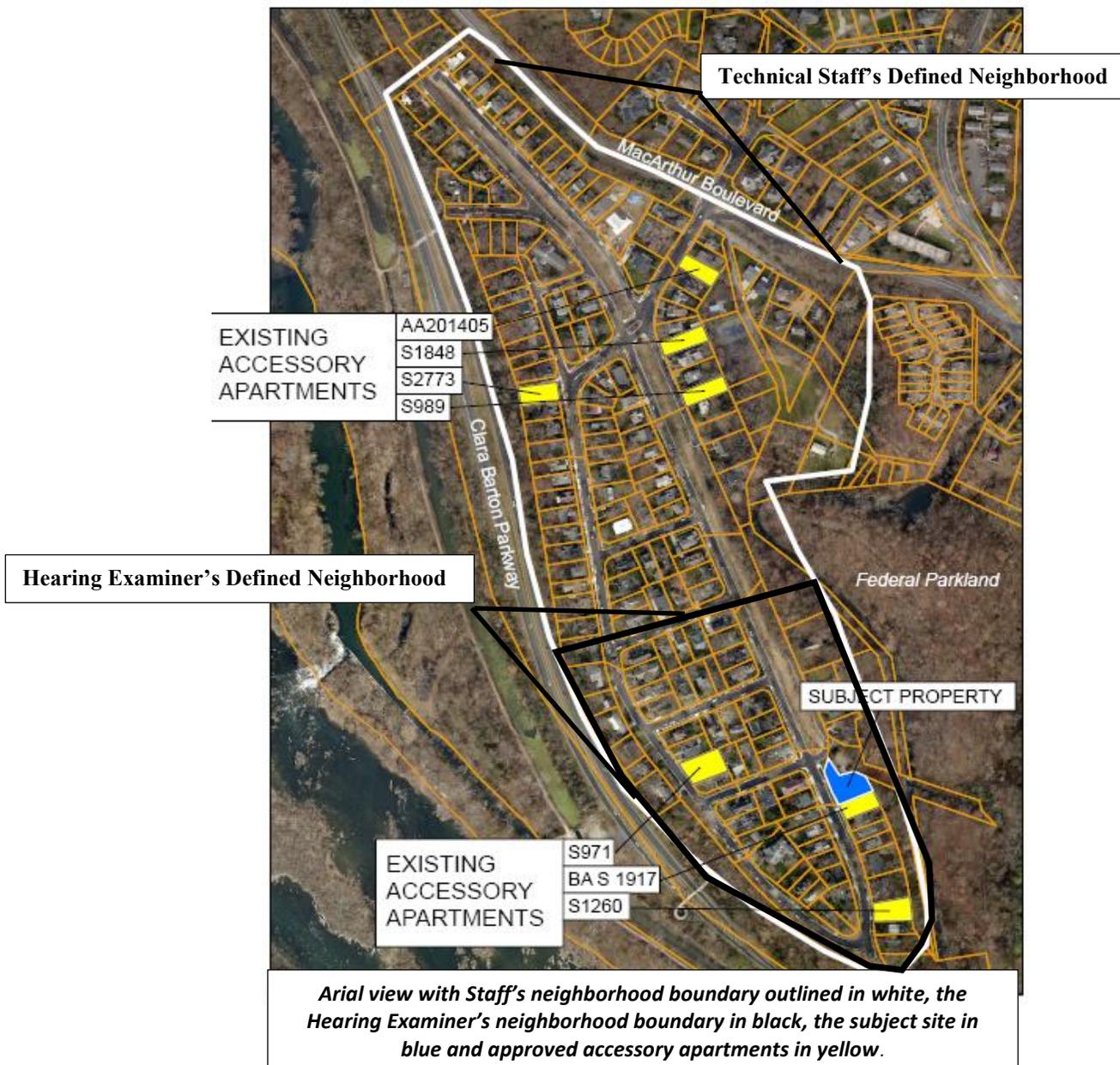


Staff also provided photographs of the home (Exhibit 25, pp. 3 and 5):



