

OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
Stella B. Werner Council Office Building
Rockville, Maryland 20850
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IN THE MATTER OF:	*	
RADEK BRABLEC	*	
Applicant	*	
Radek Brablec	*	
For the Petition	*	OZAH Case No. CU 15-09

Cynthia Lundy	*	
Department of Housing and	*	
Community Affairs	*	

Before: Martin L. Grossman, Hearing Examiner
 Director, Office of Zoning and Administrative Hearings

HEARING EXAMINER’S REPORT AND DECISION

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I. STATEMENT OF THE CASE

On May 12, 2015, the Applicant, Radek Brablec, filed an application seeking approval of a conditional use to allow an Attached Accessory Apartment in the basement of a one-family, detached home at 4528 Rosedale Avenue, Bethesda, Maryland. The subject property is identified as Lot 4, Block 9, Rosedale Park Subdivision, located in the R-60 Zone and bearing the Tax Account Number 07-00528684. The Applicant's ownership of the property is established by Maryland Real Property Records (Exhibit 7(a)).

Ordinarily, an applicant can obtain a license to establish an accessory apartment within a dwelling by applying to the Department of Housing and Community Affairs (DHCA) for a license pursuant to Section 29-19 of the Montgomery County Code; however, approval of a conditional use is required, under Zoning Ordinance §59. 3.3.3A.2.b.i., for an attached accessory apartment when the site cannot meet the on-site parking requirements for a limited use found in Section 59.3.3.3A.2.a.iii.(b) of the Zoning Ordinance.¹

The Applicant filed a license application for a Class 3 Accessory Apartment with DHCA (Reference No. 85856), but it was denied on February 13, 2015, because the on-site driveway parking measures 265 square feet, and according to DHCA, that does not meet the minimum requirement of 480 square feet for on-site parking available to homes constructed after 1958.² Exhibit 2. The Department of Housing and Community Affairs (DHCA) therefore referred the Applicant to the Office of Zoning and Administrative Hearings (OZAH) to apply for a special

¹ All citations in this Decision are to the 2014 Zoning Ordinance for Montgomery County, adopted September 30, 2014 (Ordinance No. 17-52, as amended).

² Zoning Ordinance §59.6.2.4.B. specifies that a detached single-family home must have two parking spaces, and an additional parking space is required for an accessory apartment, meaning that 3 on-site parking spaces are required in this case. Since the Applicant has a one-car garage, his driveway must have space for two cars in order to meet the minimum requirements. Zoning Ordinance §59.6.2.5.M.5, specifies that each parking space in the R-60 Zone must have 160 square feet of area, meaning that Applicant's driveway must have at least 320 square feet of space to hold two cars. According to DHCA, the driveway measures only 265 square feet, making it too small for two cars.

exception (which under the applicable Zoning Ordinance, is called a conditional use) to deviate from the on-site parking limited use standards for an accessory apartment use, as provided in the Zoning Ordinance. Exhibit 3.

The Hearing Examiner is authorized to hear and decide this type of petition pursuant to Section 59.7.3.1 of the Zoning Ordinance. The public hearing before the Hearing Examiner was scheduled for September 11, 2015, in a Notice of Hearing issued on May 15, 2015. Exhibit 16. At the request of the Applicant, the hearing date was moved to September 25, 2015. Exhibits 19, 22 and 23.

Staff of the Montgomery County Planning Department (Technical Staff or Staff) issued a report recommending approval of the application on August 21, 2015, subject to four conditions:

1. The Applicant is bound by all submitted statements and materials of record;
2. The total number of occupants residing in the accessory apartment who are 18 years or older is limited to 2;
3. No other rental residential uses are allowed to be located on the subject site; and
4. One of the Applicant's two on-street parking permits must be provided to the occupant of the accessory apartment.

Exhibit 24, p. 2.

No letters of support or opposition were received in this case.

The hearing went forward as scheduled on September 25, 2015, and Applicant Radek Brablec appeared *pro se*. He testified in support of the application and adopted the findings and conclusions in the Technical Staff report (Exhibit 24) as his own evidence of record. He also agreed to comply with Staff's proposed conditions of approval and submitted an executed Affidavit of Posting (Exhibit 26). Tr. 5-6. Cynthia Lundy, a Housing Code Inspector, testified on behalf of DHCA. Tr. 10-24. There were no other witnesses. The record was held open until October 5, 2015 to allow time for receipt of the hearing transcript.

Based on a thorough review of the entire record, and for the reasons stated herein, the

Hearing Examiner finds sufficient evidence that there is adequate on-street parking to grant Applicant's request to deviate from the minimum on-site parking requirements for an attached accessory apartment pursuant to Section 59.3.3.3.A.2.c. Further, the Hearing Examiner finds the general and specific standards for a conditional use application for an attached accessory apartment have been satisfied. The Hearing Examiner therefore approves the conditional use application, subject to the conditions listed in Part IV, below.

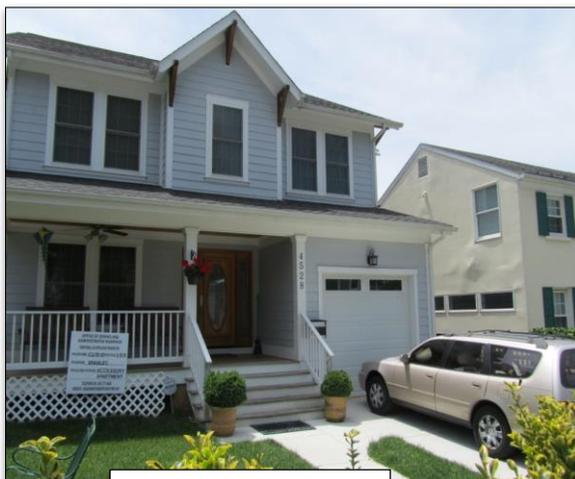
II. FACTUAL BACKGROUND

A. The Subject Property

The subject site is located at 4528 Rosedale Avenue, in Bethesda, and is identified as Lot 4, Block 9, in the Rosedale Park Subdivision. It is well described in the Technical Staff report (Exhibit 24, p. 3):

The subject property is 4,800 square feet in area, and located on the south side of Rosedale Avenue. The property is located mid-block with approximately 40 feet of frontage on Rosedale Avenue. The property is zoned R-60 and it is located within the Bethesda/Chevy Chase Master Plan area. The site is improved with a 2 ½-story detached house constructed in 2009. The house plat indicates the footprint for the house is 1,534 square feet; at 2 stories, the house is 3,068 square feet. During a site visit conducted on June 24, 2015, M-NCPPC staff observed that the exterior of the house was in good condition and the landscape appeared well maintained. The property has two on-site parking spaces (one in a garage and one in the driveway). Restricted street parking is available on Rosedale Avenue fronting the property and the Applicant has stated he owns two parking permits. . . .

