

**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:** \*  
**SOMESWARA RAO BEKKAM** \*  
Petitioner \*  
 \*  
Someswara Bekkam \* Board of Appeals No.S-2842  
For the Petition \* (OZAH Case No. 12-34)  
 \*  
\*\*\*\*\* \*  
Cynthia Lundy \*  
 \*  
Department of Housing and \*  
Community Affairs \*  
\*\*\*\*\* \*  
 \*  
Bernice Saunders \*  
Harvey Kabran \*  
 \*  
Opposing the Petition \*  
\*\*\*\*\* \*  
Before: Lynn A. Robeson, Hearing Examiner

**HEARING EXAMINER’S REPORT AND RECOMMENDATION**

|   | <b>PAGE</b> |
|---|-------------|
| <b>I. STATEMENT OF THE CASE</b> .....     | 2           |
| <b>II. FACTUAL BACKGROUND</b> .....       | 3           |
| <b>III. SUMMARY OF EVIDENCE</b> .....     | 10          |
| <b>IV. FINDINGS AND CONCLUSIONS</b> ..... | 13          |
| <b>IV. CONCLUSION</b> .....               | 15          |

## I. STATEMENT OF THE CASE

Petitioner seeks a special exception to have an accessory apartment on property zoned R-90 located at 12508 O'Fallon Street, Silver Spring, Maryland. On February 6, 2013, the Board of Appeals remanded this case to the Hearing Examiner for additional evidence on whether a fence could be constructed on Petitioner's property that would prevent tenants from cutting through the side yard of the subject property to access the proposed accessory apartment. Exhibit 28. A neighboring property owner (Mr. Harvey Kabran) testified at the initial public hearing that tenants living in the apartment repeatedly use this side yard to access the apartment. 10/18/12 T. 97-98. Mr. Kabran also testified, however, that a WSSC easement existed that would preclude construction of a fence to prevent use of the side yard. 10/18/2012 T. 99. Based on this testimony, the Hearing Examiner recommended conditions that (1) required the Petitioner to incorporate in his lease a provision preventing the tenants from accessing the apartment from the northeast side yard and (2) prohibited tenants from using the side yard to access the property. *Hearing Examiner's Report and Recommendation*, p. 36 (January 9, 2013). The Board, however, resolved that "it must know whether this [the easement] exists and therefore whether a barrier can be constructed." Exhibit 28.

On February 15, 2013, the Hearing Examiner issued a Remand Order and Notice of Public Hearing. She remanded the case to Technical Staff to investigate whether a fence would be prohibited and to show acceptable alignments of the fence. The Order noticed a public hearing for April 23, 2013. Exhibit 29.

Technical Staff submitted its Report, dated April 23, 2013, showing three potential alignments of a fence. Exhibit 23. Upon inquiry from the Hearing Examiner, Technical Staff also submitted an e-mail indicating that certain types of shrubbery could

be used to create a barrier in lieu of a fence. Exhibit 24.

The April 23, 2013, public hearing proceeded as scheduled.<sup>1</sup> For the reasons set forth, the Hearing Examiner finds that a physical barrier, such as a fence, is preferable to the use of shrubbery to create a barrier, that Alignments 2 or 3, shown in the Technical Staff Report are appropriate, and that the alignment preferred by the Petitioner will be sufficient to prevent use of the side yard provided it does not have a gate. The Hearing Examiner does not recommend Alignment 1, which calls for construction of a fence within the easement area, because the County could remove the fence if it finds that the fence interferes with its use of the easement.

## II. FACTUAL BACKGROUND

The complete factual background of the petition was set forth in the Hearing Examiner's first Report and Recommendation and will not be repeated here.<sup>2</sup> For the Board's convenience, an aerial photograph from original Staff Report (shown on the next page, Exhibit 14, p. 4) shows the surrounding area and the subject property. A second aerial photograph from the Technical Staff Report (Exhibit 14, p. 3) gives a closer view of the subject property and identifies the area used by the tenants as an alternative access to the accessory apartment.

Technical Staff reports that the subject property is part of the Calverton subdivision and is shown on Plat 8155, recorded March 1, 1966. Exhibit 23, Attachment A. Staff advises that the plat shows a 10-foot x 135.43-foot easement running adjacent to the northeastern property line with an identical easement running adjacent to the subject property on Mr. Kabran's property.

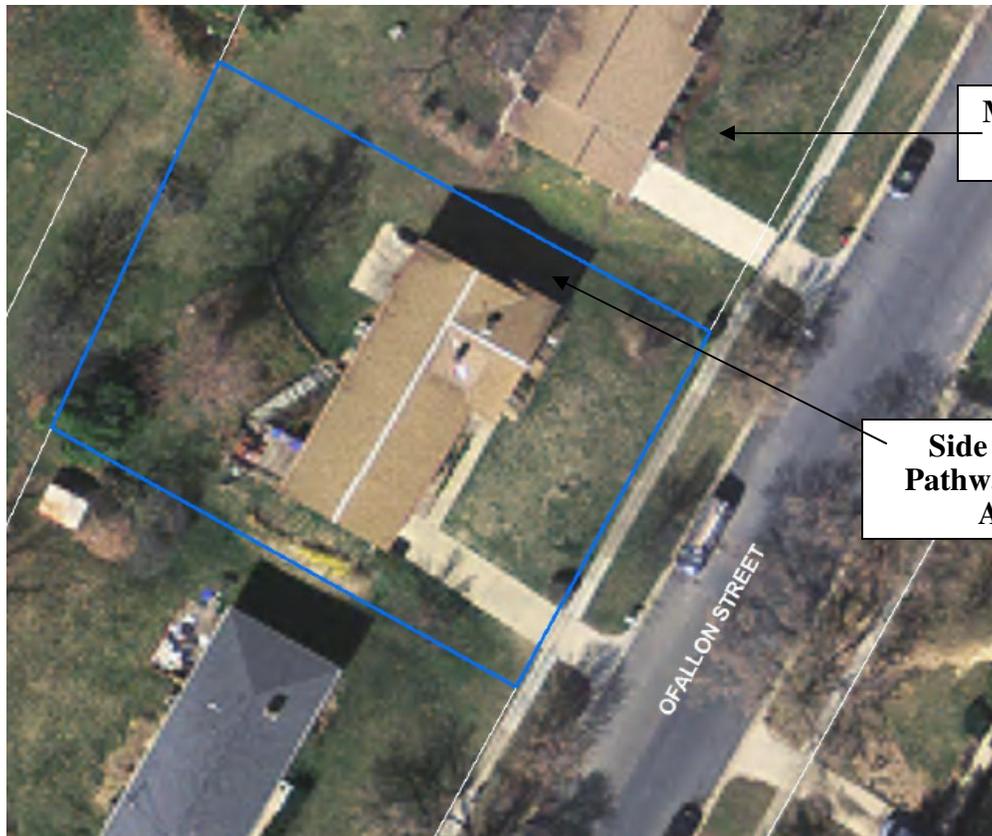
---

<sup>1</sup> All transcript citations are to the April 23, 2013, public hearing unless otherwise noted.

<sup>2</sup> All of the testimony and evidence submitted in the original case remain part of the record of the remand.



