

I. STATEMENT OF THE CASE

Petition No. S-2842, filed on April 5, 2012, seeks a special exception pursuant to §59-G-2.00 of the Zoning Ordinance to permit an accessory apartment in the basement of an existing single-family home located at 12508 O'Fallon Street, Silver Spring, Maryland. The property's legal description is Calverton, further identified as Lot 34, Block 3, and it is on land in the R-90 Zone. The tax account number is 05-00358947.

On May 11, 2012, OZAH noticed the public hearing on the petition for October 18, 2012. Exhibit 11(b). Technical Staff at the Maryland-National Capital Park and Planning Commission (M-NCPPC), in a report issued October 11, 2012, recommended approval of the special exception, with conditions. Exhibit 14.¹ Technical Staff also reported that the Applicant had failed to provide written notice to an adjacent property on a pipestem lot to the rear of the subject property. As a result, the Hearing Examiner left the record open until December 10, 2012, to correct the notice and provide the owner with the opportunity to participate in the public hearing. Exhibits 15, 17.

The Department of Housing and Community Affairs (DHCA) inspected the property on September 28, 2012. Housing Code Inspector Cynthia Lundy reported her findings in a memorandum dated October 11, 2012 (Exhibit 12). The inspector's preliminary report determined that the apartment had 752 square feet of habitable space, and the unit would allow for the occupancy of no more than two unrelated people or a family of four. Also submitted by DHCA was a memorandum dated October 11, 2012, from Ada DeJesus indicating that there is one accessory apartment and one registered living unit in the area. Exhibit 13.

The public hearing proceeded as scheduled on October 18, 2012. Mr. Frank Cockrell sought to testify on behalf of the Calverton Citizen's Association, but instead testified as an individual because the Association had not filed a statement summarizing its position ten days in advance of the

¹ The Technical Staff report is frequently quoted and paraphrased herein. The report pages were not numbered, so the Hearing Examiner's references to page numbers are by physical count.

hearing, as required by §59-A-4.49 of the Zoning Ordinance. Mr. Bekkam and Mr. Jean Pierrelus testified in support of the petition; Mr. Cockrell and two adjoining and confronting neighbors testified in opposition to the petition. Petitioner executed an affidavit of posting (Exhibit 18), and identified photos of the premises. T. 10-14. He adopted the findings in the Technical Staff Report (Exhibit 14) and in the Housing Code Inspector's Report (Exhibit 12), as Petitioner's own evidence (T. 8-9). He also agreed to meet all the conditions set forth in both reports. T. 8-9.

During the public hearing, the Hearing Examiner determined that a portion of the habitable space previously calculated by DHCA could not legally be included in the accessory apartment. There was also testimony that existing tenants used a grass path near a neighbor's property to access the apartment rather than the walkway shown on the site plan. As a result, the Hearing Examiner left the record open for DHCA to recalculate the habitable area to determine whether the reduced square footage would change the number of people that could occupy the apartment and to report on the existence of a path worn through the grass. The Hearing Examiner also permitted the Calverton Citizen's Association (CCA), through Mr. Cockrell, to submit a written closing statement and Mr. Bekkam to file a written response thereto. The CCA filed its written statement on November 5, 2012. Mr. Bekkam did not file any response. The record closed on December 10, 2012.

Based on the record, the Hearing Examiner finds that the petition meets all of the statutory criteria, although testimony and evidence indicate that certain conditions should be imposed to ensure that parking is adequate to support the use and does not adversely impact surrounding neighbors, and to ensure that noise and activity generated by the proposed use does not adversely impact an adjacent neighbor. These conditions are set forth in Section V. of this Report.

II. FACTUAL BACKGROUND

A. The Subject Property and the Neighborhood

The subject property is described as Lot 34, Block 3 of the Calverton Subdivision, and is located on the west side of O'Fallon Street approximately mid-way between Cherry Hill Road and Shanandale Drive. The 12,593-square foot lot is zoned R-90 and improved with a single family home constructed in 1967, as shown on a 2011 aerial photograph included in the Technical Staff Report, reproduced below:



Aerial Photograph of Subject Property (Exhibit 14, p. 3)

Technical Staff described the property as follows (Exhibit 14, pp. 2-3):

The property is improved with a single-family dwelling constructed in 1967. The one-story home is 1,591 square feet; the basement of the home is equal in size. The high point of the property is on the south side (left side, as seen from the street), and the ground slopes downward to the north. There is a carport and deck on the south side of the home on the main level, and, because of the slope, there is a patio and an entry to the proposed accessory apartment on the back of the house on the basement level. The property is unfenced and the landscaping consists of a mixture of turf, and ornamental and edible plantings. In addition to parking in the carport, there is ample room for two additional cars in the driveway. Street parking is permitted on both sides of O'Fallon Street, a residential primary street with a 70-foot right-of-way.

The front of the home can be seen in the following photograph from the Technical Staff report (Exhibit 14, Attachment B, p. 1):



Technical Staff defined the general neighborhood as bounded by the houses facing O'Fallon Street and those on the western leg of Gracefield Road, which has been closed to traffic at the end abutting Cherry Hill Road. These properties are in the R-90 zone, and contain single-family homes, four vacant lots, a 1950s telephone building, and a building owned by the State of Maryland that appears to be a small group home, as depicted in the map included in the Technical Staff Report

(Exhibit 14, p. 4), shown on the following page. According to Technical Staff, there are no accessory apartments in the neighborhood, although there is one located on Gracefield Road just outside the neighborhood boundary. Exhibit 14, pp. 4-5. Having no evidence to the contrary, the Hearing Examiner agrees with Staff's delineation of the neighborhood and finds that the neighborhood is characterized primarily by single-family, detached homes in the R-90 Zone.

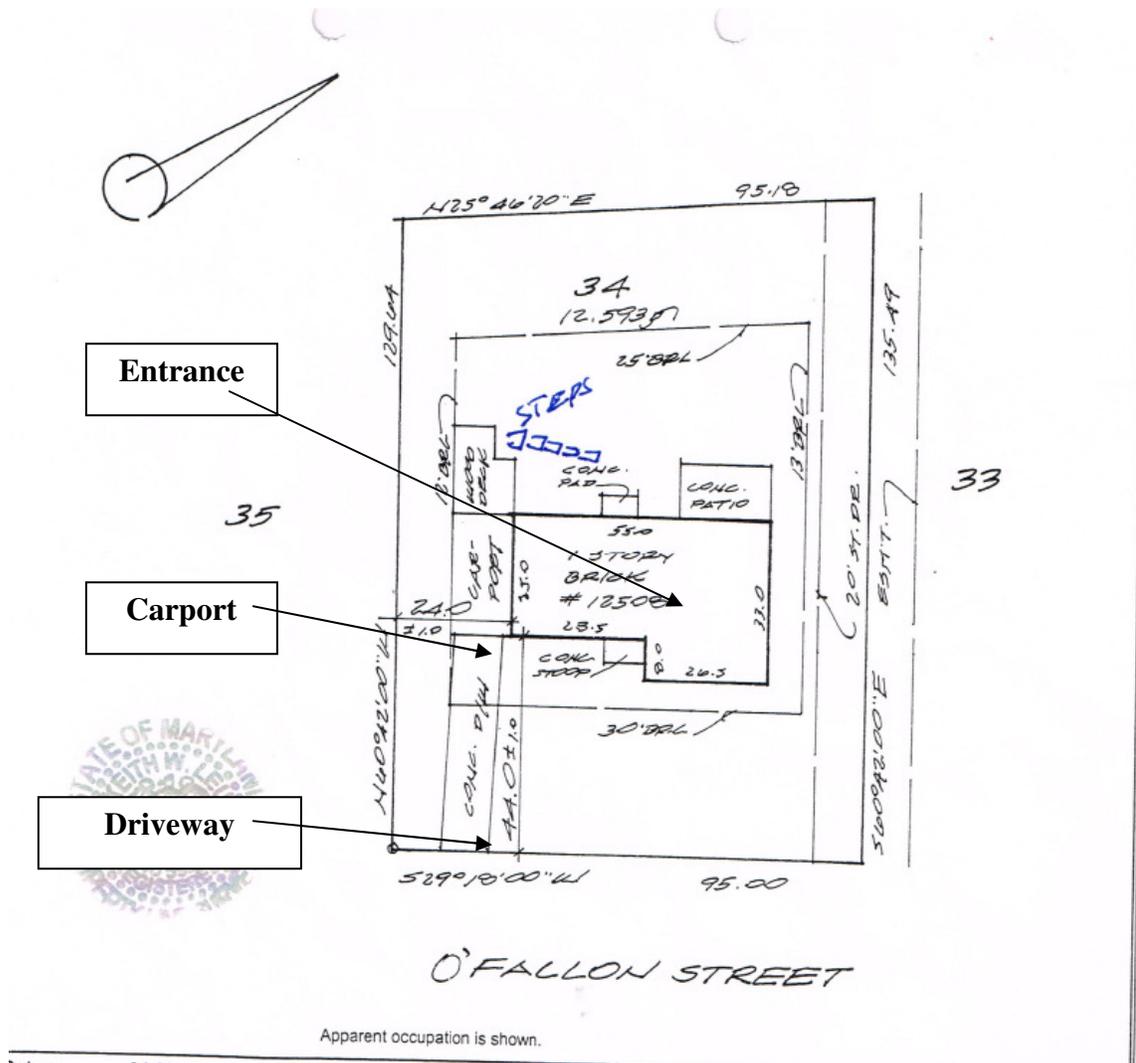


Subject Property

**Neighborhood Delineation
(Ex. 14, p. 4)**

B. The Proposed Use

The Petitioner is seeking a special exception to allow an accessory apartment of approximately 1,167 square feet of floor area, located in the basement level of the existing home.² Exhibit 3. The entrance to the accessory apartment is located in the rear, or western side, of the home. Access may be gained from the driveway by walking through the carport onto a wooden deck and then down steps on the southwestern side of the home, as illustrated in the special exception site plan (Exhibit 4), shown below:



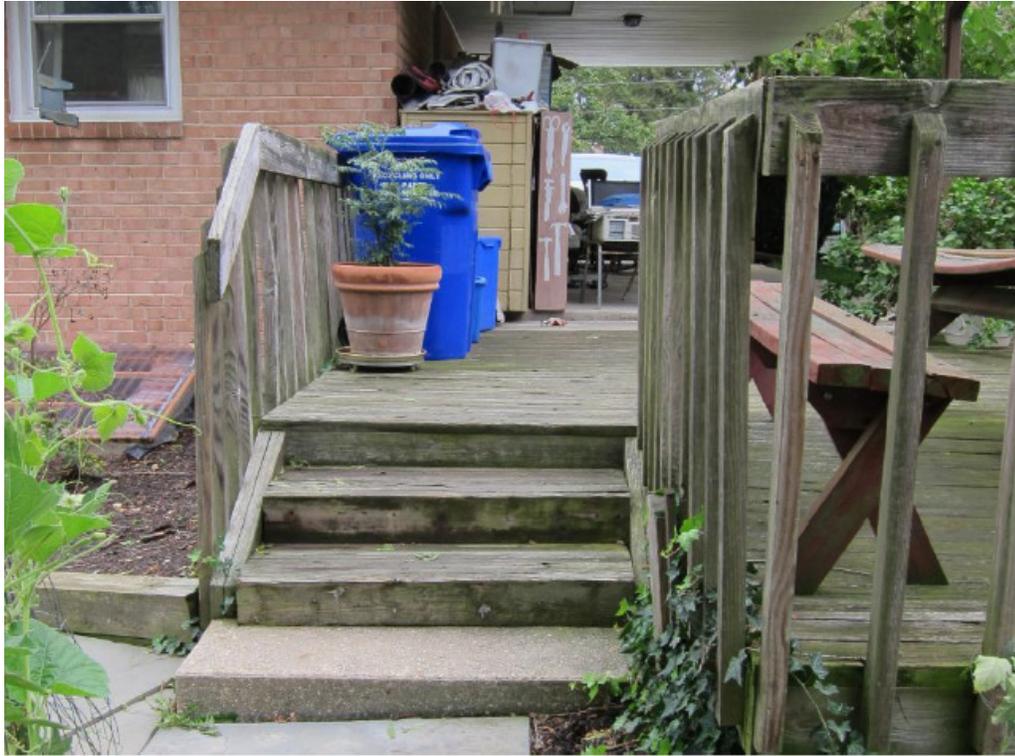
In addition to the apartment entrance located on what is labeled “concrete pad” on the site

² The Technical Staff Report states that the total floor area equals 1,181 square feet. The reduced size is based on evidence and testimony presented at the hearing which indicated that a portion of the area included by Technical Staff did not meet the requirements for an accessory apartment under the Housing Code.

plan, there is a patio door entrance to the home from the area labeled “concrete patio” on the site plan. This entrance may not be used for the accessory apartment because it leads to a room which has been used for a living area, but which (if included) would cause the apartment to exceed 1,200 square feet – the maximum floor area permitted by the Zoning Ordinance. The photographs on the following page (from the Staff report) show the carport/deck and steps leading to the entrance of the accessory apartment (Exhibit 14, Attachment B):



Entrance to Proposed Accessory Apartment



Wooden Deck (Foreground) and Carport (Background)

The photograph below (taken by the Petitioner) shows the relationship of the entrance to the apartment and the patio door leading to a living area that will not be included in the accessory apartment (Exhibit 9(c)):

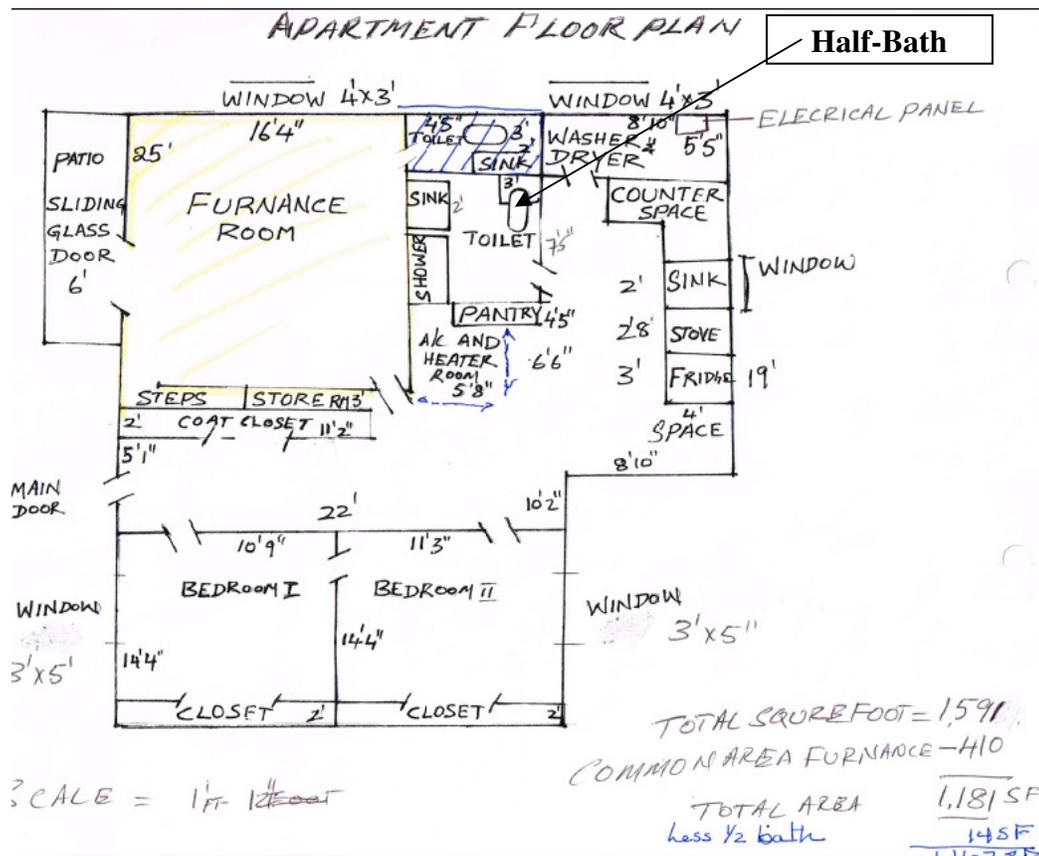


Entrance to Separate Living Area

Apartment Entrance

The floor plan submitted by the Petitioner shows two bedrooms, a full bathroom, and a kitchen area (Exhibit 5, reproduced below). The area labeled “furnace room” (hatched in yellow on the floor plan) is the living area that may not be included in the square footage of the apartment because to do so would exceed the permitted floor area. While labeled a “furnace room”, the Petitioner testified that the room is actually a living area with a TV and a separate half bathroom (hatched out in blue by the Hearing Examiner). The half-bath may only be accessed from the “furnace room” and therefore, according to the Housing Inspector, may not be used by tenants of the accessory apartment. T. 29.

Initially, Technical Staff concluded that the total floor area of the apartment was 1,181 square feet, which excluded the “furnace room” but included the half-bath accessed from the furnace room. Exhibit 14, p. 5. Based on the Housing Inspector’s determination that the half-bath contains 14



Floor Plan (Exhibit 5)

feet of floor area which may not be used for the apartment, the Hearing Examiner finds that the total square feet of floor area (exclusive of the “furnace room” and half-bath) is 1,167 square feet. T. 29; Exhibit 5.

Initially, the Housing Inspector concluded that the total habitable area consisted of 752 square feet, which included both the furnace room and the half-bath. Upon re-inspection of the property at the Hearing Examiner’s request, she determined that the habitable area of the apartment is 585 square feet, exclusive of the furnace room and half-bath. She also reports that this does not change the maximum occupancy of a family of four or two unrelated individuals. Exhibit 20.

Technical Staff recommended approval of the petition with three conditions:

- The applicant must occupy one of the dwelling units on the lot on which the accessory apartment is located (Sec. 59-G-2.00(b)(1)).
- The applicant must not receive compensation for the occupancy of more than one dwelling unit (Sec. 59-G-2.00(b)(3)).
- The applicant must adhere to the recommendations of the Department of Housing and Community Affairs. Exhibit 14, p. 2.

The Department of Housing and Community Affairs first inspected the property on September 28, 2012 and made the following findings:

1. Entrance to the apartment is in the rear of the house
2. Entrance lock is broken—(stem to knob presents a hazard)
3. Must repair/replace the kitchen light/electrical fixture—(ceiling)
4. Must install stove—(contact Department of Permitting Services-240-777-0311)
5. Must install missing drawer(s) for kitchen cabinet
6. Must install doors to furnace area—(doors should be louvered or have vents to insure proper ventilation)
7. Must provide labels for circuit breakers
8. Must repair hole(s)—ceiling—1.2 bathroom)
9. Must repair the sliding door handle
10. Must remove, from outside, all indoor furniture, carpet, etc.
11. Must remove all solid waste in the front, side and rear of property, to include but not limited to, old vacuum, plastic bags, refrigerator, poles, trash and rubbish

Upon re-inspecting the property after the public hearing, the Housing Inspector submitted another memorandum (dated October 26, 2012, Exhibit 20) which included her original findings as

well as three new findings (renumbered from the September 28, 2012, Memorandum):

10. Must install a wall(s) that completely separates the living room from the stairway that leads to the main level of the residence and also, the adjacent hallway of the unit. {Note—the living room is labeled as the “furnace room” on the diagram submitted by the owner.}*
13. Eliminate the ground erosion*
14. Install a barrier or fencing that will deter usage of the right side of property as a means to access the unit *

The “*” after each requirement indicates that the owner voluntarily agreed to make these repairs.

Exhibit 20. The “ground erosion” refers to the pathway worn by tenants of the property on the opposite side of the house from the walkway shown on the site plan. Ms. Lundy submitted photographs of the path worn in the grass, one of which is reproduced below (Exhibit 20(a)(iii)):



At the public hearing, the Housing Inspector submitted a photograph of the area labeled “a/c and heater room” on the site plan to illustrate the improvement required in Item 6 of her original memorandum. The air conditioning and heating units are currently enclosed using a slider (Exhibit 19(b)), shown below:



Regarding traffic, Technical Staff found no transportation issues associated with the petition:

The proposed accessory apartment meets the transportation related requirements of the Adequate Public Facilities (APF) Ordinance. The existing home 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, and the proposed accessory apartment is estimated to generate one additional trip during these periods. Since the existing home and the accessory apartment together will not generate 30 or more peak hour trips, a traffic study is not required; the application satisfies the Local Area Transportation Review requirements of the APF test. Because the existing and proposed uses generate less than four peak hour trips during the weekday morning and evening peak periods, the applicant is not subject to the Policy Area Mobility Review requirements of the APF test.

The existing driveway and carport provides off-street parking for three cars. O’Fallon Street allows parking on both sides of the street, and can accommodate two additional

vehicles for the accessory apartment, in the event that the three off-street parking spaces are taken. Exhibit 14, pp. 6-7.

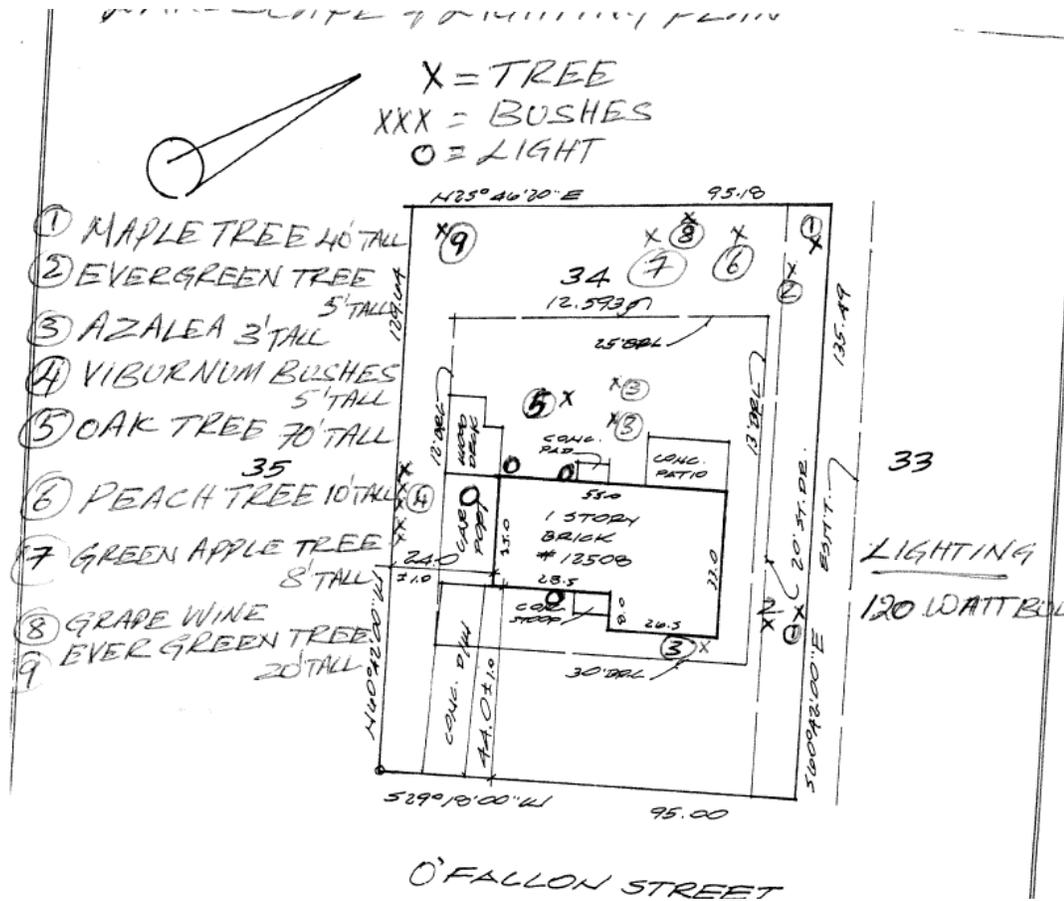
The Housing Inspector reports that the driveway is 45 feet by 10 feet and, combined with the carport, could accommodate three mid-sized vehicles. Exhibit 12. Testimony at the hearing indicates that parking is tandem (i.e., there is insufficient room for vehicles to maneuver around each to exit the driveway if they are “parked in” by another vehicle). Both Technical Staff and the Housing Inspector determined that on-street parking is available. Exhibit 12. Photographs of the driveway and the street, submitted by the Housing Inspector and Technical Staff are below and on the following page (Exhibits 19(b) and Exhibit 14, Attachment B, respectively):





At the public hearing, neighbors testified that on-street parking was insufficient, in part due to the number of cars owned by the Petitioner and his tenants. According to those testifying, the location of a group home on the street housing 14 people with six cars and a driveway that accommodates only one car contributes to the shortage of on-street parking. These concerns are set forth in detail in the next Section of this Report.

The Petitioner proposes no change to the existing landscaping. While the landscape plan submitted (Exhibit 6, shown below) shows 12 plants, including evergreens, shade trees, fruit trees, and flowering shrubs, Technical Staff reports that there are additional mature ornamental trees and evergreen shrubs on the property as well as seasonable vegetables (Exhibit 14, p. 7). Technical Staff found that: “The accessory apartment has no environmental impact on the site. Exhibit 14, p. 7. Technical Staff advises that no new lighting fixtures are proposed and the existing fixtures point downward. Exhibit 14, p. 13.



C. Neighborhood Response

Mr. Frank Cockrell testified as an individual and then submitted a written statement on behalf of the Calverton Citizen’s Association. As an individual, he expressed concern that the neighborhood in general has deteriorated due to traffic congestion, a lack of on-street parking, lack of enforcement of zoning violations, increasing crime, and illegal immigration. He is concerned that the Calverton community will become similar to Langley Park, which is overcrowded beyond what was originally intended for the area. T. 68-78.

At the public hearing, neighbors testified that parking on the street has been difficult because of the number of Petitioner’s personal vehicles and those owned by the tenants occupying the apartment. They testified that the Petitioner has three vehicles and his tenants have three vehicles. The vehicles in the Petitioner’s driveway have blocked the sidewalk and kept the postman from being able to access mailboxes from his vehicle. In the past, Petitioner’s tenants have parked large

construction dump trucks on the street filled with debris until complaints to the police forced them to stop. Individuals come to the neighborhood to commute to work with Petitioner's tenants and park their own vehicles on the street. Other parking problems are occasioned by the existence of a group home on the block which, according to neighbors, houses 14 people with six cars and a driveway that can only accommodate one vehicle. T. 81-95, 97-104.

Mr. Harvey Kabran testified that the police had been called at least five times to the premises, and that tenants living in the apartment used a side path on the subject property near Mr. Kabran's house rather than the walkway to enter the apartment, causing additional activity adjacent to his home. He stated that the tenants' consistent use had worn a pathway on the portion of Petitioner's property between his property and the house on the subject property. *Id.*

D. The Master Plan

The subject property lies within "Calverton Community" area of the 1997 Fairland Master Plan (Master Plan or Plan). The Master Plan describes the Calverton Community as follows:

Calverton is one of the older residential areas in Fairland. Its edges are defined by Fairland Road, Cherry Hill Road, and US 29. Calverton crossed the County Line and the local civic association includes residents of both Prince George's and Montgomery Counties. There are approximately 900 single-family detached homes and 330 townhouses in the Montgomery County portion... The average density is 3.5 units per acre. Many of the detached homes were built in the 1960s; the townhouses were built in the 1980s... (Plan, p. 36).

Technical Staff advises that the Plan makes no recommendations for changes in the Calverton Community and found the proposed use consistent with the Plan's goal to increase housing options:

Goal: Implement the General Plan Refinement goals, objectives, and strategies for maintaining a wide choice of housing types and neighborhoods at appropriate densities and locations.

Objective: Increase housing options.

The existing housing mix in Fairland is split three ways between single-family detached, townhouses, and multi-family units (Table V).

[Table V shows 31% single-family detached, 34% townhouses, and 35% multi-family units.]

Recommendation:

Maximize the percentage of single-family detached units in the developable areas.

[Table VI shows a recommended mix of 34.5% single-family detached, 34.6% townhouses, and 30.9% multi-family units.] Exhibit 14, p. 6; Plan, p. 28.

The Hearing Examiner notes that the following language summarizes the Plan's overall vision for Fairland's residential communities (Plan, p. 15):

Most of all, this Fairland of the future is a livable suburban community—a series of neighborhoods with sidewalks and street trees, access to the natural environment and recreational facilities with employment and commercial areas emphasizing horizontal rather than vertical structures. There is plenty of green space, jobs, shopping, and, most importantly, a variety of housing options to serve a variety of needs and households—the young couples just starting out, single adults, families who need room, older couples who want less space, and senior citizens who want to be able to participate in community life.

An accessory apartment, if operated in accordance with the conditions recommended in Section V of this Report, would maintain the existing scale and type of housing, while providing for additional housing in the area. This accessory apartment would not be visible from the street and therefore would not change the existing structure's appearance as a single-family dwelling compatible with the surrounding neighborhood. However, on-street parking has been difficult in the past, due to the presence of a group home on the street combined with the number of Mr. Bekkam's personal and work vehicles and those used by the tenants of his apartment. With conditions designed to address these issues, it is fair to say that the planned use, an accessory apartment in a single-family, detached home, is not inconsistent with the goals and objectives of the 1997 Fairland Master Plan.

III. SUMMARY OF HEARING

At the hearing, testimony was heard from the Petitioner and Mr. Jean Pierrelus in support of the Petition, and Mr. Frank Cockrell, Ms. Bernice Saunders, and Mr. Harvey Kabran in opposition to the petition. Ms. Cynthia Lundy testified for the Department of Housing and Community Affairs.

Mr. Someswara Bekkam:

Petitioner executed an affidavit of posting (Exhibit 18), and he identified his photos of the site (Exhibit 9) and the submitted plans (Exhibits 4, 5 and 6). T. 24-32. He adopted the findings in the Technical Staff Report (Exhibit 14) and in the Housing Code Inspector's Report (Exhibit 12), as Petitioner's own evidence. He also agreed to meet all the conditions set forth in both reports. T. 8-10. He understands that tenants of the apartment may not use either the area marked as "furnace room" or the half-bath. T. 23. Mr. Bekkam testified that he has three vehicles for his own use and his current tenants have three vehicles. He uses one of his vehicles for employment—he drives a medical transport van. In addition, he has a Camry and an F250 truck. T. 117. There are currently five people living in the apartment, including three children and two parents, who have three vehicles. T. 117. He understands that he will not be able to rent to that many people if the accessory apartment is approved. He also testified that the tenants now use the lawn to access the apartment because the carport is blocked by solid waste. He understands that he will have to clear out the solid waste and, once this is done, he can park his three vehicles in the driveway. He has three spaces in front of his house. T. 119. He agreed to abide by a condition which requires tenants to use the walkway to access the apartment. T. 51-58.

After hearing the concerns expressed by those opposing the petition, Mr. Bekkam agreed that he would park the van used for his work at another location, and that he would be willing to construct a barrier to prevent tenants from accessing the apartment through the lawn near Mr. Kabran's house. T. 126.