Staff provided photographs of the home and of Rosedale Avenue (Exhibit 24, pp. 3-4):



Front of the House



View of the subject property from across the street depicting sufficient frontage to accommodate Staff's SUV directly in front of the property during site visit.



View of the street heading west toward Tilbury Street (picture taken across the street from the subject property).



View of the street heading east toward Kentucky

B. Surrounding Neighborhood

For the purpose of determining the compatibility of the proposed use, it is necessary to delineate and characterize the “surrounding neighborhood” (*i.e.*, the area that will be most directly impacted by the proposed use). Staff proposed defining the boundaries of the surrounding neighborhood as “generally bounded by Tilbury Street to the west, Lynbrook Drive to the east, S Chelsea Lane to the North and Highland Avenue to the south.” Exhibit 24, p. 5.

The Hearing Examiner feels that Technical Staff has defined the neighborhood a bit too broadly because the area likely to be most impacted by a single attached accessory apartment with one additional car probably extends only for one block, if that, as shown in a black rectangle he has superimposed over the aerial photo from the Staff report (Exhibit 24, p. 6), depicted on the next page. He reaches this conclusion because the proposed use will have no visual impacts; will create only one new trip during the peak hours (Exhibit 24, p. 8); and will have virtually no impact on parking availability outside its immediate area. Tr. 24.



Technical Staff described the larger neighborhood, as follows (Exhibit 24, p. 5):

The neighborhood includes 224 detached houses, many of which are the result of teardowns being replaced with new development. While there are currently no approved accessory apartments located within the neighborhood, there is a pending application for a Class 3 accessory apartment (4610 Maple Avenue); however, this application is not within 300 feet of the subject property. In addition, there are no approved conditional uses within the neighborhood.

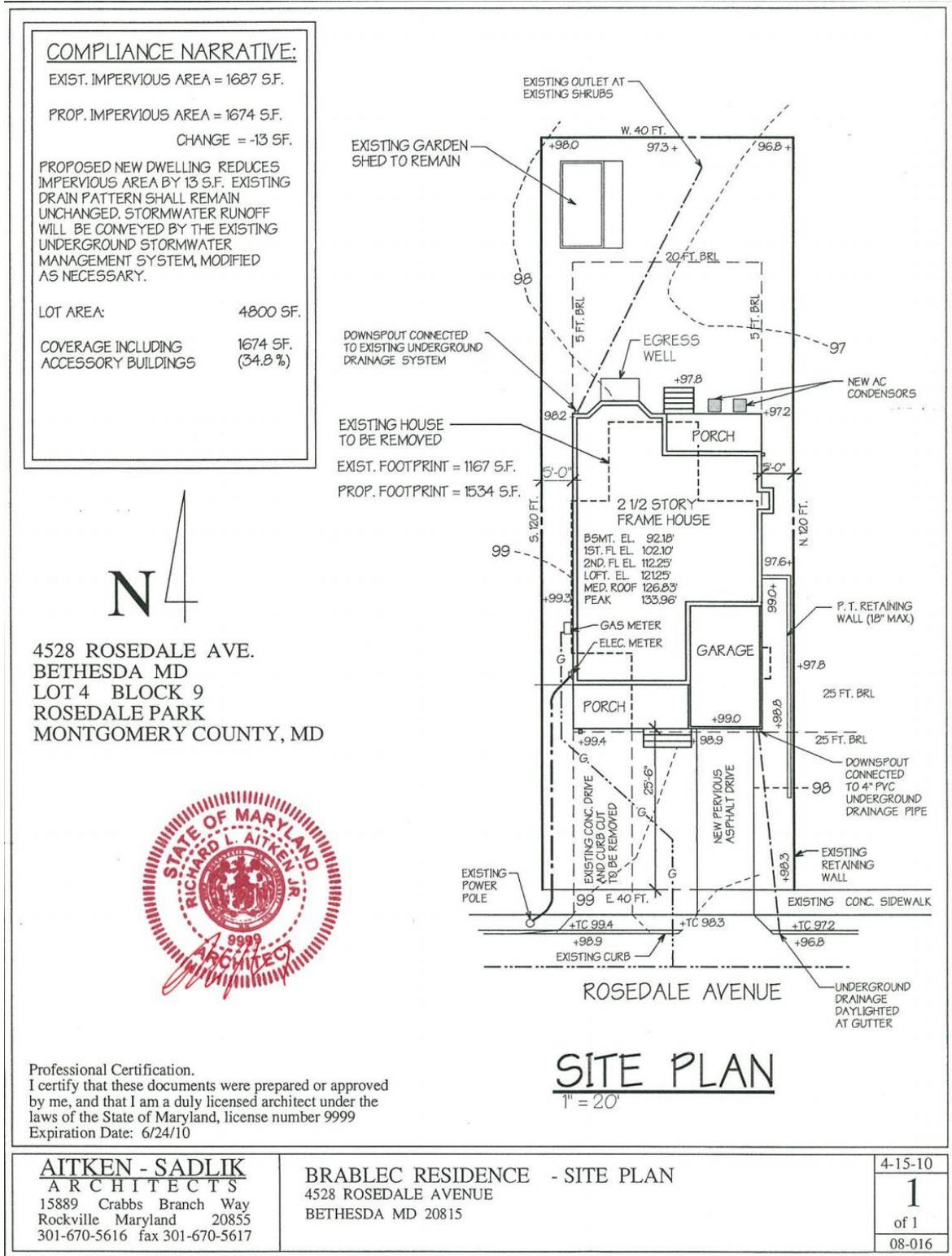
Whether one considers Staff’s larger defined neighborhood or the Hearing Examiner’s smaller defined neighborhood, the proposed use would be compatible with surrounding uses.

