

**BEFORE THE MONTGOMERY COUNTY
BOARD OF APPEALS
OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660**

**IN THE MATTER OF:
PERVAIZ SYED**

Pervaiz Syed

For the Petitioner

Unray Peters

Department of Housing and
Community Affairs

*
*
* Board of Appeals No. S-2784
* OZAH Case No. 11-09
*

HEARING EXAMINER'S REPORT AND RECOMMENDATION

TABLE OF CONTENTS

I. STATEMENT OF THE CASE 2

B. The Surrounding Neighborhood 5

D. The Proposed Use 5

E. Traffic Impacts 7

F. Environmental Impacts 8

G. Community Response 8

III. SUMMARY OF THE HEARING 8

A. Petitioner’s Case 8

B. Public Agency Testimony 9

IV. FINDINGS AND CONCLUSIONS 9

A. Standard for Evaluation 10

B. General Standards 12

C. Specific Standards 17

D. Additional Applicable Standards 22

V. RECOMMENDATION 23

I. STATEMENT OF THE CASE

In Petition No. S-2784, Pervaiz Syed, seeks approval of a Special Exception under Zoning Ordinance §59-G-2.00 to allow an accessory apartment on property located at 806 Lindsey Manor Lane, Silver Spring, Maryland. The legal description of the property is Lot 14, Block C in the Llewellyn Fields Subdivision. The property is located in the RE-2C Zone. The Board issued a notice of a public hearing before the Hearing Examiner for January 27, 2011. Ex. 11(b). That hearing was postponed due to inclement weather on February 10, 2011, and the Board issued a notice of rescheduled hearing for March 11, 2011.

Technical Staff of the Maryland-National Capital Park and Planning Commission (M-NCPPC), in its report dated January 14, 2011 (Ex. 13), recommended approval of the Petition, with four (4) conditions. An inspector with the Department of Housing and Community Affairs (DHCA), Ms. Lauren Cary reported her findings in a memorandum dated January 18, 2011 (Ex. 12(a)). The inspector concluded that occupancy must be limited to a family of three or two unrelated persons, in habitable space of 586.46 square feet. Exhibit 12. She also found that the Applicant should install egress windows with a net clear opening of 5.7 square feet. Ex.13.

The hearing went forward as scheduled on March 11, 2011. No opposition appeared at the hearing. At the hearing, the Housing Inspector reported that egress windows did not meet Code requirements. Mr. Syed testified that the windows had been approved by the Department of Permitting Services in 2003 when he applied for a registered living unit (RLU). T. 22. The Hearing Examiner left the record open to permit the Housing Inspector to research the history of the RLU application and why the existing

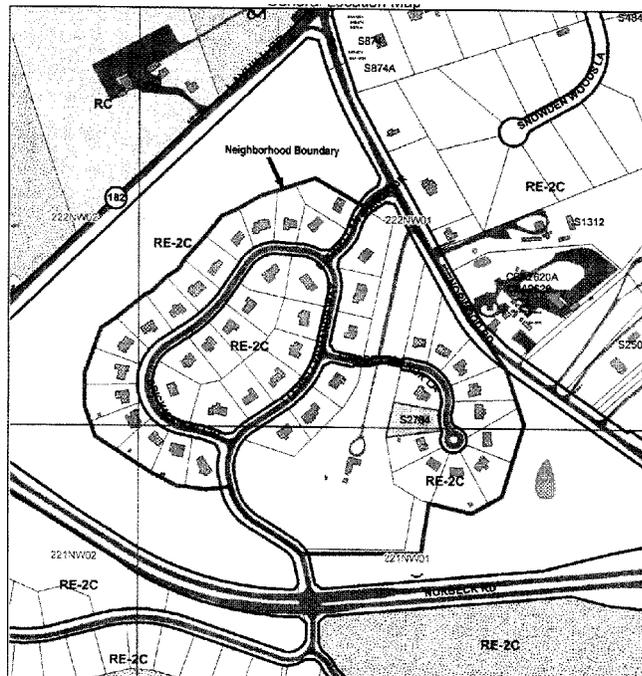
windows had been approved at less than the required standard. T. 40-41. She also requested DHCA to provide information regarding a waiver or grandfather provision which would permit the applicant to retain the existing windows. T. 40-41. Subsequently, DHCA submitted a memorandum stating that new building requirements contained in the International Residential Code required a net clear opening of 5.7 square feet for egress windows. Ex. 20. The record closed on March 25, 2011.

