

**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:	*	
MATTHEW OAKES	*	
Petitioner	*	
	*	
Matthew Oakes	*	
	*	Board of Appeals Case No. S-2864
For the Petition	*	(OZAH Case No. 13-13)
	*	

Robert Goff	*	
	*	
Department of Housing and Community Affairs	*	
	*	

Report and Recommendation by: Martin L. Grossman, Hearing Examiner¹
Hearing conducted by: Lynn A. Robeson, Hearing Examiner

HEARING EXAMINER’S REPORT AND RECOMMENDATION

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¹ Although the hearing was conducted by Hearing Examiner Lynn A. Robeson, Hearing Examiner Martin L. Grossman reviewed the entire record in this case and prepared this report and recommendations to the Board of Appeals, in accordance with similar procedures prescribed in Board of Appeals Rule 8.0.

I. STATEMENT OF THE CASE

Petition No. S-2864, filed on November 16, 2012, seeks a special exception, pursuant to §59-G-2.00 of the Zoning Ordinance, to permit an accessory apartment use in the lower level of a two-story, single-family, residential structure located at 7126 Sycamore Avenue, Takoma Park, Maryland, in the R-60 Zone. The property is identified as Lot 4, Block 21, of the B. F. Gilbert's Addition to Takoma Park, and has a Tax Account No. 13-025-01075396.²

An accessory apartment had been approved by the Board of Appeals for this site on April 6, 1989, in Case No. S-1543. At that time, the property was under different ownership, and in 2007 the Board of Appeals revoked the special exception based on the request made by the former owner, who indicated that the accessory apartment had been abandoned. The current Petitioner, Matthew Oakes, bought the property in 2012 and is reapplying for a special exception as a new owner.

On December 6, 2012, the Board of Appeals issued a notice that a hearing in this matter would be held before the Office of Zoning and Administrative Hearings on March 21, 2013, at 10:30 a.m., in the Second Floor Hearing Room of the Stella B. Werner Council Office Building (Exhibit 11). On March 4, 2013, Petitioner filed a copy of his deed, indicating that he and his wife acquired the property on May 22, 2013.³

Technical Staff at the Maryland-National Capital Parks and Planning Commission (M-NCPPC), in a report issued March 15, 2013, recommended approval of the special exception, with conditions. Exhibit 13.⁴

The Department of Housing and Community Affairs (DHCA) inspected the property on March 18, 2013, and reported its issues in a memorandum of the same date (Exhibit 14). The inspector concluded that occupancy must be limited to two unrelated persons or a family of up to

² The Tax ID Number is listed as 13-01075396 in the SDAT records, in Subdivision "0025." Exhibit 16.

³ The Maryland SDAT records (Exhibit 16) indicate a transfer date of May 24, 2013, the date used by Technical Staff in its report (Exhibit 13); however, the deed clearly shows a settlement date of May 22, 2013, so that is the date used by the Hearing Examiner as the date Petitioner acquired ownership.

⁴ The Technical Staff report is frequently quoted and paraphrased herein.

two, in habitable space of 193.55 square feet. By memorandum dated March 7, 2013, Ada DeJesus of DHCA purported to provided information about another accessory apartment and a registered living unit in the neighborhood.⁵ Exhibit 15.

A public hearing was convened on March 21, 2013, as scheduled, and Petitioner Matthew Oakes appeared *pro se*. Also testifying was DHCA Housing Code Inspector, Robert Goff. Petitioner executed an affidavit of posting (Exhibit 18). He also adopted the findings in the Technical Staff Report (Exhibit 13) and the Housing Code Inspector's Report (Exhibit 14), as his own evidence. Tr. 5. Petitioner agreed to meet all the conditions set forth in both reports. Tr. 5-6.

The record was held open till April 2, 2013, to obtain clarification from DHCA or the Board of Appeals records as to other special exceptions in the neighborhood and to allow Petitioner time to file a letter from his wife, a co-owner of the property, indicating her consent to the special exception. As indicated in footnote 5, below, additional information regarding the other special exceptions was timely filed. On March 29, 2013, Petitioner filed a letter from his wife, Kristina Oakes, indicating her consent to the application (Exhibit 23(a)), and the record closed as scheduled on April 2, 2013.

There has been no opposition to this special exception petition, nor response of any kind from the community. The evidence indicates that Petitioner has met the requirements for obtaining this special exception, and the Hearing Examiner recommends that the petition be granted, with conditions as set forth in Part V of this report.

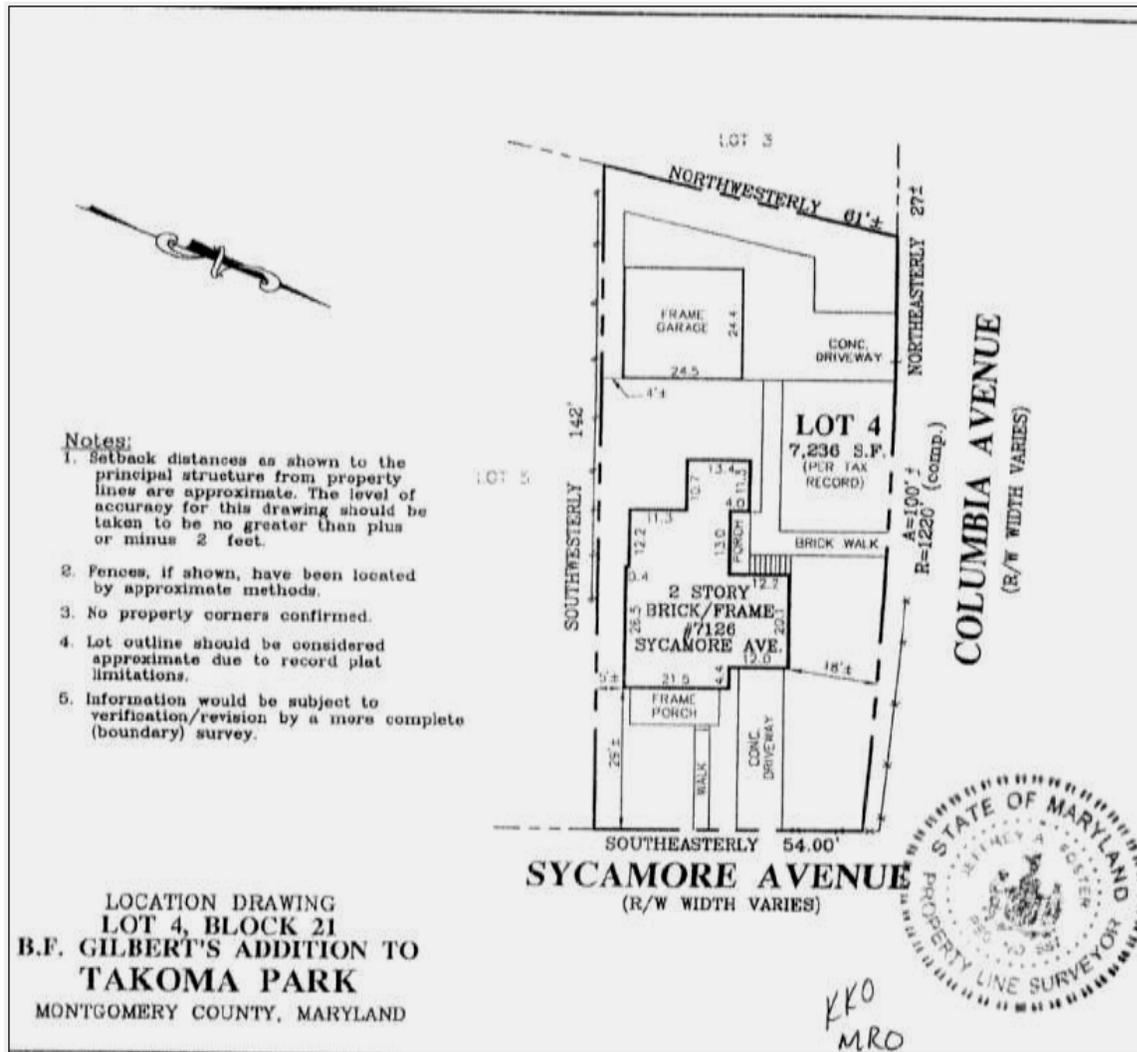
II. FACTUAL BACKGROUND

A. The Subject Property and the Neighborhood

As noted above, the address of the subject property is 7126 Sycamore Avenue, in the B. F. Gilbert's Addition to Takoma Park, and the home is in the R-60 Zone. It is located on a corner lot in the southwest quadrant of the intersection of Columbia Avenue and Sycamore Avenue, and is

