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I. STATEMENT OF THE CASE

Petition No. S-2792, filed on November 5, 2010, seeks a special exception, pursuant to §59-G-2.00 of the Zoning Ordinance, to permit an accessory apartment in an addition to the rear of an existing single-family home located at 2301 Hermitage Avenue, Silver Spring, Maryland, on land in the R-90 (Residential, One-family, Detached) Zone. The property's legal description is Lot 12, Block 7 of the Arcola Subdivision. The tax account number is 01094765.

The public hearing was scheduled for March 3, 2011, by notice dated November 15, 2010 (Exhibit 11). Technical Staff of the Maryland-National Capital Park and Planning Commission (M-NCPPC), in a report issued February 25, 2011, recommended approval of the special exception, with conditions. Exhibit 1.¹

The Department of Housing and Community Affairs (DHCA) inspected the property on February 23, 2011. Housing Code Inspector Robert Goff reported his findings in a memorandum dated February 24, 2011 (Exhibit 14). The inspector concluded that occupancy must be limited to two unrelated persons or a family of three, in habitable space of 1,002.48 square feet. The report noted that the apartment did not have a private entrance; the entrance was via a foyer shared with the main dwelling. Exhibit 14. The report concluded that if the area of the foyer were included in calculating the area of the apartment, the total area would be 1,682.48 square feet.

A public hearing was convened on March 3, 2011, as scheduled, and Petitioners appeared *pro se*. Mary Vargas-Enriquez, the Applicants' daughter testified in support of the petition and also acted as interpreter for her parents. Also testifying was Housing Inspector Robert Goff of the DHCA. Petitioners executed an affidavit of posting (Exhibit 15). They adopted the findings in the Technical Staff Report (Exhibit 13). T. 10. They also agreed with certain, but not all, of

¹ The Technical Staff report is frequently quoted and paraphrased herein.

the findings in the Housing Inspector's report. Tr. 12. The Housing Inspector testified that the apartment must have a private entrance. T. 24. He also testified that if the foyer were included in the apartment, it would be 1,682.48 square feet, exceeding the maximum size (1,200 square feet) permitted by the Zoning Ordinance. T. 23.

The record was held open to permit the Applicants to submit revised floor plans by March 17, 2011, and to permit those in opposition two additional weeks to respond. T. 100. The DHCA conducted a re-inspection of the property on March 3, 2011, to ascertain whether the property's driveway was located on Martin Road, a paper street owned by the County. Exhibit 29(b). The Inspector found that the gravel driveway and half the parking pad are located on County-owned land. Exhibit 29(b). Subsequently, the Applicants did submit revised plans on March 16. On March 18, 2011, the Hearing Examiner issued a Notice of Motion to Amend the Petition and Order extending the time for closing the record to April 8, 2011 to afford additional time for M-NCPPC staff to review the amendments. Exhibit 35. The Housing Inspector submitted its report on the plan revisions on March 17, 2010, stating that the "unit is 993.4 square feet and now meets code." Exhibit 29. The DHCA submitted a memorandum stating that there were three approved and one pending Registered Living Unit in the neighborhood. Exhibit 30. Technical Staff submitted its supplemental report on March 31, 2011, finding that the floor area of the apartment shown on the revised floor plan exceeded the maximum permitted by the Zoning Ordinance. The record closed on April 8, 2011.

Six individuals opposed the petition, and their concerns are set forth in Sections II.C and III of this Report.

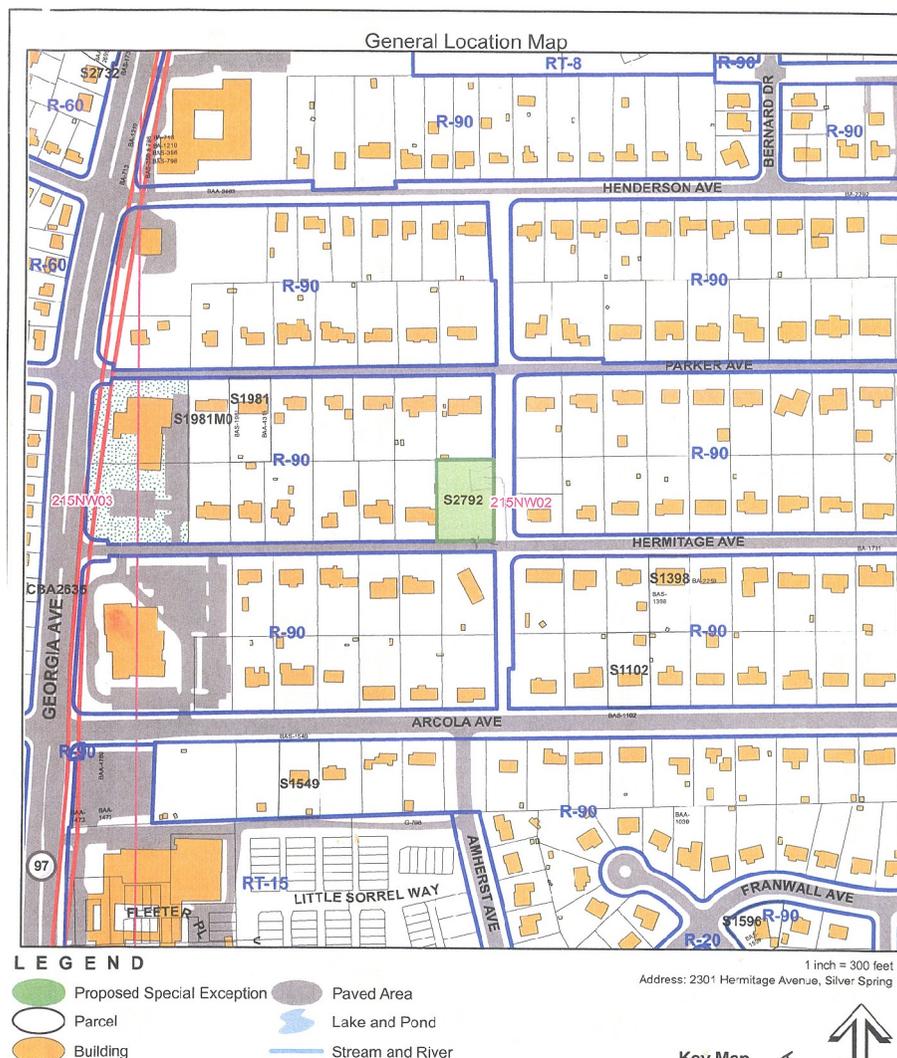
Because Petitioner's have not demonstrated by a preponderance of the evidence that (1) there will be adequate parking for the use, (2) that the use will meet all of the special standards imposed by §59-G-2.00 of the Zoning Ordinance, and (3) that the use is consistent with the 1989