**B. Surrounding Neighborhood**

For the purpose of determining the compatibility of the proposed use, it is necessary to delineate and characterize the “surrounding neighborhood” (*i.e.*, the area that will be most directly impacted by the proposed use). Staff proposed defining the boundaries of the surrounding neighborhood as “generally bounded by MacArthur Boulevard to the north, federal parkland to the east and south and Clara Barton Parkway to the west.” Technical Staff’s defined neighborhood is shown below in an aerial photo from page 6 of the Staff Report (Exhibit 25):



The Hearing Examiner feels that Technical Staff has defined the neighborhood a bit too broadly because the area likely to be most impacted by a single attached accessory apartment with one additional car probably extends only for a block or two, at most, as shown in a black outline he has superimposed over the aerial photo, above, from the Staff report. He reaches this conclusion because the proposed use will have no visual impacts; will create only one new trip during the peak hours (Exhibit 25, p. 8); and will have virtually no impact on parking availability outside its immediate area. Exhibit 25, p. 13 and Tr. 15, 17-18, 21. Thus, the Hearing Examiner's defined neighborhood for this use extends north only to 63<sup>rd</sup> Street, a distance of about 700 feet from the subject site, but otherwise follows the contours of Staff's definition to the south of 63<sup>rd</sup> Street.

The neighborhood, as redefined, consists of one-family dwelling units zoned R-60. The following approved accessory apartments are located in the redefined neighborhood, according to Staff (Exhibit 25, p. 6):

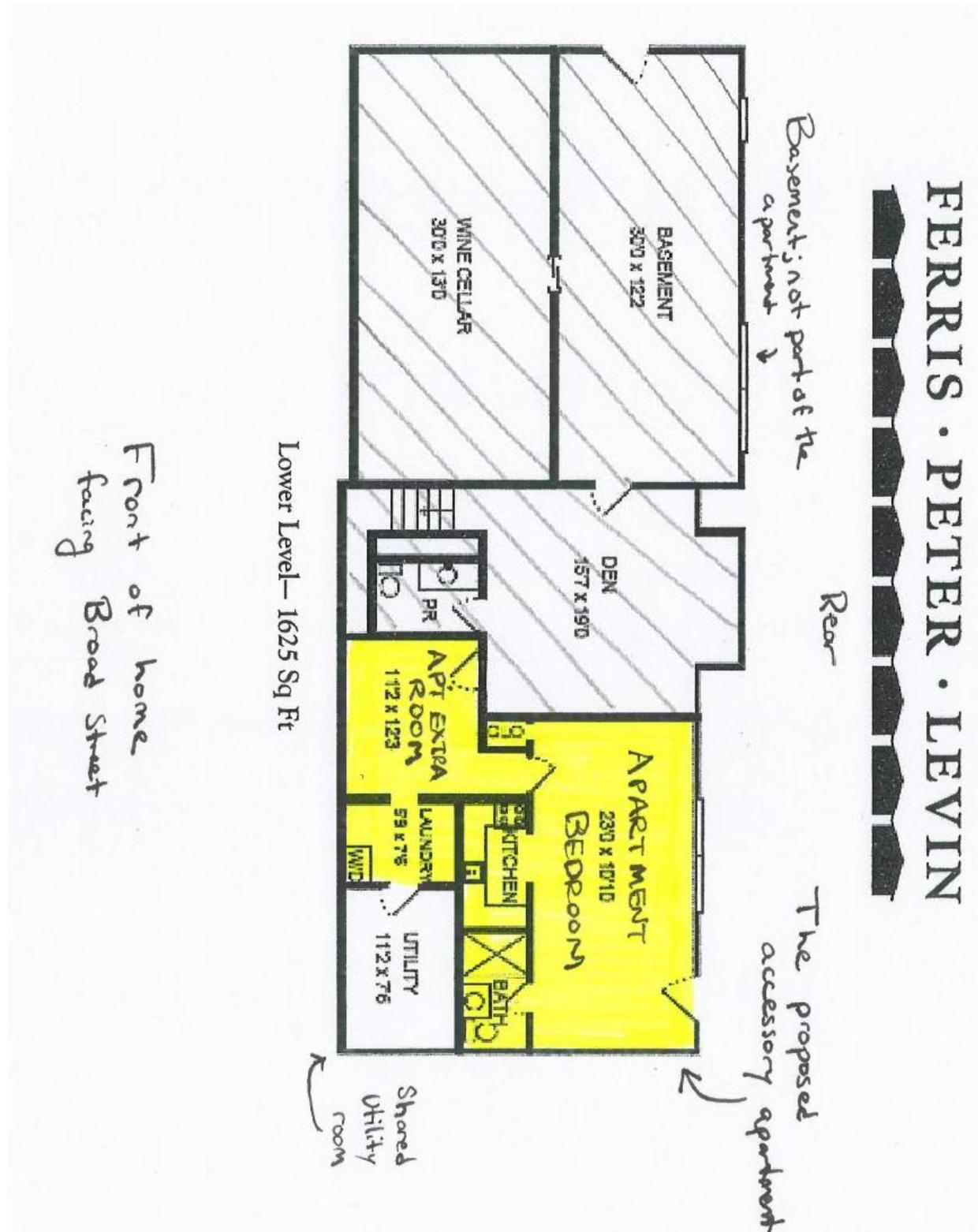
- S-1260 located at 6021 Broad Street approved 3/18/86;
- S-971 located at 6105 Ridge Road approved 11/24/86; and
- BAS 1917 located at 6037 Board Street approved 2/3/92.