⁵ Subsequently filed evidence (Exhibits 17-23) clarified the question about other special exceptions in the area.

accessed via existing residential driveways on both streets, as shown below in the Site Plan (Ex. 4):



Technical Staff reports (Exhibit 13, p. 3):

The subject property contains 7,800 feet of land and is a corner lot. The site is currently improved by a one-family house that was constructed in 1909. The property is zoned R-60 and is located within the 2000 Takoma Park Master Plan area. The Maryland Department of Assessments and Taxation indicates the existing dwelling has an enclosed area of 1990 square feet. The property slopes down from Sycamore Avenue and there are trees and shrubs surrounding the dwelling.

There is a detached, two car, frame garage, in addition to the two driveways which can accommodate four cars. The locations of landscaping and lighting, all of which are existing and will remain unchanged (except for the light required by DHCA for the accessory apartment walkway),

Technical Staff defined the neighborhood as bordered by Ethan Allen Avenue and Columbia Avenue to the north, property lines of the one-family homes facing Sycamore Avenue to the east, Poplar Avenue to the west, and Beech Avenue to the south. The Hearing Examiner accepts this definition of the general neighborhood, which includes any nearby properties that may be affected by a potential increase in density or traffic, and it is outlined below on an aerial photo supplied by Technical Staff (Exhibit 13, p. 4):



Staff reports that the neighborhood consists of approximately 60 one-family homes which are zoned R-60. Staff supplied two photographs of Sycamore Avenue in the neighborhood (Exhibit 13, p. 5):



Although Technical Staff lists eight additional special exceptions within the neighborhood boundaries (Exhibits 17 and 13, p. 4), other evidence (Exhibits 19, 21 and 23) leads the Hearing Examiner to conclude that not all the special exceptions listed by Staff are currently operational.

Board of Appeals records indicate the following active special exceptions (Exhibit 21)⁶:

CBA-2016	7012 Sycamore Avenue	Child care home	– granted	July 26, 1966
S-939	7120 Sycamore Avenue	Accessory apartment	– granted	August 1, 1984
S-1156	7100 Sycamore Avenue	Accessory apartment	– granted	October 16, 1985
S-1419	7106 Sycamore Avenue	Accessory apartment	– granted	April 26, 1988
S-1525	7017 Sycamore Avenue	Accessory apartment	– granted	November 14, 1988
S-2325 ⁷	7008 Sycamore Avenue	Accessory apartment	– granted	April 24, 1998
CBA-251	7008 Sycamore Avenue	Child care home	– granted	November 9, 1954
S-2731	7011 Sycamore Avenue	Accessory apartment	– granted	January 15, 2009

DHCA records indicate that S-939 has been revoked (although Board records do not confirm that), and S-1419 was removed by the new owners about six years ago (Exhibit 22). According to Mr.

⁶ Board records list S-2131, an accessory apartment at 7009 Poplar Avenue, as being revoked on May 9, 2008.

⁷ Technical Staff listed S-2325 and S-2731 as “antique shops.” Exhibit 17. The Board’s records show them to be accessory apartments.

Goff, only two of the remaining four accessory apartments on the Board's list are "near" the subject site. Exhibit 22. Mr. Oakes also challenged the notion that child care homes were operating on his street (CBA-251 and CBA-2016). He noted that these special exceptions were granted many decades ago, and from his observation, they are no longer in operation. Exhibit 23 and Tr. 21.

Based on this evidence, and on the fact that none of the neighbors complained about an excessive concentration of special exceptions in the area, the Hearing Examiner finds that while there are more active accessory apartments in this area than are typically found in reviews of similar applications, the record does not support the conclusion that the concentration of special exceptions is so great as to affect the neighborhood adversely.