Kensington Wheaton Master Plan, the Hearing Examiner recommends denial of the petition.

II. FACTUAL BACKGROUND

A. The Subject Property and the Neighborhood

The subject property contains approximately 27,530 square feet located on the Hermitage Avenue adjacent to Martin Avenue, a “paper street” owned by Montgomery County. Exhibit 13, p. 3; Exhibit 29(a). A general location map showing the subject property, attached to the Technical Staff Report (Exhibit 13, Attachment 1), is shown below. The property is within the R-90 Zone.



The property is improved by a single family home fronting on Hermitage Avenue, shown below (Exhibit 9).



The main dwelling has a side entrance accessed from a gravel driveway and concrete parking pad on the eastern side of the property, shown on Exhibit 9 below:



Opponents of the petition testified at the public hearing that the Martin Avenue (bordering the east side of the property is a “paper street” owned by Montgomery County. T.

47, 48. County “no parking” signs are posted at the entrance to Martin Avenue along Hermitage Avenue. T. 49, 53. After the public hearing, the Housing Inspector submitted a report stating that the gravel driveway and a portion of the concrete parking pad for the subject property are located on County-owned property. Exhibit 29(a). He also submitted a copy of the County’s “Data Mining Map” (Exhibit 29(a)) showing an aerial view of the property overlaid by the property boundaries:



In addition, he attached a photograph of the County right-of-way (Martin Avenue), improved by the gravel driveway and concrete parking pad (Exhibit 29(a)):



Evidence presented shows that there are currently at least four vehicles owned by different family members parked at the site. Two are parked on the concrete pad, which is partially located on Martin Avenue and two are parked on the grass. T. 96, Exhibit 27. A picture of the existing parking showing three of the vehicles (Exhibit 27), submitted by those opposing the application, is set forth below:



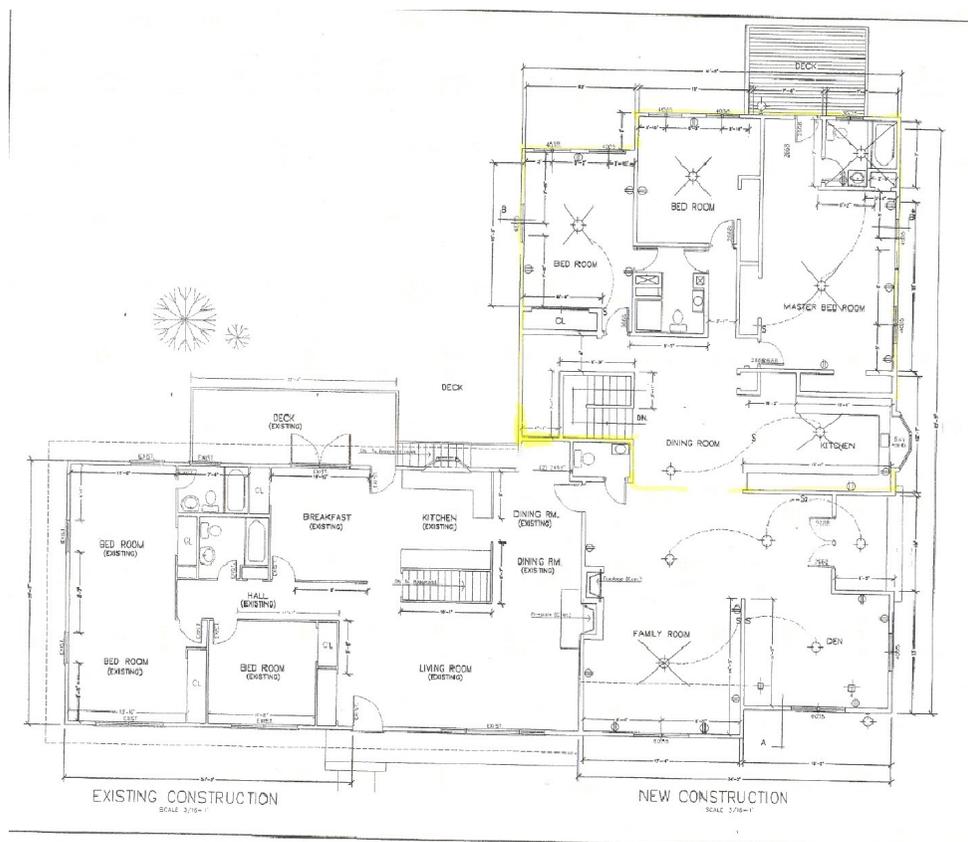
Technical Staff defined the general neighborhood as bounded by Georgia Avenue to the west, Arcola Avenue to the south, Parker Avenue to the north, and Martin Avenue to the east. Exhibit 13, p. 2. There being nothing in the record to the contrary, the Hearing Examiner agrees with Technical Staff's definition of the neighborhood.