As observed by Technical Staff, one accessory apartment (BAS 1917) abuts the subject property along the southern property line and is thus within 300-foot minimum distance requirement set forth in the Zoning Ordinance. Whether one considers Staff's larger defined neighborhood or the Hearing Examiner's smaller defined neighborhood, the proposed use would be compatible with surrounding uses.

### **C. Proposed Use**

The Applicants seek a conditional use for an attached accessory apartment in the basement of their existing, single-family detached home. Exhibit 5. The gross floor area of the proposed

apartment would be 479 square feet, as described by the Applicants (Exhibit 5, p. 2). The floor plan for the proposed apartment is shown below in an exhibit provided by the Applicants, which also shows other parts of the basement (Exhibit 10):



Technical Staff describes access to the proposed unit, its lighting and its appearance

(Exhibit 25, p. 7):

A walkway leads from the front of the house to the proposed accessory apartment at the rear of the house. Adequate lighting, residential in character, is located next to the accessory apartment entrance. The entrance appears as a typical basement entrance, and does not detract from the appearance of the existing house. The Applicant does not propose any exterior modifications to the house.

The entrance to the apartment is depicted below (Exhibit 25, p. 7):



Parking on Applicants' street, Broad Street, is not restricted, and Housing Code Inspector Eloisa reports that "Street Parking directly in front of the home is adequate for 3-4 vehicles." Exhibit 26, p. 1. As stated by Technical Staff (Exhibit 25, p. 8),

The subject property is located on the east side of Broad Street, a one-way, northbound, secondary residential public roadway within a 50-foot wide right-of-way. Broad Street is improved to a width of approximately 26 feet along the site's frontage to accommodate two lanes of on-street parking and one lane of northbound travel. There are continuous sidewalks within the site's vicinity.

An evaluation regarding the availability of parking will be made in Part III.B. of this Report and Decision.

Housing Code Inspector Eloisa's report regarding his inspection of the property (Exhibit 26) also contained the following conditions:

- The sleeping area must be located in the habitable room (noted as apartment bedroom in the floor plan submitted by the applicants) with the accessory apartment entrance door.
- The smaller room next to the utility room (noted as apartment extra room in the floor plan) cannot be used for sleeping purposes due to lack of proper egress.
- Install a properly functioning smoke alarm in the habitable room.

The Applicants indicated their agreement to these conditions at the hearing (Tr. 20-21), and they will be included in the conditions in Part IV of this Report and Decision.

#### **D. Community Response**

There has been no community response to this application, either for or against.