**Subject Property**

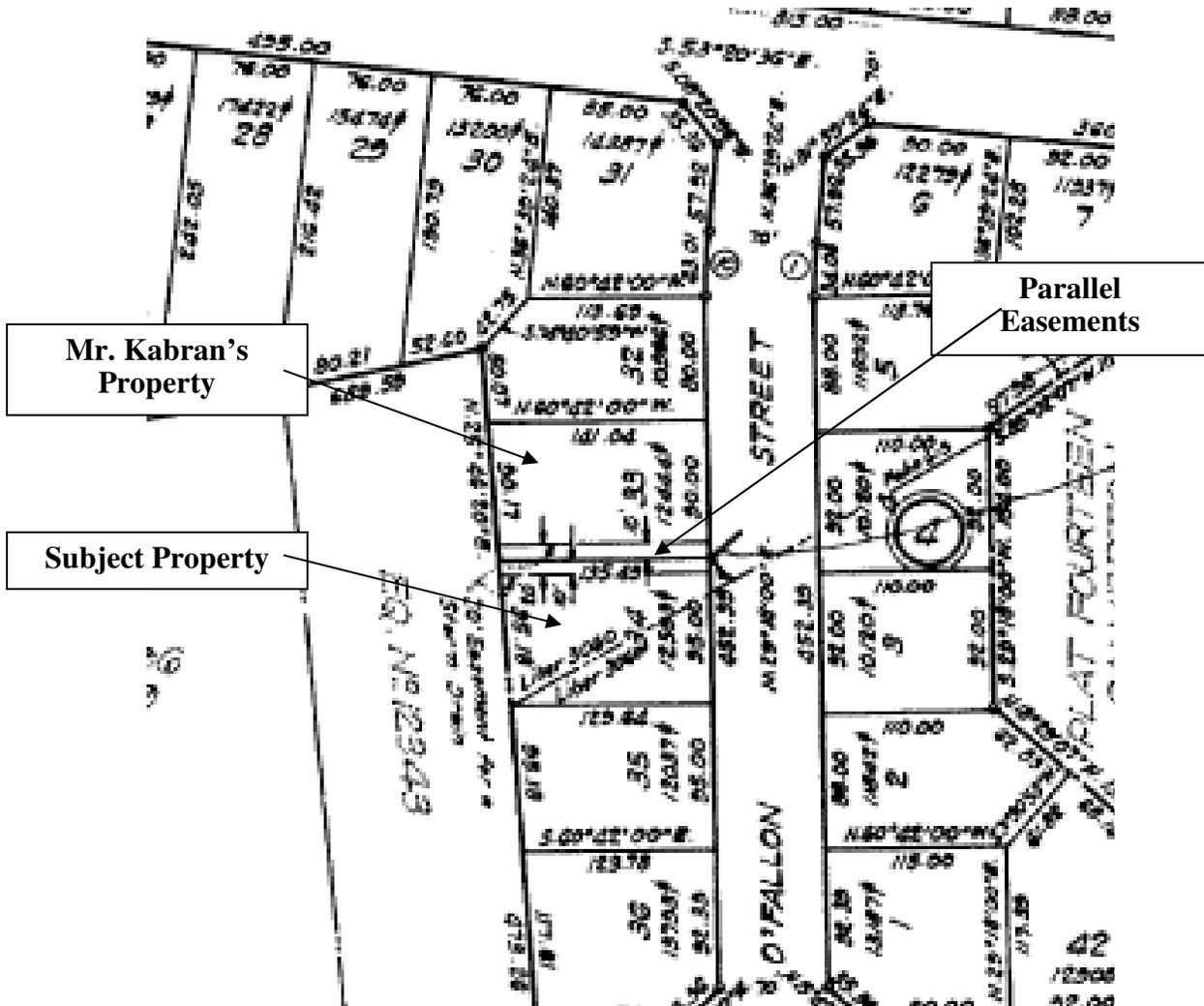


**Mr. Kabran's Property**

**Side Yard Used as Pathway to Accessory Apartment**

lot. The location of the easement is shown on an excerpt from the Plat, below). (Exhibit 23, Attachment A). The Plat contains a note: “No grading shall be undertaken or any structures, buildings, fences or additional plantings shall be located within the drainage easements without the Washington Suburban Sanitary Commission’s written consent.”

*Id.*



Technical Staff advises that the WSSC transferred these storm drain easements to local jurisdictions in July, 1987; thus, the easement is now controlled by the Montgomery County Department of Permitting Services (DPS). Exhibit 23, p. 2. Construction of a

fence within the easement is possible with certain permits; however, if DPS requires access they may remove the fence and will not replace it.<sup>3</sup> *Id.* at 2.

Staff also discovered private covenants governing the subject property which provide, in pertinent part (Exhibit 23, Attachment B):

No wall except such retaining walls as are necessary to take care of the ground elevation, no fences, hedge, or shrub planting in excess of twenty-four inches in height shall be installed on the property hereby conveyed except that nothing herein contained shall prohibit installation of such fence or planting around the back yard of said property, in which event said fence or planting shall not exceed four feet in height.

Based on its investigation, Staff submitted three drawings showing possible alignments of the fence. These were evaluated based on cost of construction, amount of useable square footage in the Petitioner's rear yard, and any adverse impact on the neighbors. For all three alternatives, Staff recommended against having a gate in the fence, which would dilute its effectiveness in preventing tenants from accessing the apartment via the side yard. Exhibit 23, p. 2.

Alternative 1 (Exhibit 23, shown below) extends the fence from the rear wall of the house to the side property line and continues it to the rear property line. As noted, this will require several permits from the County. Staff anticipates that this alternative will cost the most in time and money, will have a greater adverse impact on Mr. Kabran's property, but will leave the most unobstructed back yard on the subject property.

---

<sup>3</sup> Technical Staff advises that the County requires a permit for work in a public right of way, a standard "Declaration of Covenant", and a building permit to construct a fence within the easement area. Staff included an application for construction work in the right of way and the form "Declaration of Covenant" in its letter to the Petitioner. Exhibit 23.







planting that should be used to create an effective barrier (Exhibit 24):

In order to create a barrier at the time of planting, evergreen hedging plants should be at least three feet tall at planting. Effective hedging plants that can be found at local nurseries include English yews (*Taxus baccata*) and Chinese hollies (*Ilex cornuta*). If deer are present, yews are not usually recommended. The Chinese hollies are lightly spined, which can help to deter foot traffic. Both plants grow moderately quickly and tolerate a range of conditions including sun, shade, moderate moisture or drought, heat and cold. There are numerous other plants that can also be used to create an effective barrier—they may be more costly or less readily available.

Staff sent a letter to the Petitioner explaining the alternative fencing options, including some of the applications necessary for Alternative 1, and suggesting that he seek legal advice on the status of the private covenants. Exhibit 23. At the public hearing, Petitioner acknowledged receiving this letter. T. 7.

### III. SUMMARY OF EVIDENCE

Petitioner testified in support of the Petition and two neighbors, Mrs. Bernice Saunders and Mr. Harvey Kabran, testified in opposition.<sup>4</sup>

Mr. Bekkam testified that he no longer felt that he needed to construct a fence, even though he committed to do so in the prior hearing, because he has instructed his tenants to avoid the side yard and use the walkway shown on the site plan. According to him, the tenants have not been using the side yard to access the property. T. 7. He was also informed by DPS that he could construct a walkway rather than a fence to avoid “water pipes” that may be located in the easement area. T. 8. He did review Technical Staff’s e-mail regarding the possibility of using a landscaped hedge in lieu of a fence. When asked which he would install, he replied, “[M]aybe I put fence up.” T. 10. He

---

<sup>4</sup> A complete summary of the testimony from the public hearing is set forth in the Appendix to this Report, which is attached hereto and incorporated herein.

explained t When asked whether he would prefer a particular fence alignment, Mr. Bekkam opted for Alternative 3 listed in the Technical Staff Report. T. 11.

Both Mr. Kabran and Mrs. Saunders, a neighbor who lives across the street, testified that the current tenants regularly use the side yard to access the accessory apartment.<sup>5</sup> Both testified that some of the tenant's children will cut across Mr. Kabran's driveway and grass to get to the bus stop in the morning. Mr. Kabran testified that he had seen the tenants unloading groceries via the side yard the day before the public hearing. T. 13, 34-40, 46-48.