B. The Proposed Use

Technical Staff described the proposed accessory apartment (Exhibit 13, p. 6):

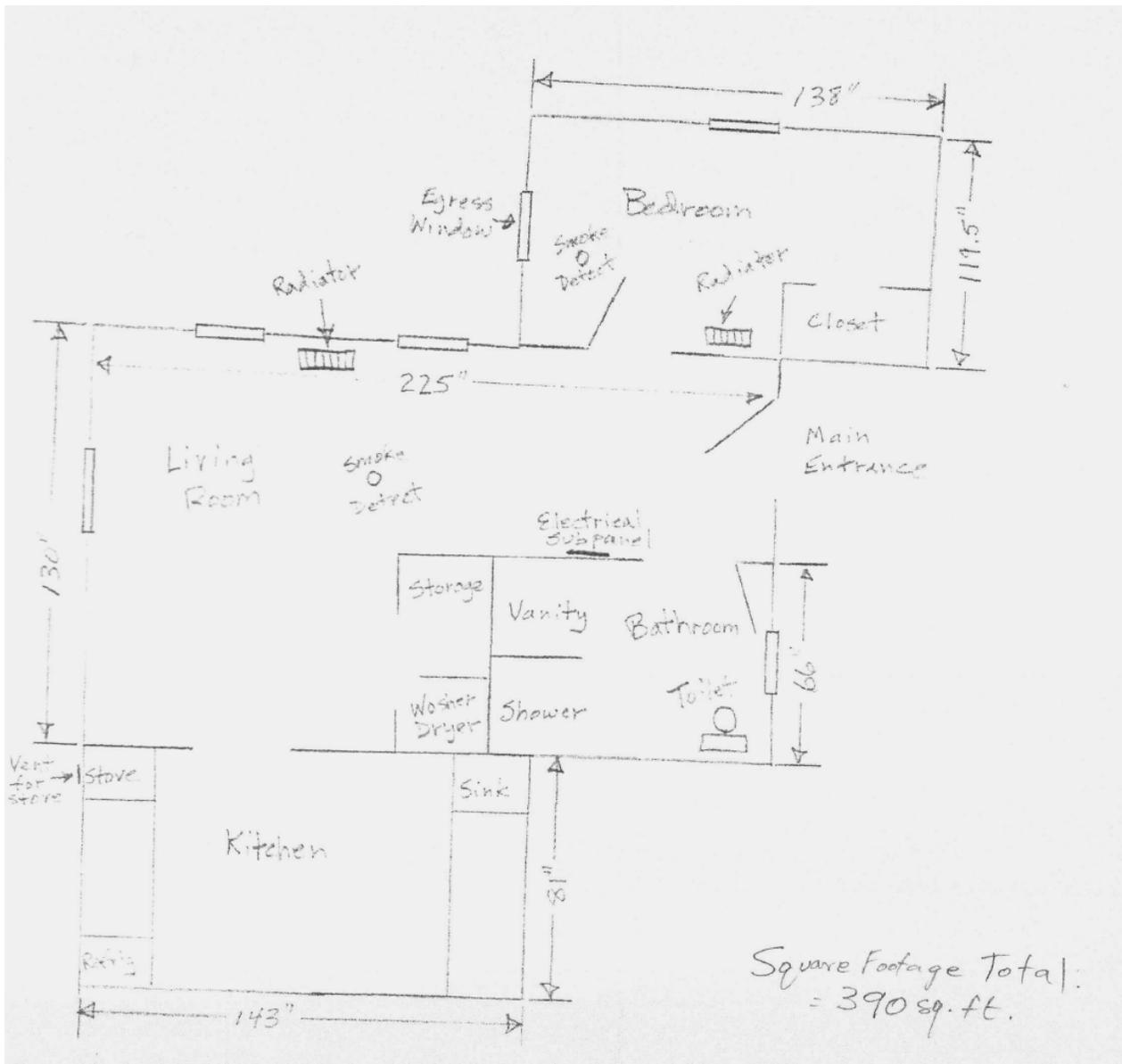
The applicant is proposing a 390 square foot accessory apartment located in the lower level of the existing dwelling unit. A separate entrance to the apartment is located along the north side of the house and is distinct from the entrance to the main dwelling. The proposed accessory apartment includes a living room/ dining room combination, bedroom, kitchen and bath. To reach the entrance of the proposed accessory apartment one would take the brick steps from Columbia Avenue to reach the apartment door.