### **III. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

A conditional use is a zoning device that authorizes certain uses provided that pre-set legislative standards are met. The legislative standards for accessory apartments were modified by amendments to the 2014 Zoning Ordinance, adopted on December 1, 2015 in ZTA 15-09 (Ordinance No. 18-08) and effective December 21, 2015. The major change was to specify that the general findings required for other kinds of conditional uses, as set forth in Section 59.7.3.1.E. "are not applicable to this type of conditional use." Section 59.3.3.3.A.2.c. This change eliminated not only general assessments of compatibility and impacts on the neighborhood, but also any evaluation of master plan conformance and compliance with requirements of zone and development standards. However, the limited use standards of Section

3.3.3.A.2.a and Section 3.3.3.A.2.c continue to apply to all accessory apartment conditional use applications, and the limited use standards of Section 3.3.3.B.2 apply as well to the Attached Accessory Apartment applications. These provisions specify minimum requirements for accessory apartments and allow the Hearing Examiner to evaluate the impact of the proposed use on the availability of parking in the neighborhood.

The December 21, 2015 amendments to the Zoning Ordinance did not change the Conditional Use application requirement regarding ownership of the subject property, specified in Section 59.7.3.1.B.1. The application of that section to this case is discussed in Part III. A., below:

**A. Application Requirements Regarding Ownership of the Subject Property**

The application requirements for all conditional uses are set forth in Section 59.7.3.1.B. of the Zoning Ordinance. Usually, the application requirements are not an issue by the time a case gets to the stage of an OZAH hearing and decision; however, this case has an unusual wrinkle regarding ownership of the subject site. The Zoning Ordinance addresses ownership requirements in Section 59.7.3.1.B.1.:

*1. Ownership:*

*a. An applicant must own the subject property or be authorized by the owner to file the application.*

*b. If any land or right-of-way is owned or controlled by the State, County, or any other entity or agency, written authorization from that entity or agency must be submitted with the application*

It is undisputed that the Applicants own the subject site consisting of Lots 1-5, in Block 15 of the Brookmont Subdivision (Exhibit 15). The wrinkle is that some of the structures used by the Applicants (a fence, deck and gazebo, according to Technical Staff (Exhibit 25, pp. 2-3) extend onto land possibly owned by the National Park Service (NPS). Apparently this situation existed at the time the Applicants acquired the subject site in May of 2015 (Tr. 6-11), as

recounted in a January 5, 2009 letter from Montgomery Planning Department to the National Park Service with regard to structures built by a previous owner (Exhibit 25, Attachment B, p. 2).

When Technical Staff asked the Applicants about this situation (Exhibits 23 and 24), they replied with a copy of a letter sent to them on August 26, 2015 by the National Park Service, indicating that NPS was unable to locate a federal deed to the parcel and therefore would not pursue any legal action with regard to it. Exhibit 25, Attachment B. Based on this letter, Technical Staff completed its review of the application and recommended approval; however, Staff proposed a condition relating to the land possibly belonging to the NPS:

4. The Applicant must remove the existing off-site fencing and cease continued maintenance of the off-site lawn areas to the northeast of the subject site.

At the hearing, Applicant Allison Leotta objected to this proposed condition on grounds that the alleged NPS land was unrelated to the accessory apartment conditional use at issue. Tr. 5-8. The Hearing Examiner concludes that Applicants have a fair point. Given the fact that the proposed conditional use will be indoors and not utilizing the land in question, there appears to be no reason to impose the condition recommended by Technical Staff (*i.e.*, a condition which would have required immediate removal of a fence and cessation of maintenance on the allegedly federal land). With the December 21, 2015 amendments to the Zoning Ordinance, the Hearing Examiner no longer has a mandate to evaluate compliance with the zone's setbacks, and the federal government has clearly indicated that it will not object to the use of its land adjacent to this site. Given these circumstances, there appears to be no clear statutory authority for the County to impose a condition, in a case involving an application for a conditional use, requiring the immediate removal of structures and cessation of activities on adjacent federal land.