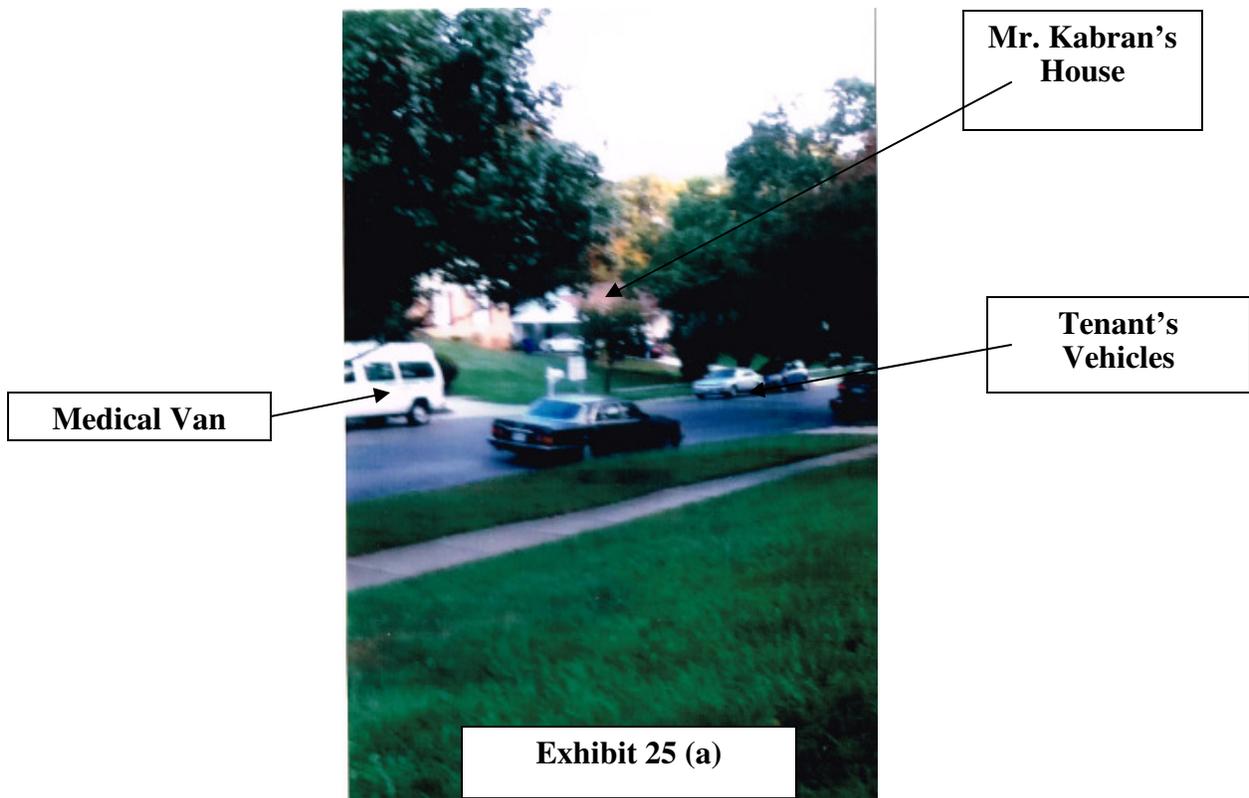
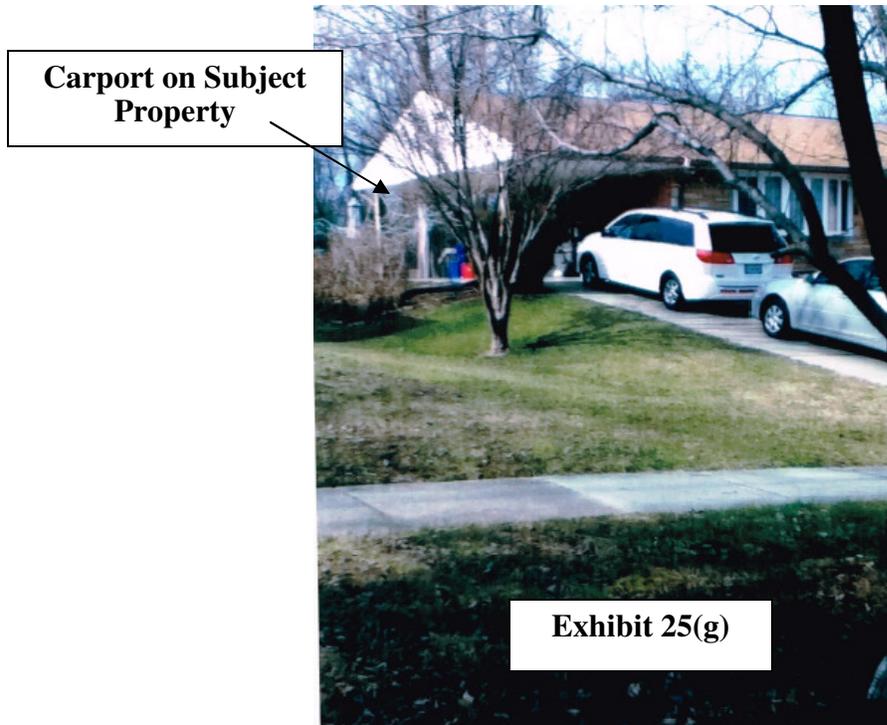
Mrs. Saunders submitted photographs she had taken of the subject property in February and April, 2013. Exhibits 25(a) – (i). She stated that the tenants park their cars on the street very close to Mr. Kabran's driveway because this is directly in front of the path in the side yard used to access the apartment. T. 38. According to her, the tenants have several visitors who visit for several weeks at a time and also park in the front of the property. T. 40. At times, she has seen Mr. Bekkam outside while the tenants are unloading groceries through the side yard. T. 37. At other times, tenants have parked their work trucks on the street while they have gone inside the apartment during the day. T. 44.

