

I. STATEMENT OF THE CASE

On November 3, 2015, the Applicant, Yaineababa Masresha, 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 14010 Parkland Drive. Rockville, Maryland. Zoned R-90 (Residential-Detached), the subject property is identified as Lot 6, Block 45, of the Wheaton Woods Subdivision.

On October 2, 2015, DHCA informed the Applicant that she did not qualify for a license because there is no on-site parking on the property (the property has no driveway.) Exhibit 1. DHCA referred the Applicant to the Office of Zoning and Administrative Hearings (OZAH) to apply for a conditional use to permit a deviation from this requirement. Exhibit 2.

A. Agency Recommendations

The Applicant filed her conditional use application on November 3, 2015, and OZAH issued a notice for a public hearing to be held on February 29, 2016. Exhibit 20. Planning Staff submitted its report recommending approval of the application on February 5, 2016, subject to two conditions (Exhibit 22, p. 1):

1. The total number of residents 18 years or older in the accessory apartment is limited to 2.
2. No other rental Residential uses are allowed to be located on the subject site.

Mr. Cesar Ivan Eloisa, Housing Code Inspector III, submitted his inspection report on February 29, 2016, advising that the proposed apartment did not meet several Housing Code requirements (Exhibit 23):¹

1. The property does not meet the on-site parking requirement.

¹ Montgomery County's Housing Code is set forth in Chapter 26 of the *Montgomery County Code*. The owner of a dwelling unit may not rent the unit until it complies with the Housing Code requirements. *Montgomery County Code*, §26-3(a). Before issuing a license for an accessory apartment, DHCA must inspect the property and complete a report listing any repairs or improvements needed to comply with the Housing Code. *Id.*, §29-19(b)(2)(B) and (C).

2. Proposed apartment area does not have proper egress (emergency escape and rescue opening).
3. Proposed apartment is in combustion air area (air for dilution and ventilation of mechanical equipment). The basement area where the apartment is located does not qualify as habitable space.
4. Walkway steps to the apartment entrance are not safe. Steps need to be secured and handrails are required in the steps at the front of the house and at the stairs leading to the rear entrance door.
5. Applicant must obtain and provide copies of approved DPS and WSSC building, electrical and plumbing permits for the basement unit construction.
6. Artificial light source is required outside the dwelling unit walkway.

B. Hearing and Post-Hearing Actions

The hearing went forward as scheduled on February 29, 2016, and the Applicant appeared *pro se*. Ms. Masresha adopted the findings and recommendations contained in the Staff report as her own testimony. T. 5. She testified that on-street parking is available to serve the use without the need for a parking permit. Parking spaces in front of her house are regularly available because “99 percent” of the homes in the neighborhood have garages. Usually, there are two parking spaces available on the street in front of her house. T. 6.

Mr. Eloisa explained why the property did not comply with the Housing Code. The bedroom must have a 5.7 net clear opening for emergency egress. T. 7. The existing windows are very small and high and do not meet the requirements for egress. The only door to the outside is in a foyer, which is not habitable space. If Ms. Masresha removed the walls creating the foyer, she would still need egress from the bedroom. T. 12-14. He testified that she cannot move the sleeping area to the area with the entrance door because the housing code prohibits an entrance to the rest of the house through a bedroom. T. 15.

The second major issue is that the furnace is a combustion air furnace, Mr. Eloisa testified. The furnace and water heater are located in a closet in the center of the apartment. Both are fueled by gas and borrow air for ventilation in that area. Because of this, it is not considered habitable

space under the Housing Code. Mr. Eloisa testified that there was no way to rearrange the area to separate the bedroom from the utility room because it is in the middle of the apartment and has openings on all sides. Ms. Masresha could, however, resolve the issue by either switching the furnace and water heater to electric appliances or by installing a high-efficiency gas heater that does not run on combustion air. The high-efficiency appliances have two pipes, one an intake pipe and one outtake pipe, which feed to the outside. T. 24.

Mr. Eloisa also testified that there was some work done in the apartment area at some point in 2009 or 2010 without permits. He estimated the time-frame from labels on the wood in an area surrounding the sump pump. T. 20-22. Mr. Eloisa testified that the Applicant would have to apply to the Department of Permitting Services (DPS) for permits to cover the work done. T. 25. Ms. Kinna explained that inspectors would have to inspect the work done to ensure it complied with the County's building code. T. 29.

