

BOARD OF APPEALS
for
MONTGOMERY COUNTY
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Case No. S-2569

PETITION OF JOSEPH SSEMWOGERERE

OPINION OF THE BOARD

(Public Hearing Date: May 28, 2003)

(Effective Date of Opinion: September 10, 2003)

Case No. S-2569 is an application for a special exception pursuant to Section 59-G-2.00 (Accessory Apartment) of the Zoning Ordinance to permit an existing accessory apartment.

The Board of Appeals held a hearing on the application on May 28, 2003. Joseph Ssemwogerere appeared in support of the application. Lynn McCreary, Housing Code Inspector, Montgomery County Department of Housing and Community Affairs (DHCA) also testified. The Board received no correspondence or testimony in opposition to the application.

Decision of the Board: Special Exception **granted**, subject
to conditions enumerated below.

EVIDENCE PRESENTED

1. Joseph Ssemwogerere, owner of the subject property, requests approval of a special exception to allow the continued use of an existing accessory apartment. The subject property is Lot 21, Block 2, Oakview Subdivision, located at 9608 Dilston Road, Silver Spring, Maryland, 20903, in the R-60 Zone.

2. Maryland National Capital Park and Planning Commission (MNCPPC) staff analyzed the application and recommend approval of the special exception. [Exhibit No. 13]. Staff finds that the application is consistent with the East Silver Spring Master Plan (December 2000) which contains as a goal to “preserve existing residential character, encourage neighborhood reinvestment and enhance the quality of life throughout East Silver Spring”. Staff notes that the

accessory apartment can contribute to this goal and can expand the range of available housing choices in the planning area. The plan also supports the R-60 zoning for the subject property, where accessory apartments are allowed by special exception.

Staff finds that in the neighborhood defined by I-495 to the north, New Hampshire Avenue to the east, and the Northwest Branch Stream Valley Park to the west and south, there is one other approved special exception, which is for an accessory apartment. Staff further finds that the subject property is served by adequate public facilities, and that the application meets all development standards for the R-60 zone as well as the general and specific standards for approval for accessory apartments. Staff notes that the accessory apartment is located in the existing, rear extension of the house, which is not visible from the street because it is narrower than the main house. The rear extension has neither a second story nor a basement level. The entrance to the accessory apartment is at the side of the extension, behind the main house, and also not visible from the street. Staff finds that the accessory apartment is subordinate to the main dwelling.

Staff confirmed with Mr. Ssemwogerere that he will live at the subject property, will receive compensation for only one dwelling unit and that no family of unrelated persons occupies the property nor are there any other residential uses there.

Staff finds that although no off-street parking spaces are available, on street parking is sufficient. Staff notes that Dilston Road is wide enough for two way traffic with parking on both sides of the street, and that three cars can park along Dilston Road in front of the subject property. Staff visited the subject property at 10:30 a.m. on a weekday and observed a moderate number of cars parked on the street. Staff finds that the accessory apartment will not adversely affect pedestrian or vehicular safety.

3. DHCA Housing Code Inspector Lynn McCreary inspected the accessory apartment and submitted a report of her inspection into the record [Exhibit No. 11]. Ms. McCreary states in her report that the accessory apartment meets all requirements of the Montgomery County Housing Code, and that based upon its 305 square feet of habitable area the accessory apartment is suitable for occupancy by no more than two individuals.

4. The accessory apartment is located in the rear extension to the house [Exhibit Nos. 3 and 8].

5. Mr. Ssemwogerere stated to MNCPPC technical staff and at the public hearing that he will live at the subject property.

6. The lot comprises 6,600 square feet. [Exhibit No. 3].

7. The house was built in 1949. Mr. Ssemwogerere purchased the house on August 14, 2002, and the accessory apartment already existed. [Exhibit Nos. 3 and 5].
8. No exterior modifications are proposed. [Exhibit No. 13].
9. The accessory apartment has the same address as the main house and has a separate entrance at the side of the house, which is not visible from the street, as the portion of the house where the apartment is located is narrower than the main house. [Exhibit Nos. 8 and 13].
10. The accessory apartment contains a bedroom, living room, kitchen, bathroom and closet. [Exhibit No. 13, Appendix].

FINDINGS OF THE BOARD

GENERAL STANDARDS

Sec. 59-G-1.2. Conditions for granting a special exception.

59-G-1.2.1. Standard for evaluation. A special exception must not be granted absent the findings required by this Article. In making these findings, the Board of Appeals, Hearing Examiner or District Council, as the case may be, must consider the inherent and non-inherent adverse effects of the use on nearby properties and the general neighborhood at the proposed location, irrespective of adverse effects the use might have if established elsewhere in the zone. Inherent adverse effects are the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations. 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. Non-inherent adverse effects, alone or in conjunction with the inherent effects, are a sufficient basis to deny a special exception.

The physical and operational characteristics necessarily associated with an accessory apartment include: the existence of the apartment as a separate entity from the main living unit, but sharing a party wall with the main unit; the provision within the apartment of the necessary facilities and spaces and floor area to qualify as a habitable space under the Building Code; provision of a separate entrance and walkway, and sufficient lighting; additional activity from that household, including more use of the outdoor space and more pedestrian and automobile traffic and parking activity; and the potential for additional noise from the additional household.

The accessory apartment in the instant application is subordinate to the main dwelling, has a separate entrance not visible from the street, which maintains the single family appearance of the house, and adequate on-street parking.