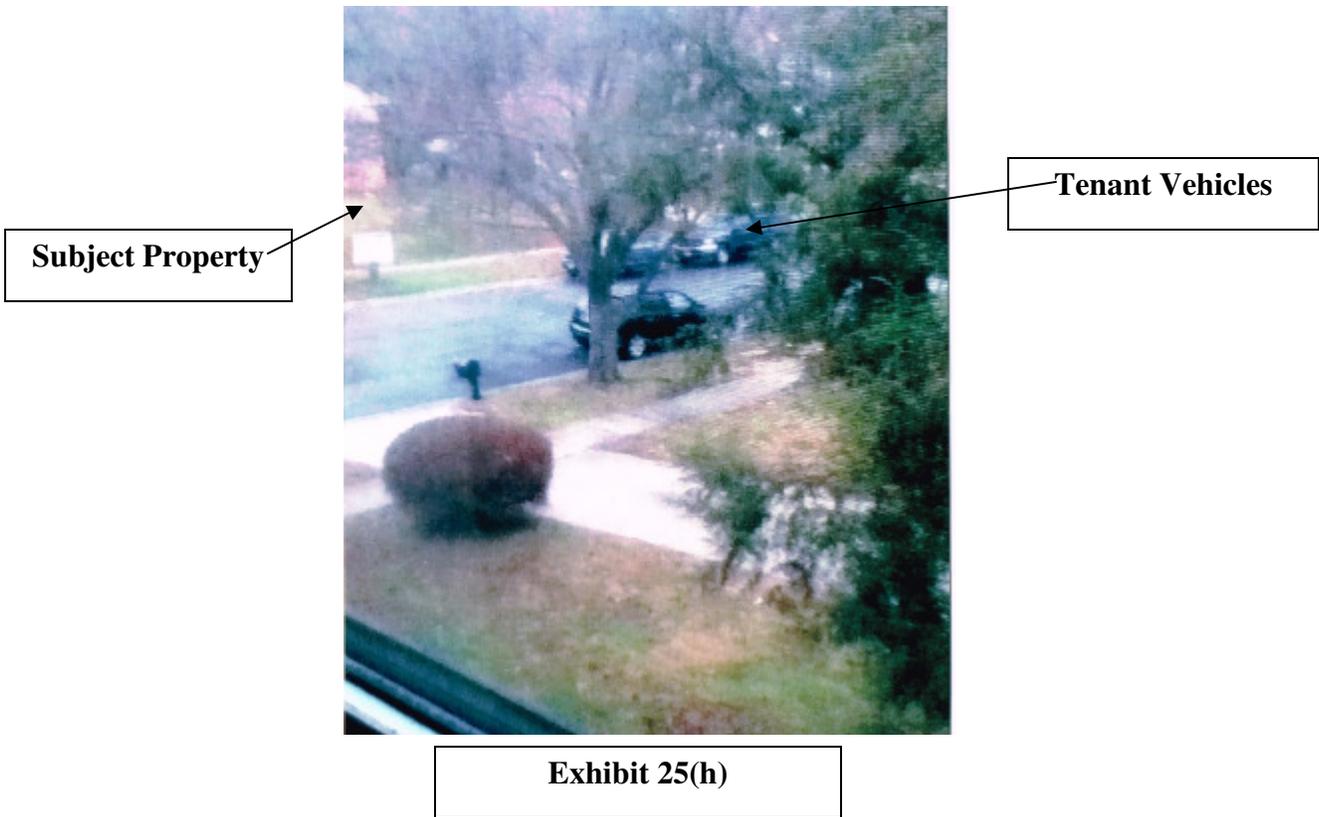
Mr. Bekkam confirmed that the tenants themselves have two cars, a Camry and a RAV4. Two of the tenants' brothers visit "once in a blue moon". When asked to be more specific on the timing of these visits, Mr. Bekkam testified that they occur once every two or three months. T. 50. Mrs. Saunders, however, insisted they were more frequent and of longer duration, about a week at a time. T. 57. Several of the photographs

---

<sup>5</sup> Mr. Bekkam testified that three children and two adults are currently living in the apartment. T. 50-51. If approved by the Board, occupancy will be limited to a family of four. Exhibit 12.

submitted by Mrs. Saunders are shown beginning below and on the following pages:





When confronted with Mrs. Saunder's evidence, Mr. Bekkam testified that he parked his work truck on the street when he cut his grass and at other times, he was there because the street was being cleaned.<sup>6</sup> T. 26, 36. He stated that his tenant used his work truck one day to deliver firewood that he had left at work. T. 53.

#### IV. FINDINGS AND CONCLUSIONS

The Hearing Examiner originally recommended conditions prohibiting use of the side yard adjacent to Mr. Kabran's property in response to testimony from those opposing the application that tenants occupying the accessory apartment regularly used the side yard rather than the walkway to access the use. In her opinion, this resulted in activity not necessarily residential in character on that side of the house. Specifically, she found these conditions necessary to make the following finding contained in §59-G-1.21(a)(5)

<sup>6</sup> The Hearing Examiner notes that because the Board remanded this case, the conditions recommended by the Hearing Examiner are not binding on the Petitioner at this point.

of the Zoning Ordinance:

(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.*

*ZHE Report*, p. 7. In its remand Order, the Board requested whether more could be done to protect Mr. Kabran's property from these activities, and specifically, whether a fence could be constructed in the easement area.