C. Proposed Use

The Applicant seeks a conditional use for an attached accessory apartment in the basement of his existing, single-family detached home. Dr. Brablec testified that he plans no

addition to the exterior lighting and no external changes to the site, except for minor repairs. Tr.

7-8. The Site Plan for the proposed use is reproduced below (Exhibit 11):



A walkway leads from the front of the house to the proposed accessory apartment on the side of the house. The walkway and the entrance to the accessory apartment are depicted below in photographs from the Staff report (Exhibit 24, pp. 6-7).



According to Technical Staff, there is adequate lighting, residential in character, located next to the accessory apartment entrance, and the entrance, located on the side of the house, cannot be seen from the front of the house. Staff concluded that it therefore does not detract from the appearance of the existing house. Exhibit 24, p. 7.

The proposed accessory apartment contains 524 square feet, and it is located in the basement level of the home. The Applicant provided photos of the interior (Exhibits 14(a)–(c)):



Entrance



Kitchen

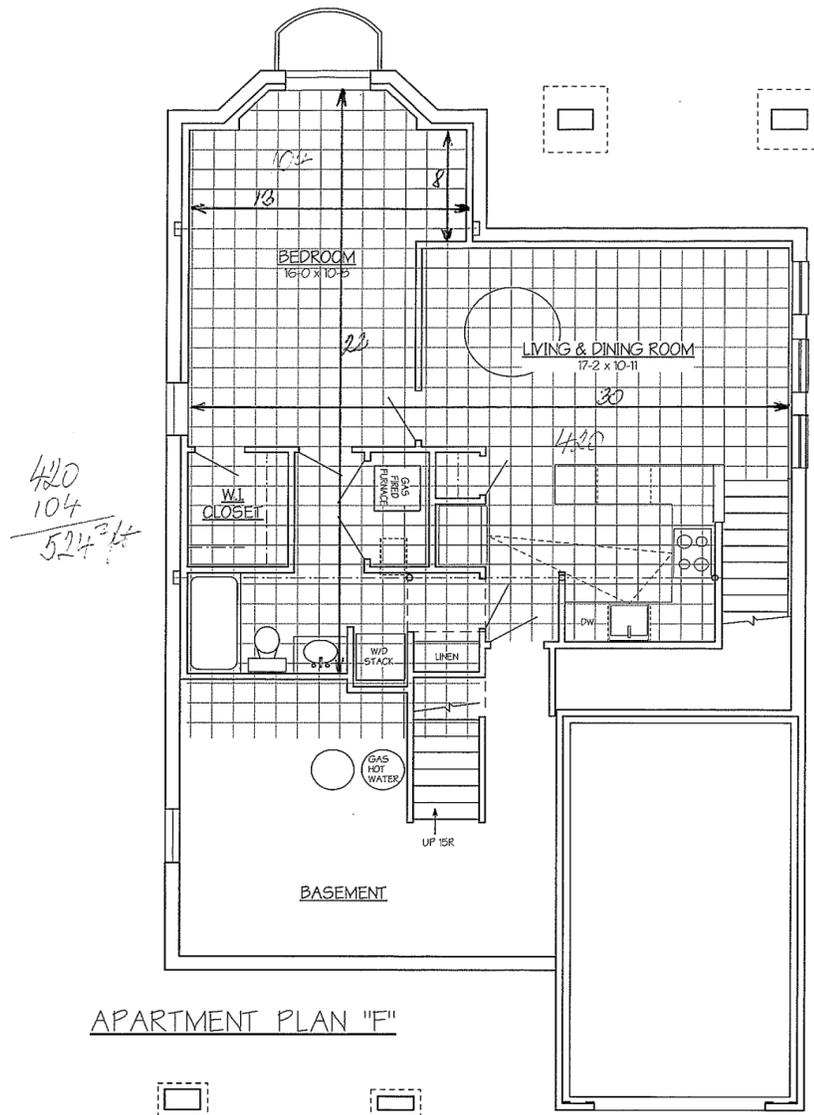


Living Room



Bedroom

The floor plan of the proposed use (Exhibit 13) is shown below:



Parking on Applicant's street, Rosedale Avenue, is by permit, and Applicant indicated that he has two parking permits and a visitor's permit. Tr. 20. According to Technical Staff, it is within the East Bethesda Residential Permit Parking Area, which is managed by the Department of Transportation. Exhibit 24, p. 8. Cynthia Lundy, a DHCA Housing Code Inspector, testified that the only problem with the subject site is the lack of sufficient on-site (*i.e.*, off-street) parking; however, she noted that there is a parking space on the street in front of Applicant's home and ample parking on the street near Applicant's home. Tr. 14-20. She also introduced photographs (Exhibits 27(a) – (e)) so demonstrating; however, Technical Staff's photos, reproduced on pages 4 and 5 of this Report and Decision, are of a better quality and are to the same effect. They all demonstrate that there is ample parking available on the street near Applicant's home. Technical Staff agreed, stating (Exhibit 24, pp. 13-14):

Parking on Rosedale Avenue is adequate to serve the accessory apartment use. The subject property has 40 feet of frontage on Rosedale Avenue, which is enough space to accommodate a single car. In addition, the Applicant already holds two on-street parking permits. If one is provided to the occupant of the accessory apartment, there is no increased demand for on-street parking. Furthermore, the property is also served by public transportation; there are two WMATA Metrobus routes and two Ride-On routes serving the area with the closest bus stop approximately 0.3 miles from the property.

