

**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:
CAROL E. FLYNN**

Petitioner

Carol E. Flynn
For the Petition

Lynn McCreary

Department of Housing and
Community Affairs

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* Board of Appeals No. S-2838
* (OZAH No. 12-27)
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Before: Tammy J. CitaraManis, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDATION

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I. STATEMENT OF THE CASE

In Petition No. S-2838, Carol E. Flynn seeks approval of a Special Exception under Zoning Ordinance §59-G-2.00 to allow an accessory apartment on property located at 4512 Chase Avenue, Bethesda, Maryland in the R-60 (Residential, One-family, Detached) Zone. The legal description of the property is Lot 18, Block 8, in the Westboro Subdivision. The Tax Account number is 07-00541191.

On March 19, 2012, the Board of Appeals issued a notice of a public hearing before the Hearing Examiner for July 12, 2012. Exhibit 11. Technical Staff of the Maryland-National Capital Park and Planning Commission (M-NCPPC), in a report dated July 5, 2012, recommended approval of the special exception, with three (3) conditions. Exhibit 14.¹

A Housing Inspector from the Department of Housing and Community Affairs (DHCA) inspected the property on May 31, 2012. Housing Code Inspector Lynn McCreary (Ms. McCreary) reported her findings in a memorandum dated May 31, 2012 (Exhibit 12). The inspector found the accessory apartment had 407 square feet of habitable space and as a result, concluded that occupancy in the unit must be limited to no more than two (2) occupants. Exhibit 12.

The hearing went forward as scheduled on July 12, 2012. Petitioner appeared *pro se*. Petitioner executed an Affidavit of Posting (Exhibit 18) and provided a copy of her deed (Exhibit 16) and other documents showing restoration of her maiden name.² Petitioner testified in support of the petition and agreed to meet all the conditions set forth in the Technical Staff

¹ The Technical Staff report is frequently quoted and paraphrased herein. The Technical Staff Report was received via e-mail on July 5, 2012 (Exhibit 14) and by mail on July 11, 2012 (Exhibit 15).

² Petitioner's deed is in her married name, Carol Flynn Burans. Petitioner's maiden name, Carol Elizabeth Flynn, was restored by Order in 2010 and is reflected on the Deed of Trust to the property when Petitioner subsequently refinanced the mortgage note. Exhibits 17 and 19.

Report (Exhibit 14) and the Housing Inspector's report (Exhibit 12). Ms. McCreary also testified at the hearing. No opposition appeared at the hearing.

The record was held open until July 20, 2012, to give time for the Court Reporter to produce the hearing transcript. The record closed as scheduled. However, upon review of the evidence and legislative history for Zoning Ordinance § 59-G-2.00(c)(1), the Hearing Examiner determined that because Petitioner's 5,184 square foot lot did not meet the 6,000 square feet minimum lot size requirement of § 59-G-2.00(c)(1) a variance from the minimum lot size was required.³ The Hearing Examiner reopened the record by Order on August 16, 2012, and gave Petitioner until September 10, 2012, to advise the Hearing Examiner whether she intended to apply for a variance and to request that the record remain open pending resolution of her variance application by the Board of Appeals. Exhibit 20.

In a letter dated August 21, 2012, Petitioner indicated she intended to seek a variance from the minimum lot size requirement and requested that the record remain open pending

³ In its report, Technical Staff noted that with the exception of the minimum lot size (6,000 square feet) and lot width at the front building line (60 feet), the proposed special exception application complied with the current development standards of the R-60 Zone as shown on the development chart provided on page 6 of the Technical Staff report (Exhibit 14). The property's lot size is 5,184 square feet and the lot width at the front building line is 55 feet. Petitioner's lot was created in 1939 and subject to the development standards and requirements of the 1928 Zoning Ordinance, including the minimum lot size of 5,000 square feet and 50 feet lot width minimum at the front building line. Zoning Ordinance § 59-B-5.1. states in pertinent part that "any lot recorded by deed prior to June 1, 1958, . . . is a buildable lot for building a one-dwelling family only, even though the lot may have less than the minimum area for any residential zone. Any such lot may be developed under the zoning development standards in effect when the lot was recorded. . . ." The Hearing Examiner agrees with Technical Staff's conclusion that the minimum lot width at the front building line for Petitioner's lot is grandfathered under this provision and thereby complies with the current development standards for the R-60 Zone. However, the same rationale does not "grandfather" the smaller lot size to meet the minimum lot size requirements for an accessory apartment use. Zoning Ordinance § 59-G-2.00(c) (1) provides: "The minimum lot size must be 6,000 square feet, except where the lot size is larger." A review of the legislative history reveals that in 1989 the minimum lot size for an accessory apartment use was reduced from 7,500 square feet to 6,000 square feet, the minimum lot size required for the R-60 Zone. In its opinion, the Council noted that "the [PHED] committee in recommending this as a minimum was concerned over the potential impact of accessory apartments in the older sections of the County, where legal lots exist which are smaller than 6,000 square feet." *Opinion*, Montgomery County Ordinance No. 11-61. With this knowledge, the Council established the minimum lot size requirement for accessory apartments must be 6,000 square feet. Petitioner's lot is approximately 5,184 square feet in size and therefore does not meet the minimum lot size requirement. Thus, a variance from the minimum lot size requirement of Zoning Ordinance § 59-G-2.00(c) (1) is required for Petitioner's special exception application to proceed.

resolution of her application for a variance by the Board of Appeals. Exhibit 21. On September 10, 2012, the Hearing Examiner granted Petitioner's request and entered an Order to keep the record in S-2838 open until 30 days after the Board of Appeals acted on Petitioner's variance application (e.g., effective dated of Opinion). Exhibit 24.

The Board of Appeals accepted Petitioner's variance application (BOA Case No. A-6400) for filing on November 8, 2013. On January 16, 2013, the Board voted to approve the variance, which is reflected in the Board's resolution effective February 12, 2013. Exhibit 27. In a letter to the Hearing Examiner dated February 21, 2013, Petitioner requested approval of her pending special exception petition (Exhibit 1) and in support of this request submitted a copy of the Board's resolution granting her variance application. Exhibit 28. By Order dated March 5, 2013, the Hearing Examiner directed that the record close on March 14, 2013, which is 30 days from February 12, 2013, the effective date of the Board's resolution granting Petitioner's variance of 816 square feet from the 6,000 square-foot minimum lot size requirement per Zoning Ordinance § 59-G-2.00(c)(1). Exhibit 29. The record closed as scheduled.