Jean Pierrelus:

Mr. Pierrelus testified that Ms. Saunders continually calls the police on him. T. 116.

Housing Code Inspector Cynthia Lundy:

Housing Code Inspector, Cynthia Lundy, testified that she inspected the premises and that her findings are set forth in her report of October 11, 2012 (Exhibit 12). Initially, she stated that the apartment measured 752 square feet of habitable space; however, at the hearing she acknowledged that including the furnace room would make the apartment exceed 1,200 square feet, the maximum floor area permitted by the Zoning Ordinance. She calculated that the half-bath contained 14 square feet of floor area, which reduces the total area 1,167 square feet. T. 24-25. Based on 752 square feet of habitable space, she advised that a family of four or two unrelated individuals could occupy the building. She agreed to recalculate the habitable space and report on whether the number of individuals that could occupy the accessory apartment must be lower. She also agreed to report on whether the tenants had worn a path next to Mr. Kabran's house. According to Ms. Lundy, the driveway measures 45 feet by 10 feet. The driveway and carport combined may accommodate up to three vehicles, although the carport must be cleared of junk and debris. She also testified that there does appear to be parking available on the street. Ms. Lundy then identified a picture of the area marked on the floor plan as ac/heater that she had taken (Exhibit 19(b)). T. 33-34.

On cross-examination, Ms. Lundy testified that County law prohibits vehicles in the driveway from crossing sidewalks. She also testified that DHCA will not issue a license until the carport has been cleared of the solid waste. T. 47-48.

Frank Cockrell:

Mr. Cockrell opposed the petition. He testified that there had been five police calls to the residence and the owner did not get a County permit to install the apartment. He expressed concern about the lack of enforcement of existing regulations. In his opinion, the Planning Board has not responded to citizens concerns about accessory apartments. He believes that illegal apartments lead to tax avoidance because the income is not reported. T. 68-72.

He also testified that a block or two from this property, people have had to call police because of noise and parking problems, although he stated that he is “not saying that this will happen here.” He stated that the egress from the neighborhood, including O’Fallon Street, is already overloaded and believes that additional density should be located in smart growth areas. T. 72-74. In his opinion, the neighborhood has incrementally changed—there is less peace and quality of life and more police calls and drugs. T. 75-76. He believes that the petition should be delayed or deleted because the eastern portion of the County has been a “dumping ground” for more density. There are too many group homes and enforcement is lax. T. 76-78.

Bernice Saunders:

Ms. Saunders testified that she lives across the street diagonally from the subject property. T. 81. The property first came to her attention when a neighbor to the rear of the property alerted her that he was putting things in the back, approximately two-three years ago. She investigated and found that the Petitioner was renovating his basement. T. 81-82. His tenants have included construction workers who parked their large dump trucks in front of her house, made noise all night and early into the morning. T. 82-83. She called the police about the dump trucks because they were over 12 feet long—the trucks were so heavy, the pavement was “weighing down”. According to Ms. Saunders, the police came several times and eventually the construction workers left. T. 84.

Ms. Saunders stated that, after the construction workers moved out, four adults and three children occupied the apartment. In addition to Mr. Bekkam’s family, which has three children, there were a total of ten people living in the home. Sometimes, there have been as many as six cars. Her daughter was afraid to go out at one point because a red car would sit in the street for approximately one-half hour. T. 88. According to her, there is a continuous pattern of people moving in and out quickly and the tenants have disrupted the neighborhood. She could not think of a condition that would make the use compatible with the neighborhood because she does not trust

the Petitioner to abide by the conditions of approval. T. 85-88. She testified that if Mr. Bekkam puts his truck in the carport, no one would be able to use the walkway to the apartment. T. 94-95.

Harvey Kabran:

Mr. Kabran testified that he lives adjacent to the subject property's northeastern property line. According to Mr. Kabran, the tenants use a grass area on the subject property that adjoins his house rather than the walkway to the apartment. He stated that tenants have worn a path in that area. The Washington Suburban Sanitary Commission (WSSC) has a 10-foot easement over that area, so Mr. Bekkam will not be able to build a structure to block people from using the grass. There is a storm drain that runs underground to O'Fallon Street. Because the tenants use the grass, there is a lot more activity than would normally be associated with a single-family home.

Mr. Kabran further testified that the tenants have not parked in the driveway, but on the street. He opposes the special exception because Mr. Bekkam "acts first and asks permission later." T. 102. In the past, the Petitioner's tenants have parked very large dump trucks filled with debris in the evenings. The police were called and had to ticket the individuals to get the trucks to stop parking there. T. 102-103. The police had to be called five times since he's been there, partially due to vehicles blocking the sidewalk. He is concerned about this because a neighbor is disabled and in a wheelchair that cannot cross where the cars are parked. T. 103. He stated that there is a "continuously rotating group of people" or a "rotating door" of people living in the apartment. There are a large number of the vehicles owned by Petitioner's tenants parked on the streets; they park in front of the mailbox. T. 103-104. There is a group home on the other side with a total of 14 people living in it. There are six vehicles associated with that house, which has a driveway that can only accommodate one car. Because of the Petitioner's tenants and the group home, there is insufficient parking on the street. T. 104.

IV. FINDINGS AND CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions, and the Petitioners have the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Technical Staff concluded that Petitioners will have satisfied all the requirements to obtain the special exception, if they comply 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, but recommends conditions to mitigate the impact on on-street parking and activity from the use, which are 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 14, p. 8):

- the existence of the apartment as a separate entity from the main living unit but sharing a party wall with it;
- the provision within the apartment of the necessary facilities, spaces, and floor area to qualify as habitable space under the applicable code provisions;
- a separate entrance and walkway and sufficient exterior lighting;
- sufficient parking;
- 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
- 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.

While Technical Staff identified the characteristics inherent in an accessory apartment use, it did not provide its analysis of whether there are any non-inherent adverse impacts generated by this petition as proposed. Thus, the Hearing Examiner undertakes her own analysis of whether there is a non-inherent impact of the use as proposed.