Finally, Ms. Lundy testified that the conditional use would not be likely to significantly reduce available on-street parking within 300 feet of the proposed accessory apartment, adding only one additional car, and that there is no indication that residents living within 300 feet of the proposed accessory apartment would be unable to park near their residence on a regular basis because of it. She saw no reason to deny the conditional use. Tr. 24.

D. Community Response

There has been no community response to this application, either for or against.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A conditional use is a zoning device that authorizes certain uses provided that pre-set legislative standards are met. Pre-set legislative standards are both specific and general. General standards are those findings that must be made for all conditional uses. Zoning Ordinance, §59.7.3.1.E. Specific standards are those which apply to the particular use requested, in this case an Attached Accessory Apartment, are set out in Sections 59.3.3.3.A. & B. of the Zoning Ordinance.

Weighing all the testimony and evidence of record under the “preponderance of the evidence” standard specified in Zoning Ordinance §59.7.1.1, the Hearing Examiner concludes that the conditional use proposed in this application, subject to the conditions imposed in Part IV of this Report and Decision, would satisfy all of the specific and general requirements for the use.

A. Necessary Findings (Section 59.7.3.1.E.)

The general findings necessary to approve a conditional use are found in Section 59.7.3.1.E of the Zoning Ordinance. Standards pertinent to this review, and the Hearing Examiner’s conclusions for each finding, are set forth below:³

E. Necessary Findings

1. To approve a conditional use application, the Hearing Examiner must find that the proposed development:

a. satisfies any applicable previous approval on the subject site or, if not, that the previous approval must be amended;

Conclusion: Technical Staff advises that “this lot was approved (plat 92) on August 5, 1908, and the approval is satisfied.” Exhibit 24, p. 10. There are no other special exceptions or conditional uses on the site. Therefore, the Hearing Examiner finds that this standard is satisfied.

³ Although §59.7.3.1.E. contains six subsections (E.1. through E.6.), only subsections 59.7.3.1.E.1. and E.3. contain provisions that apply to this application. Section 59.7.3.1.E.1. contains seven subparts, a. through g.

b. satisfies the requirements of the zone, use standards under Article 59-3, and applicable general requirements under Article 59-6;

Conclusion: This subsection requires an analysis of the standards of the R-60 Zone contained in Article 59-4; the use standards for Attached Accessory Apartments contained in Article 59-3; and the applicable development standards contained in Article 59-6. Each of these Articles is discussed below in separate sections of this Report and Decision (Parts III.B, C, and D, respectively). Based on the analysis contained in those discussions, the Hearing Examiner finds, as did Technical Staff (Exhibit 24, pp. 2, 10-11), that the application satisfies the requirements of Articles 59-3, 59-4 and 59-6.

c. substantially conforms with the recommendations of the applicable master plan;

Conclusion: The subject property lies within the geographic area covered by the 1990 Bethesda/Chevy Chase Master Plan. As noted by Technical Staff (Exhibit 24, p. 7), the Master Plan does not specifically discuss the subject site, but it “endorses expanding choices of housing types by provision of accessory apartments.” Plan p. 33, ¶ numbered 4. Since the subject application furthers the Plan’s general guidance, Technical Staff found the proposed use to be consistent with the Bethesda-Chevy Chase Master Plan, as does the Hearing Examiner.

An accessory apartment maintains the existing scale and type of housing, while providing for additional housing in the area. This accessory apartment is not visible from the street and therefore does not change the existing structure’s appearance as a single-family dwelling, compatible with the surrounding neighborhood. Thus, it is fair to say that the planned use, an accessory apartment in a single-family, detached home, substantially conforms with the recommendations of the Bethesda/Chevy Chase Master Plan.

d. is harmonious with and will not alter the character of the surrounding neighborhood in a manner inconsistent with the plan;

Conclusion: Technical Staff found that the proposed use meets this standard (Exhibit 24, p. 11):

The proposed conditional use is in harmony with the general character of the neighborhood. It will have only a slight impact on population density, and it will result in only a modest increase in the intensity of use of the property with no change in the residential character of the detached house.

The Hearing Examiner notes that the proposed use “*is harmonious with and will not alter the character of the surrounding neighborhood*” because it will remain a single-family, detached residence in a neighborhood of single-family, detached residences, and no external modifications to the structure or the lighting are planned.

e. will not, when evaluated in conjunction with existing and approved conditional uses in any neighboring Residential Detached zone, increase the number, intensity, or scope of conditional uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area; a conditional use application that substantially conforms with the recommendations of a master plan does not alter the nature of an area;

Conclusion: Staff confirmed that there are no other approved conditional uses in the Staff-defined neighborhood (which is even more inclusive than the Hearing Examiner defined neighborhood). Exhibit 24, p. 11. Moreover, the proposed use conforms with the recommendations of the Master Plan. Thus, the Hearing Examiner finds that this standard has been met.

f. 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. If an approved adequate public facilities test is currently valid and the impact of the conditional use is equal to or less than what was approved, a new adequate public facilities test is not required. If an adequate public facilities test is required and:

i. if a preliminary subdivision plan is not filed concurrently or required subsequently, the Hearing Examiner must find that the proposed development will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage; or

ii. if a preliminary subdivision plan is filed concurrently or required subsequently, the Planning Board must find that the proposed development will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage; and

Conclusion: The application does not require approval of a preliminary plan of subdivision.

Exhibit 24, p. 12. Therefore, the Hearing Examiner must determine whether the proposed development will be served by adequate public services and facilities. Technical Staff determined that “The proposed conditional use will be adequately served by public services and facilities.” Exhibit 24, p. 12.

There is no evidence in the record to dispute that conclusion. By its nature, the proposed use, within an existing single-family residence, will not create significant additional burdens for schools, police and fire protection, water, sanitary sewer and storm drainage. Thus, the single area of increased demand on public facilities will be on transportation services. Technical Staff analyzed that impact in accordance with Local Area Transportation Review (LATR) and Transportation Policy Area Review (TPAR), as set forth in Exhibit 24, p. 8. With regard to LATR, Staff stated (Exhibit 24, p. 8):

Using trip generation rates included in the Local Area Transportation Review (LATR) and Transportation Policy Area Review (TPAR) Guidelines, the detached house 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 these guidelines, the accessory apartment is estimated to generate one additional peak-hour trip during each of the weekday peak periods. Since the existing house and the accessory apartment together will generate fewer

than 30 peak-hour trips, a traffic study is not required for the subject petition. As a result, the subject petition satisfies the LATR requirements of the APF test.

As to Transportation Policy Area Review, Technical Staff found that “the detached house and the accessory apartment on the property together will generate less than three peak-hour trips during each of the weekday morning and evening peak periods. Therefore, the subject petition is not subject to the TPAR requirements of the APF test.” Exhibit 24, p. 8.

In sum, both LATR and TPAR are satisfied in this case, and the Hearing Examiner finds that the proposed development will be served by adequate public services and facilities.

g. will not cause undue harm to the neighborhood as a result of a non-inherent adverse effect alone or the combination of an inherent and a non-inherent adverse effect in any of the following categories:

- i. the use, peaceful enjoyment, economic value or development potential of abutting and confronting properties or the general neighborhood;***
- ii. traffic, noise, odors, dust, illumination, or a lack of parking; or***
- iii. the health, safety, or welfare of neighboring residents, visitors, or employees.***

Conclusion: This standard requires consideration of the inherent and non-inherent adverse effects of the proposed use, at the proposed location, on nearby properties and the general neighborhood. *Inherent adverse effects* are “adverse effects created by physical or operational characteristics of a conditional use necessarily associated with a particular use, regardless of its physical size or scale of operations.” Zoning Ordinance, §59.1.4.2. *Non-inherent adverse effects* are “adverse effects created by physical or operational characteristics of a conditional use not necessarily associated with the particular use or created by an unusual characteristic of the site.” *Id.* As specified in §59.7.3.1.E.1.g., quoted above, non-inherent adverse effects in the listed categories, alone or in conjunction with inherent effects in those categories, are a sufficient

basis to deny a conditional use. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception.

Analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with an Attached Accessory Apartment. Characteristics of the proposed use that are consistent with the characteristics thus identified will be considered inherent adverse effects. Physical and operational characteristics of the proposed use that are not consistent with the characteristics identified *or* adverse effects created by unusual site conditions, will be considered non-inherent adverse effects. The inherent and non-inherent effects then must be analyzed, in the context of the subject property and the general neighborhood, to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff determined that the following physical and operational characteristics are necessarily associated with (*i.e.*, are inherent in) an Attached Accessory Apartment (Exhibit 24, p. 13):

- (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.

Staff analyzed the potential impacts on the neighborhood as follows (Exhibit 24, pp. 13-14):

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

basement of the house and will be not be identifiable from the street. This apartment entrance has the appearance of a side entryway to the house, making it difficult to distinguish from any other neighborhood home. The grounds of the accessory apartment will be safe and the entryway illumination consistent with typical residential standards.

Parking on Rosedale Avenue is adequate to serve the accessory apartment use. The subject property has 40 feet of frontage on Rosedale Avenue, which is enough space to accommodate a single car. In addition, the Applicant already holds two on-street parking permits. If one is provided to the occupant of the accessory apartment, there is no increased demand for on-street parking. Furthermore, the property is also served by public transportation; there are two WMATA Metrobus routes and two Ride-On routes serving the area with the closest bus stop approximately 0.3 miles from the property.

Based on this analysis, Staff concluded (Exhibit 24, p. 14):

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 does not agree with Staff's conclusion that "[t]he operational and physical characteristics of the proposed accessory apartment are consistent with the inherent characteristics of an accessory apartment use." One of the physical and operational characteristics Staff listed as necessarily associated with (*i.e.*, inherent in) an Attached Accessory Apartment was "sufficient parking." The on-site parking in this case is not sufficient, and that insufficiency is the only reason this case ended up before the Hearing Examiner in an application for a conditional use. Thus, the Hearing Examiner would characterize that physical characteristic of the site as a non-inherent site condition for this type of use.

However, this observation does not mean that the conditional use must be denied. It has been amply demonstrated in this record by both Technical Staff and Cynthia Lundy of DHCA that there is ample on-street parking in the area. By conditioning the conditional use on requiring the Applicant to give one of his parking permits to his accessory apartment tenant, the

Hearing Examiner agrees with Staff that the addition of the tenant should not add any significant burden to parking in the neighborhood.

Finally, the addition of the proposed use is not likely to have undue adverse effects on the neighborhood in any of the other categories listed in §59.7.3.1.E.1.g (*i.e.*, the use, peaceful enjoyment, economic value or development potential of abutting and confronting properties or the general neighborhood; traffic, noise, odors, dust, illumination, or the health, safety, or welfare of neighboring residents, visitors, or employees).

Based on the entire record, the Hearing Examiner finds that, with the conditions imposed in Part IV of this Report and Decision, the proposed use will not cause undue harm to the neighborhood as a result of non-inherent adverse effects alone or the combination of inherent and non-inherent adverse effects in any of the categories listed in §59.7.3.1.E.1.g.

2. Any structure to be constructed, reconstructed, or altered under a conditional use in a Residential Detached zone must be compatible with the character of the residential neighborhood.

Conclusion: No structural modifications are proposed in this application.

3. The fact that a proposed use satisfies all specific requirements to approve a conditional use does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require conditional use approval.

Conclusion: The application satisfies all specific requirements for the conditional use, and the proposed use will be compatible with the neighborhood. The Hearing Examiner concludes that, with the conditions imposed in Part IV of this Report and Decision, the conditional use should be approved.