There was no opposition to this special exception petition, and except for the minimum lot size requirement, the petition meets all of the statutory requirements. However, given the Board of Appeals' grant of a variance from the minimum lot size requirement (Exhibit 27), and for the reasons set forth below, the Hearing Examiner recommends approval of the requested special exception, subject to the conditions set forth in Section V of this Report.

II. FACTUAL BACKGROUND

A. The Subject Property and Its Current Use

The subject property is located at 4512 Chase Avenue, Bethesda, Maryland, in the Westboro Subdivision. The property is an interior lot, 5,184 square feet in size and rectangular in

shape, located on the south side of Chase Avenue between Pearl Street/Maryland Avenue to the west and Kentucky Avenue to the east, shown below on the Zoning Map (Exhibit 10(b)) of the area:



The lot is in the R-60 zone and improved with a two-story single-family dwelling.

Technical Staff described the property as follows (Exhibit 14, p. 3):

According to State of Maryland tax records, the existing two-story house constructed in 1940 and has an enclosed area of 2,056 square feet. The house is located on a mid-block lot on Chase Avenue southeast of the street's intersection with Pearl Street. The lot is level and the backyard is landscaped. The site has its sole access point from Chase Avenue. The home has a side driveway with adequate space for 2 vehicles. On-street parking is available along one side of Chase Avenue.⁴

Technical Staff provided a location aerial photograph of the area (Exhibit 14, Attachment 1), and two photographs of the front of the house taken from Chase Avenue (Exhibit 14, Attachment 3), shown on the next page of this report.

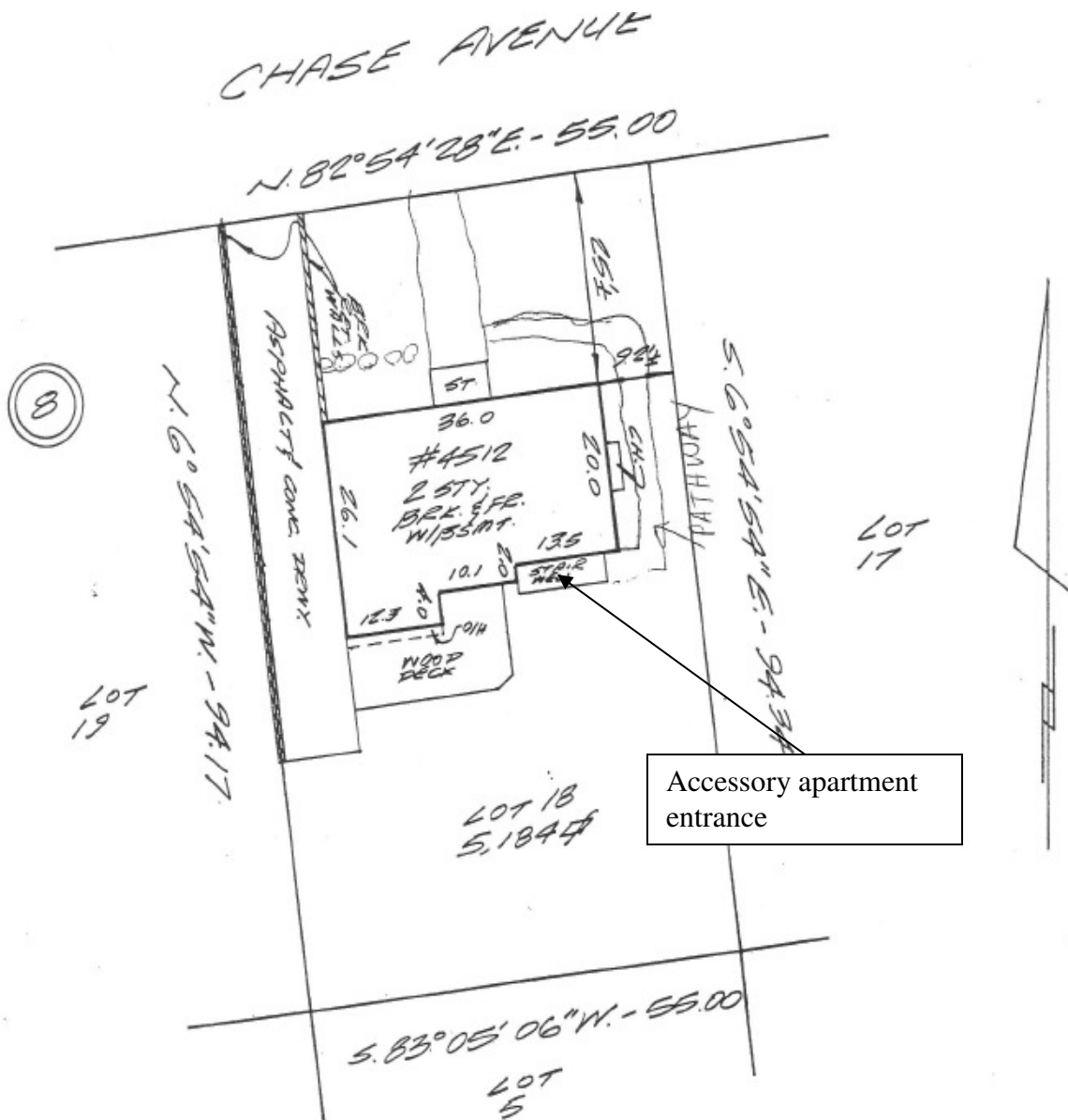
⁴ The Maryland Department of Taxation and Assessments record (SDAT) for this property is marked as Exhibit 13.



Front of the house



The Site Plan for the property, modified by Petitioner to show the location of the pathway to the accessory apartment entrance along the east side of the property, is shown below (Exhibit 4)⁵:



⁵ The Site Plan does not show the screen porch that encloses the wood deck in the rear of the dwelling. The porch extends to the east corner of the house and over the stairwell leading to the entrance to the accessory apartment. The screen porch is shown on the Landscape and Lighting Plan (Exhibit 6 (a)), shown on page 13 of this report.