B. The Proposed Use

Originally, the Petitioners sought a special exception to allow an accessory apartment in an addition to the main dwelling located to the rear of the lot. The floor plan for the accessory apartment originally submitted (highlighted in yellow on Exhibit 13, Attachment 4) is shown on the next page.

In their original Petition, the Applicants proposed a foyer entrance on the eastern side of the building (adjoining the concrete parking pad) as a shared entrance to the main house and the

accessory apartment. Technical Staff recommended approval of the petition, but the Housing Inspector found that the foyer entrance, which is shared with the main dwelling, was impermissible because an accessory apartment requires a private entrance. T. 24.



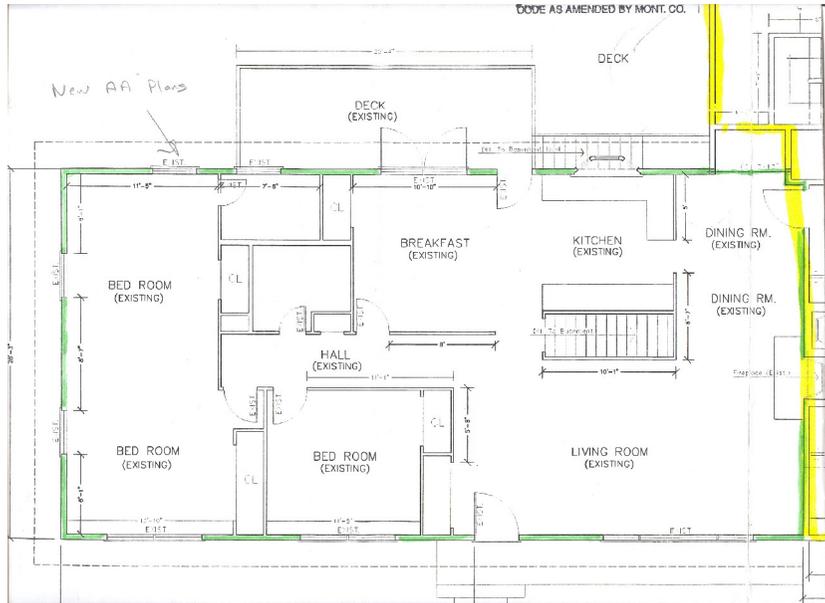
If the foyer were walled off to provide a private entrance to the accessory apartment, the apartment would not meet the size limitation of 1,200 square feet in the Zoning Ordinance. T. 23. Mr. Goff testified that there was a private entrance to the accessory apartment on the deck in the rear, but it opened to a bedroom which was not permitted under the code. T. 24-25 . The findings of his report on the original petition are set forth below:

1. Replace dead bolt lock with thumb turn lock in master bedroom.
2. Install door at bottom of steps.
3. Install drywall in opening on landing of steps.
4. Install Range in kitchen.

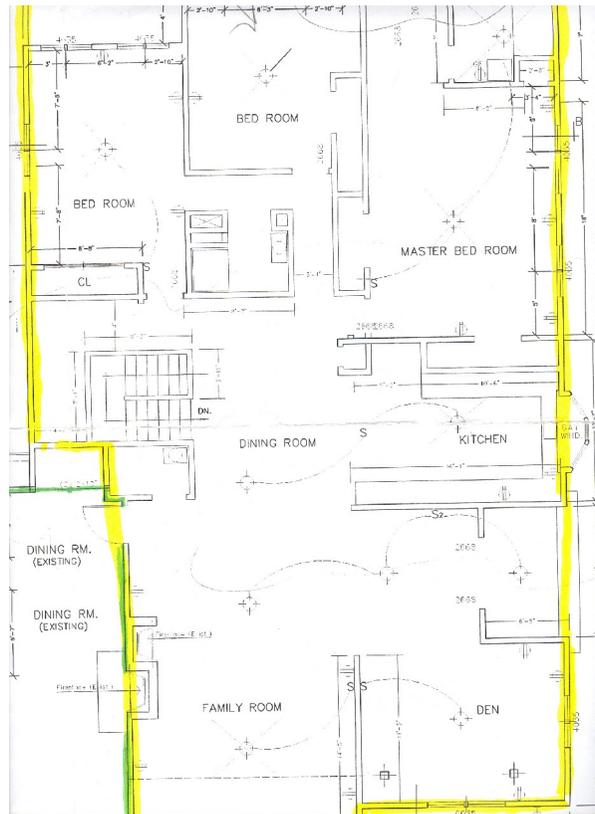
5. Install Range in hood in kitchen.
6. The driveway will hold up to 5 vehicles.
7. The unit is 1002.48 square feet. 2 unrelated or a family of 3 may live in the unit.
8. The entrance to the Accessory Apartment is a shared foyer with the owner and not a private entrance. If this area is calculated, it would bring the square footage to 1682.48.
9. Both doors to the main house and to the Accessory Apartment must be replaced with a 20 minute fire rated doors.

Mr. Goff testified that when he inspected the property in February, there was snow on the ground. His finding that there were 5 off-street parking spaces was due to the fact that he thought the driveway was part of the use. T. 58. He also testified that there is a “no parking” sign at the entrance to the driveway, as did those in opposition. T. 49, 59, 74. Technical Staff advised that while most of Martin Avenue was unpaved, the portion adjacent to the subject property was paved and “appears to function as a discontinuous alley.” Staff advises that Martin Avenue is identified on the 1989 Master Plan as a planned Class I bikeway. Exhibit 13, p. 3.

After the public hearing was adjourned, the Applicant submitted revised floor plans (Exhibit 31(b)). The Applicants revised the original plan so that what was originally part of the main dwelling was now depicted (in green) as the accessory apartment on Exhibit 31(b). The original apartment was merged with a portion of the main dwelling, shown in yellow on Exhibit 31(b). The reconfigured accessory apartment and main dwelling are shown below and on the next page.



**Reconfigured Accessory Apartment (Above)
Exhibit 31(b)**



**Reconfigured Main Dwelling (Above)
Exhibit 31(b)**

Based on the revised plans, the Housing Inspector submitted its supplemental finding that the “unit is 993.94 square feet and now meets code.” Exhibit 32. The report also included the following items:

1. Replace all deadbolt locks with thumb turn locks.
2. Install door at top of steps so that tenants will have total privacy.
3. Remove door in dining room of main house to the accessory apartment and close up wall. Exhibit 32.

As noted in Section II.A, the Housing Inspector submitted information from the County’s Data Mining Map overlaying property lines on an aerial view of the property and concluded that “there is no parking on the property, but there is on-street parking.” Exhibit 29(b). After the hearing concluded, the Housing Inspector also inquired of the Department of Permitting Services about the status of the parking area within the County right-of-way. Exhibit 33. On March 10, 2011, the Inspector forwarded DPS’ response, “The concrete driveway is installed on a ‘Dedicated but Unmentioned County Road’, no permits are required.” Exhibit 33.

On March 31, 2011, Technical Staff filed its Supplement Report based on the revised floor plans. Staff recommended denial of the revised petition because the new area of the accessory apartment exceeded 1,200 square feet. Exhibit 40.

C. Neighborhood Response

Several individuals residing in the area appeared to oppose the petition. Generally, they raised concerns about the impact of the proposed use on the character of the neighborhood, especially in combination with other illegal residential uses neighborhood. According to these individuals, these uses had generated trash, increased the volumes of vehicles on the street, illegal home businesses, and other issues. Exhibit 28. They also testified that the apartment and the main dwelling were too large in scale compared with other homes in the neighborhood. T. 43, 47, 75, 92. Some stated that in the past, there had been large numbers of people living in the

house. Exhibit 12. They also felt that that this type of use was inappropriate because of the neighborhood's proximity to Wheaton Regional Park. Their complete testimony is set forth in Section III of this Report.

D. The Master Plan

The subject property lies within the *1989 Master Plan for the Communities of Kensington-Wheaton*. Exhibit 8. Technical Staff advises that one of the plan's main objectives is "maintaining the *well established low- to medium- residential character that prevails in the area.*" Exhibit 14, p. 3 (emphasis in original). The master plan reconfirmed the R-90 zoning for the property without any site specific recommendations. Exhibit 13. Technical Staff recognized that Martin Avenue is a "paper street". Exhibit 13, p. 3. It also reports that the Plan identifies Martin Avenue as a "planned Class I bikeway (paved shared-use path)". Exhibit 13, p. 3. Based on the original plans, Technical Staff found that the petition was consistent with the master plan. With regard to the parking on Martin Avenue, Technical Staff found:

If the paper street is constructed as a bikeway, or developed as a county roadway, access to the accessory apartment may need to be modified. There is ample room on the subject property for another parking pad off of Hermitage Avenue should roadway construction on the paper street interfere with the operation of the existing parking pad. Exhibit 13, p. 3.

III. SUMMARY OF HEARING

For the Petitioner:

1. Ms. Angela Enriquez/Ms. Vargas-Enriquez:

Ms. Enriquez testified that she agreed with the findings and conclusions of the Technical Staff Report and adopted them as her own testimony. T. 10. She agreed to the statements contained in Items No. 1 through 6 of the Housing Inspector's Report, but was not sure about Items 7 – 9. T. 12-15. She also agreed with item No. 12 requiring her to replace two doors with

20 minute fire-rated doors. T. 15. The entrance by the parking pad leads to the main house which is open into the main house and the accessory apartment. T. 18-19. She described the landscape plan (Exhibit 5). Most of the mature trees surrounding the property died because of the weather. Ms. Vargas-Enriquez testified that there are not as many trees now as shown on the landscape plan. There are some fruit trees and one oak on the property, as well as small decorative bushes. T. 19. Ms. Enriquez testified that they had been trying for a long time to do something with the house because they need the income to pay the mortgage. T. 20. They tried to sell the house, but were unable to do so. T. 20. She questioned whether she could have more renters than the number listed in the Housing Inspector's report because the accessory apartment had three bedrooms. T. 21. She also stated that when the inspector first came to the house, she provided the permits and plans to show him that they had been approved. T. 34.

Ms. Vargas-Enriquez testified on rebuttal that the greater number of people living in the home in the past was because her aunt lived there with her two children until they could purchase a home. Her aunt lived with the Applicants for six months and there were two extra cars there at the time. T. 93. Her parents had no intent to rent any other rooms and want to pursue the process legally. T. 93-94. While the house has a lot of bedrooms, not all are occupied because they are used for storage. At present, only her parents and her younger brother live in the dwelling. T. 94. Her parents built the addition because her grandmother had Alzheimer's disease and they wanted to take care of her in the home. T. 94. Her grandmother died before the addition was complete. T. 94. It was never the family's intention to rent the home. T. 94-95. They did not intend to sell the home as a "two-for-one." T. 95. When her aunt lived in the premises, there was a stove and microwave in the second kitchen, but they didn't know it was illegal. T. 95. When they realized that someone had complained about that, her aunt had to leave as soon as possible. T. 95. The trailer that was located on Martin Avenue was not theirs,

but belonged to a neighbor across the street. She stated that the trailer had been there for a long time. T. 95.

For DHCA:

Mr. Goff testified that he did a preliminary inspection of the property on February 23, 2011. T. 22. He listed the items noted in his report and stated that the entrance to the apartment was shared with the main dwelling and therefore was not a private entrance. If the shared foyer is included in the size of the apartment, the total size is 1,682.45 square feet. T. 22-23. The unit was vacant at the time he did his inspection. T. 23. He testified that, in his opinion, the apartment did not meet the Housing Code because an accessory apartment is required to have a separate private entrance. T. 24. There is a door from the rear deck, but this enters directly into a bedroom which is not permitted by the Code. T. 25.

On cross examination, Mr. Goff testified that nine complaints had been filed against the property since 2004. T. 26. He did not have information as to whether the complaints were valid, but he did know that his office had been to the subject property nine times on complaints that it was being used as an illegal boarding house. T. 26. He stated that he considered the asphalt part of the driveway to be part of Petitioners' property when he concluded there were five off-street parking spaces. T. 29. He testified that the addition to the main dwelling had received building permits from Montgomery County. T. 30. DHCA enforces the limitations on occupancy by investigating complaints from the public. T. 32-33. Were the Applicants to rent the property, Mr. Goff stated that they would be required to have a lease every year.

In response to questions from Ms. Enriquez, Mr. Goff testified that it may be possible to create an accessory apartment using the front door along Hermitage Avenue. T. 35. He thought that option might exceed the 1,200 square foot size limitation. T. 35.

Opponent's Testimony:1. Mr. Robert Freeland:

Mr. Freeland testified that he lived one street to the north of the subject property. T. 37. He stated that granting the special exception will constitute a "tipping point" that will give Montgomery County's "blessing to a phenomenon", turning single family homes into boarding houses, that is destroying neighborhoods. T. 37-38. On his streets, there are three or four houses operating as boarding houses and just that many has dramatically changed the quality of life on the streets. The impacts include "offensive" volumes of traffic. T. 38. He stated that the visual effect is like stumbling on to a used car lot. There are also voluminous amounts of trash and increasing rodent populations. There are also houses operating illegal home businesses and there has been clear-cutting of trees in the neighborhood. T. 38. The neighborhood is adjacent to Wheaton Regional Park, which is an economic draw for lower Montgomery County. T. 38. The streets in the neighborhood together comprise a buffer zone for the park. T. 38. In the last four years, Mr. Freeland stated that overcrowded houses have degraded the environmental attributes of his street, which impacts the neighborhoods ability to protect Wheaton Regional Park. T. 39. He also stated that there was an obvious inconsistency in the number of bedrooms in the house and the owner's claim that the additio was added for her mother-in-law. T. 39. Given the owner's track record with permitting processes and the size of the renovation, he felt one could reasonably assume that it would have similar activity once the special exception was granted.

He stated that the proposed use did not meet the special exception standards because it would be detrimental to the use, peaceful enjoyment, and economic value of the neighborhood. T. 40. On cross-examination, he stated that he did not know how many people lived in the house at present. T. 41.

2. Ms. Marjorie Berry:

Ms. Berry testified that she lived on Parker Avenue since 1950. When she first came there, they knew that Georgia Avenue would someday be more commercial, and that hasn't changed. When she first came, it was a neighborhood of single-family homes. She opposes the special exception because of the size of the addition, the lack of parking and the potential increase in traffic. T. 43.

3. Dr. Geoffrey Patton:

Dr. Patton testified that the neighborhood remains a single-family residential neighborhood that buffers Wheaton Regional Park. He believed that granting the petition would open the floodgates as a precedent that would change the neighborhood forever. He believes that the petitioners intend to rent to as many people as they can squeeze in. The prior nine complaints were because petitioner's were operating a boarding house for a couple of years. T. 47. They have had tenants operating motorcycles at 5:30 and 6:00 in the morning. The house was initially modest in size, but the Applicants promptly started increasing the size, he believed as an income generator. T. 47. When Petitioner's tried to sell the house, they were unable to because it was too large for the area. T. 47.

He also testified that Martin Avenue is a paper street. In the neighborhood, it's used as a "pedestrian easement". T. 47. It is designated on the master plan as a bike path. T. 48. Technical Staff erred in their report when they stated it was paved. T. 48. He believed that the County had deposited waste asphalt there and spread it out into what appears like it might be a paved road or driveway, but is really Martin Avenue. T. 48. For that reason, there is no legitimate driveway from Hermitage into the subject property. There is a County no parking sign right in front of where the cars for the subject property are parked. T. 49.

4. Mr. Henry Besmen:

Mr. Besmen testified that, at the time he constructed his home in 1955 or 1957, the Building Code permitted only single-family homes. He wanted to know when that was changed to permit accessory apartments.