On the other hand, given the vagaries of the NPS letter (*i.e.*, not renouncing ownership of the area in question, but just saying it did not intend to pursue a legal remedy), the Hearing

Examiner sent the Applicants a post-hearing email proposing a modified condition (Exhibit 28(a)):

4. If lawfully requested by the National Park Service (NPS), the Applicants must remove the existing fencing on property purportedly owned by NPS and cease maintenance of the lawn areas to the northeast of the subject site purportedly owned by NPS.

The Applicants immediately accepted this proposed condition (Exhibit 28(b)). This modified condition will be imposed in Part IV of this Report and Decision. Its language will simultaneously recognize that the NPS issue exists, yet not require any action by the Applicant unless the NPS “lawfully” asserts its rights. The “lawfully” modifier allows the Applicants to legally contest the issue with NPS should they choose to do so. It will place the burden on the NPS to pursue the matter before requiring the Applicants to remove any structures under this conditional use, but it will leave the legal questions open should NPS pursue them.

**B. Use Standards for Accessory Apartments, in General (Section 59.3.3.3.A.)**

The specific use standards for approval of an Attached Accessory Apartment are set out in Sections 59.3.3.3.A. & B. of the Zoning Ordinance. In general, accessory apartments are permitted as limited uses, requiring only a license from DHCA. Zoning Ordinance, §59.3.1.6. However, property owners must obtain a conditional use approval for an accessory apartment if they do not have the amount of off-street parking required for the limited use or if there is another accessory apartment in the R-60 Zone within 300 feet of the dwelling in which the accessory apartment is to be located. Zoning Ordinance, §59.3.3.2.A.2.b.

In this case, there is another accessory apartment within 300 feet and there is inadequate on-site parking to meet the Zoning Ordinance standards for an accessory apartment, so a conditional use is needed to determine that adequate on-street parking is available to make up for the inadequate on-site parking and the proximity of another accessory apartment.

Conditional use applications for Attached Accessory Apartments must meet all standards specific to Attached Accessory Apartments and all the standards required for a limited use accessory apartment (except for the required number of on-site parking spaces and the required separation from other accessory apartments). In addition, the Applicants must demonstrate that on-street parking is sufficient to serve the use, and that the use “does not result in an excessive concentration of similar uses, including other conditional uses, in the general neighborhood of the proposed use.” *Id.*, §59.3.3.3.A.2.c. Standards pertinent to this approval, and the Hearing Examiner’s finding for each standard, are set forth below.

***Section 59.3.3.3.A. – Accessory Apartments, In General***

***1. Defined, In General***

*Accessory Apartment means a second dwelling unit that is subordinate to the principal dwelling. An Accessory Apartment includes an Attached Accessory Apartment and a Detached Accessory Apartment.*

***2. Use Standards for all Accessory Apartments***

***a. Where an Accessory Apartment is allowed as a limited use, it must satisfy the following standards:***

- i. Only one Accessory Apartment is permitted for each lot.*
- ii. The Accessory Apartment was approved as a conditional use before May 20, 2013 and satisfies the conditions of the conditional use approval; or*
- iii. The Accessory Apartment is licensed by the Department of Housing and Community Affairs under Chapter 29 (Section 29-19); and*

Conclusion: The Applicants are requesting approval for only one accessory apartment on the subject site. Based on a Referral Notice from DHCA (Exhibits 1 and 2), the Applicants filed an application for an attached accessory apartment conditional use, seeking approval to deviate from requirements for on-site parking and distance from other accessory apartments. Following approval of the conditional use, the Applicants must obtain any license for an accessory apartment required by DHCA.

*(a) The apartment has the same street address as the principal dwelling;*

Conclusion: The accessory apartment will be located in the basement and have the same address as the principal dwelling (6043 Broad Street, in Bethesda).