Petitioner provided the following photographs of the front, side and rear views of the property (Exhibit 9):



B. The Surrounding Neighborhood

Technical Staff defined the general neighborhood, which consists of approximately 62 single-family homes in the R-60 zone, as “bound by West Virginia Avenue to the north, Harling Lane to the south, and Maryland Avenue/Pearl Street to the west and Kentucky Avenue to the east.” Exhibit 14, pp. 3 and 11. Having no evidence to the contrary, the Hearing Examiner accepts Staff’s definition of the general neighborhood.

The neighborhood boundary, which is depicted with a solid line on the location map shown below (Exhibit 14, Attachment 2), has been drawn by Technical Staff to include any nearby properties that may be affected by a potential increase in density or traffic.



Technical Staff reports (Exhibit 14, p. 11):

There are no records for any other accessory apartment special exceptions in the neighborhood. However, in one case, for 7907 Kentucky Avenue, a map reference has been found to “ADM SE 306 80”. There are no records associated with it. Even if this reference was for an approved special exception, the proposed apartment will not increase the intensity or scope of special exception uses sufficiently to affect the area adversely. Because the proposed use is a residential use by definition, the special exception will not alter the predominantly residential nature of the area.

The Hearing Examiner concurs with Technical Staff that the proposed accessory apartment will not adversely affect the area or change the residential character of the neighborhood.

C. The Master Plan

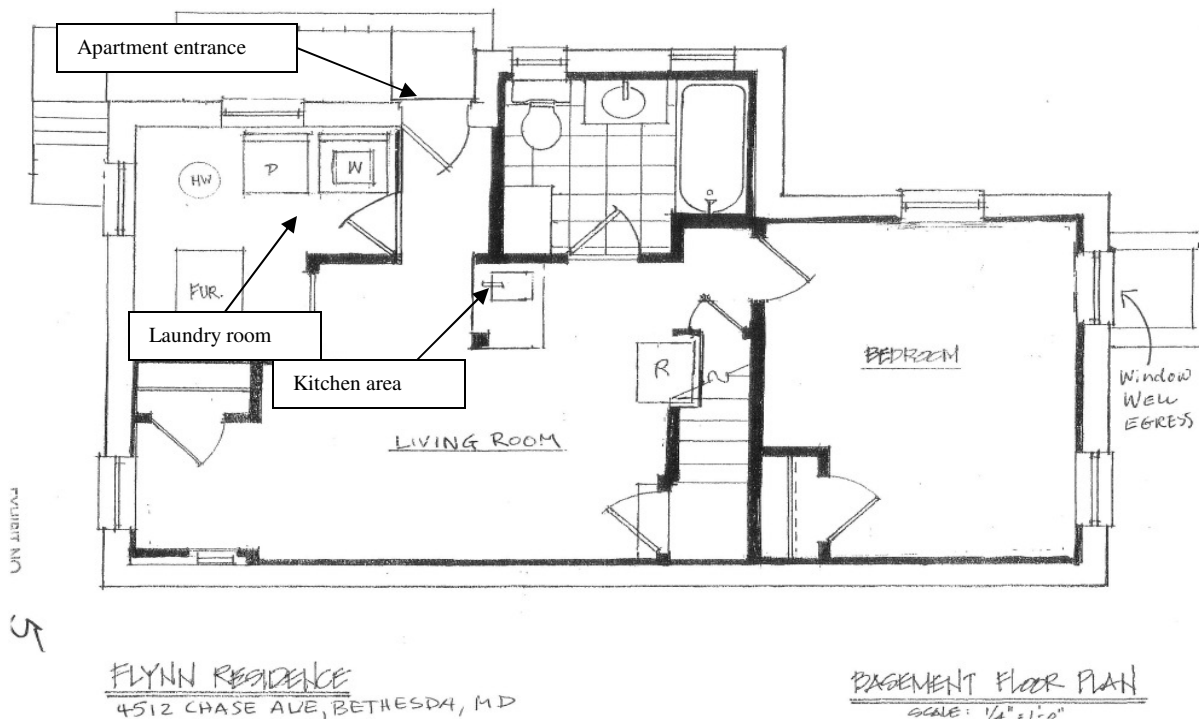
The subject property lies within the geographic area covered by the *Bethesda Chevy Chase Master Plan*, approved and adopted in April 1990. Technical Staff advises that there are no Master Plan recommendations relevant to this site. However, a stated goal of the Master Plan is to “[p]rovide for a balanced housing supply so that persons of varying income levels, age, backgrounds, and household characteristics may find suitable housing appropriate to their needs.” Exhibit 8, p. 19. The Master Plan supports “special exception uses that contribute to the housing objectives in the Master Plan.” Exhibit 8, p. 31. More specifically, “[t]he Plan also endorses expanding choices of housing types by provision of accessory apartments.” Exhibit 8, p. 33. Thus, Technical Staff found the proposed accessory apartment was consistent with the *Bethesda Chevy Chase Master Plan*. Exhibit 14, p. 4.

The Hearing Examiner concurs with Technical Staff because the Master Plan supports the R-60 zoning in which accessory apartments are a special exception use. In addition, this accessory apartment is not visible from the street and therefore does not change the existing structure’s appearance as a single-family dwelling consistent with the surrounding neighborhood.

Since the exterior of Petitioner's home will not be changed, it will retain the residential appearance and compatibility sought by the Master Plan. The Hearing Examiner finds that the proposed use is consistent with the *Bethesda Chevy Chase Master Plan*.

D. The Proposed Use

Petitioner is seeking a special exception to allow an existing accessory apartment located in the basement of her single-family detached home. The accessory apartment is approximately 610 square feet in size, 407 square feet of which DHCA found to be habitable. Petitioner will occupy the main dwelling. The accessory apartment is currently occupied by one tenant and includes one bedroom, a full bathroom, small kitchen area, and living room as shown below on the Floor Plan (Exhibit 5)⁶:



⁶ According to Petitioner's Statement in support of this petition, she identified the kitchen area as a "kitchenette with a studio-size refrigerator and sink." Exhibit 3. Petitioner testified that the tenant currently uses the kitchen in the main dwelling. Tr. 14.

Petitioner and the accessory apartment tenant will share access to and use of the laundry room facilities. Tr.27.