The Board finds that none of the physical or operational characteristics of the proposed accessory apartment exceed what would be expected with the use. The Board finds that there will be no non-inherent adverse effects from this proposed accessory apartment.

59-G-1.21. General Conditions.

(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.*

Accessory apartments are permitted by special exception in the R-60 Zone.

(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.*

As discussed more fully below, the application complies with all pertinent standards.

(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 an approved and adopted 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.*

The Board adopts MNCPPC staff's finding of Master Plan consistency and concurs that the accessory apartment can expand the range of housing choices in the planning area.

- (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.*

No new structures are proposed. The accessory apartment's entrance is not visible from the street, maintaining the single family residential character of the house. Occupancy of the apartment will be limited to two persons, and adequate parking is available on the street. Therefore the Board finds that the impact of the accessory apartment on surrounding properties will be relatively low and in harmony with the general character of the neighborhood.

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

The Board finds, given the availability of parking, maintenance of the single family appearance of the home and limitation of occupancy to two persons, that the apartment will have little visual or operational impact on surrounding properties or the general neighborhood, and will not be detrimental to their use, peaceful enjoyment or economic development.

- (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.*

The accessory apartment is not visible from the street and will entail no activity to create the above-listed objectionable effects.

- (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 recommendation of a master or sector plan do not alter the nature of an area.*

The Board adopts MNCPPC staff's finding that, together with the one other special exception in the area, the requested accessory apartment will not 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.*

The Board finds no evidence that the accessory apartment will have any of these effects.

- (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.*

The subject property is served by adequate public facilities.

- (i) *If the special exception use requires approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of the special exception.*

Not applicable.

- (ii) *With regard to findings relating to public roads, the Board, the Hearing Examiner, or the District Council, as the case may be, must further determine that the proposal will have no detrimental effect on the safety of vehicular or pedestrian traffic.*

The Board adopts MNCPPC staff's finding that parking on street is adequate to allow the accessory apartment, and that, given the width of Dilston Road, the apartment will not be detrimental to pedestrian or vehicular safety.

SPECIFIC STANDARDS

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.*

Only one apartment is requested.

- (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:*

The accessory apartment is located in an extension of the main floor of the house, located at the rear, and shares a party wall in common with the house.

- (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.*

Not applicable.

- (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.*

No new structures are 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.*

The house, built in 1949, is 54 years old.

- (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.*

The applicant confirmed that none of these conditions exist on the subject property.

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

The entrance to the apartment is located at the side of the house, behind the main section of the house, and not visible from the street. The Board finds, therefore, that the single-family appearance of the house is maintained.

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

No external modifications are proposed.

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

The apartment has 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 apartment, located in a portion of the main level of the house is subordinate to the main dwelling. The habitable area of the apartment is 305 square feet, well below the 1200 square foot maximum.

(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.

The applicant resides in the main dwelling unit.

(2) Except in the case of an accessory apartment that exists at the time of the acquisition of the home by the applicant, 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.

Mr. Ssemwogerere purchased the home August 14, 2002. Thus, one year will have elapsed between that time and the effective date of this opinion.

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

Mr. Ssemwogerere affirmed that he will receive compensation for only one dwelling unit.

(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.

As evidenced by the deed submitted as Exhibit No. 5, Mr. Ssemwogerere owns the subject property.

(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.

Not applicable.

(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.

The lot size is 6600 square feet.

(2) An accessory apartment must not, when considered in combination with other existing or approved accessory apartments, result in an excessive concentration of similar uses in the general neighborhood of the proposed use (see also Section 59-G-1.21(a)(6) which concerns excessive concentration of special exceptions in general).

The Board concurs with MNCPPC staff's finding that this accessory apartment, combined with the one other special exception, which is for an accessory apartment, in the relatively large neighborhood, will not result in an excessive concentration of similar uses.

(3) There shall be adequate water supply and sewage disposal systems to serve the occupants of both the accessory apartment and the main dwelling.

The property is served by adequate public facilities.

(4) Adequate parking shall be provided. There must be a minimum 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 shall not be located in the yard between the front of the house and the street right-of-way line.

The Board adopts MNCPPC staff's finding that on-street parking is adequate to support the accessory apartment without any off-street parking.

(5) Accessory apartments shall not be detrimental to the use and peaceful enjoyment of surrounding properties or the general neighborhood, and shall cause no objectionable noise, traffic or other adverse impacts.

The Board finds, given the availability of parking, maintenance of the single family appearance of the home and limitation of occupancy to two persons, that the apartment will have little visual or operational impact on surrounding properties or the general neighborhood, and will neither be detrimental to the use and peaceful enjoyment of surrounding properties nor create adverse noise traffic or other impacts.

Therefore, based upon the foregoing, the Board **grants** the special exception, subject to the following conditions:

1. Petitioner shall be bound by his testimony and exhibits of record, to the extent that such evidence and representations are identified in the opinion of the Board.
2. Pursuant to the provisions of the Montgomery County Housing Code and based upon its habitable area of 305 square feet, occupancy of the apartment will be limited to no more than two individuals.

On a motion by Louise L. Mayer, seconded by Allison Ishihara Fultz, with Donna L. Barron, Angelo M. Caputo and Donald H. Spence, Jr., Chairman in agreement, the Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled petition.

Donald H. Spence, Jr.
Chairman, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 10th day of September, 2003.

Katherine Freeman
Executive Secretary to the Board

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure.