

I. STATEMENT OF THE CASE

On March 29, 2016, Luke Boschma (Applicant), 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 2610 Arcola Avenue, Silver Spring, Maryland. The subject property is identified as Lot 13, Block 9 of the Wheaton Hills Subdivision, located in the R-60 Zone and bearing the Tax Account Number 13-01181602.

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 under Section 29-19 of the Montgomery County Code. Approval of a conditional use is required, however, when the property cannot meet the on-site parking requirements for an accessory apartment and/or the requirement for a 300-foot separation from other accessory apartments in the R-60 Zone.¹ *Zoning Ordinance*, §59.3.3.3.A.2.b.²

The Applicant filed a license application for a Class 3 Accessory Apartment with DHCA. DHCA referred the application to the Office of Zoning and Administrative Hearings (OZAH) for a conditional use approval because the property has no on-site parking. Exhibit 1.

The public hearing before the Hearing Examiner was scheduled for July 15, 2016. Exhibit 18. On June 24, 2016, Staff of the Montgomery County Planning Department (Technical Staff or Staff) issued a report recommending approval of the application, subject to two conditions (Exhibit 19, p. 1):

1. The total number of residents 18 years or older in the accessory apartment is limited to two.

¹ In this case, the Zoning Ordinance requires three on-site parking spaces for approval as a limited use. Single-family detached homes must have two on-site parking spaces in addition to one on-site space for the accessory apartment. *Zoning Ordinance*, §§59.6.2.4.B; 59.3.3.3.A.2.a.iii.(b). Accessory apartments in the R-60 Zone must be separated by at least 300 feet from any other detached or attached accessory apartment. *Id.*, §59.3.3.3.B.2.d.

² All citations in this Decision are to the 2014 Zoning Ordinance for Montgomery County (*Zoning Ordinance*), effective September 30, 2014 (Ordinance No. 17-52), as amended.

2. No other rental Residential uses are allowed to be located on the subject property.

The Applicant's wife, Kcrystal Boschma, a co-owner of the property, submitted an affidavit consenting to be bound by all conditions of approval. Exhibit 25.

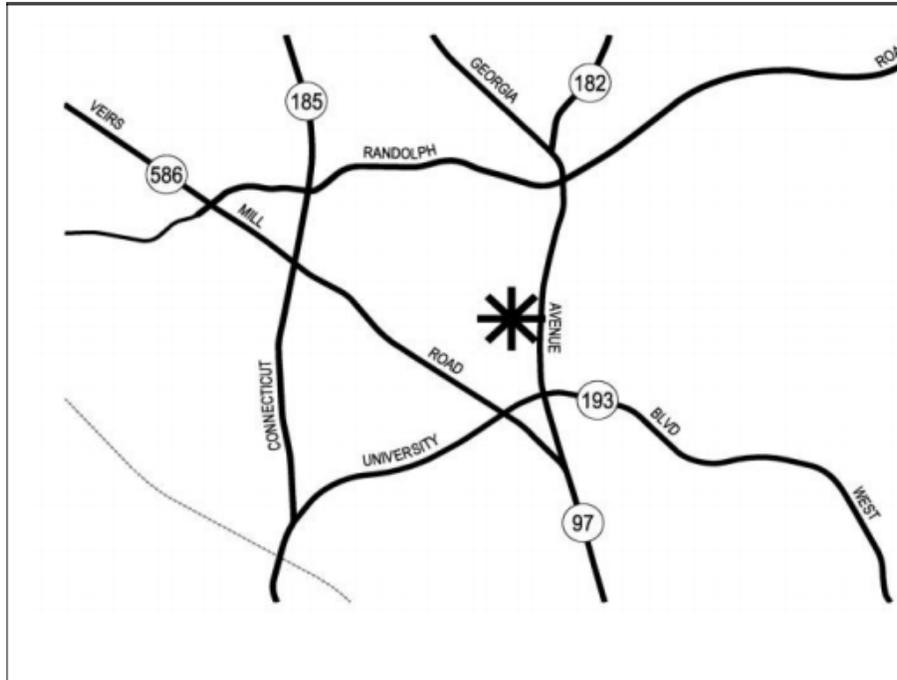
The hearing went forward as scheduled and the Applicant and Mrs. Boschma appeared *pro se*. Both testified in support of the application. Mr. Boschma adopted the findings and conclusions of the Technical Staff report (Exhibit 19) as his own evidence of record. T. 5. He agreed to comply with Staff's proposed conditions of approval. T. 5-6. Mr. Boschma also submitted an executed Affidavit of Posting (Exhibit 24). Cesar Ivan Eloisa, a Housing Code Inspector, testified on behalf of DHCA and submitted a report regarding his inspection of the property on June 16, 2016 (Exhibit 20). Mr. Boschma agreed to make the changes to the property required in the Housing Inspector's Report. T. 15. There were no other witnesses.

Based on a thorough review of the entire record, the Hearing Examiner finds sufficient evidence that there is adequate on-street parking available to grant Mr. Boschma's request for an attached accessory apartment that deviates from the on-site parking requirement. Further, the Hearing Examiner finds the standards for a conditional use application for an attached accessory apartment have been satisfied. The Hearing Examiner approves the conditional use application, subject to the conditions listed in Part IV, below.

II. FACTUAL BACKGROUND

A. The Subject Property

The subject site consists of 7,314 square feet located at the southeast corner of Arcola Avenue and Galt Avenue. A vicinity map included in the Staff Report shows the general location of the property (Exhibit 19, p. 1, on the next page).



**Vicinity Map
Exhibit 19, p. 1**

Staff reports that the property is irregularly shaped and improved with a two-story detached house originally constructed in 1949. Exhibit 19, p. 2. The Applicant testified that the home has recently been renovated. The renovation included a 180-square foot, one-story addition on the east side of the existing house. T. 10-11. With the addition, the total floor area of the home is 1,972.6 square feet. The below-grade floor area is 598.9 square feet. Exhibit 13(a).

An aerial photograph from the Staff Report shows the entrance to the accessory apartment, (Exhibit 19, p. 3, on the next page) and depicts the property's general physical conditions, including the absence of a driveway. It does not show the recent addition. Two other photographs from the Staff Report (Exhibit 19, pp. 3-4) do show current conditions on the property. The view from Arcola Avenue (on the bottom of the next page) shows the new addition and the entrance to the accessory apartment. The view from Galt Avenue (on page 6) shows the side yard with the entrance to the accessory apartment.



Aerial View of Property (without addition)
Exhibit 19, p. 3



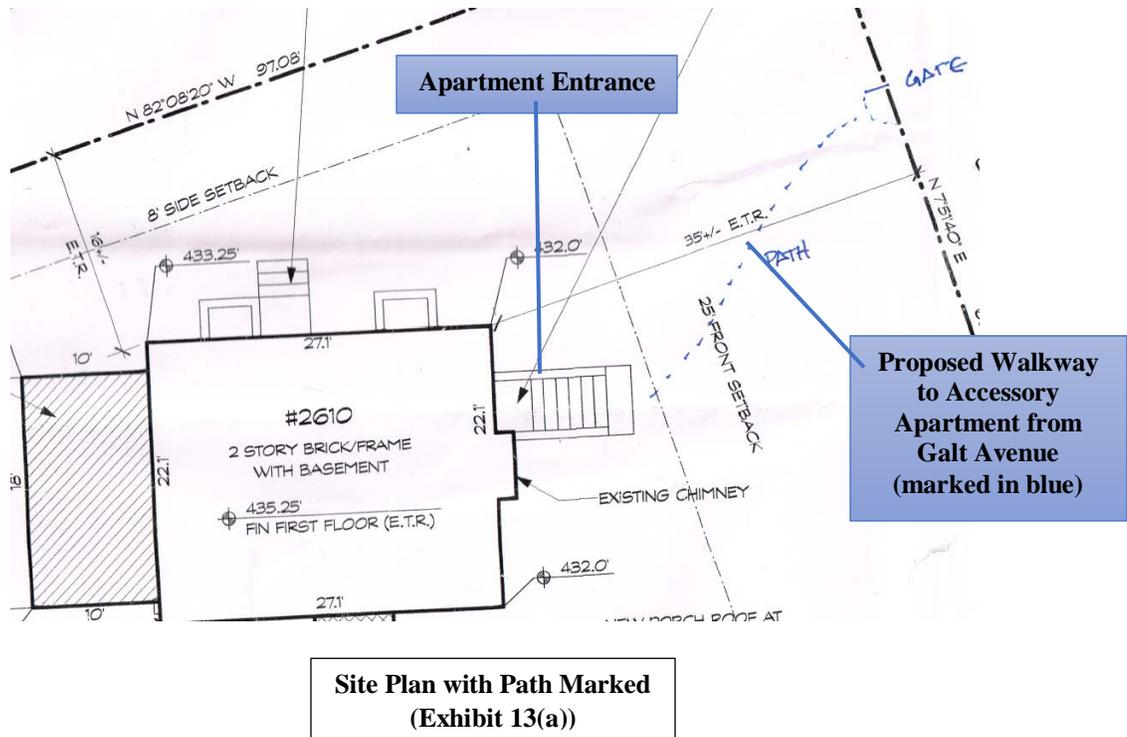
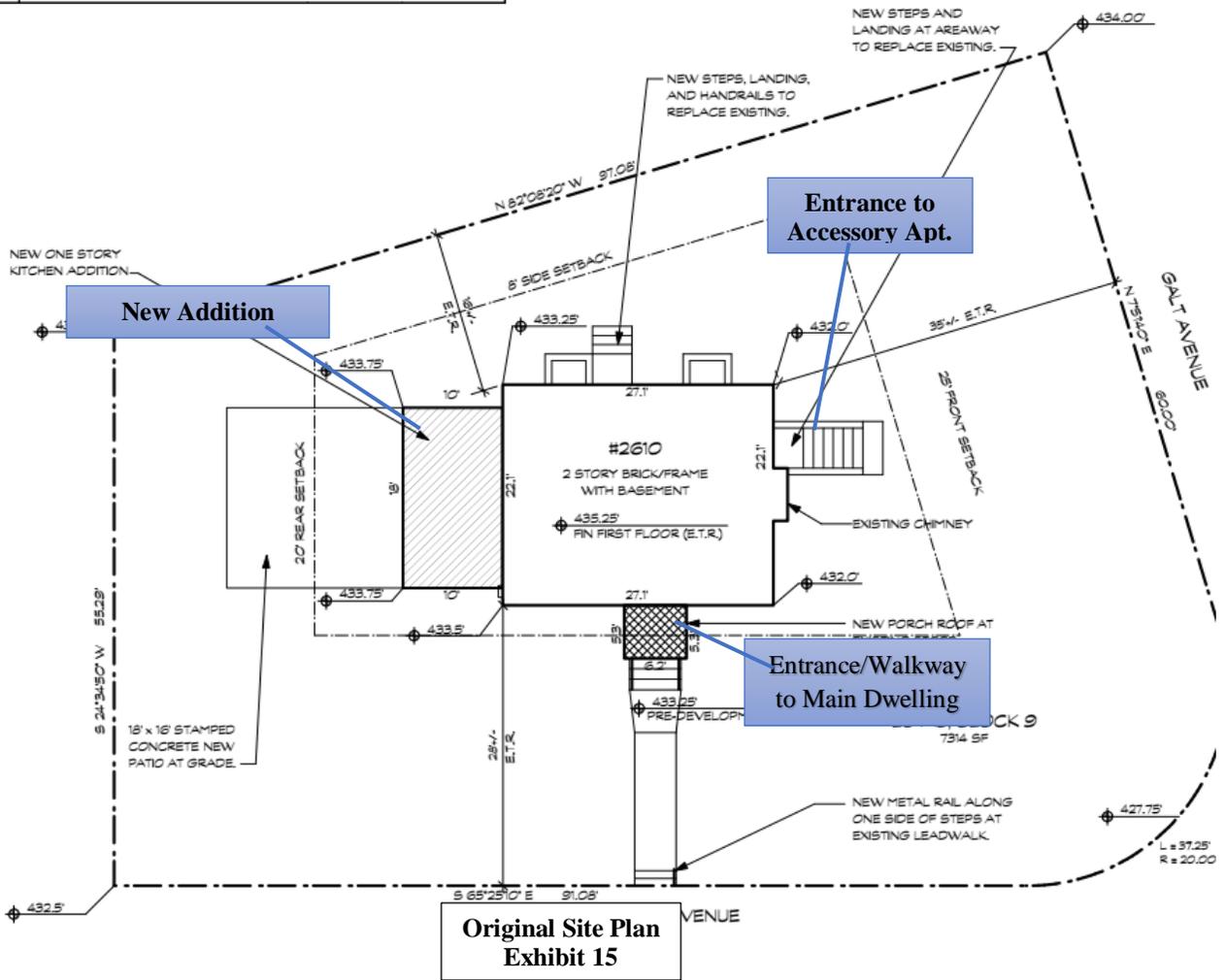
Figure 2: Front view of house from Arcola Avenue

View from Arcola Avenue
Exhibit 19, p. 3

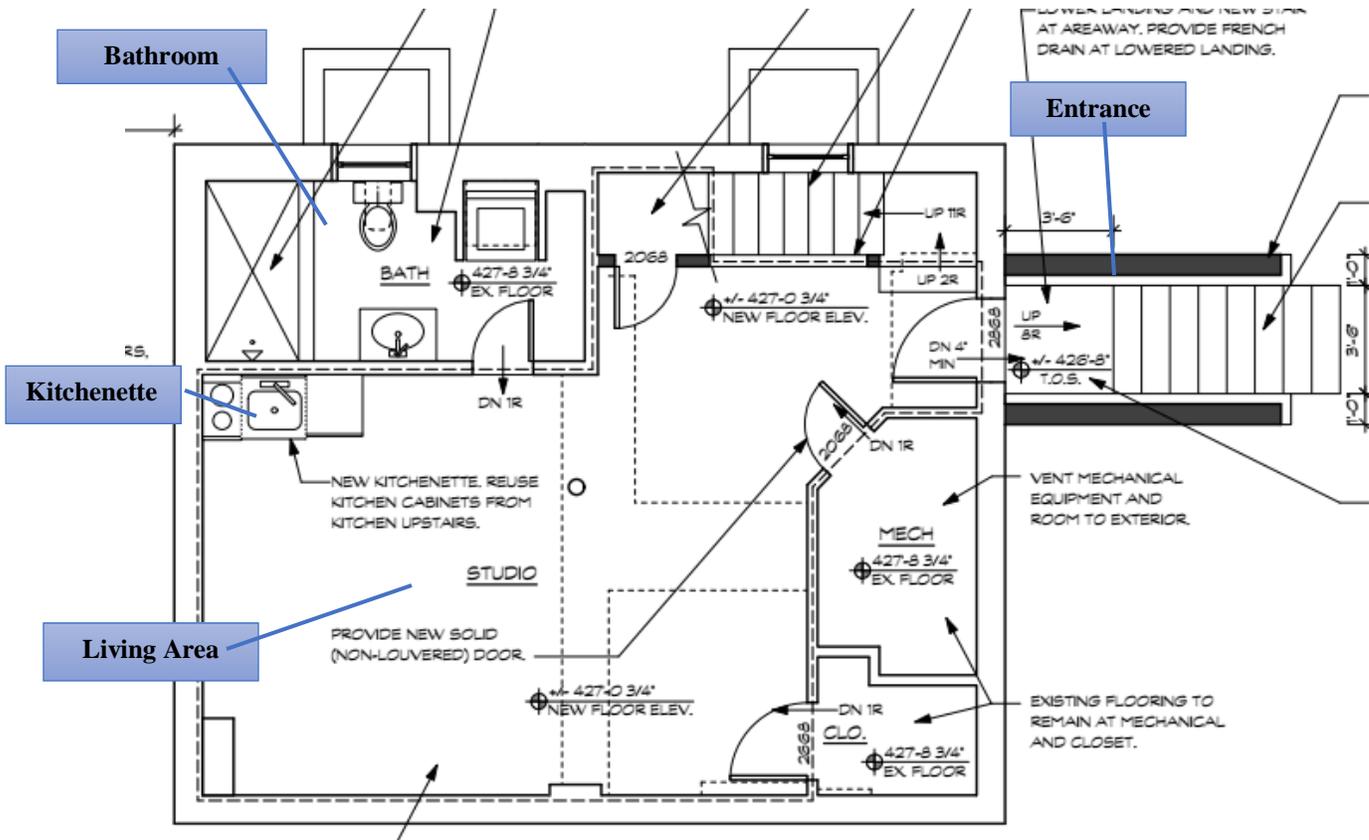


B. The Proposed Use

The Applicant proposes an accessory apartment in the basement of the renovated dwelling. Mr. Boschma clarified that the new addition will be used for a kitchen for the main dwelling. T. 10-11. The basement apartment is within the original footprint of the house. He originally submitted a site plan showing all improvements to the property (Exhibit 15, on the next page). Since that submission, Mr. Boschma has installed a walkway from the gate along Galt Avenue (shown above) to the accessory apartment entrance. T. 8. At the public hearing, Mr. Boschma revised the site plan to show the location of the new walkway on the property. An excerpt of the revised site plan, with the walkway marked, appears at the bottom of following page (Exhibit 13(a)). T. 7-8.



The floor plan for the accessory apartment (Exhibit 13(c), below) depicts a studio apartment with a kitchenette in the living/sleeping area and a separate bathroom. A mechanical room is located near the entrance to the apartment:



Parking near the corner of Arcola and Galt Avenues is restricted, but the property still has sufficient on-street parking for five vehicles. Technical Staff advises (Exhibit 19, p. 4):

Parking along the Property's frontage is limited under Chapter 31 (Section 31-17), which prohibits parking within 35 feet of the nearest curb line of an intersecting public street. There is no signage to notify drivers of the parking restriction in front of the subject Property. In spite of this restriction, legal parking is available for three standard size vehicles on the Property's frontage on Arcola Avenue, and for two vehicles on the Property's frontage on Galt Avenue.

Mr. Boschma testified that no permit is necessary to park on the street and there are generally spaces available on the street. Their property is the only one on Arcola Avenue between Arcola and Grandview that does not have a driveway. T. 12. Ms. Boschma testified that she and

her husband have only one vehicle and her husband walks to the Wheaton Metro Station to commute to work. She believes that proximity of transit reduces the need for on-street parking.