There were no other witnesses and the hearing adjourned. Given the issues raised by DHCA, the Hearing Examiner left the record open until March 29, 2016, to permit the Applicant time to decide whether she wished to proceed with the application. T. 31-32.

On March 9, 2016, the Applicant informed the Hearing Examiner that she wished to proceed with the application. Exhibit 37. She agreed to install (1) an egress window meeting code requirements, (2) a high-efficiency gas furnace and hot water heater at the same location shown on the floor plan, (3) a walking path to the apartment entrance from the steps to the main house, and (4) an artificial light source above the door to the entrance. *Id.* Mr. Eloisa confirmed that these improvements would meet the requirements of the housing code. Exhibits 39(a) and (b). He advised that (Exhibit 39(a));

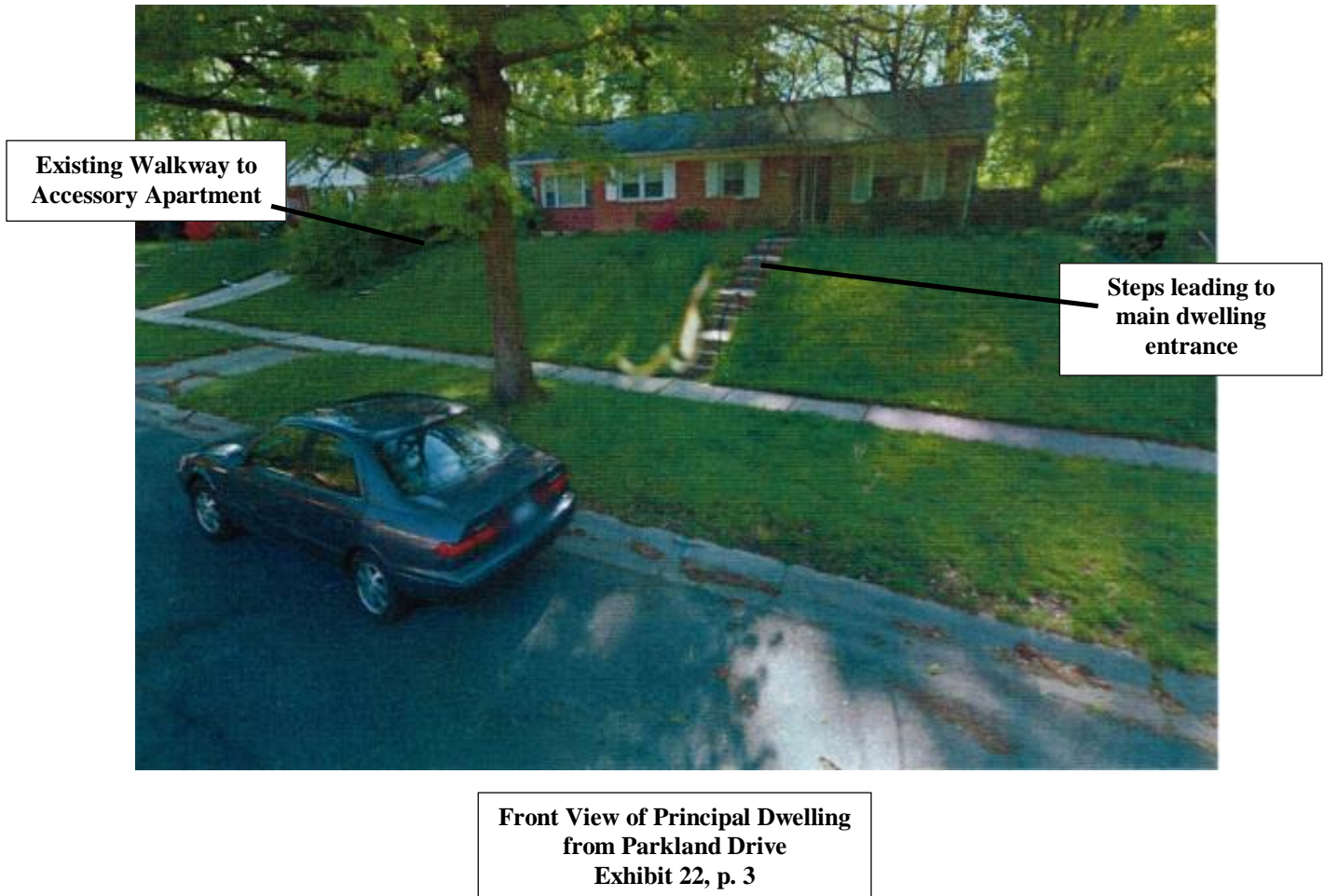
Once a permit [for the work proposed] has been obtained, the DPS inspector can look at the walls built in the last few years to determine if they are acceptable or

single-family detached house constructed in 1961. The principal dwelling consists of 1,480 square feet with a 1,118-square foot basement. The property has 77 feet of frontage on Parkland Drive. The property does not have a driveway and therefore, has no on-site parking. Exhibit 22, p. 2. An aerial view of the property depicting existing conditions, as well as a view of the property's frontage on Parkland Drive are shown below and on the following page (Exhibit 22, p. 3):



B. The Proposed Use

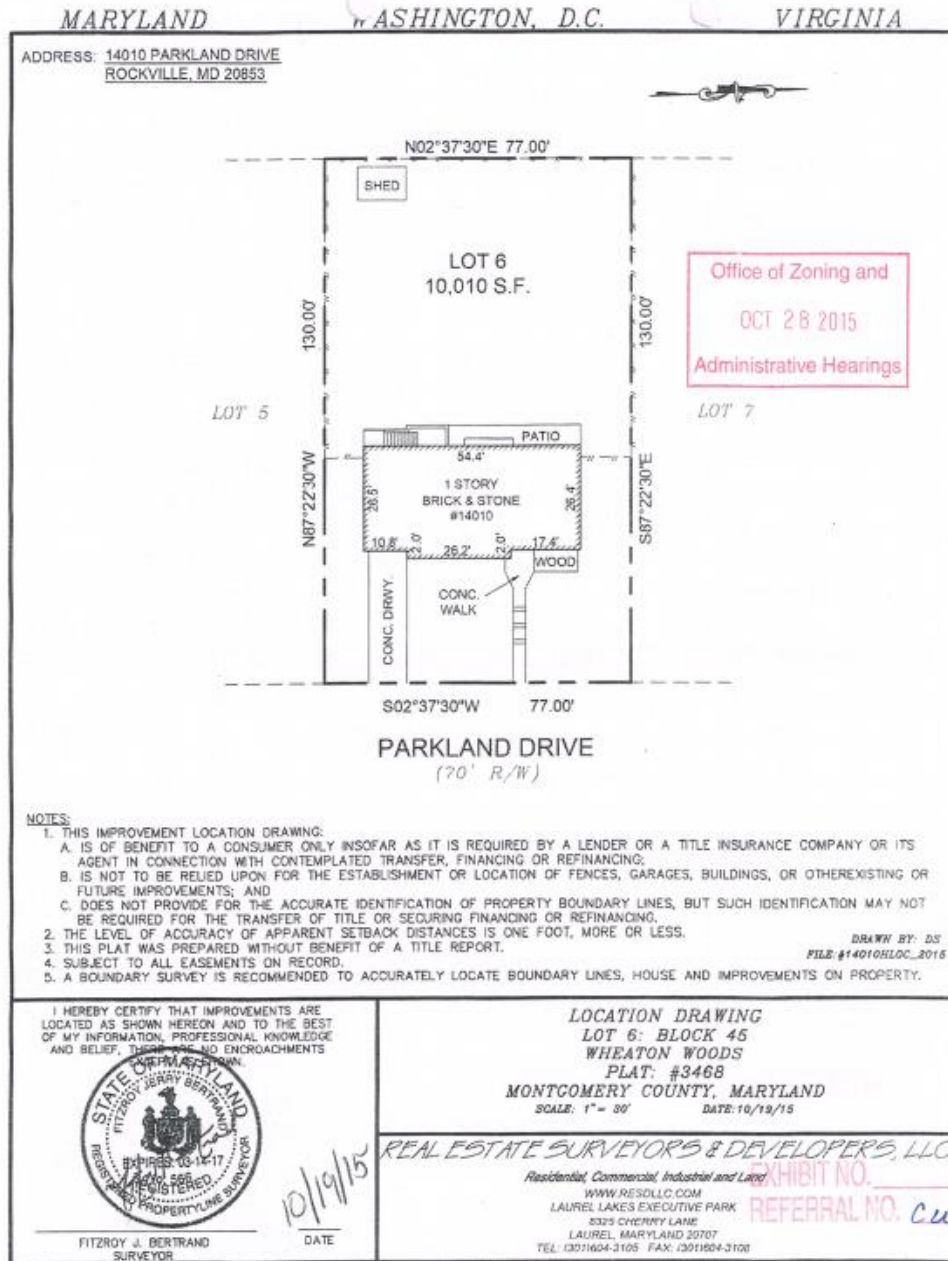
The Applicant proposes a 650 square-foot accessory apartment in the basement of the one-story, single-family home. The remaining portion of the basement will be used for the principal



dwelling. Ms. Masresha submitted a survey showing the placement of the house on the lot, shown on page 8).

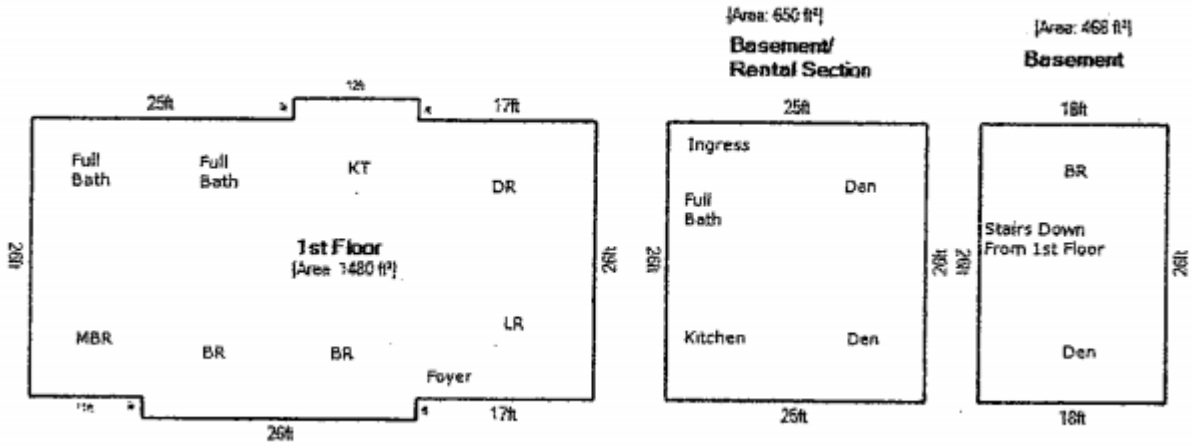
The Applicant has agreed to remove the existing walkway to the apartment, which consists of loose pavers. Instead, she proposes to put in a walkway connecting the concrete steps for the main entrance to the entrance for the accessory apartment. She will also install a light above the rear entrance and an egress window meeting Housing Code standards. Exhibit 37. Other than these changes, the Applicant proposes no exterior alterations to the home. Ms. Masresha submitted a location survey (Exhibit 8, on the next page) showing the placement of the existing dwelling on the lot. While the location survey shows a concrete driveway at the approximate location of the existing

walkway to the apartment, the aerial photograph (Exhibit 22 on page 6) demonstrates that this no longer exists.