Access to the accessory apartment from the driveway is via a walkway of flagstone pavers to a concrete pathway with iron railings along the east side of the house. The accessory apartment entrance is located at the rear of the house in a stairwell under the screen porch facing the backyard. Technical Staff found “[t]he accessory apartment entrance is clearly distinct from the entrance to the main dwelling and has the appearance of a typical rear entry of a one-family home.” Exhibit 14, p. 4. The accessory apartment entrance is illuminated with a porch light. A motion sensor light on the rear corner of the house provides additional illumination for the concrete path and entrance to the stairwell. The concrete pathway and stairwell to the accessory apartment entrance are shown below in photographs taken from the Technical Staff report (Exhibit 14, Attachment 4)⁷:



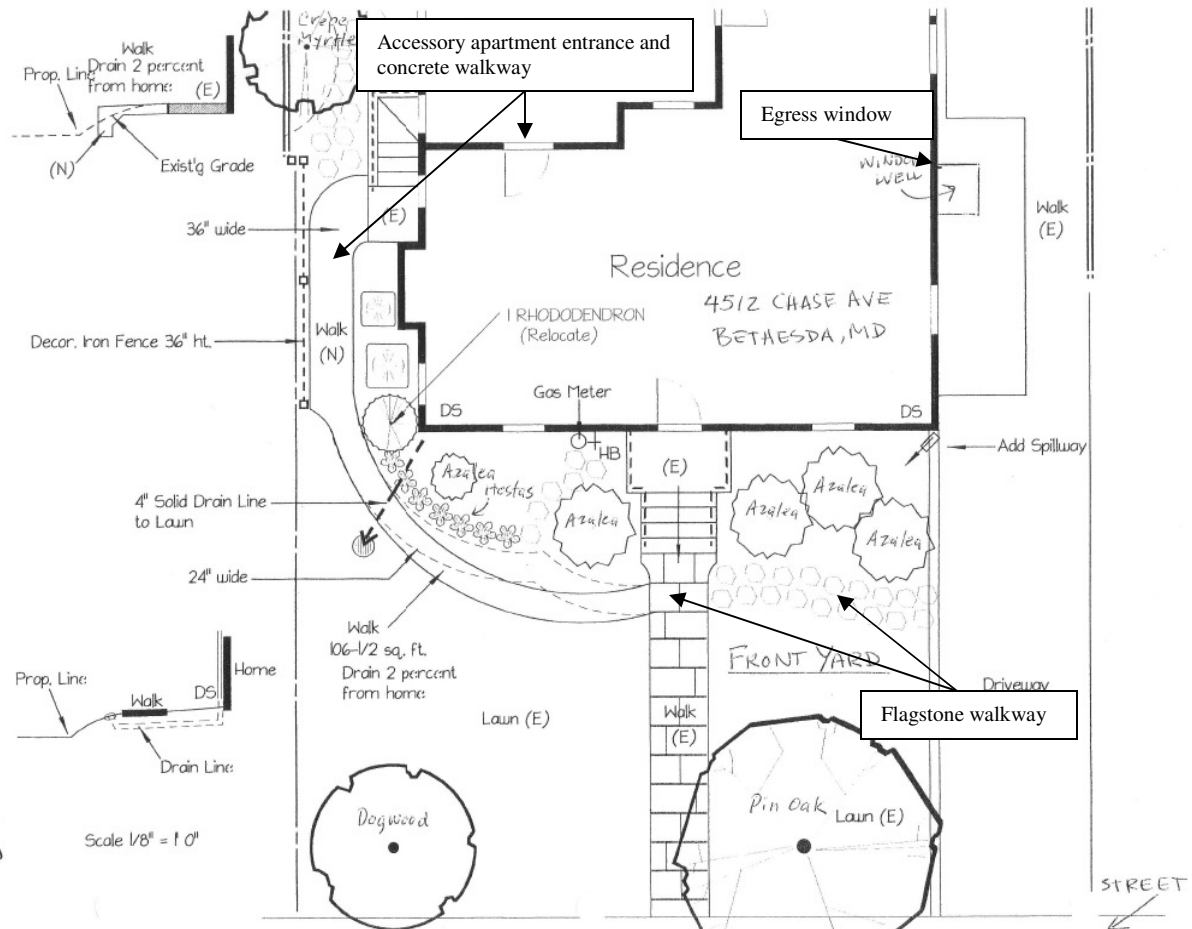
There is a path along the side of the house to the entrance to the accessory unit.



View of the entrance to the accessory unit behind the wooden screen, below the back porch.

⁷ Additional photographs of access to the accessory apartment entrance and lighting can be seen on page 8 of the report (Exhibit 9).

railings along the east side of the house (Exhibit 6 (c)):



Technical Staff found the lighting to be adequate and residential in character. Exhibit 14, p. 4. Thus, Staff concluded, "The use will cause no objectionable illumination or glare as the provided lighting is residential in character." Exhibit 14, p. 10.

DHCA inspected the property on May 31, 2012, and Housing Code Inspector Lynn McCreary reported her findings in a memorandum with the same date. (Exhibit 12). The substance of her report is set forth below:

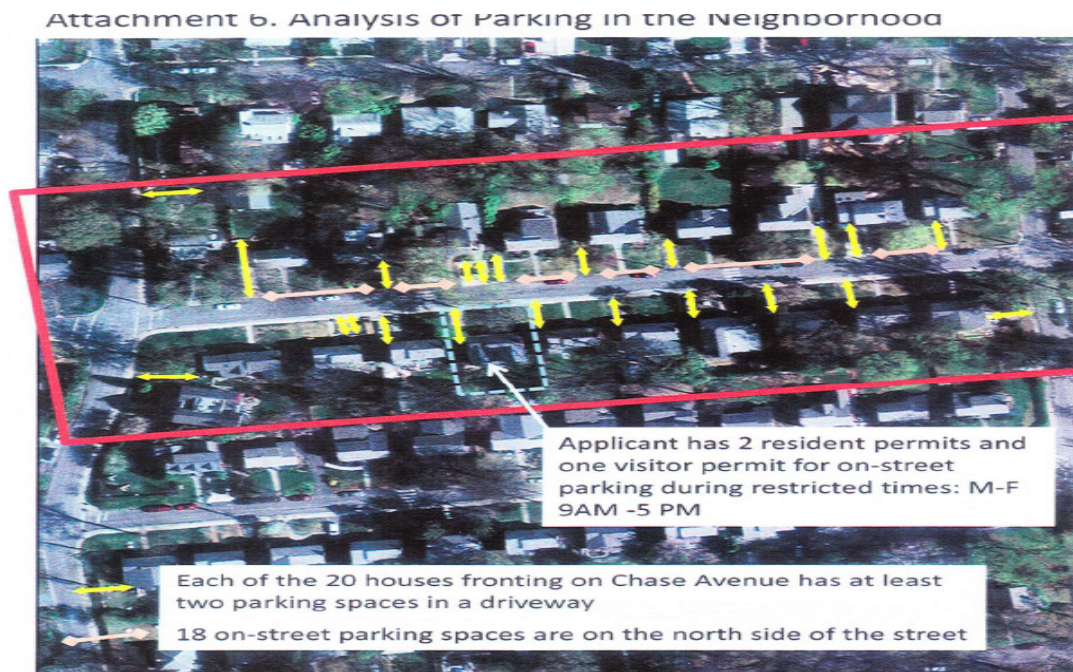
The preliminary inspection was conducted on May 31, 2012. The Accessory Apartment is located in the cellar of the house. The issues regarding Accessory Apartment standards are as follows:

1. The Accessory Apartment measures 407 square feet of habitable [space]. Two persons may occupy the unit.
2. There is adequate off street parking for two vehicles parked back to front. On street parking is available.
3. A permanently installed [cook top] along with a portable convection oven may be installed in lieu of a conventional kitchen stove. All required permits must be acquired and finalized and all work must be done in a professional, workmanlike manner.

Technical Staff reports (Exhibit 14, p. 5):

Vehicular access to the existing house and accessory apartment will be through a driveway on the site. Parking for the main dwelling and the accessory apartment can be accommodated with the two-parking spaces on the driveway and with on-street parking in the neighborhood on the opposite of the street. On-street parking is on the north side of the street only. It is restricted on weekdays between [9:00 am and 5:00 pm], and is allowed at that time only by permit. The applicant has two resident permits and one visitor permit for use during the restricted times.

Technical Staff provided an analysis of the available parking in the neighborhood in an aerial photograph of the area (Exhibit 14, Attachment 6), shown below, to support the conclusion that “[t]here are adequate choices to ensure sufficient neighborhood parking even with the existence of an additional household on the block.” Exhibit 14, p. 8.



There are two off-street parking spaces on the driveway, the minimum required under Section 59-G-2.00(c) (3). Petitioner testified she has two vehicles and three parking permits (two resident permits and one visitor permit) for on-street parking. Petitioner agreed to provide the accessory apartment tenant with a parking permit for on-street parking during the restricted weekday periods. Tr. 33-34. Based on this information, the Hearing Examiner concurs with Technical Staff's finding that there is adequate off-street parking for two vehicles on the driveway and sufficient on-street parking to accommodate the main dwelling and accessory apartment.

E. Traffic Impacts

Technical Staff found: "The proposed accessory apartment meets the transportation related requirements of the Adequate Public Facilities Ordinance (APF) ordinance." Exhibit 14, p. 4. Transportation Staff reported (Exhibit 14, Attachment 7):

Using trip generation rates included in the *Local Area Transportation Review (LATR)/Policy Area Mobility Review (PAMR) Guidelines*, the single-family dwelling on the property is estimated to generate one peak-hour trip during the weekday morning (6:30 a.m. to 9:30 a.m.) and evening (4:00 p.m. to 7:00 p.m.) peak periods. Using the same rates, the accessory apartment is estimated to generate one additional peak-hour trip during the weekday peak periods.

Since the existing house and the accessory apartment together will not generate 30 or more peak-hour trips during the weekday morning and evening peak periods, a traffic study is not required for the subject petition. With documentation of site trip generation as above, the subject petition satisfies the LATR requirements of the APF test.

Policy Area Mobility Review

As noted above, the single-family dwelling and the accessory apartment on the property together generate less than four peak-hour trips during the weekday morning and evening peak periods. The subject petition is therefore not subject to the PAMR requirements of the APF test.

Due to the small scale of the proposed use, the Hearing Examiner has no basis in this

record to disagree with the finding of Technical Staff and therefore agrees that the accessory apartment satisfies the LATR and PAMR tests and will have no adverse impact on the area roadways and pedestrian facilities. Exhibit 14, p. 5. There being no evidence in the record to the contrary, the Hearing Examiner so finds.

F. Environmental Impacts

Petitioner does not propose any external changes to the site. Technical Staff advises that the property is exempt from the Forest Conservation Law. Exhibit 14, p. 4. Technical Staff further noted that “[t]he property’s landscaping is well-maintained [and] falls within the standards expected for a typical one-family home.” *Id.* Based on this evidence, the Hearing Examiner finds that Petitioner’s request will have no adverse environmental impacts.

G. Community Response

There has been no response from the community, either positive or negative, to the subject petition.

III. SUMMARY OF THE HEARING

Petitioner, Carol E. Flynn, testified at the public hearing in support of the petition. DHCA Housing Code Inspector, Lynn McCreary, also testified as to compliance with the Housing Code. There was no opposition at the hearing.

A. Petitioner’s Case

Petitioner Carol E. Flynn:

Petitioner executed an Affidavit of Posting (Exhibit 18). Petitioner provided a copy of her deed dated August 10, 2009 (Exhibit 16), deed of trust dated October 26, 2010 (Exhibit 17), and a certified copy of the Judgment of Absolute Divorce from her husband, James P. Burans, dated August 13, 2009 (Exhibit 19). Petitioner testified that she took sole ownership of the property in

her married name, Carol F. Burans, because her divorce was not final at the time of transfer. Petitioner's former and current name, Carol Elizabeth Flynn, was restored in the final divorce decree. Petitioner subsequently refinanced the mortgage, and the Deed of Trust using her maiden name. Tr. 6-9. Petitioner adopted the findings and conclusions in the Technical Staff report (Exhibit 14) as her own evidence and agreed to comply with all the conditions set forth in the report. Tr. 7-10.