The entrance to the apartment is depicted below, in a photograph from the Staff report (Exhibit 13, p. 7):



As reported by Staff, the proposed accessory apartment entrance has the appearance of a side door and does not diminish the one-family home character of the building. The accessory apartment entrance will not detract from the appearance of the neighborhood. Staff also notes that the property has a two car garage and two driveways, with a total of at least four off-street parking spaces. The applicant is not proposing to make any exterior alterations to the dwelling, except as required by DHCA.

The apartment's floor plan, Exhibit 5, is reproduced below:



The Housing Code Inspector, Robert Goff, measured the habitable apartment floor space as about 193.55 square feet. Tr. 14 and Exhibit 14. Mr. Goff reported the following in his memorandum of March 16, 2013.

The preliminary inspection was conducted on 3-18-2013. The Accessory Apartment is located in the cellar of the house. The issues regarding Accessory Apartment standards are as follows:

1. Install exterior light on rear of house to light the walkway to the Accessory Apartment.
2. The driveway in the rear will accommodate 3 cars and the driveway in the front will accommodate 1 car.
3. There is a total of 193.55 sq feet of habitable space. The total sq feet of the Accessory Apartment is 320.66. 2 unrelated or a family of 2 can live in the unit.

Thus, the only repair required is for Petitioner to install one exterior light to illuminate the walkway. Petitioner is agreeable to doing the repairs required to make the accessory apartment habitable. Tr. 5-6. As indicated by the Housing Code Inspector, given the habitable space of the apartment, it may be occupied by a maximum of two unrelated persons or a family of up to two. Exhibit 14. Mr. Goff also estimated that the parking area of the on-site driveways can accommodate a minimum of four vehicles. Exhibit 14 and Exhibit 13, p. 6. There is also on-street parking available, according to Mr. Goff. Tr. 15.

Technical Staff found that the proposed use will have no adverse effects on the transportation system, and that both Local Area Transportation Review (LATR) and Transportation Policy Area Review (TPAR) are satisfied without the need for a traffic study because the use will generate only one additional trip in both the morning and evening peak hours. Exhibit 13, pp. 8-9.

Petitioner is not proposing any new construction or modifications to the exterior of the dwelling. Therefore, the appearance of a single-family, detached dwelling will be maintained. There are no environmental issues associated with the proposed use, and the site is exempt from the forest conservation law. Exhibit 7 and Exhibit 13, p. 9.

C. Neighborhood Response

As mentioned at the beginning of this report, there has been no response from the community to this petition, negative or positive.

D. The Master Plan

The property is located within the area covered by the *Takoma Park Master Plan*, approved and adopted in December 2000. The Plan does not explicitly address the question of accessory apartments, but it does emphasize revitalizing housing and accepting a diversity of housing types in the community. Master Plan, pp. 28-29. The Plan also supports the R-60 zoning, which permits accessory apartments as special exceptions. Plan Appendix B, at p.11. The Technical Staff concluded that the proposed accessory apartment would be consistent with the Master Plan because it meets the requirements of the R-60 zone and will be compatible with the neighborhood. Exhibit 13, p. 8.

The Hearing Examiner agrees. Because Petitioner plans no external structural modifications to the subject property and because there is sufficient parking to accommodate the proposed use, the requested special exception will maintain the residential character of the area. 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 *Takoma Park Master Plan*.

III. SUMMARY OF HEARING

At the hearing, testimony was heard from Petitioner Matthew Oakes and from the Housing Code Inspector, Robert Goff.

Matthew Oakes (Tr. 4-14; 17, 21-25):

Matthew Oakes executed an affidavit of posting (Exhibit 18). He also adopted the findings in the Technical Staff Report (Exhibit 13) and the Housing Code Inspector's Report (Exhibit 14), as

his own evidence. Tr. 5. Petitioner agreed to meet all the conditions set forth in both reports. Tr. 5-6.