5. Ms. Mary Jane Berry:

Ms. Berry submitted an e-mail from the Department of Traffic and Transportation, her initial complaint filed with DHCA, and an advertisement for the sale of the subject property from 2009. T. 70-72. She opposed the petition because the house did not have adequate parking or a driveway that opens onto Hermitage Avenue. The existing driveway is on a street that is not maintained by the County. T. 74. The street is marked on Parker Avenue for “no motorized vehicles.” T. 74. It is shown as a pedestrian or bike path on many County documents but the encroachment of the home is discouraging to pedestrians like her. She grew up on Parker Avenue and has owned her house since 1979. She believes the size of the home is out of character with the area. T. 75. In June, 2005, the County issued a permit to build the 2,550 square foot addition. In 2009, the home was advertised for sale as a 10-bedroom, 6 and a half bath home. She spoke with Dan McHugh of DHCA regarding the parking who referred her to the County Department of Transportation regarding the driveway. She spoke with a representative of the Department of Transportation who stated that the road was not maintained by the County. T. 75-77.

Ms. Berry also testified that she can hear this house from her back patio on Parker Avenue. She stated that the trees had been clear cut several summers ago and was disturbed by the sound of chainsaws. T. 77. She believed that the loss of trees in the neighborhood increases the noise from traffic, including the traffic along Georgia Avenue and decreases property values.

T. 77. The quality of life in their neighborhood is changing due to overcrowding from illegal boarding houses, the increased traffic and noise. T. 78. She stated that there has been an increased volume of trash in the neighborhood. T. 78. She stated that she believed about 4 of the 39 houses on her street were illegal boardinghouses. T. 79. On cross-examination, she stated that she did not know how many people were currently residing in the home on the subject property. T. 81.

6. Kim Persaud:

Ms. Persaud submitted a real estate listing advertising the subject property as “two homes in one.” T. 83. She testified that the Applicants had overbuilt the property with “the blessing of Montgomery County.” T. 88. The renovations were finished in December, 2007, and less than two years later the owners put the house on the market as a “two-for-one.” T. 88. They had installed a second kitchen. DHCA came out in 2009 and informed the Applicants that they had to remove the second stove. T. 88. After that, the Applicants put the home on the market. T. 89. DHCA had been to the property before this in 2008 and told the Applicants that they had to remove the stove. T. 89. She stated that there were inconsistencies in the Technical Staff Report and the Housing Inspector’s report. T. 90. She stated the area of the addition is 2,552 square feet, which, according to the DPS 2008 record was too large to be considered an accessory apartment or a registered living unit. T. 90. With the foyer added, DHCA reports that the total square footage of the apartment is 1,682.48 square feet. T. 90.

She testified that the Technical Staff report states that most of Martin Avenue is unpaved. In fact, all of Martin Avenue is an unpaved bike/walk path that neighbors of abutting property have maintained. T. 91. She has worked with Montgomery County for three years trying to find out who’s responsible for the maintenance of Martin Avenue and has been unable to get a definitive answer. T. 91. She could find no permits or exceptions that allow Martin Avenue to

be used for private parking. T. 91.

IV. FINDINGS AND CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards 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 Petitioners have the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Technical Staff concluded that Petitioners did not meet the requirements of the Zoning Ordinance because the apartment exceeded the maximum of 1,200 square feet of floor area (Exhibit 40).

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 does not meet the general and certain specific requirements for the proposed use.

A. Standard for Evaluation

The standard for evaluation prescribed in Code § 59-G-1.2.1 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. 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 § 59-G-1.2.1. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or

in conjunction with inherent effects, are a sufficient basis to deny a special exception.

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

Technical Staff lists the following inherent characteristics of accessory apartments (Exhibit 13, p. 5):

- (1) the existence of the apartment as a separate entity from the main living 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;
- (3) a separate entrance and walkway and sufficient lighting;
- (4) provision of sufficient parking;
- (5) the existence of an additional household on the site with resulting additional activity including more use of outdoor space and more pedestrian, traffic, and parking activity; and
- (6) the potential for additional noise.

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.

In this case, the Hearing Examiner concludes that the location of the parking area for the main dwelling and accessory apartment on the County-owned paper Street, Martin Avenue, is a

non-inherent physical and operational characteristic of this petition. Based on the evidence in this case, Petitioners' have not demonstrated their legal right to use the gravel drive or the parking area. The Hearing Examiner finds that this non-inherent physical and operational characteristic will have a negative impact on the surrounding area. Petitioners' testified that currently there are three cars and one truck belonging to their family which park on the concrete pad (part of which is on Martin Avenue) and in the grass on Petitioners' property. This would potentially require six cars from the property to park on the street. There was evidence from the opposition that there was an increased volume of cars and traffic along the residential streets in the area. T. 38.

This non-inherent physical and operation characteristic must be considered in combination with fact that the apartment is too large to meet the Zoning Ordinance requirements. Technical Staff recommended denial of the petition of this Petition on this basis.

The Hearing Examiner agrees with Technical Staff's assessment of the reconfigured application. Considering size, scale, and scope of the proposed use, the Hearing Examiner concludes, as did the Technical Staff, that the non-inherent adverse impact from the use of Martin Avenue for parking, combined with the large size of the accessory apartment warrants denial of the application.

B. General Conditions

The general standards for a special exception are found in Zoning Code §59-G-1.21(a). The Technical Staff report, the exhibits in this case, and the testimony at the hearing provide ample evidence that the general standards would not be satisfied in this case.