*(b) One on-site parking space is provided in addition to any required on-site parking space for the principal dwelling; however, if a new driveway must be constructed for the Accessory Apartment, then 2 on-site parking spaces must be provided;*

Conclusion: As mentioned above, one reason for this application is the fact that there is on-site parking for only one vehicle, and the Zoning Ordinance requires parking for two vehicles for the residential use (Section 59.6. 2.4.B.), plus one for the accessory apartment (Section 59.3.3.3.A.2.a.iii.(b)). Section 59-3.3.3.A.2.b. permits the grant of a conditional use to deviate from the on-site parking space requirements if the conditions specified in Section 59-3.3.3.A.2.c. are met. The adequacy of available parking will be discussed in connection with that section.

*(c) The maximum gross floor area for an Accessory Apartment, including any floor area used for an Accessory Apartment in a cellar, must be less than 50% of the total floor area in the principal dwelling, including any floor area used for an Accessory Apartment in the cellar of the principal dwelling, or 1,200 square feet, whichever is less;*

Conclusion: The proposed accessory apartment is sized at 479 square feet (Exhibit 5), which is clearly less than the statutory maximum of 1,200 square feet. The SDAT tax records (Exhibit 15) list the “above grade enclosed area” as 3,624 square feet, and the accessory apartment size is therefore also less than 50% of the total floor area in the principal dwelling.

*(d) The maximum floor area used for an Accessory Apartment in a proposed addition to the principal dwelling must not be more than 800 square feet if the proposed addition increases the footprint of the principal dwelling; and*

Conclusion: Not applicable. No addition is proposed in this case.

- (e) The maximum number of occupants is limited by Chapter 26 (Section 26-5); however, the total number of occupants residing in the Accessory Apartment who are 18 years or older is limited to 2.*

Conclusion: Conditions listed in Part IV of this Report and Decision specify that total number of occupants residing in the accessory apartment who are 18 years or older is limited to 2, and that the Applicants must comply with the determination of the Housing Code Inspector as to limits on occupancy in the accessory apartment.

- iv. An Accessory Apartment must not be located on a lot where any other allowed rental Residential use exists; however, an Accessory Apartment may be located on a lot in an Agricultural or Rural Residential zone that includes a Farm Tenant Dwelling or a Guest House.*

Conclusion: Staff advises there are currently no other rental residential uses on the property, and a prohibition against other rental residential uses is included in Part IV of this Report and Decision as a condition of approval. Exhibit 25, p. 10. Therefore, the Hearing Examiner finds that the use as proposed and conditioned will have no other rental uses permitted on the property.

- v. In the Agricultural and Rural Residential zones, an Accessory Apartment is excluded from any density calculations. If the property associated with an Accessory Apartment is subsequently subdivided, the Accessory Apartment is included in the density calculations.*

Conclusion: The property is located in the R-60 (Residential Detached) Zone. Therefore, this standard is not applicable to this application.

- vi. Screening under Division 6.5 is not required.*

Conclusion: This section exempts accessory apartments from the Division 6.5 screening requirements for conditional uses.

- vii. In the AR zone, this use may be prohibited under Section 3.1.5, Transferable Development Rights.*

Conclusion: Not applicable. The property is located in the R-60 (Residential Detached) Zone.

***b. An Accessory Apartment conditional use application may be filed with the Hearing Examiner to deviate from the following limited use standards;***

*i. The number of on-site parking spaces; or*

Conclusion: Since the property does not meet the minimum on-site parking requirements for a Class III Accessory Apartment license, the Applicants filed this conditional use application seeking approval to deviate from the on-site parking requirements.

*ii. The minimum distance from any other Attached or Detached Accessory Apartment*

Conclusion: As stated by Technical Staff (Exhibit 25, p. 11), “An accessory apartment is located at 6037 Broad Street which abuts the subject property to the south. Therefore, this Application was submitted to deviate from this distance requirement.” Staff also provided an aerial photo depicting the radius of the required 300-foot distance (Exhibit 25, p. 12):