The Hearing Examiner finds that there is one non-inherent adverse impact generated by the proposed use: there is insufficient off-street and on-street parking to accommodate the use. The testimony indicates that Petitioner's driveway is only 10 feet wide and permits only tandem (single-file) parking. Thus, while the driveway and carport may physically accommodate three vehicles, testimony indicates that tenants of the apartment park on the street. In addition, Petitioner parks his work vehicle, a medical transport van, at his premises. Finally, there is an existing group home on the street with six vehicles, most of which park on the street because that driveway is able only to accommodate one vehicle. For these reasons, the Hearing Examiner finds that tandem parking combined with the lack of on-street parking constitutes a non-inherent adverse impact of the use.

The existence of a non-inherent adverse impact does not necessarily warrant denial of the petition. Much of the opposition to this petition results from past experiences with tenants. For periods of time, as now, there have been more individuals occupying the apartment than permitted by the Housing Code. When limited to a family of four or two unrelated individuals, the impact on parking may be reduced. To ensure, however, that cars do not block the sidewalk where it crosses the Petitioner's driveway and that on-street parking is available to the community, the Hearing Examiner finds that the non-inherent adverse impact may be negated with conditions (1) limiting the number of vehicles used by tenants of the property to two vehicles, (2) prohibiting the Petitioner from parking the medical transport van at the subject property, and (3) prohibiting vehicles parked in the driveway from blocking the sidewalk. In addition, the Hearing Examiner recommends a condition requiring all occupants of the accessory apartment to enter by means of the walkway

shown on the site plan, thus reducing the amount of activity experienced by the adjacent neighbor to the northeast.

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 in this case.

Sec. 59-G-1.21. General conditions.

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

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

Conclusion: An accessory apartment is a permissible special exception in the R-90 Zone, pursuant to Code § 59-C-1.31.

(2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

Conclusion: The 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: Technical Staff found that the proposed use was substantially consistent with the *1997 Fairland Master Plan* because it furthered the Plan's goal to provide a variety of housing options. The Hearing Examiner agrees with this analysis and further finds that the use, with the recommended conditions, will be consistent with the suburban residential vision for the Calverton Community.

(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 in an existing dwelling and will not require any external changes. It therefore will maintain its residential character. With limitations on the number of vehicles the tenants may use and requiring the Petitioner's work vehicle to be parked elsewhere, there will be sufficient parking, considering the carport and driveway spaces and the on-street parking. Traffic conditions will not be affected adversely, according to Transportation Planning Staff. There are no other accessory apartments in the defined neighborhood, and the addition of this use will not affect the area adversely. 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 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: In addition to the conditions relating to parking, the Hearing Examiner also recommends a condition requiring tenants of the apartment to use the walkway for access to the apartment entrance in order to reduce the activity experienced by Mr. Kabran. With these conditions, and for the reasons set forth in answer to the previous section of this report, the special exception will not be detrimental to the use, peaceful enjoyment, economic value, or development of the

surrounding properties or the defined neighborhood, provided that the special exception is operated in compliance with the listed conditions of approval.

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

Conclusion: Technical Staff found that “Due to the nature of an accessory apartment, the proposed special exception will not cause objectionable noise, vibrations, fumes, odors or dust. No new lights are proposed, so no change in the current levels of illumination or glare will be created. The anticipated increase in physical activity will be minimal.” The testimony presented indicates that the activity from the proposed use will actually *decrease* if the apartment is operated in accordance with the recommended conditions. Based on the evidence, the Hearing Examiner finds that this standard has been met if operated within the conditions set forth in Section V of this Report.

- (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: Technical Staff advises that there are no other accessory apartments within the surrounding area. 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 services and facilities (Exhibit 14, p. 10), 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 Policy Area Mobility Review (PAMR). 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 14, pp. 6-7. Since the existing house, combined with the proposed accessory apartment, would generate fewer than 30 total trips in the weekday morning and evening peak hours, the requirements of the LATR are satisfied without a traffic study. Since the proposed use is estimated to generate only one additional peak-hour trip, PAMR is also satisfied. Therefore, the Transportation Staff concluded, as does the Hearing Examiner, that the instant petition meets all the applicable Growth Policy standards.

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

Conclusion: Based on the evidence of record, especially the Technical Staff's conclusion that "the proposed use is not likely to negatively impact the safety of vehicular or pedestrian traffic as the use will not generate a substantial increase in either form of traffic," the Hearing Examiner so finds.

Exhibit 14, p. 15.

C. Specific Standards

The testimony and the exhibits of record, especially the Technical Staff Report (Exhibit 14), 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 cellar of an existing house, and therefore shares a wall in common, as required for a lot of this size (under an acre).

- (3) An addition or extension to a main dwelling may be approved in order to add additional floor space to accommodate an accessory apartment. All development standards of the zone apply. An addition to an accessory structure is not permitted.*

Conclusion: No new addition or extension of the main dwelling is proposed. The accessory apartment will be located in an existing dwelling.

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

Conclusion: Records of the Maryland State Department of Assessments and Taxation indicate that the house was built in 1967. Exhibit 14, p. 14. Based on this evidence, the proposed use meets this 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 will 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 will preserve the appearance of a one-family

dwelling. The apartment entrance will be separate from the main entrance in the rear of the home. As noted by Technical Staff, the apartment entrance will have the appearance of a typical basement entry to a one-family home. There will thus be no change to the home's residential appearance. Exhibit 14, p. 14.

(7) All external modifications and improvements must be compatible with the existing dwelling and surrounding properties.

Conclusion: No external improvements are planned by Petitioner.

(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: Technical Staff advises that the enclosed area of the single-family dwelling, exclusive of the accessory apartment, is 1,591 square feet. The accessory apartment, at 1,167 square feet (d square feet of which is habitable), will be subordinate to the main dwelling. Exhibit 14, p. 15.

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 unit 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: According to Petitioner's deed (Exhibit 21) and the Maryland Tax Records (Exhibit 16),

Petitioner purchased the property in 1987. 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: The Petitioner is the owner 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 12,593 square feet in size, and therefore satisfies this requirement. According to Technical Staff, the subject property conforms to all applicable development standards of the zone. Exhibit 14, p. 9. The table shown on the following page from the Technical Staff report summarizes the relevant development standards for the application. Exhibit 14, p. 11.

R-90 Zone Standard	Minimum/ (Maximum)	Provided	Source for "Provided" Data
Minimum net lot area for a one-family detached dwelling (59-C-1.322)	9,000 square feet	12,593 sf	Plat 8155
Minimum lot width at front building line for a one-family detached dwelling (59-C-1.322)	75 feet	95 feet (est.)	GIS**
Minimum lot width at existing or proposed street line (59-C-1.322)	25 feet	95 feet	Plat 8155
Minimum setback from street (59-C-1.323) (subject to an established building line, 59-A-5.33)	30 feet	33 feet (est.)	GIS**
Setback from adjoining lot (59-C-1.323):			
- One side	8 feet	12 feet (est.)	GIS**
- Both sides	25 feet	26 feet (est.)	
- Rear	25 feet	54 feet (est.)	
Maximum height (59-C-1.327)	(35 feet*)	24 feet (est.)	Pictometry***
Coverage (maximum percentage of net lot area that may be covered by buildings) (59-C-1.328)	(30 percent)	18 percent (est.)	GIS**
Maximum percentage of the area of the front yard that can be covered by surfaced area (59-C-1.328)	(30 percent)	11 percent (est.)	GIS**
<p>* For a main building in the zones indicated (*): The height must not exceed: (1) 35 feet when measured to the highest point of roof surface regardless of roof type, or (2) 30 feet to the mean height level between the eaves and ridge of a gable, hip, mansard, or gambrel roof, subject to the following: (a) The height must not exceed 2 ½ stories⁵ or 30 or 35 feet, depending on the method of measurement, if other lots on the same side of the street and in the same block are occupied by buildings with a building height the same or less than this requirement (b) The height may be increased to either 3 stories or 40 feet if approved by the Planning Board in a site plan.</p> <p>** Measurements taken from 2011 aerial photos using GIS *** Measurements taken from 2003-2010 aerial oblique photos using Pictometry</p>			

(2) *An accessory apartment must not, when considered in combination with other existing or approved accessory apartments, result in excessive concentration of similar uses, including other special exception uses, in the general neighborhood of the proposed use(see also section G-1.21 (a)(7) which concerns excessive concentration of special exceptions in general).*

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

(3) *Adequate parking must be provided. There must be a minimum of 2 off-street parking spaces unless the Board makes either of the following findings:*

- (i) *More spaces are required to supplement on-street parking; or*
- (ii) *Adequate on-street parking permits fewer off-street spaces.*

Off-street parking spaces may be in a driveway but otherwise must not be located in the yard area between the front of the house and the street right-of-way line.

Conclusion: As discussed in Part II.B. of this Report, there are three off-street spaces in the Petitioner's driveway and carport, but these spaces are tandem. As conditioned, the Petitioner's personal vehicles may be parked in the carport and driveway and the van he uses for work may not be parked at the premises, which should reduce the possibility that Petitioner's vehicles will block the sidewalk. The tenant's two vehicles may park on the street, an improvement over existing conditions. For these reasons, the Hearing Examiner finds that parking is adequate for the proposed use.

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 reports (Exhibit 12 and 20) found that certain modifications were needed, and that occupancy must be limited to a family of four or two unrelated individuals. Although Ms. Lundy's report recommends that the Petitioner install a barrier or fencing that will deter usage of the right side of the property as a means to access the unit, the Hearing Examiner is concerned that this may be imposing an impossible condition because of Mr. Kabran's testimony that there is a WSSC easement on the area being used. As a result, the Hearing Examiner recommends a special exception condition requiring the Petitioner to include a provision in his lease requiring tenants to use the walkway and mandating that tenants use the walkway shown on the site plan as a condition of the special exception.

V. RECOMMENDATION

Based on the foregoing analysis, I recommend that the Petition of Someswara Bekkam, BOA No. S-2842, which seeks a special exception for an accessory apartment to be located at 12508 O'Fallon

Street, Silver Spring, Maryland, be GRANTED, with the following conditions:

1. The Petitioner is bound by their testimony, representations and exhibits of record;
2. The Petitioner must comply with all of the conditions (with the exception of Item 14) set forth in the Memorandum of Cynthia Lundy, Housing Code Inspector, Division of Housing and Code Enforcement dated October 26, 2012 (Exhibit 20):
 1. Entrance to the apartment is in the rear of the house
 2. Entrance lock is broken—(stem to knob presents a hazard)
 3. Must repair/replace the kitchen light/electrical fixture—(ceiling)
 4. Must install stove—(contact Department of Permitting Services-240-777-0311)
 5. Must install missing drawer(s) for kitchen cabinet
 6. Must install doors to furnace area—(doors should be louvered or have vents to insure proper ventilation)
 7. Must provide labels for circuit breakers
 8. Repair hole(s)—ceiling—1/2 bathroom)
 9. Repair the sliding door handle
 10. Must install a wall(s) that completely separates the living room (labeled “furnace room” on Exhibit 6) from the stairway that leads to the main level of the residence and also, the adjacent hallway of the unit.
 11. Must remove, from outside, all indoor furniture, carpet, etc.
 12. Must remove all solid waste in the front, side and rear of property, to include but not limited to, old vacuum, plastic bags, refrigerator, poles, trash and rubbish
 13. Eliminate the ground erosion
3. Occupancy must be limited to a family of four or two unrelated individuals and Petitioner must comply with any other directions of the Housing Code Inspectors to ensure safe and code-compliant occupancy;
4. Occupants of the accessory apartment shall not use the area marked “furnace room” and half bath accessed from the furnace room;
5. Occupants of the accessory apartment may have no more than two cars housed in the neighborhood;
6. Vehicles parked in the driveway must not block the sidewalk;
7. Petitioner must not park any vehicles used in his work at the premises or on the street within the neighborhood;
8. Petitioner shall have any new tenants of the accessory apartment sign a lease agreement that (1) prohibits them from having more than two vehicles housed in the neighborhood, (2) prohibits them from parking in the driveway so as to block the sidewalk, and (3) mandating that they use only the walkway shown on the site plan (Exhibit 4) to access the accessory apartment.
9. Occupants of the apartment must use only the walkway shown on the site plan (Exhibit 4) to access the accessory apartment;

10. Petitioner must occupy one of the dwelling units on the lot on which the accessory apartment is located;
11. Petitioner must not receive compensation for the occupancy of more than one dwelling unit; and
12. Petitioner must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioners shall at all times ensure that the special exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: January 9, 2013

Respectfully submitted,

A handwritten signature in black ink, consisting of a stylized 'L' and 'R' followed by a long horizontal line extending to the right.

Lynn A. Robeson
Hearing Examiner