Petitioner is seeking a special exception to allow her to rent out the basement of her home. Petitioner testified that she is recently retired from the federal government and is working a part-time job. She needs the additional income to maintain the family home which she wants to keep even though her children have moved away (one is in college and one is living on her own). To supplement her income, Petitioner rents the basement to one tenant and she occupies the main dwelling. The basement has a full bathroom, one bedroom and living room area. At present, the tenant uses the kitchen on the first floor of the main dwelling because the basement does not have its own kitchen. Petitioner testified she will comply with the conditions stated in the Housing Code Inspector's report, and will limit occupancy to no more than two people and will install a permanent cook top with a portable convection oven in lieu of a conventional stove. Tr. 13, 14 and 28. Petitioner and the tenant will share the laundry room facilities located in the basement. Tr. 27.

Petitioner identified the Site Plan (Exhibit 4), Landscape and Lighting Plan (Exhibit 6 (a)-(c)), seven photographs of the property (Exhibit 9), and the Floor Plan (Exhibit 5).

Petitioner testified that the seven photographs, taken earlier this year and shown in Exhibit 9, accurately depict the front, side and rear views of her home. Access to the separate exterior entrance to the basement is via a flagstone path from the driveway (stepping stones) and

front sidewalk that connects to a concrete path with iron railings along the east side of the house. Tr. 25-26. Petitioner modified the Site Plan (Exhibit 4) to show the location of the flagstone and concrete pathway from the driveway to the rear entrance to the basement. Tr. 29-30. There is a motion sensor light on the east side of the house to illuminate the path to the stairwell and the rear entrance to the accessory apartment (fourth photograph). A porch light is located to the right of the apartment door (fifth photograph). Tr. 21-22.

Petitioner identified additional lighting, shown on the Landscape and Lighting Plan (Exhibit 6 (a)-(c)), to the right of the front porch, on the rear screened porch, and on the west side (motion sensor) of the house. Tr. 17-23. The Landscape and Lighting Plan identifies the location and type of plantings in the front and rear yards of the property. Also shown is the window well on the west side of the house to allow safe egress from the basement bedroom. Steps were built into the well to allow for emergency exit. The window well is covered with plexiglass that is easily pushed out from inside the bedroom. Tr. 24.

The driveway can accommodate two vehicles front to back, and possibly three if all the vehicles are small. Petitioner testified that on-street parking is permitted on the north side of Chase Avenue only and requires a permit during the week (Monday thru Friday) between the hours of 9:00 am to 5:00 pm. Petitioner has two vehicles and three parking permits: two resident permits and one visitor permit. Petitioner's current tenant uses the visitor parking permit which she intends to provide to future tenants if her application for a special exception is granted. Tr. 15-16 and 32-34.

B. Public Agency Testimony

Housing Code Inspector Lynn McCreary:

Housing Code Inspector Lynn McCreary testified that she and her supervisor, Kevin Martell, inspected the property on May 31, 2012, the findings of which she included in a memorandum of the same date. (Exhibit 12). Ms. McCreary found there was 407 square feet of habitable space in the basement and determined occupancy was limited to no more than two people. She noted that the kitchen did not have a stove. Ms. McCreary testified that it was permissible for Petitioner to install a permanent cook top (stove burners) with a portable convection oven in lieu of a conventional kitchen stove. Ms. McCreary suggested that Petitioner contact the Department of Permitting to obtain the required electrical or other permits necessary to install the cook top stove. Tr. 35-36

Ms. McCreary confirmed that there was space for two vehicles on the existing driveway, and the egress window in the bedroom complies with the building code. The plexiglass covering the window is similar to a screen and easily pushed out from the inside to allow for emergency exit. There was adequate exterior lighting and access to the accessory apartment entrance was safe. It was Ms. McCreary's opinion that the proposed accessory apartment will not detract from the residential character of the neighborhood. Tr. 37.

IV. FINDINGS AND CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards and conditions are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions and the Petitioner has the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Technical Staff concluded

that Petitioner will have satisfied all the requirements to obtain the special exception if she complies with the recommended conditions. Exhibit 14.

Weighing all the testimony and evidence of record under a “preponderance of the evidence” standard (Code 59-G-1.21(a)), the Hearing Examiner concludes that the instant petition meets the general and specific requirements for the proposed use as long as Petitioner complies with the recommended conditions set forth in Part V, below.

A. Standard for Evaluation

The standard for evaluation prescribed in Code Section 59-G-1.2.1 requires consideration of the inherent and non-inherent adverse effects of the proposed use at the proposed location, on nearby properties and in the general neighborhood. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code Section 59-G-1.2.1. 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 14, p. 7):

- (1) The existence of the apartment as a separate entity from the main living unit but sharing a party wall with it;
- (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 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.

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 that there are no non-inherent adverse effects arising from the accessory apartment. In support of this conclusion, Technical Staff summarized the evidence as follows (Exhibit 14, p. 8):

In the instant case, there are no adverse effects that will negatively impact the community above and beyond those necessarily inherent to an accessory apartment. The apartment will be located in the basement of the main

dwelling and is non-identifiable from the street. The apartment is set up to provide all the spaces and facilities necessary for an apartment use.

The accessory unit has a separate entrance apart from the main dwelling. The apartment entrance is typical of a rear-entry to the basement of a one-family house, making it difficult to distinguish from any other neighborhood home. The walkway and grounds of the accessory apartment will be safe and illuminated while consistent with typical residential standards.

Parking for the accessory apartment will be sufficient. There is room for two vehicles to park on the property's driveway. There are adequate choices to ensure sufficient neighborhood parking even with the existence of an additional household on the block. On street parking is allowed on one side of the street. Most other houses on the street have driveways that can be used for parking as well.

Based on these findings, Staff concluded (Exhibit 14, p. 8):

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.

The Hearing Examiner agrees with Technical Staff's assessment with one exception. The 5,184 square-foot lot size should be recognized as an unusual characteristic of the site. However, based on the evidence presented at the hearing, and considering that the Board granted Petitioner's 816 square feet variance from the required 6,000 square-foot lot size required for an accessory apartment use (Exhibit 27), the Hearing Examiner finds that the smaller lot size does not create any adverse effects in this case to warrant denial of the special exception request. The proposed accessory apartment is located in the basement of an existing one-family dwelling and the apartments rear separate rear entrance is not visible from the street. No exterior modifications or changes to the existing dwelling are proposed or required to accommodate the proposed use. There is adequate parking to accommodate the main dwelling and accessory apartment tenant on the driveway and on the street in front of Petitioner's house.

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

B. General Standards

The general standards for a special exception are found in Section 59-G-1.21(a). The Technical Staff report and the Petitioner's written evidence and testimony provide sufficient evidence that the general standards would be satisfied in this case, as outlined below.

Sec. 59-G-1.21. General conditions.

§ 59-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(a).

(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: Given the variance granted by the Board of Appeals in BOA Case No. A-6400 (Exhibit 27), 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 *Bethesda-Chevy Master Plan*, approved and adopted in April 1990. For reasons set forth in Part II.C of this report, the Hearing Examiner finds that the planned use, an accessory apartment in a one-family detached home located in the R-60 zone, is consistent with the goals and objectives of the *Bethesda-Chevy Chase 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 proposed special exception would be in harmony with the general character of the neighborhood especially because no structural changes to the home are proposed to accommodate the accessory apartment. It therefore will maintain its residential character. The accessory apartment is fully contained in the basement of an existing dwelling with a separate entrance typical of a rear entrance for a one-family home. Occupancy will be limited to no more than two people and therefore will have only minimal impact on population density. There is sufficient off-street parking and available on-street parking to accommodate the accessory apartment and main dwelling. According to Transportation Staff, the proposed special exception will not have an adverse effect on vehicular traffic or pedestrian access or safety in the immediate area. There are no other accessory apartment uses

within the Staff-defined neighborhood. The Hearing Examiner finds that the addition of the proposed accessory apartment to the neighborhood will not be excessive or change the residential character of the 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 surrounding residential 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 the answer to the previous section of this report, the Hearing Examiner agrees with Technical Staff and finds that the special exception will not be detrimental to the use, peaceful enjoyment, economic value, or development of the surrounding properties or the defined neighborhood, provided that the special exception is operated in compliance with the listed conditions of approval.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Technical Staff found: “Based on the nature of the use, the proposed special exception will cause no objectionable noise, vibrations, fumes, odors, dust, or physical activity. The use will cause no objectionable illumination or glare as the provided lighting is residential in character.” Exhibit 14, p. 10. Since the use will be indoors and residential, the Hearing Examiner concurs with Technical Staff

and finds it will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: According to Technical Staff, “[t]he neighborhood is comprised of approximately 62 one-family detached homes.” Exhibit 14, p. 11. Technical Staff reported there were no other accessory apartment uses in the neighborhood. However, Staff noted there were no records to support one map reference identified on the neighborhood map as “ADM SE 306 80” at 7907 Kentucky Avenue. Thus, Staff could not confirm whether there was an approved special exception at this location. Because the proposed use is a residential use by definition, and permitted by special exception in the R-60 Zone, the special exception will not alter the predominantly residential nature of the area. The Hearing Examiner concurs with Technical Staff and finds that the proposed special exception, even considering the possibility a special exception use may exist at 7907 Kentucky Avenue as noted above, 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 will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area of 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 “[t]he proposed special exception will be adequately served by existing public services and facilities.” Exhibit 14, p. 12. 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
(i) the determination of adequate public facilities for the site is not currently valid for an impact that is the same 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 special exception application was submitted.

Conclusion: The special exception sought in this case will not require approval of a preliminary plan of subdivision. Therefore, the Board must consider whether the available public facilities and services will be adequate to serve the proposed

development under the applicable Growth Policy standards. These standards include Local Area Transportation Review (LATR) and Policy Area Mobility Review (PAMR). As indicated in Part II. E. of this report, Transportation Planning Staff made such reviews and concluded that the proposed accessory apartment use would add one additional trip during each of the peak-hour weekday periods. 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. For the same reason, PAMR is also satisfied. Therefore, the Transportation Staff concluded, as does the Hearing Examiner, that the instant petition meets all the applicable Growth Policy standards.

(C) *With regard to public roads, the Board or the Hearing Examiner must further find that the proposed development will not reduce the safety of vehicular or pedestrian traffic.*

Conclusion: Technical Staff found that the proposed use satisfies transportation related requirements and noted the “minimal amount of traffic increase can be accommodated by the existing road network in the neighborhood.” Exhibit 14, p. 12. Based on the evidence of record, especially the availability of adequate parking and the limited number of additional trips generated by the special exception, the Hearing Examiner concurs with Technical Staff and finds that the proposed use will not reduce the safety of vehicular or pedestrian traffic. *Id.*

C. Specific Standards

The testimony and the exhibits of record, especially the Technical Staff Report (Exhibit

14) and the variance granted by the Board of Appeals in BOA Case No. A-6400, 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 accessory apartment is located in the basement of an existing one-family detached dwelling and therefore shares a wall in common, as required for a lot of this size (under one 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 basement of an existing one-family detached dwelling.

(4) The one-family detached dwelling in which the accessory apartment is to be created or to which it is to be added must be at least 5 years old on the date of application for special exception.

Conclusion: The house was built in 1940. Exhibit 13. 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 use as proposed does not violate any of the provisions of this subsection. Also, a requirement that the occupancy of the main dwelling and the accessory apartment meet all these standards will be a condition of this approval.

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

Conclusion: Access to the accessory apartment is through an existing separate entrance located in the rear of the dwelling. Technical Staff found that “[t]he apartment entrance has the appearance of a typical rear-entry to a basement of a one-family home.” Exhibit 14, p. 14. Thus, 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 of the dwelling.

(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. 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.

Conclusion: The accessory apartment, at 610 square feet, 407 square feet of which is habitable, is under the maximum 1,200 square feet restriction. According to SDAT records (Exhibit 13), the total enclosed area for the two-story dwelling is 2,056 square feet. The Hearing Examiner finds, as did Technical Staff, that the accessory apartment is subordinate to the main dwelling.

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 will live in the main dwelling on the property.

(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: Petitioner co-owned the property with her former husband, James P. Burans, from 1991 until August 10, 2009, when Petitioner became the sole owner of the property. Exhibit 3. The deed was recorded January 12, 2010, and is still titled in Petitioner's married name, Carol F. Burans. Exhibit 16. Petitioner's former name, Carol Elizabeth Flynn, was restored when she was granted a Judgment of Absolute Divorce from her former husband on August 13, 2009. Exhibit 19. Petitioner subsequently refinanced the mortgage on the property and the existing Deed of Trust reflects her current name, Carol E. Flynn. Exhibit 17. Having no evidence to the contrary, the Hearing Examiner finds that the Petitioner, known as Carol E. Flynn and Carol F. Burans, are one in the same person and Petitioner has owned the property since August 2009. Thus, the one-year rule has therefore been satisfied.