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 R-90 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 Hearing Examiner finds that the proposed use does not comply with the standards and requirements set forth in Division 59-G-2 because the floor area of the apartment exceeds 1,200 square feet and because Petitioners' have not adequately shown that they have a legal right to use the area which they propose for parking.

Section 59-G-2.00(a)(9) limits the floor area of the use to 1,200 square feet:

The accessory apartment must be subordinate to the main dwelling. The floor area of the accessory apartment is limited to a maximum of 1,200 square feet. The 1,200 square feet limitation does not apply to an accessory apartment located in a separate existing accessory structure located on the same lot as the main dwelling. The maximum floor area for a separate existing accessory structure must be less than 50 percent of the total floor area of the main dwelling, or 2,500 square feet, whichever is less. *Montgomery County Zoning Ordinance*, Section 59-G-2.00(a)(9).

While the Housing Inspector concluded that the apartment as reconfigured consisted of only approximately 994 square feet, Technical Staff found the size of the reconfigured unit exceeded 1,200 square feet. A review of the scaled drawing (Exhibit 31(b)) indicates that the Housing Inspector may have used the measurement for "habitable space" as defined in the housing code to reach his assessment. The Housing Code excludes a number of areas of a dwelling from the definition of "habitable space", including bathrooms, laundries, pantries, closets, recreation rooms, workshops or hobby rooms and storage space. *Montgomery County*

Code, §26-2.

Generally, the Zoning Ordinance does not utilize the concept of habitable space. The Hearing Examiner agrees with Technical Staff that it is not appropriate for this purpose. The legislative history of this special exception use reveals that the Council intended ensure that an accessory apartment remain just that—an accessory residential use. *Council Opinion, Zoning Text Amendment 83023; Council Opinion, Zoning Text Amendment 03-18*. Habitable space use exclude significant areas of the dwelling unit which would affect exterior size. Were that measurement to be used, the interior measurement of the accessory apartment could be much smaller than its exterior appearance, as is the case here. Because the use exceeds the maximum permitted floor area under the special exception standards, it does not meet the requirement set forth in §59-G-2.00(a)(9).

Nor does the proposed use meet the requirements of Section §59-G-2.00(c)(3) of the Zoning Ordinance. This provides:

- (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.

The weight of evidence in this case supports a finding that the Petitioner does not own a legal interest either in a portion of the concrete pad or the driveway either by license, lease or otherwise. Technical Staff and the Housing Inspector agree that the parking is located within the County right-of-way. Exhibits 13, p. 3 and 29(b). Moreover, the Petitioners' submitted no evidence as to the sufficiency of on-street parking. While the Inspector notes that on-street

parking is available, he does not state whether it would be sufficient to support the proposed use. As noted, there was testimony regarding the large number of cars currently parked on neighborhood streets. There was also testimony that Petitioners' and their family own four vehicles, thus leaving the possibility that six additional cars must be parked on the street. Based on this evidence, the Hearing Examiner concludes that Petitioners have not met their burden to prove "by a preponderance of the evidence" that there is adequate parking available for the use.

- (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: From the evidence before her, the Hearing Examiner concludes that the proposed use is *not* consistent with the *1989 Master Plan for the Communities of Kensington-Wheaton* for two reasons. First, the Hearing Examiner finds that the size of the accessory apartment exceeds the maximum permitted by the Zoning Ordinance and combined with the existing home, is of a size out of character with the neighborhood. As a result, the proposed accessory apartment does not meet the Master Plan's goal to maintain the "low- to medium-density residential character that prevails in the area".

The Hearing Examiner also finds that utilization of Martin Avenue for parking is not consistent with the Master Plan's identification of the use as a planned bikeway and pedestrian walkway. Petitioners' have provided no documents showing their legal right to use the property for the purpose proposed and private use of what is intended for a public pathway is inconsistent

with the 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.*²

Conclusion: Although the proposed accessory apartment will be located in an existing dwelling and will not require any external changes, the Hearing Examiner concludes that its large size and questionable parking does not maintain the neighborhood's residential character. Technical Staff's initial finding that the street access to the property is safe (Exhibit 13) was based on the erroneous assumption that Petitioner had the right to use the driveway and concrete pad. Based on these facts and the other evidence of record, the Hearing Examiner concludes, that the proposed use is not 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.*

Conclusion: For the reasons set forth in answer to the previous section of this report, the special exception will 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: Because Petitioners' have failed to establish their legal right to use the parking area, they have failed to show that the use will cause no objectionable physical activity at the property due to lack on off-street parking.

² This section was amended, as set forth here, by Zoning Text Amendment 10-13 (Ord. No. 17-01, effective 2/28/11).

- (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: While there was testimony about several illegal boarding houses being operated in the neighborhood, the Hearing Examiner does not consider this relevant to evaluating this particular standard. The proliferation of illegal uses stems from enforcement; the Zoning Code focuses on avoiding a concentration of legally permitted uses. Technical Staff found that there were no special exceptions in the neighborhood, which was confirmed by the DHCA. DHCA found that there were three Registered Living Units in the neighborhood. Exhibits 13, 30. The Hearing Examiner finds that this standard has been met.

- (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 does not support a 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 for the reasons previously set forth.

- (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 services and facilities (Exhibit 13, Attachment 8), and the evidence supports this conclusion.