Mr. Oakes identified the plans and photographs in the file, and described the apartment, the exterior lighting and driveways. There is a marked brick walkway leading up to the entryway from Columbia Avenue. Tr. 7-14. The tenants will park on what is marked as a concrete driveway that leads off of Sycamore Avenue, and there is on-street parking on Columbia Avenue up to a point prior to the intersection that's about halfway from the brick walk to Sycamore Avenue. It does not require a permit. Tr. 8-9.

Mr. Oakes further testified that although Technical Staff listed two special exceptions as antique shops and as child care, he had never seen any exterior advertising for child care or antique shops. So, those may or may not still be operating. Tr. 21.

In response to a request from the Hearing Examiner, Mr. Oakes indicated that his wife would submit a letter stating that she consented to the special exception on the property she co-owns. Tr. 24.

Housing Code Inspector Robert Goff (Tr. 14-25):

Housing Code Inspector, Robert Goff, testified that he had inspected the premises on March 18, 2013, and he listed the items raised in the Housing Code Inspector's report (Exhibit 14). Tr. 14-15.

Mr. Goff stated that the only requirement is for Mr. Oakes to install an exterior light to light the walkway to the accessory apartment. He indicated that three cars can fit in rear driveway and one in the front driveway. Tr. 14-15.

Mr. Goff further testified that he found a total of 193.55 square feet of habitable space in the apartment. The total square footage of the accessory apartment is 320.66. Two unrelated persons or a family of two can live in the unit. Tr. 14. There is also on-street parking available, according to

Mr. Goff. Tr. 15.

Mr. Goff noted that the prior owner originally had an accessory apartment, but the owner was doing a lot of modifications without permits, so the special exception was revoked. The owner then got all his permits and finished the work, after which he turned the space into a registered living unit. Tr. 15-17. Mr. Goff also discussed other special exceptions in the area. Tr. 18-20.

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 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 conditions set forth in Part V, below.

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. 11):

- (1) the existence of the apartment as a separate entity from the main living unit but sharing a party wall;
- (2) the provision within the apartment of the necessary facilities, spaces and floor area to qualify as habitable space under the applicable code provisions;
- (3) a separate entrance and walkway and sufficient exterior lighting;
- (4) sufficient parking;
- (5) the existence of another household on the site with resulting additional activity, including greater use of outdoor space and more pedestrian traffic and parking activity; and
- (6) the potential for additional 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, “There are no non-inherent adverse effects present in this case” Exhibit 13, p. 11. The Hearing Examiner agrees that there are no unusual, adverse characteristics of the site. Since there will be no exterior modifications and since ample off-street parking is available on the site, the Hearing Examiner finds that there will be no non-inherent, adverse effects on the neighborhood, as long as all conditions of approval are met. As stated by Staff (Exhibit 13, p. 11):

Under the subject application, there are no adverse effects that will negatively impact the community above those necessarily inherent to an accessory apartment. The apartment will be located at the lower level of the main dwelling and is not identifiable from the street. This apartment will provide space and facilities necessary for an apartment use. The accessory unit has its own entrance separate from the entry to the primary dwelling. Vehicular parking for the accessory apartment will be located in the driveway of the one-family house.

The operational and physical characteristics of the proposed accessory apartment are consistent with the inherent characteristics of an accessory apartment use. There are no non-inherent adverse effects present in this case.

Based on the evidence in this case, and considering size, scale, scope, light, noise, traffic and environment, the Hearing Examiner concludes, as did the Technical Staff, that there are no non-inherent adverse effects from the proposed use warranting denial of this petition.

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 Housing Code Inspector’s report, the exhibits in this case and the testimony at the hearing provide ample evidence that the general standards would be satisfied.

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-60 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 *Takoma Park Master Plan*, approved and adopted in December 2000. The Plan does not explicitly address the question of accessory apartments, but it does emphasize revitalizing housing and accepting a diversity of housing types in the community. Master Plan, pp. 28-29. The Plan also supports the R-60 zoning, which permits accessory apartments as special exceptions. Plan Appendix B, at p.11. The Technical Staff concluded that the proposed accessory

apartment would be consistent with the Master Plan. Exhibit 13, p. 8.