B. Development Standards of the Zone (Article 59.4)

In order to approve a conditional use, the Hearing Examiner must find that the application meets the development standards of the zone where the use will be located – in this case, the R-60

Zone. Current development standards for the R-60 Zone are contained §59.4.4.9.B. of the Zoning Ordinance. Staff compared the minimum development standards of the R-60 Zone to those provided by the application in a Table included in the Staff Report (Exhibit 24, p. 9) and shown below. Staff also added a column to show that the applicable standards are modified by the grandfathering provisions of Zoning Ordinance §§59-7.7.1.D.1 and 59-7.7.1.D.3. The footnotes to data within the table are Technical Staff's footnotes.

Development Standards for the R-60 Zone and Modifications under §59-7.7.1.D.1 and §59-7.7.1.D.3

Development Standards	R-60 Zone Min/Max Required	Modified by §59-7.7.1.D.1 and §59-7.7.1.D.3	Proposed
Minimum Lot Area	6,000 sq ft	Exempt ⁴	4,800 sq ft
Minimum Lot width at front building line	60 ft	40 ft ⁵	40 ft
Minimum lot width at front lot line	25 ft	40 ft ⁵	40 ft
Maximum Building coverage	35%	-	34.8%
Minimum Setbacks			
- front	25 ft	25 ft	25 ft 6 in
- side	8 ft; 18 ft sum of both sides	5 ft ⁶	5 ft; 10 ft sum of both sides
- rear	20 ft	20 ft	41 ft
Maximum Building Height	35 ft	-	35 ft
Maximum Floor area for acc apt	946 sq ft	-	524 sq ft

⁴ §59-7.7.1.D.1 of the current zoning ordinance allows DPS to issue a building permit for a detached house on any Residential zoned lot identified on a plat before October 30, 2014 without regard to the street frontage or lot size requirements of its zoning. In 2009, when the detached house (including the accessory apartment) was built, the subject property was exempt from the minimum lot size requirements under Division 59-B-5. of the zoning ordinance in effect on October 29, 2014.

⁵ In addition to the exemptions under §59-7.7.1.D. and Division 59-B.5 of the zoning ordinance in effect on October 29, 2014, this lot meets the minimum lot width exceptions of Section VIII in the 1928 zoning ordinance.

⁶ §59-7.7.1.D.3 are provisions for pre-1928 lots, which require a house on a lot recorded before 1928 to satisfy the front, rear, and side yard setbacks of the 1928 Zoning Ordinance (includes exemptions in Section VIII for lots recorded prior to the 1928 Ordinance).

Conclusion: As can be seen from the above Table, the proposed use meets all the development standards of the R-60 Zone, as provided in Zoning Ordinance §59.4.4.9.B., or the alternative standards applicable in this case based on the grandfathering provisions of Zoning Ordinance §§59-7.7.1.D.1 and 59-7.7.1.D.3. As stated by Technical Staff (Exhibit 24, p. 9):

The subject property is located in the R-60 zone, which permits the proposed conditional use. In addition, since the subject property was subdivided in 1908, the grandfathering provisions under §59-7.7.1.D.1 and §59-7.7.1.D.3 of the Zoning Ordinance apply. . . .

The development standards discussed above are ones from Article 59.4, pertaining to the Zone itself. The general development standards for site access, parking, lighting, and the like are set forth in Article 59-6, and they will be discussed in Section III.D. of this Report and Decision.

C. Use Standards for an Attached Accessory Apartment (Section 59.3.3.3.A. & B.)

The specific use standards for approval of an Attached Accessory Apartment are set out in Sections 59.3.3.3.A. & B. of the Zoning Ordinance. In general, accessory apartments are permitted as limited uses, requiring only a license from DHCA. Zoning Ordinance, §59.3.1.6. However, property owners must obtain a conditional use approval for an accessory apartment if they do not have the amount of off-street parking required for the limited use or if there is another accessory apartment within 300 feet of dwelling in which the accessory apartment is to be located. Zoning Ordinance, §59.3.3.2.A.2.b. In this case, there is no other accessory apartment within 300 feet, so the only reason a conditional use is needed is to determine that adequate on-street parking is available to make up for the inadequate on-site parking.

Conditional use applications for Attached Accessory Apartments must meet all standards required for a limited use accessory apartment (except for the required number of on-site parking spaces, in this case) and standards specific to Attached Accessory Apartments. In addition, an

Applicant must demonstrate that on-street parking is sufficient to serve the use or, if the deviation is from the minimum distance between apartments, that the use “does not result in an excessive concentration of similar uses, including other conditional uses, in the general neighborhood of the proposed use.” *Id.*, §59.3.3.3.A.2.c. Standards pertinent to this approval, and the Hearing Examiner’s finding for each standard, are set forth below.

Section 59.3.3.3.A. – Accessory Apartments, In General

1. Defined, In General

Accessory Apartment means a second dwelling unit that is subordinate to the principal dwelling. An Accessory Apartment includes an Attached Accessory Apartment and a Detached Accessory Apartment.

2. Use Standards for all Accessory Apartments

a. Where an Accessory Apartment is allowed as a limited use, it must satisfy the following standards:

- i. Only one Accessory Apartment is permitted for each lot.*
- ii. The Accessory Apartment was approved as a conditional use before May 20, 2013 and satisfies the conditions of the conditional use approval; or*
- iii. The Accessory Apartment is licensed by the Department of Housing and Community Affairs under Chapter 29 (Section 29-19); and*

Conclusion: The Applicant is requesting approval for one accessory apartment. The property has a one-car garage, but its driveway is too small to permit the parking of two vehicles. As a result, the property does not meet the minimum on-site parking requirements for a Class III Accessory Apartment license. Based on a Referral Notice from DHCA, the Applicant filed an application for an attached accessory apartment conditional use, seeking approval to deviate from the on-site parking requirements. Following approval of the conditional use, the Applicant must obtain any license for an accessory apartment required by DHCA.

- (a) The apartment has the same street address as the principal dwelling;*

Conclusion: The accessory apartment will be located in the basement and have the same address as the principal dwelling (4528 Rosedale Avenue, in Bethesda).