The evidence here demonstrates that a fence could be constructed either within or outside the easement area that would prevent access to the apartment through the side yard. In all cases, private covenants restrict the fence to four feet in height and require the fence to be placed in the rear yard of the home. Technical Staff has developed three alternative alignments for the fence which would meet these requirements. The evidence demonstrates that a barrier could also be created using specific types of plantings. Because these opportunities exist, the question then becomes whether a particular alignment is preferable and whether a fence is still necessary.

Mr. Bekkam now testifies that a fence is not warranted because his tenants have been instructed not to use the side yard. Based on the record of this case, the Hearing Examiner is not reassured. She finds far more credible Mr. Kabran's and Mrs. Saunders' testimony that the tenants regularly continue to use the side yard, and in fact, frequently cross Mr. Kabran's property to access the apartment. While Mr. Bekkam may have instructed his tenants to avoid the side yard in good faith, it is clear to the Hearing Examiner that he has been unable to control their actions.

In light of this finding and if the Board decides to approve the special exception, the Hearing Examiner recommends a condition requiring a fence be constructed in

accordance with the plan shown as “Alternative 3” in the record. Technical Staff estimates that this is the least expensive alignment to construct, has the least adverse impact on Mr. Kabran’s property, and is the preferred alternative of the Petitioner. Mr. Kabran did not have a preference as to the alignments, provided that no gates or entries are permitted in the fence.

The Hearing Examiner does not recommend the alignment shown as “Alternative 1” because it encroaches into the storm drain easement. Her recommendation stems from concern that DPS may have to remove the fence to service the easement, and would not bear the expense of reinstalling it.

Nor does the Hearing Examiner recommend a shrubbery hedge. While this may commonly be used in lieu of a fence, the Hearing Examiner does not find it sufficient to forestall the continuing pattern of behavior exhibited by the current tenants, even given that Mr. Bekkam has instructed them not to use the side yard.

#### **IV. CONCLUSION**

For the foregoing reasons, the Hearing Examiner finds that should the Board recommend approval of the special exception, it impose the following condition requiring installation of a fence in the rear yard of subject property:

The Petitioner shall install a fence that meeting the alignment shown in “Alternative 3” of the Staff Report (Exhibit 23). The fence shall be no greater than four feet in height and must not contain a gate or provide any other access through the fence.

Dated: May 2, 2013

Respectfully submitted,

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

---

Lynn A. Robeson  
Hearing Examiner

**APPENDIX**

**Summary of Testimony**

1. Someswara Rao Bekkam:

Mr. Bekkam testified that he received the letter from Technical Staff (Exhibit 23) explaining the easement and the different options for the fence. He said that he spoke with the Department of Permitting Services (DPS), who informed him that he could simply install a walkway. When the Hearing Examiner explained that the Board's issue was the amount of activity occurring on and near Mr. Kabran's property, Mr. Bekkam stated that the tenants have stopped using that area to enter the apartment. According to him, the tenants are now using the driveway and rear steps. T. 7. He stated that the two boys who live in the apartment were cutting through that area to get to the bus stop, but they have not gone on Mr. Kabran's property after he instructed them not to do so. When the Hearing Examiner explained that it was not simply a matter of staying off Mr. Kabran's property, Mr. Bekkam replied that to his knowledge the tenants no longer use the side yard at all to get in and out of the apartment. T. 14. According to Mr. Bekkam, he has cleared the carport of debris and the tenants are now able to go in and out that way. T. 15.

When questioned by the Hearing Examiner regarding testimony before remand agreeing to install a fence, he stated that DPS told him that there were some water pipes running under the ground, and that perhaps it would be better to install the walkway. T. 8. In his opinion, a fence is no longer necessary because the tenants are no longer using the path adjacent to Mr. Kabran's property. T. 8-9.

When asked whether he would prefer a particular fence alignment, Mr. Bekkam opted for Alternative 3 listed in the Technical Staff Report. T. 11. He also had the opportunity to review Technical Staff's e-mail regarding the possibility of using a landscaped hedge in lieu of a fence. When asked which he would install, he replied,

“[M]aybe I put fence up.” T. 10. He explained that the hedge may become overgrown and spread into Mr. Kabran’s yard. T. 12.