Based on the evidence submitted, the Hearing Examiner recommends approval of the application subject to the condition that the egress windows either be enlarged to have a net clear opening of net clear opening of 5.7 square feet or the Petitioner obtain a “modification” of the building code requirements from the appropriate building official.

II. FACTUAL BACKGROUND

A. The Subject Property and Its Current Use

The subject property is located at 806 Lindsey Manor Lane, Silver Spring. Below is a locational map showing the boundaries of the neighborhood (Exhibit 13):



The lot contains a total of 25,011 square feet with driveway access from Lindsey Manor Lane. It is improved with a two-story single family home, shown below (Exhibit 9(a)), which fronts Lindsey Manor Lane. The lawn has multiple evergreens and shade trees along the eastern and western property boundaries. Exhibit 12.



Access to the main dwelling is by a concrete walkway leading from the street. A photograph of the back yard (Exhibit 9(b)) of the main dwelling is below:



B. The Surrounding Neighborhood

Technical Staff concluded that the surrounding area (shown on page 4) is bounded by Llewellyn Manor Drive to the north, Norwood Road to the east, Brick Manor Circle/Llewellyn Manor Way to the west and Norbeck Road to the south. Exhibit 12, p. 2. Staff advises that the neighborhood consists primarily of single-family homes in the RE-2C Zone. It also reports that no other accessory apartments exist in the neighborhood. As Technical Staff reports and the location map demonstrates that the entire vicinity consists of single-family dwellings, the Hearing Examiner finds these to be the boundaries of the neighborhood as evidenced by the record in this case.

C. The Master Plan

The subject property lies within the *1997 Cloverly Master Plan*. Exhibits 8 and 12. Technical Staff advises that the Master Plan contains no specific recommendations for this property or the neighborhood. According to Staff, the overall guidance of the Plan is to maintain the mix of suburban and rural communities resulting from watershed protection and rural development patterns to reinforce the strength of residential areas. Exhibit 12, p. 3. Technical Staff found, as does the Hearing Examiner, that the proposed accessory apartment is consistent with the Master Plan.

D. The Proposed Use

The petition proposes an accessory apartment in the basement of Petitioner's existing two-story detached home. The separate entrance for the proposed apartment may be reached by a stone walkway following the western side of the house to the rear. Exhibit 12. The rear entrance consists of steps down to a doorway illuminated by a light

Staff advises that Applicant's scaled floor plan demonstrates that the apartment contains a total of 784 gross square feet of floor area. Exhibit 13, p. 9. Records from the State Department of Assessment and Taxation reflect that the entire dwelling contains 2,946 square feet. Exhibit 13, p. 9. The Housing Inspector reports that the apartment contains 586.46 square feet of habitable space. Exhibit 12(a). Based on this square footage, the Housing Inspector found that two unrelated people or a family of three could reside in the apartment. The property contains an off-street parking area which can accommodate six (6) cars. On-street parking is permitted in the neighborhood. Exhibit 12(a).

The Housing Inspector found that the proposed accessory apartment did not have sufficiently sized egress windows. Exhibit 12(a). She measured the net clear opening of one window at 5 square feet. The current building code requires egress windows to have a 5.7 square foot net clear opening. Exhibit 20. Petitioner testified that he measured the net clear opening of the windows at 5.35 square feet the morning of the hearing. T. 19.

E. Traffic Impacts

Technical Staff advises that the requested special exception will generate a single additional peak hour trip for the both uses on the property for a total of two peak hour trips. Exhibit 13. Due to the small scale of the proposed use, the Hearing Examiner has no basis in this record to disagree with the finding of Technical Staff and therefore agrees that the accessory apartment meets the requirements of Local Area Transportation Review (LATR). Similarly, the Hearing Examiner also finds that the proposed accessory apartment generates fewer than three (3) trips and therefore is not subject to Policy Area Mobility Review (PAMR).

F. Environmental Impacts

Petitioner does not propose any external changes to the site. Technical Staff advises that the property is already subject to an approved Forest Conservation Plan. Exhibit 13, p. 3. Based on this evidence, the Hearing Examiner finds that Petitioner's request will have no adverse environmental impacts.

G. Community Response

There was no community response to the special exception request.