Moreover, because Petitioner plans no external structural modifications to the subject property and because there is sufficient parking to accommodate the proposed use, the requested special exception will maintain the residential character of the area. 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 *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.*

Conclusion: The accessory apartment will be located on the lower level of an existing dwelling and will not require any external changes other than the addition of a light bulb to illuminate a walkway. It therefore will maintain its residential character. There will be sufficient parking, considering the driveway space and the garage, and traffic conditions will not be affected adversely, according to Transportation Planning Staff. As discussed on pages 7-8 of this report, there will not be an excessive concentration of similar uses in the defined neighborhood. Based on these facts and the other evidence of record, the Hearing Examiner concludes, as did Technical Staff, that the proposed use will be 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: The proposed accessory apartment presents only minimal impacts to the immediate area, and 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 accordance with the recommended 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 special exception would cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site. Staff noted, “The use will cause no objectionable illumination or glare as the provided lighting is residential in character.” Exhibit 13, p. 13. Given the nature of the use, and the undisputed evidence that no external changes are planned except adding a single light, the Hearing Examiner agrees with Staff and so finds.

- (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: In response to this provision, Technical Staff states (Exhibit 13, pp. 13-14),

Although there are other special exceptions in the neighborhood, the proposed apartment will not increase the intensity or scope of special exception uses to such a degree that the area will be adversely impacted. The Montgomery County Board of Appeals approved an accessory apartment special exception for this property in 1989 that continued till 2007. The applicant bought the property in 2012 and is reapplying for a special exception as a new owner. The proposed use is a residential use by definition; therefore, the special exception will not alter the residential nature of the area. The proposed use will not be visible to the surrounding properties and is also consistent with the master plan recommendations.

For the reasons stated by Technical Staff and those discussed at pages 7-8 of this report, 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.

- (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, pp. 14-15), 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:*
- (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 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 Transportation Policy Area Review (TPAR). As indicated in Part II. B. 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, pp. 14-15. 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, TPAR 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 the Technical Staff's conclusion that the special exception "is not likely to negatively impact the safety of vehicular or pedestrian traffic . . .," the Hearing Examiner so finds. Exhibit 13, p. 15.

C. Specific Standards

The testimony and the exhibits of record, especially the Technical Staff Report (Exhibit 13), 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 lower level 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 the existing structure.

- (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: The house was built in 1909. Exhibit 13, p. 17. It 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: The proposed use does not violate any of the provisions of this subsection.

- (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 through an existing side entrance. There will 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: Petitioner is not proposing any new construction or modifications to the exterior, other than the addition of a light bulb to illuminate the walkway for the accessory apartment, as required by the Housing Code Inspector.

- (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.

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

Conclusion: The accessory apartment meets the limit of 1,200 square feet of floor area and is clearly subordinate to the main dwelling, as it occupies approximately 321 square feet of space in the lower level of Petitioner's home, and the home has approximately 1,990 square feet of floor space. Exhibit 13, p. 18.

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 Petitioner lives in the main 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: According to the deed (Exhibit 12), Petitioner and his wife, Kristina Oakes, acquired the property on May 22, 2012. The one-year rule specified in this section therefore would ordinarily require the Board to postpone the effective date of any resolution granting the special exception until May 22, 2013. Unfortunately, that effective date would be two days after the Board's authority to grant an accessory apartment special exception expires by virtue of the Council's recently enacted Bill No. 31-12 and ZTA 12-11,⁸ both of which become effective on May 20, 2013. The Hearing Examiner takes official notice of this new legislation and finds that denial of this application based on this "one-year" provision would create an undue hardship on the Petitioner by forcing him to go through an entirely new process to obtain licensure for his proposed accessory apartment, exacting new costs of both time and money. Such a result is undue because this Board is authorized by the section to waive the one-year time period to avoid hardship, and the Board can do so while preserving the intent of the provision by waiving only three days of the one-year period, making the Board's resolution effective on May 19, 2013. The Hearing Examiner therefore recommends the following condition in Part V of this report:

To avoid a hardship, the Board hereby grants a three-day waiver of the requirement of Zoning Ordinance §59-G-2.00(b)(2) that "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." This special exception will therefore become effective on May 19, 2013. The cited section expressly permits a hardship waiver by the Board.

⁸ Bill 31-12 was enacted on February 5, 2013, and ZTA No. 12-11 was adopted on February 5, 2013, in Ordinance No. 12-11, both with effective dates of May 20, 2013.

Although it could be argued that the Board can alternatively avoid the new legislative restriction by adopting a resolution prior to May 20, 2013, which postpones the effective date of the accessory apartment until May 22, 2013, the Hearing Examiner fears that such a procedure might be subject to challenge, given the legislative changes enacted by the Council. Thus, the better way is to invoke the Board's power to grant a waiver of the one-year provision.

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

Conclusion: The Petitioner 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 Petitioner and his wife are the joint 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 7,800 square feet in size, and it therefore meets the 6,000 square foot minimum. The following chart from the Technical Staff Report (Ex. 13, p. 10) demonstrates compliance with all applicable development standards:

Development Standards for the R-60 Zone

Development Standards	Min/Max Required	Proposed	Applicable Zoning Ordinance Provisions
Minimum Lot Area	6,000 sq ft	7800 sq ft.	§59-C-1.322 (a)
Minimum Lot width at street line	25 ft.	54 ft.	§59-C-1322 (b)
Minimum lot width at front building line	60 ft. min	54 ft.*	§59-C-1322 (b)
Setbacks			
- front	25 ft. min	29 ft.	§59-C-1.323
- side	8 ft. min; 18 ft. sum of both sides	5 ft.*; 23 ft. sum of both sides	§59-C-1.323
- rear	20 ft. min	63'	§59-C-1.323
Maximum Building Height	35 ft.	Approximately 25 ft.	§59-C-1.327
Maximum Building coverage	35 %	Approximately 24 %	§59-C-1.328
Maximum Floor area for accessory apartment	1,200 sq ft	390 sq. ft.	§59-G-2.00 (a) (9)

* This property was part of the City of Takoma Park and was annexed into Montgomery County on July 1, 1997. As per §59-B-6.2 any building or structure which was lawful under the Prince George County Zoning Ordinance in effect on June 30, 1997 and was constructed within the Annexation Area under a building permit issued prior to February 10, 1998 is a conforming building or structure in Montgomery County and may be altered, renovated, or enlarged in accordance with the Montgomery County Zoning Code.

- (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 discussed previously in this report, although there are other special exceptions in the neighborhood, the proposed apartment will not increase the intensity or scope of special exception uses to such a degree that the area will be adversely impacted.

- (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: There are a minimum of four off-street parking spaces in Petitioner's two driveways. In addition, Petitioner has a garage, and there is on-street parking available. The Housing Code Inspector confirmed that on-street parking is available, in addition to the garage and driveways. Tr. 15.

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 report (Exhibit 14) notes only one needed repair, and has recommended that occupation of the accessory apartment be limited to no more than two unrelated persons or a family of up to two. As mentioned above, Petitioner has agreed to meet all conditions, and will make the repair required by the Housing Code Inspector.

V. RECOMMENDATION

Based on the foregoing analysis, I recommend that Petition No. S-2864, which seeks a special exception for an accessory apartment to be located at 7126 Sycamore Avenue, Takoma Park, Maryland, be GRANTED, with the following conditions:

1. The Petitioner is bound by his testimony, representations and exhibits of record;
2. To avoid a hardship, the Board hereby grants a three-day waiver of the requirement of Zoning Ordinance §59-G-2.00(b)(2) that "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." This special exception will therefore become effective on May 19, 2013. The cited section expressly permits a hardship waiver by the Board;
3. The Petitioner must complete repairs to comply with the conditions set forth in the Memorandum of Robert Goff, Division of Housing and Code Enforcement (Exhibit 14). These conditions require Petitioner to install an exterior light on rear of house to light the walkway to the Accessory Apartment;
4. Based on habitable space in the apartment (193.55 square feet), no more than two unrelated persons or a family of up to two may reside in the accessory apartment;

5. Petitioner must occupy one of the dwelling units on the lot on which the accessory apartment is located;
6. Petitioner must not receive compensation for occupancy of more than one dwelling unit; and
7. 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. Petitioner 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 10, 2013

Respectfully submitted,



Martin L. Grossman
Hearing Examiner