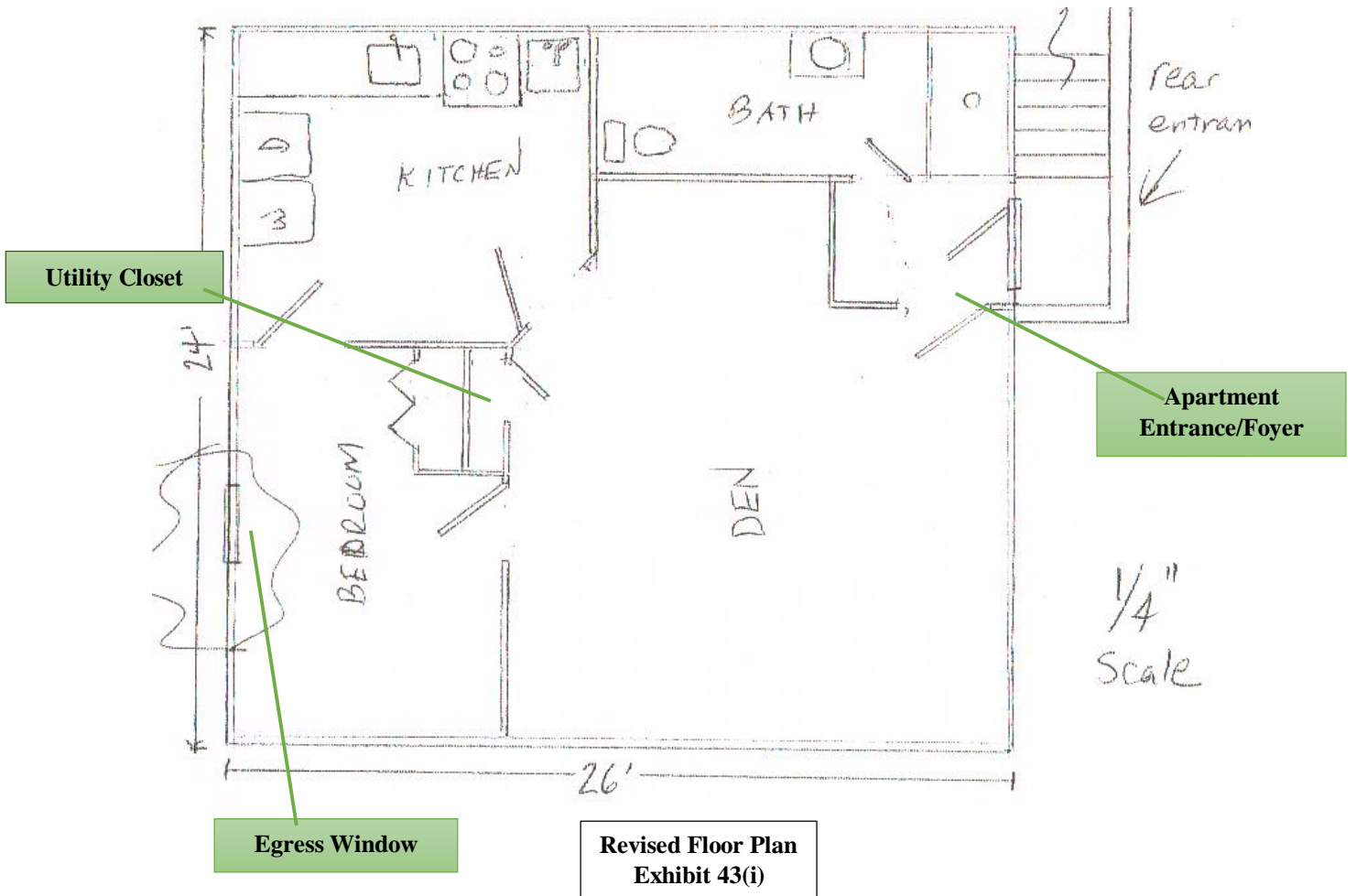


Location Survey
Exhibit 8

A floor plan showing the relationship of the proposed accessory apartment to the main structure is shown below (Exhibit 22, Attachment 2):