- c. Where an Accessory Apartment conditional use application is filed under Section 3.3.3.A.2.b, the Hearing Examiner may approve a conditional use for the Accessory Apartment under Section 7.3.1, except that the findings under Section 7.3.1 E are not applicable to this type of conditional use. The limited use standards of Section 3.3.3.A.2.a and Section 3.3.3.A.2.c apply to all accessory apartment conditional use applications. In addition, the limited use standards of Section 3.3.3.B.2 apply to the Attached Accessory Apartment applications and the limited use standards of Section 3.3.C.2 apply to the Detached Accessory Apartment applications.*
- i. Fewer off-street spaces are allowed if there is adequate on-street parking. On-street parking is inadequate if:*
- (a) the available on-street parking for residents within 300 feet of the proposed Accessory Apartment would not permit a resident to park on-street near his or her residence on a regular basis; and*
  - (b) the proposed Accessory Apartment is likely to reduce the available on-street parking within 300 feet of the proposed Accessory Apartment.*

Conclusion: There is adequate on-street parking available, as established both by Technical Staff and by DHCA Code Inspector, Cesar Ivan Eloisa, at the hearing, and there is no indication that residents living within 300 feet of the proposed accessory apartment would be unable to park near their residence on a regular basis because of the accessory apartment. Parking on Applicants' street, Broad Street, is not restricted, and Housing Code Inspector Eloisa reports that "Street Parking directly in front of the home is adequate for 3-4 vehicles." Exhibit 26, p. 1. Applicant Allison Leotta testified that parking was not a problem in the area (Tr. 15, 17-18), a conclusion which is supported both by Mr. Eloisa's testimony (Tr. 21) and by Technical Staff's findings (Exhibit 25, p. 13).

Street parking is adequate. The existing one-family house has approximately 159 feet of frontage on Broad Street. Other residential uses along this roadway have street frontages that vary from 42 feet to 147 feet. However, the majority of these uses have both driveways and garages which further decrease the demand for on-street parking. Taking into account the existing on-site driveway of approximately 12 feet in width and the Ride-On bus stop, in front of the property, approximately 40 feet in width, four averaged sizes cars could be parked directly in front of the

property. Thus, parking directly in front of the property is sufficient to ensure that this accessory apartment will not prevent a resident within 300 feet of the subject property from parking on-street near their residence on a regular basis.

*ii. When considered in combination with other existing or approved Accessory Apartments, the deviation in distance separation does not result in an excessive concentration of similar uses, including other conditional uses, in the general neighborhood of the proposed use.*

Conclusion: Technical Staff reports (Exhibit 25, p. 13):

. . . [O]nly one of the approved conditional uses [in the defined neighborhood] is located within the 300-foot minimum distance requirement. The neighborhood is overwhelmingly residential in character . . . Accessory apartments are deemed a compatible accessory use to a primary residential use. While maintaining the residential character of a neighborhood accessory apartments are also viewed as a way to promote additional affordable housing choices in the county. Thus, approval of the requested conditional use will not create an excessive concentration of similar uses in the general neighborhood as the appearance of the existing one-family residence will remain unchanged and retain its residential appearance with nearby residential uses.

The Hearing Examiner agrees with Technical Staff's observation. There is nothing about the proposed use that will change the single-family residential character of the neighborhood, and the Hearing Examiner finds that the addition of the proposed use will not result in an excessive concentration of similar uses, including other conditional uses, in the general neighborhood.

### **C. Use Standards for Attached Accessory Apartments (Section 59.3.3.3.B)**

#### ***Section 59.3.3.3.B. – Attached Accessory Apartment***

##### ***1. Defined***

*Attached Accessory Apartment means a second dwelling unit that is part of a detached house building type and includes facilities for cooking, eating, sanitation, and sleeping. An Attached Accessory Apartment is subordinate to the principal dwelling.*

##### ***2. Use Standards***

*Where an Attached Accessory Apartment is allowed as a limited use, it must*

*satisfy the use standards for all Accessory Apartments under Section 3.3.3.A.2 and the following standards:*

- a. A separate entrance is located:***
- i. On the side or rear of the dwelling;*
  - ii. At the front of the principal dwelling, if the entrance existed before May 20, 2013; or*
  - iii. At the front of the principal dwelling, if it is a single entrance door for the use of the principal dwelling and the Attached Accessory Apartment.*

Conclusion: A separate entrance to the accessory apartment is located on the rear of the existing dwelling (Exhibit 25, p. 14). The Hearing Examiner finds that this standard has therefore been met.