III. SUMMARY OF THE HEARING

Petitioner testified at the public hearing in support of the petition. Mr. Unray Peters, representing DHCA, also testified as to compliance with the Housing Code.

A. Petitioner's Case

Mr. Pervaiz Syed:

Mr. Syed testified that he accepted the findings of the Housing Inspector's Report (Exhibit 12(a)) but stated that he had paid \$20,000 in 2003 to have the new egress windows installed when he applied for a registered living unit. T. 8-9. The windows installed then have a net clear opening of 5 feet, 2 inches. Mr. Syed testified that he measured the net clear area of both windows at 5.35 square feet immediately before the hearing. T. 9. He requested that he obtain an exception to the requirement for egress windows with a net clear opening of 5.7 square feet. T. 9. He identified the exhibits and explained the floor plan. T. 10-16. He stated that the floor plans approved for the accessory apartment were the same as the approved plans for the registered living unit. T. 16. Mr. Syed testified that economically, it would be very difficult to comply with the regulations because he is being furloughed. T. 33.

B. Public Agency Testimony

Housing Code Inspector Unray Peters:

Mr. Peters testified that he did not personally conduct the inspection, but he had both the original inspector's report and her notes. T. 16. Ms. Lauren Cary (the Housing Inspector who performed the inspection), measured 586.46 square feet of habitable space, which permits two unrelated individuals or a family of three to live in the unit. T. 17. The lot size is 25,011 square feet. Mrs. Cary had measured egress windows in the basement. Both met the necessary height from floor to sill, but not the requirement for the area of net clear opening. T. 19. Net clear opening means the unobstructed area available for egress when the window is open. T. 20. In Bedroom No. 1, Ms. Cary's notes indicated that the window opening measured 30 inches by 24 inches or 5 square feet. T. 17. For bedroom two, Mr. Peters did not have information as to the exact measurement of the net clear opening of that window. T. 18. He stated that the inspector wouldn't have mentioned the 5.7 square foot requirement unless she found that the window failed complied with current code. T. 19. Mr. Unray was not sure why the existing windows were approved in 2003. Mr. Peters testified that there was no grandfathering provision in the residential building code. T. 24. He was unaware of any waiver provision as well. T. 24. He testified later that he checked with his supervisor during a short break and was informed there was no waiver provision. T. 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-1.21 requires consideration of the inherent and non-inherent adverse effects of the proposed use, at the proposed location, on nearby properties and 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-1.21. Inherent adverse effects alone are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

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

Technical Staff lists the following inherent characteristics of accessory apartments (Exhibit 13, p. 4):

- (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 a habitable space under the Building Code provisions;
- (3) The provision of a separate entrance and walkway and sufficient lighting;
- (4) The provision of sufficient parking; and
- (5) The existence of an additional household on the site;
- (6) Additional activity from that household, including additional noise 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 “[t]he 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.” Exhibit 13, p. 4. Thus Staff concluded that there are no non-inherent adverse effects arising from the accessory apartment sufficient to form a basis for denial.

As the accessory apartment is fully contained within the interior of the single-family home, will generate only two additional peak hour trips, contains a separate walkway and entrance illuminated with lighting characteristic of residential homes, and has ample off-street parking, the Hearing Examiner concludes that there are no non-inherent adverse effects of the requested use and there will be no adverse effects sufficient to warrant denial of the 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.

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

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

Conclusion: An accessory apartment is a permissible special exception in the RE-2C Zone, pursuant to Code § 59-C-1.31.

- (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 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 *1997 Cloverly Master Plan*. The Plan does not explicitly address the question of accessory apartments. According to Technical Staff, the overall guidance of the Plan is to maintain the mix of suburban and rural communities resulting from watershed protection and rural development patterns to reinforce the strength of residential areas and to enhance the quality of life. Technical Staff found the application to be consistent with that goal. Exhibit 13, p. 3. With regard to special exceptions, the Plan recommends that non-residential uses locate in commercial areas. Exhibit 13, Attachment 5. Staff found that the proposed apartment is consistent with the Master Plan.

The Hearing Examiner agrees with Staff and so finds. Because Petitioner plans no external structural modifications to the existing single-family dwelling, the requested special exception will maintain the residential character of the area. The Plan also

supports the existing RE-2C zoning in which accessory apartments are permitted as special exception uses. Thus, it is fair to say that the planned use, an accessory apartment in a single-family, detached home, is not inconsistent with the goals and objectives of the *1997 Cloverly Master Plan*.

- (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. The Board or Hearing Examiner must consider whether the 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 accessory apartment will be located within an existing dwelling and will not require any external changes other than certain repairs required by DHCA. It therefore will maintain its residential character. There will be sufficient parking, considering the driveway space (parking for six cars), and traffic conditions will not be affected adversely, according to Transportation Planning Staff. There are only two special exceptions along Norwood Road adjacent to the neighborhood—one for a nursery and the other an accessory apartment. Based on these facts, the Hearing Examiner concludes, as did Technical Staff, that the proposed use will be in harmony with the general character of the neighborhood. Technical Staff indicates that the subject site will be adequately served by existing public facilities (Exhibit 13, p. 3, Attachment 6), and the evidence supports this conclusion.

- (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: Because the proposed apartment is residential in character and will have minimal impact on the surrounding community, the Hearing Examiner 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: Technical Staff found that the proposed use will cause no objectionable effects. Exhibit 13, p. 3. Mr. Syed testified that the light above the entrance to the apartment is in a well fixture and is recessed below grade. T. 14. As the use will be indoors and residential, it will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site.

- (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: As discussed above, the Hearing Examiner 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 would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, provided that the Petitioner complies with the conditions of approval set forth in Section V.

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

Conclusion: Technical Staff indicates that the subject site will be adequately served by existing public facilities (Exhibit 13, p. 6). There being no evidence to the contrary in this case, the Hearing Examiner so finds.

- (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 does not require approval of a preliminary plan of subdivision, the Board of Appeals must determine the adequacy of public facilities when it considers the special exception application. The Board 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 would not require approval of a preliminary plan of subdivision. 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 LATR and PAMR. As indicated in Part II. E. of this report, Transportation Planning Staff did do such a review, and concluded that the proposed accessory apartment use would add one additional trip during each of the peak-hour weekday periods. Exhibit

13, Attachment 6. 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. Also, because the proposed use is estimated to generate only two additional peak-hour trips, PAMR 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: Based on the evidence of record, especially given the amount of off-street parking on the property and the limited number of additional trips generated by the special exception, the Hearing Examiner finds that the use will not cause a traffic hazard on the public roadways abutting the property and will not reduce the safety of vehicular or pedestrian traffic. Exhibit 13, Attachment 6, Exhibit 12(a).

B) §59-G.1.23 General Development Standards:

(a) Development Standards. Special exceptions are subject to the development standards of the applicable zone where the special exception is located, except when the standard is specified in Section G-1.21 or in Section G-2.

Technical Staff advises that the site complies with all standards of the RE-2C zone. There being no evidence to the contrary, the Hearing Examiner so finds.

C. Specific Standards

The testimony and the exhibits of record, especially the Technical Staff Report (Exhibit 12), 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 apartment is located in the basement of an existing house, and therefore shares a wall in common, as required for a lot of this size (under an 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. The accessory apartment will be located in an existing dwelling.

(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: Technical Staff advises that the structure was built in 1997. Exhibit 13. Having no evidence to the contrary, the Hearing Examiner so finds and the proposed apartment 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: There is no evidence that the use as proposed violates any of the provisions of this subsection; a requirement that occupancy of both the main house and the accessory apartment meet all Code requirements 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 by a walkway which leads to the rear of the dwelling. No exterior changes to the structure are proposed except those required by DHCA. There will thus 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: Petitioners are not proposing any new construction or modifications to the exterior of the dwelling, with the possible exception of enlarging the basement windows. The Hearing Examiner finds that these changes, if necessary for residential occupancy, will not affect the residential nature of the structure.

(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.

(10 The accessory apartment must be subordinate to the main dwelling. The floor area of the accessory apartment is limited to a maximum of 1,200 square feet.

Conclusion: The accessory apartment is subordinate to the main dwelling and less than 1,200 square feet, as it occupies approximately 784 gross square feet of space (only 586.46 square feet of which is habitable space) in Petitioner's existing 2,946 square-foot home.

Exhibit 13, p. 2; Exhibit 12(a).

59-G § 2.00(b) Ownership Requirements

(1) The owner of the lot on which the accessory apartment is located must occupy one of the dwelling units, except for bona fide temporary absences not exceeding 6 months in any 12-month period. The period of temporary absence may be increased by the Board upon a finding that a hardship would otherwise result.

Conclusion: The Petitioners will live in the upper level of the dwelling.

(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 the deed submitted into the record, Petitioner purchased the home in 1997. Exhibit 19. The one-year rule has therefore been satisfied.

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

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

(4) For purposes of this section owner means an individual who owns, or whose parent or child owns, a substantial equitable interest in the property as determined by the Board.

Conclusion: Petitioner has submitted a deed dated August 22, 1997, evidencing ownership in his name. Exhibit 19. 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 consists of a single lot that is approximately 25,011 square feet in size, and therefore satisfies this requirement.

- (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: There is only one other accessory apartment and one special exception for a nursery adjacent to the surrounding area described in this case. Technical Staff found that approval of this special exception would not result in excessive concentration of similar uses and, based on this evidence, the Hearing Examiner does as well.

- (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: Both Technical Staff and the Housing Inspector concluded that the off-street parking area may accommodate up to six (6) cars. Exhibits 12(a), 13. The Hearing Examiner finds, therefore, that the minimum requirement of two (2) spaces has been met.

D. Additional Applicable Standards

Not only must an accessory apartment comply with the zoning requirements as set forth in 59-G, it must also be approved for habitation by the Department of Housing and Community Affairs. As discussed in Part II. D. of this Report, the Housing Code Inspector's report (Exhibit 12(a)) notes that one issue, the size of the net clear opening of the bedroom windows, remains, and recommends that occupation of the accessory apartment be limited to no more than three family members or two unrelated persons.

The evidence supports a finding that the accessory apartment does not meet the building code requirement that egress windows have at least 5.7 square feet of net clear opening. Petitioner testified that based on his measurements, the net clear opening of the basement windows measured approximately 5.35 square feet. T. 19. The Housing Inspector measured the net clear opening of at least one window at approximately 5 square feet. T. 17. The windows shown on the plans submitted for the 2003 registered living unit stated the RLU was approved with windows which had a net clear opening of 5.2 inches. Because none of the measurements meet the current code requirements, the Hearing Examiner finds that it is unnecessary to determine the exact size of the net clear

opening. The Hearing Examiner has been directed to no “grandfather” provision of the building code which would permit approval of the accessory apartment based on the prior approval for a registered living unit.

As for a “waiver” provision, the Montgomery County Building Code provides that appropriate code official may grant a modification of the Code requirements in the following circumstances:

R104.10 Modifications. Wherever there are practical difficulties involved in carrying out the provisions of this code, the *building official* shall have the authority to grant modifications for individual cases, provided the *building official* shall first find that special individual reason makes the strict letter of this code impractical and the modification is in compliance with the intent and purpose of this code and that such modification does not lessen health, life and fire safety or structural requirements. The details of action granting modifications shall be recorded and entered in the files of the department of building safety.

International Residential Code, Section 104.10 (Emphasis in original). The Board of Appeals, however, has no authority to grant a modification of the building code. *IRC*, §R112.2. As a result, the Petitioner must either (1) comply with the requirements of the current building code and provide a 5.7 square feet of net clear opening for the bedroom egress windows or (2) obtain a modification from the building official. Compliance with either option shall be made a condition of approval of the special exception.

V. RECOMMENDATION

Based on the foregoing analysis, I recommend that Petition No. S-2784, which seeks a special exception for an accessory apartment to be located at 806 Lindsey Manor Lane, Silver Spring, Maryland, be GRANTED, with the following conditions:

1. The Petitioner is bound by his testimony, representations and exhibits of record;
2. The Petitioner must either enlarge the basement egress windows to have a net clear

- opening of 5 feet, 7 inches or obtain approval of a modification to the requirements of the building code to permit the existing windows to remain in place. Petitioner must obtain approval of the modification prior to the Board of Appeals' decision in this case.
3. Based on habitable space in the apartment (586.46 square feet), no more than three family members or two unrelated persons may reside in the accessory apartment;
 4. Petitioner must occupy one of the dwelling units on the lot on which the accessory apartment is located;
 5. Petitioner must not receive compensation for the occupancy of more than one dwelling unit; and
 6. 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. Petitioners shall at all times ensure that the special exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: April 20, 2011

Respectfully submitted,

Lynn A. Robeson
Hearing Examiner