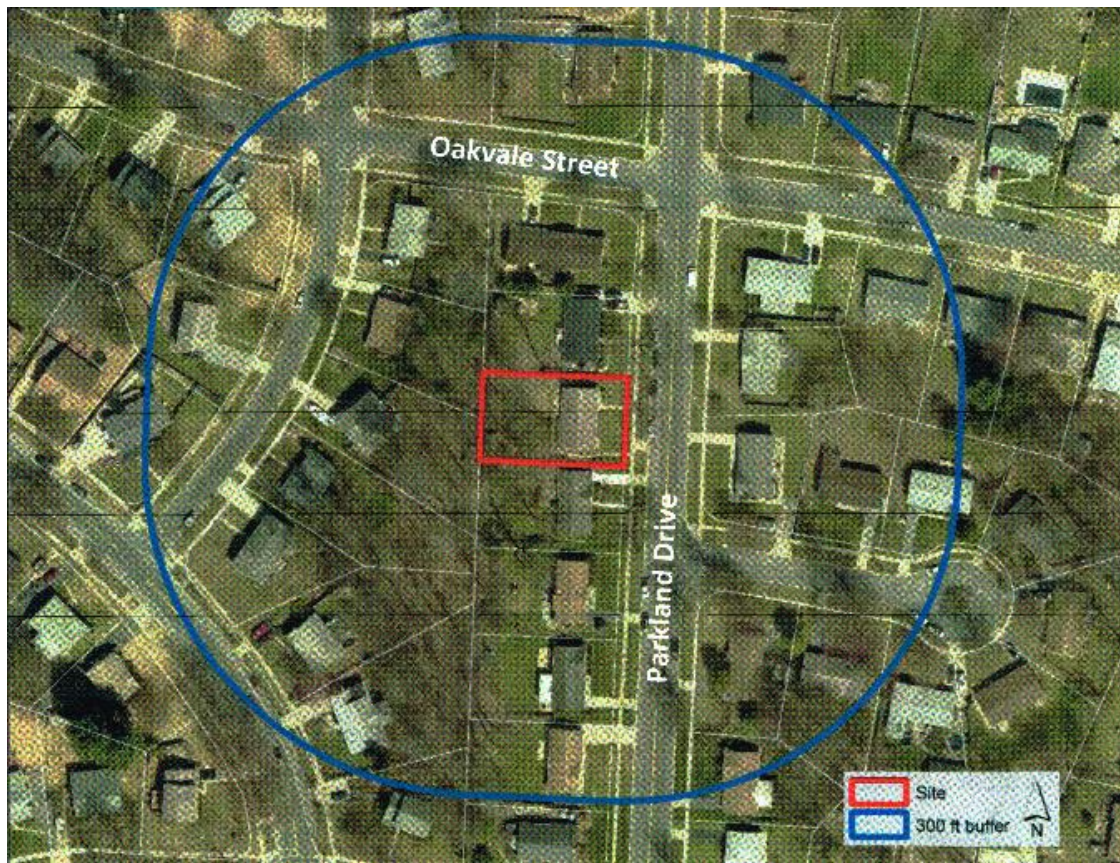
A revised floor plan for the proposed apartment, showing the location of the new egress window, is below (Exhibit 43):



There are no parking restrictions on Parkland Drive. Planning Staff reports that there is enough on-street parking to permit residents within 300 feet to park on the street near their residences on a regular basis (Exhibit 22, pp. 6-7):

The Site has a front lot line width of 77 feet, which can easily accommodate three parallel parked, average sized vehicles. The majority of properties within 300 feet of the proposed Accessory Apartment have front lot line widths of at least 70 feet, and these properties can easily accommodate at least two average size cars along the frontage. In addition, all properties within 300 feet of the proposed accessory apartment have driveways to accommodate one or two vehicles, and many have garages...Demand for on-street parking is likely [to be] relatively low, and the amount of parking directly in front of the Site is sufficient to ensure that the proposed accessory apartment will not prevent a resident within 300 feet of the Site from parking on-street near his or her residence on a regular basis. The proposed use will not prevent other residents within 300 feet of the Site from parking on the street.

In support of its conclusion, Staff submitted the following aerial photograph with the 300-foot diameter marked (Exhibit 22, p. 7):



III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

While most accessory apartments may be established through a licensing process (under §29-19 of the *Montgomery County Code*) through the Department of Housing and Community Affairs (DHCA), those that do not have the number of on-site parking spaces required by the Zoning Ordinance must obtain a conditional use before approval of the license. *Montgomery County Zoning Ordinance*, §59.3.3.3.A.2.b.i.² A conditional use may be approved if the application complies with standards in the Zoning Ordinance. Unlike other conditional uses, accessory apartments need not meet general requirements regarding compatibility with the neighborhood or compliance with the Master Plan. *See*, ZTA 15-09 (Ordinance No. 18-08), effective December 21, 2015. Instead, attached accessory apartments are evaluated under the limited use standards of Sections 59.3.3.3.A.2 and 59.3.3.3.B.2

The Hearing Examiner sets forth each standard for approval of an attached accessory apartment below, along with her analysis of whether this application meets those standards.

A. Application Requirements Regarding Ownership of the Subject Property

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.

Conclusion: The Applicant has submitted a deed showing transfer of the property to her name.

Exhibit 4. This standard has been met.

² 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.

B. Limited Use Standards for All Accessory Apartments (Section 59.3.3.3.A.)

Section 59.3.3.A of the Zoning Ordinance sets the requirements for all types of accessory apartments (i.e., whether attached or detached). This application must meet all of the standards listed in this section, except that it may have fewer than the number of required parking spaces if the Applicant can demonstrate that sufficient on-street parking is available to serve the use.