(b) One on-site parking space is provided in addition to any required on-site parking space for the principal dwelling; however, if a new driveway must be constructed for the Accessory Apartment, then 2 on-site parking spaces must be provided;

Conclusion: As mentioned above, the reason for this application is fact that there is no room for an additional on-site parking space. Section 59-3.3.3.A.2.b. permits the grant of a conditional use to deviate from the on-site parking space requirements. Rosedale Avenue has permit parking for residents. A condition of this conditional use is that the Applicant must provide one of his two on-street parking permits to the occupant of the accessory apartment.

(c) The maximum gross floor area for an Accessory Apartment, including any floor area used for an Accessory Apartment in a cellar, must be less than 50% of the total floor area in the principal dwelling, including any floor area used for an Accessory Apartment in the cellar of the principal dwelling, or 1,200 square feet, whichever is less;

Conclusion: The proposed accessory apartment is sized at 524 square feet, which is clearly less than the statutory maximum of 1,200 square feet. The SDAT tax records (Exhibit 7(a)) list the “above grade enclosed area” as 2,396 square feet, and the accessory apartment size is therefore also less than 50% of the total floor area in the principal dwelling.

(d) The maximum floor area used for an Accessory Apartment in a proposed addition to the principal dwelling must not be more than 800 square feet if the proposed addition increases the footprint of the principal dwelling; and

Conclusion: Not applicable. No addition is proposed in this case.

(e) The maximum number of occupants is limited by Chapter 26 (Section 26-5); however, the total number of occupants residing in the Accessory Apartment who are 18 years or older is limited to 2.

Conclusion: Conditions listed in Part IV of this Report and Decision specify that total number of occupants residing in the accessory apartment who are 18 years or older is limited to 2, and that the Applicant must comply with the determination of the Housing Code Inspector as to limits on occupancy in the accessory apartment.

- iv. An Accessory Apartment must not be located on a lot where any other allowed rental Residential use exists; however, an Accessory Apartment may be located on a lot in an Agricultural or Rural Residential zone that includes a Farm Tenant Dwelling or a Guest House.*

Conclusion: Staff advises there are currently no other rental residential uses on the property, and a prohibition against other rental residential uses is included in Part IV of this Report and Decision as a condition of approval. Exhibit 24, p. 17. Therefore, the Hearing Examiner finds that the use as proposed and conditioned will have no other rental uses permitted on the property.

- v. In the Agricultural and Rural Residential zones, an Accessory Apartment is excluded from any density calculations. If the property associated with an Accessory Apartment is subsequently subdivided, the Accessory Apartment is included in the density calculations.*

Conclusion: The property is located in the R-60 (Residential Detached) Zone. Therefore, this standard is not applicable to this application.

- vi. Screening under Division 6.5 is not required.*

Conclusion: This section exempts accessory apartments from the Division 6.5 screening requirements for conditional uses. In some cases, screening would have to be considered anyway to avoid compatibility problems, but there is no evidence that is the case here. The Hearing Examiner finds no need for screening in this case.

- vii. In the AR zone, this use may be prohibited under Section 3.1.5, Transferable Development Rights.*

Conclusion: Not applicable. The property is located in the R-60 (Residential Detached) Zone.

b. An Accessory Apartment conditional use application may be filed with the Hearing Examiner to deviate from the following limited use standards;

i. The number of on-site parking spaces; or

Conclusion: Since the property does not meet the minimum on-site parking requirements for a Class III Accessory Apartment license, the Applicant filed this conditional use application seeking approval to deviate from the on-site parking requirements.

ii. The minimum distance from any other Attached or Detached Accessory Apartment

Conclusion: Not applicable to this case since the site meets the minimum distance requirements.

c. Where an Accessory Apartment conditional use application is filed under Section 3.3.3.A.2.b, the Accessory Apartment may be permitted by the Hearing Examiner under the limited use standards in Section 3.3.3.A.2.a, Section 7.3.1, Conditional Use, and the following standards:

i. Fewer off-street spaces are allowed if there is adequate on-street parking. On-street parking is inadequate if:

- (a) the available on-street parking for residents within 300 feet of the proposed Accessory Apartment would not permit a resident to park on-street near his or her residence on a regular basis; and*
- (b) the proposed Accessory Apartment is likely to reduce the available on-street parking within 300 feet of the proposed Accessory Apartment.*

Conclusion: There is adequate on-street parking available, as established both by Technical Staff and by DHCA Code Inspector, Cynthia Lundy at the hearing. As stated by Technical Staff

(Exhibit 24, p. 18):

Street parking is adequate. The subject property has adequate frontage to allow for an average size car to park on-street in front of the property. In addition, almost all of the properties on the block have driveways and/or garages and can accommodate up to two vehicles on-site, which reduces the demand for on-street parking. The amount of parking directly in front of the property is sufficient to ensure that this accessory apartment will not prevent a resident within 300 feet of the subject property from parking on-street near his or her residence on a regular basis. . . .

The addition of one car associated with the proposed accessory apartment is unlikely to reduce the availability of on-street parking within 300 feet of the proposed accessory apartment. The subject property's frontage on Rosedale Avenue provides adequate space for one average size car to park on the street directly in front of the house. This on-street parking space is adequate to meet the one on-site parking space required for the proposed conditional use, an accessory apartment. While Rosedale Avenue has restricted parking, the Applicant already owns two on-street parking permits for the area. If one of these parking permits is provided to the occupant of the accessory apartment, as conditioned, there should be no impact on the demand for on-street parking spaces.

Ms. Lundy testified that the conditional use would not be likely to significantly reduce available on-street parking within 300 feet of the proposed accessory apartment, adding only one additional car, and that there is no indication that residents living within 300 feet of the proposed accessory apartment would be unable to park near their residence on a regular basis because of it. She saw no reason to deny the conditional use. Tr. 14-20, 24.

ii. When considered in combination with other existing or approved Accessory Apartments, the deviation in distance separation does not result in an excessive concentration of similar uses, including other conditional uses, in the general neighborhood of the proposed use.