- b. The detached house 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 the application for a license or a conditional use.***

Conclusion: According to the property tax records, the detached dwelling was built in 1938. Exhibit 15. Therefore, the Hearing Examiner finds that the dwelling in which the accessory apartment will be located is more than 5 years old and concludes this standard has been met.

- c. In the RE-2C, RE-1, and R-200 zones the Attached Accessory Apartment is located at least 500 feet from any other Attached or Detached Accessory Apartment, measured in a line from side lot line to side lot line along the same block face.***

Conclusion: The property is located in the R-60 (Residential Detached) Zone. Therefore, this standard is not applicable to this case.

- d. In the RNC, R-90, and R-60 zones the Attached Accessory Apartment is located at least 300 feet from any other Attached or Detached Accessory Apartment, measured in a line from side lot line to side lot line along the same block face.***

Conclusion: This section is applicable because the subject property is in the R-60 Zone. As discussed above, there is one other accessory apartment located within 300 feet; however the

proposed use meets the requirements of Section 59.3.3.3.A.2.c. for granting the conditional use in spite of the proximity of another accessory apartment.

In sum, the application satisfies all of the applicable use standards in Code §59.3.3.3.A. and B.

#### **IV. CONCLUSION AND DECISION**

Weighing all the testimony and evidence of record under the “preponderance of the evidence” standard specified in Zoning Ordinance §59.7.1.1, the Hearing Examiner concludes that the conditional use proposed in this application, subject to the conditions set forth below, would satisfy all of the requirements for the use.

Based on the foregoing findings and conclusions and a thorough review of the entire record, the application of Allison and Michael Leotta (CU 16-05), for a conditional use under Section 59.3.3.3.A. and B. of the Zoning Ordinance, to operate an Attached Accessory Apartment at 6043 Broad Street, Bethesda, Maryland, is hereby **GRANTED**, subject to the following conditions:

1. The Applicants shall be bound by all of their testimony and exhibits of record;
2. The total number of occupants residing in the accessory apartment who are 18 years or older is limited to 2;
3. No other rental residential uses are allowed to be located on the subject site;
4. If lawfully requested by the National Park Service (NPS), the Applicants must remove the existing fencing on property purportedly owned by NPS and cease maintenance of the lawn areas to the northeast of the subject site purportedly owned by NPS;
5. The sleeping area for the accessory apartment must be located in the habitable room with the accessory apartment entrance door, noted as the apartment bedroom in the floor plan (Exhibit 10) submitted by the Applicants;
6. The smaller room next to the utility room (noted as apartment extra room in the floor plan) cannot be used for sleeping purposes due to lack of proper egress;

7. The Applicants must install a properly functioning smoke alarm in the habitable room;
8. The Applicants must comply with any directions of the Housing Code Inspector to ensure safe and code-compliant occupancy; and
9. The Applicants 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 conditional use premises and operate the conditional use as granted herein. The Applicants shall at all times ensure that the conditional 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.

Issued this 3<sup>rd</sup> day of March, 2016.



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Martin L. Grossman  
Hearing Examiner

#### NOTICE OF RIGHT TO REQUEST ORAL ARGUMENT

Any party of record or aggrieved party may file a written request to present oral argument before the Board of Appeals, in writing, within 10 days after the Office of Zoning and Administrative Hearings issues the Hearing Examiner's report and decision. Any party of record or aggrieved party may, no later than 5 days after a request for oral argument is filed, file a written opposition or request to participate in oral argument.

Contact information for the Board of Appeals is listed below, and additional procedures are specified in Zoning Ordinance §59.7.3.1.F.1.c.

Montgomery County Board of Appeals  
100 Maryland Avenue, Room 217  
Rockville, MD 20850  
(240) 777-6600

#### COPIES TO:

Allison and Michael Leotta, Applicants  
Barbara Jay, Executive Director  
Montgomery County Board of Appeals  
Kathleen A. Reilly, Planning Department