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 accessory apartment proposed here is subordinate to the principal dwelling because it is located in the basement and is less than 50% of the floor area of the principal dwelling. The Applicant is requesting approval for only one accessory apartment on the subject site. Based on a Referral Notice from DHCA (Exhibits 1 and 2), the Applicant filed an application for an attached accessory apartment conditional use, seeking approval to deviate from requirements for on-site parking. Following approval of the conditional use, the Applicant must obtain a license for an accessory apartment from DHCA.

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

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

(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, the Applicant here must obtain approval of a conditional use because the property has no on-site parking. A property owner may deviate from these requirements if the Hearing Examiner finds that parking is adequate to serve the use without impacting the ability of nearby neighbors to park on the street as well. The adequacy of available parking will be discussed separately below.

(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 consists of 650 square feet, less than the maximum size of 1,200 square feet. Staff advises floor area of the main floor is 1,480 square feet (consistent with the SDAT records). The basement consists of 1,118 square feet for a combined area of 2,590 square feet. Exhibit 22, p. The Hearing Examiner finds that the 650 square-foot apartment is 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. The Applicant is not proposing an addition to the main dwelling.

(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: The number of occupants must be limited to 2 individuals that are 18 years or older.

This will be made a condition of approval of the conditional use.

- 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 as a condition of approval. Exhibit 22, p. 5. 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-90 (Residential Detached) Zone. Therefore, this standard is not applicable to this application. Exhibit 22, p. 6.

- 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-90 (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 Applicant filed this conditional use application seeking

approval to deviate from the on-site parking requirements. The standards for determining whether parking is adequate are set forth below:

- 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: Planning Staff concluded that on-street parking is *not inadequate* because there is room for three cars to park in the right of way in front of the house, which is 77 feet in length. Staff also determined the demand for parking in the area is probably low, as most of the neighboring properties within 300 feet have driveways. The aerial photograph in the Staff Report confirms this. In addition, Ms. Masresha testified that on-street parking is permitted on Parkland Drive without restriction. Based on this evidence, the Hearing Examiner finds that on-street parking will not be inadequate if the accessory apartment is approved.

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

Section 59.3.3.3.B contains specific standards for *attached* accessory apartments. These standards, as well as the Hearing Examiner's analysis of whether this application meets those standards, is below.

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.

Conclusion: The floor plan submitted (Exhibit 43(b)(i)) indicates that the apartment will include a full kitchen, bathroom, and one bedroom. The apartment will be subordinate to the principal dwelling both in size and appearance. The entrance is located to the rear and the apartment will be in the basement of the existing 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: Staff reports that the accessory apartment has a separate entrance located at the rear of the existing dwelling (Exhibit 22, p. 8), which is consistent with the revised floor plan submitted by the Applicant (Exhibit 43(b)(i)). The Hearing Examiner finds that this standard has 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 SDAT records, the detached dwelling was built in 1961. Exhibit 10.

From this evidence, the Hearing Examiner finds that 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-90 (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-90 Zone. Staff advises that no other accessory apartments are recorded within 300 feet of the one proposed here.

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.

For this reason, the application of Yaineababa Masresha (CU 16-06), for a conditional use to operate an Attached Accessory Apartment at 14010 Parkland Drive, Rockville, Maryland, is hereby **GRANTED**, subject to the following conditions:

1. The Applicant shall be bound by all of her 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 property;
4. The Applicant must install a high-efficiency gas furnace and hot water heater or other heating and cooling appliance meeting the Housing Code after obtaining all required permits for the installation.
5. The Applicant must install an egress window meeting all Housing Code requirements at the location shown on revised floor plan (Exhibit 43(b)(i)).
6. The Applicant must install a walkway from the steps leading to the principal residence to the entrance of the accessory apartment.
7. The Applicant must make all repairs necessary to correct those deficiencies noted in the Housing Inspector's report (Exhibit 23);
8. The Applicant must comply with any directions of the Housing Code Inspector to ensure safe and code-compliant occupancy; and
9. The Applicant must obtain and satisfy the requirements of all licenses and permits, including but not limited to an accessory apartment license, building permits and use and occupancy permits, necessary to occupy the conditional use premises and operate the conditional use as granted herein. The Applicant 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 11th day of April, 2016.



Lynn A. Robeson
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:

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C. Ivan Eloisa, Housing Inspector