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

Conclusion: The 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: Petitioner submitted a deed (Exhibit 16) dated August 10, 2009, evidencing sole ownership of the subject property. Therefore, the Hearing Examiner concludes that this condition has been met.

(5) The restrictions under (1) and (3) above do not apply if the accessory apartment is occupied by an elderly person who has been a continuous

tenant of the accessory apartment for at least 20 years.

Conclusion: Not applicable.

§ 59-G-2.00(c) Land Use Requirements

(1) The minimum lot size must be 6,000 square feet, except where the minimum lot size of the zone is larger. A property consisting of more than one record lot, including a fraction of a lot, is to be treated as one lot if it contains a single one-family detached dwelling lawfully constructed prior to October, 1967. All other development standards of the zone must also apply, including setbacks, lot width, lot coverage, building height and the standards for an accessory building in the case of conversion of such a building.

Conclusion: As previously discussed in Part I of this report, Petitioner's lot was created in 1939 and subject to the 1928 Zoning Ordinance, which required a minimum 5,000 square-foot lot size. At 5,184 square feet in size, Petitioner's lot exceeds the 1928 Zoning Ordinance lot size but does not comply with the 6,000 square-foot minimum lot size required for an accessory apartment use. However, the 816 square-foot deficiency was remedied by the variance granted in BOA Case No. A-6400. Exhibit 27. With the exception of the lot width at the front building line, the proposed special exception complies with all other development standards in the R-60 Zone. While Petitioner's lot width is 5 feet less than required under the current R-60 Zone, it complies with the 1928 Ordinance which required a minimum lot width at the front building line of 50 feet. The following table (shown on the next page) from the Technical Staff report (Exhibit 14, p.6), modified to show the variance and lot width at the front building line, summarizes the relevant applicable development standards for this application.

Development Standard	Min/Max Required	Provided	Applicable Zoning Provision
Maximum Building Height	2.5 stories	2 stories	§ 59-C-1.327
Minimum Lot Area	6,000 sq. ft.	5,184 sq. ft. ⁸ (816 sq. ft. variance effective February 12, 2013)	§ 59-G-2.00(c)(1) § 59-C-1.322(a)
Minimum Lot Width at Front Building Line	60 ft.	55 ft. ⁹	§ 59-C-1.322(b)
Minimum Lot Width at Street Line	25 ft.	55 ft.	§ 59-C-1.322(b)
Minimum Setback from Street	25 ft.	25 ft.	§ 59-C-1.323(a)
Minimum Rear Yard Setback	20 ft.	43 ft.	§ 59-C-1.323(b)(2)
Maximum Building Coverage	35 percent	18 percent	§ 59-C-1.328
Maximum Floor Area for Accessory Apartment	1,200 sq. ft.	610 sq. ft.	§ 59-G-2.00(a)(9)
Parking	2 4 total	2 in driveway 2 on street	§ 59-G-2.00(c)(3)

(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 stated by Technical Staff, “Out of the approximately 62 homes within the neighborhood, there are no other approved special exceptions for accessory apartments. The proposed accessory apartment, if granted, will not result in an excessive concentration of similar uses in the general neighborhood.” Exhibit 14, p. 17. The Hearing Examiner concurs with Technical Staff’s conclusion and finds

⁸ Board of Appeals Case No. A-6400. Exhibit 27.

⁹ Attachment to Article 59-B, Section II, (C)(1) states that “[e]ach dwelling hereafter erected or altered in this zone shall occupy a lot with a minimum area of five thousand (5,000) square feet and a minimum lot width of fifty (50) feet at the front building line.” See also, Zoning Ordinance § 59-B-5.1.

that the proposed special exception will not create an excessive concentration of similar uses.

(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, there are two off-street parking spaces on the driveway and sufficient on-street parking spaces on the north side of Chase Avenue. A parking permit is required during the week (Monday through Friday) from 9:00 am to 5:00 pm. Petitioner testified that she has two cars and three on-street parking permits. Petitioner agreed to provide a parking permit for on-street parking to the accessory apartment tenant. The Housing Code Inspector confirmed Staff's finding of adequate off-street parking on the driveway. Exhibit 12; The Hearing Examiner finds, therefore, that the minimum requirement of two (2) off-street parking spaces has been met and there is sufficient on-street parking to accommodate the main dwelling and accessory apartment use.

D. Additional Applicable Standards

Not only must an accessory apartment comply with the zoning requirements as set forth in Article 59-G, it must also be approved for habitation by the Department of Housing and Community Affairs. As discussed in Part II. D of this Report, the Housing Code Inspector's report (Exhibit 12) notes certain issues and recommends that occupation of the accessory apartment be limited to no more than two people. As mentioned above, Petitioner has agreed that

no more than two people will live in the accessory apartment and she will meet all conditions, including installation of a permanent cook top stove and portable convection oven in the kitchen, required by the Housing Code Inspector.

V. RECOMMENDATION

Based on the foregoing analysis, I recommend that the Petition of Carol E. Flynn, BOA No. S-2838, which seeks a special exception for an accessory apartment to be located at 4512 Chase Avenue, Bethesda, Maryland, be **GRANTED**, with the following conditions:

1. The Petitioner is bound by her testimony, representations and exhibits of record, to the extent that such testimony and evidence are identified in this report;
2. The Petitioner must comply with the conditions set forth in the Memorandum of Lynn McCreary, Housing Code Inspector, Division of Housing and Code Enforcement (Exhibit 12):
 - a. The accessory apartment measure 407 square feet of habitable [space]. Two persons may occupy the unit.
 - b. There is adequate off street parking for 2 vehicles parked back to front. On street parking is available.
 - c. A permanently installed cook top along with a portable convection oven may be installed in lieu of a conventional kitchen stove. All required permits must be acquired and finalized and all work must be done in a professional and workmanlike manner.
3. The Petitioner must occupy one of the dwelling units on the lot on which the accessory apartment is located;
4. The accessory apartment must not be located on a lot that is occupied by a family of unrelated persons, or where there is a guest room for rent, a boardinghouse or registered living unit;
5. The Petitioner must not receive compensation for the occupancy of more than one dwelling unit; and
6. The 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: March 19, 2013

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Tammy J. CitaraManis".

Tammy J. CitaraManis
Hearing Examiner