On cross-examination, Mrs. Saunders, a neighbor across the street, asked Mr. Bekkam to explain his testimony regarding the use of the side yard given that Mrs. Saunders had seen him present outside when the tenants were using the side yard to carry groceries into the apartment. He replied that he had never seen that. T. 17. He explained that the photographs of the medical van parked on the street were taken when he cut the grass and did not park in the driveway. T. 26. He also stated that he was sitting in his medical van on the street in one of the photographs because the street was being cleaned. T. 36.

On rebuttal, Mr. Bekkam testified that two of the cars observed by Mrs. Saunders are owned by friends and family who live in New York and Virginia that visit “once in a blue moon”. When asked to be more specific, he stated that they visit once every two to three months. T. 50. In his opinion, that should be permissible because he parks his car in front of his relative’s house when he is on vacation. T. 48. As for the work truck observed by Mrs. Saunders, he stated that these are friends who are just visiting.

When queried by the Hearing Examiner, Mr. Bekkam testified that there are three children and two adults currently living in the apartment. The father drives silver Camry and the mother drives the RAV4 shown in the Mrs. Saunder’s photographs. When shown the white work truck in one of Mrs. Saunder’s photographs, Mr. Bekkam explained that the tenant had gotten a wood delivery that day, which he had left at his work place. T. 52-53. The tenant’s brother drives a Lincoln and another brother drives the white BMW with Virginia tags. T. 53-54.

2. Mr. Harvey Kabran:

Mr. Kabran lives adjacent to the north side of Mr. Bekkam's property. He did not have a preferred alignment for the fence, but did want to ensure that no gate was installed. T. 12. He believes that Technical Staff's recommendations meet all the requirements of the private covenants on the property, which provide that fences may not intrude into the front yard and must be no more than four feet high. T. 18.

According to Mr. Kabran, the current tenants still use the side yard adjacent to his property to access the apartment. T. 13, 47-48. He testified that it's very obvious that they've been instructed not to do so because when they see him they turn around and walk the other way. If they don't see him, they will continue to bring in groceries. T. 13. He stated that he observed the tenants unloading groceries and carrying them into the apartment through the side yard the day before this public hearing. T. 14. In addition to the side yard, Mr. Kabran testified that children often cross over his property when coming home from school. T. 46.

Mr. Kabran testified that he had also seen the cars described by Mrs. Saunders. He stated that the white BMW had been at the property for almost a week and that the Camry and RAV4 are there all of the time.

3. Mrs. Bernice Saunders:

Mrs. Saunders submitted several photographs depicting the tenant's activities on the subject property. Exhibit 25. According to Mrs. Saunders, the photographs showed that Mr. Bekkam continued to park his medical van on the street and that the tenants park in front of the side yard adjacent to Mr. Kabran's house. T. 19. She believes that Mr. Kabran cannot see to get out of his driveway because the tenant's cars are always parked

there. T. 19. She stated that Mr. Bekkam was sitting in his car at one time while his tenants used the side yard to enter the apartment. T. 19. She also testified that Mr. Bekkam has not cleared the debris from his carport and submitted a photograph taken sometime in April, 2013, showing the debris. T. 22.

Mrs. Saunders described several cars that were regularly parked on the street in front of Mr. Bekkam's property. These include a RAV4 and a white BMW with Virginia tags. She stated that these cars limit Mr. Kabran's visibility when leaving his driveway. T. 37. She observed the tenants exit the RAV4 and carry groceries through the side yard. T. 37. She also observed an individual exit the white BMW and carry something toward the apartment through the side yard. T. 37. Mrs. Saunders testified that Mr. Bekkam was in his medical van on the street and saw these individuals move through the side yard. According to her, the tenants park close to Mr. Kabran's property so they may use the side yard to get in and out of the apartment. T. 38. On school days, she observes a young boy cut across Mr. Kabran's driveway and grass and run down to the bus stop which is at the opposite end of the corner on Shanandale. T. 38. She stated that he does this every single day. T. 39.

In addition to these vehicles, Mrs. Saunders testified that there is a tannish/gold car and a red car that regularly park at the property that have been used by different tenants. T. 40. These cars are also parked by Mr. Kabran's property because the tenants do not use the walkway. T. 40.

Mrs. Saunders submitted another photograph of the Petitioner's carport, which she described as being filled with "junk". T. 42. According to her, another photograph showed one of the tenants parking his work truck at the house while he took something

inside. T. 44. She stated that the children living in the apartment use the side yard every day. T. 45.