- (A) *If the special exception use requires approval of a preliminary plan of subdivision, the Planning Board must determine the adequacy of public facilities in its subdivision review. In that case, approval of a preliminary plan of subdivision must be a condition of the special exception.*

- (B) *If the special exception:³*
- (i) does not require approval of a new preliminary plan of subdivision; and*
 - (ii) the determination of adequate public facilities for the site is not currently valid for an impact that is the same as or greater than the special exception's impact;*
- then the Board of Appeals or the Hearing Examiner must determine the adequacy of public facilities when it considers the special exception application. The Board of Appeals or the Hearing Examiner must consider whether the available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the application was submitted.*

Conclusion: The special exception sought in this case would not require approval of a preliminary plan of subdivision and there is no currently valid determination of the of adequacy of public facilities for the site, taking into account the impact of the proposed special exception. Therefore, the Board must consider whether the available public facilities and services will be adequate to serve the proposed development under the applicable Growth Policy standards. These standards include Local Area Transportation Review (LATR) and Policy Area Mobility Review (PAMR). 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, p. 3-4, Attachment 8. 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. Since the proposed use is estimated to generate only one additional peak-hour trip, 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.*

³ This section was amended, as set forth here, by Zoning Text Amendment 10-13 (Ord. No. 17-01, effective 2/28/11).

Conclusion: Because Petitioners have not established their legal right to use the driveway, the Hearing Examiner finds that this standard has not been met by a “preponderance of the evidence.”

C. Specific Standards

The testimony and exhibits of record in this case show that, while the proposed use meets some of the specific standards relating to accessory apartment special exceptions, it does not meet two of the requirements, the maximum floor area or the adequacy of parking. A review of each standard is set forth 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: If the wall between the living room and dining area shown on the reconfigured plan could be closed off, this requirement could be met, but is not met at the present time.

(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.

(3) 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: According to Technical Staff, the original home was constructed in 1961. It therefore meets the “5 year old” requirement.

(4) The accessory apartment must not be located on a lot:

- (i) That is occupied by a family of unrelated persons; or*
- (ii) Where any of the following otherwise allowed residential uses exist: guest room for rent, boardinghouse or a registered living unit; or*
- (iii) That contains any rental residential use other than an accessory dwelling in an agricultural zone.*

Conclusion: The proposed use does not violate any of the provisions of this subsection.

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

Conclusion: As reconfigured, access to the accessory apartment is through the entrance fronting Hermitage Road; therefore, this requirement is met.

(6) 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.

(7) 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.

(8) 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 exceeds the limit of 1,200 square feet of floor area (Exhibit 40) and therefore does not meet this requirement.

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 one part 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: Petitioners' did not submit a deed demonstrating when they purchased the property. Records from the Maryland State Department of Assessments and Taxation (SDAT) are in the file and indicate that Petitioners' purchased the property in 2009. Therefore, the Hearing Examiner finds that this requirement has been met.

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

Conclusion: As proposed, 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: The SDAT records show that the Petitioners are the owners of the 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.

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 lot is approximately 27,530 square feet in size, and therefore satisfies this requirement. Technical Staff advises that the property meets the minimum development requirements for the R-90 Zone. The following table summarizes the relevant development standards for the application. Ex. 12, p. 8.

Development Standard	Required	Provided
Minimum Lot Area (square feet)	9,000	27,530
Minimum lot width (feet) at front building line for and single family detached dwelling	75	137.65
Minimum lot width (feet) at existing street line	25	137.65
Minimum street setback (feet)	30	45.4
Minimum Setback from adjoining lot (feet)		
-- One side	8	21.7
--Sum of both sides	25	46.6
--Rear	25	87.3
Maximum Building Height (feet)	30 or 35 feet or 2.5 stories	1 story
Maximum Coverage (%)	30	13.5

(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: As previously stated in this report, the Hearing Examiner concludes that the proposed special exception will not create an excessive concentration of similar uses since there are no other accessory apartments in the neighborhood.

- (3) *Adequate parking must be provided. There must be a minimum of 2 off-street parking spaces unless the Board makes either of the following findings:*
- (i) *More spaces are required to supplement on-street parking; or*
 - (ii) *Adequate on-street parking permits fewer off-street spaces. Off-street parking spaces may be in a driveway but otherwise must not be located in the yard area between the front of the house and the street right-of-way line.*

Conclusion: As discussed in Part II.B. of this report, Petitioners have not demonstrated a legal right to use the off-street parking area or driveway access to their home. Petitioners own at least four vehicles, thus resulting in the possibility of six or more cars would have to park on the street. Although the Housing Inspector and Technical Staff report that on-street parking is available, there is also evidence from neighborhoods that the volume of cars is excessive. Based on the testimony and evidence before her, the Hearing Examiner concludes that this standard has not 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. B. of this Report, the Housing Code Inspector's original report (Exhibit 14) notes several problems with the use as originally proposed. Primarily, these included the lack of private entrance to the apartment as well as exceeding the maximum permitted size. When reconfigured, the Housing Inspector found that these issues were resolved (measuring the floor area of the habitable space). Exhibit 32. Technical Staff then also measured the area for the accessory apartment and then recommended denial of the petition,

finding that the size exceeded the maximum permitted by the Zoning Ordinance. Exhibit 40.

V. RECOMMENDATION

Based on the foregoing analysis, I recommend that Petition No. S-2792, which seeks a special exception for an accessory apartment to be located at 2301 Hermitage Avenue, Silver Spring, Maryland, be DENIED.

Dated: May 3, 2011

Respectfully submitted,

Lynn A. Robeson
Hearing Examiner