Conclusion: Technical Staff reports that "There are no accessory apartments located within 300 feet of the subject property." Exhibit 24, p. 19. Since approval of an attached accessory apartment as a limited use in the R-60 zone requires only a 300 foot spacing between accessory apartments along the same block face, the addition of the proposed use would not result in an excessive concentration of similar uses, including other conditional uses, in the general neighborhood.

Section 59.3.3.3.B. – Attached Accessory Apartment

1. Defined

Attached Accessory Apartment means a second dwelling unit that is part of a detached house building type and includes facilities for cooking, eating, sanitation, and sleeping. An Attached Accessory Apartment is subordinate to the principal dwelling.

2. Use Standards

Where an Attached Accessory Apartment is allowed as a limited use, it must satisfy the use standards for all Accessory Apartments under Section 3.3.3.A.2 and the following standards:

a. A separate entrance is located:

- i. On the side or rear of the dwelling;*
- ii. At the front of the principal dwelling, if the entrance existed before May 20, 2013; or*
- iii. At the front of the principal dwelling, if it is a single entrance door for the use of the principal dwelling and the Attached Accessory Apartment;*

Conclusion: A separate entrance to the accessory apartment is located on the west side of the dwelling. The Hearing Examiner finds that this standard has therefore been met.

b. The detached house 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 the application for a license or a conditional use.

Conclusion: According to the property tax records, the detached dwelling was built in 2009. Exhibit 7(a). Therefore, the Hearing Examiner finds that the dwelling in which the accessory apartment will be located is more than 5 years old and concludes this standard has been met.

c. In the RE-2C, RE-1, and R-200 zones the Attached Accessory Apartment is located at least 500 feet from any other Attached or Detached Accessory Apartment, measured in a line from side lot line to side lot line along the same block face;

Conclusion: The property is located in the R-60 (Residential Detached) Zone. Therefore, this standard is not applicable to this case.

d. In the RNC, R-90, and R-60 zones the Attached Accessory Apartment is located at least 300 feet from any other Attached or Detached Accessory Apartment, measured in a line from side lot line to side lot line along the same block face;

Conclusion: This section is applicable because the subject property is in the R-60 Zone. As discussed above, there are no other accessory apartments located within 300 feet. Ex. 24, p. 19.

In sum, the application satisfies all of the applicable use standards in Code §59.3.3.3.A. and B.

D. General Development Standards (Article 59.6)

Article 59.6 sets the general requirements for site access, parking, screening, landscaping, lighting, and signs. The applicable requirements, and whether the use meets these requirements, are discussed in the Technical Staff report (Exhibit 24, pp. 10-11).

The general development requirements under Division 6.2. (Parking, Queuing, and Loading) apply to this conditional use. Under §59-6.2.4.B., the existing primary use, a one-family residential unit, requires a minimum of two parking spaces, which the property satisfies (one parking space in the garage and one in the driveway). The proposed use, an attached accessory apartment, requires a minimum of one parking space, in addition to the spaces required for the primary use. However, §59-3.3.3.A.2.b. allows an applicant to file a conditional use application to deviate from the on-site parking space requirements if the application satisfies §59-3.3.3.A.2.c. . . . [as discussed above].

Other general development requirements under Article 59-6 do not apply to this conditional use application. The site access requirements under Division 6.3. do not apply to properties in Residential Detached zones. The provision of open space and recreation under Division 6.3. is not required for an accessory apartment. Landscaping and outdoor lighting under Division 6.4. . . . [are] not required for a use in a detached house that is not proposing a new outdoor lighting fixture. Under §59-3.3.3.A.2.a.vi., an accessory apartment is exempt from the screening requirements of Division 6.5. The outdoor display and storage requirements under Division 6.6 do not apply because no materials or merchandise will be displayed or stored outside. The sign requirements under Division 6.7 do not apply because no permanent signage is associated with the application.

Conclusion: The Hearing Examiner agrees with Technical Staff's findings and conclusions regarding the development standards of Article 59.6, as applied to accessory apartments. He therefore finds that the Applicant has satisfied those standards in this case, to the extent they are applicable.

IV. CONCLUSION AND DECISION

As set forth above, the application meets all the applicable standards for approval in Articles 59-3, 59-4, 59-6 and 59-7 of the Zoning Ordinance.

Based on the foregoing findings and conclusions and a thorough review of the entire record, the application of Radek Brablec (CU 15-09), for a conditional use under Section 59.3.3.3.A. and B. of the Zoning Ordinance, to operate an Attached Accessory Apartment at 4528 Rosedale Avenue, Bethesda, Maryland, is hereby **GRANTED**, subject to the following conditions:

1. The Applicant shall be bound by all of his testimony and exhibits of record;
2. The total number of occupants residing in the accessory apartment who are 18 years or older is limited to 2;
3. No other rental residential uses are allowed to be located on the subject site;
4. One of the Applicant's two on-street parking permits must be provided to the occupant of the accessory apartment;
5. The Applicant must comply with the determination of the Housing Code Inspector as to limits on occupancy in the accessory apartment and must comply with any other directions of the Housing Code Inspector to ensure safe and code-compliant occupancy; and
6. The Applicant 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 conditional use premises and operate the conditional use as granted herein. The Applicant shall at all times ensure that the conditional 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.

Issued this 21st day of October, 2015.



Martin L. Grossman
Hearing Examiner

NOTICE OF RIGHT TO REQUEST ORAL ARGUMENT

Any party of record or aggrieved party may file a written request to present oral argument before the Board of Appeals, in writing, within 10 days after the Office of Zoning and Administrative Hearings issues the Hearing Examiner's report and decision. Any party of record or aggrieved party may, no later than 5 days after a request for oral argument is filed, file a written opposition or request to participate in oral argument.

Contact information for the Board of Appeals is listed below, and additional procedures are specified in Zoning Ordinance §59.7.3.1.F.1.c.

Montgomery County Board of Appeals
100 Maryland Avenue, Room 217
Rockville, MD 20850
(240) 777-6600

COPIES TO:

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