T. 11-13. Mr. Eloisa testified that he is often in the area for his job and observes that on-street parking spots are plentiful. T. 13.

Staff reports that transit is available via a bus stop immediately in front of the house. The stop for the northbound Ride-On Bus Route 33 is in front of the house on Arcola Avenue and the southbound stop is across the street. The Route 33 bus connects the Glenmont Metro Station to the Medical Center Station during the week with 30 minute headways. The Wheaton Metro Station is 0.80 miles south of the property. *Id.* at 5.

Housing Code Inspector Eloisa submitted a report listing the repairs required before the apartment may receive a license from DHCA. These repairs include (Exhibit 20):

1. The area where the Accessory Apartment is located does not qualify as habitable space due to combustion air (air for dilution and ventilation of mechanical equipment). The water heater must be replaced with a high efficiency or electric appliance.
2. The electrical light fixture in the utility room must be secured.
3. Install outlet and junction box cover plates in the electrical closet.
4. Walkway to Accessory Apartment must be in good working condition.
5. Exterior artificial light source is required on the walkway to the AA.
6. Exterior stairs of three or more risers must have a handrail on at least one side.
7. The property does not meet the on-site parking requirement for a Class 3 Accessory Apartment.

At the hearing, the Applicant agreed to make these repairs (T. 10-11, 15), which will be included as a condition of approval of this application. Mr. Eloisa will re-inspect the pathway to ensure that it is in walkable condition. T. 9.

C. Community Response

There has been no community response to this application, either for or against. Staff reports that the application has satisfied all noticing and posting requirements and the Applicant submitted an affidavit of posting at the public hearing. Exhibits 19, 24.

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. The legislative standards for accessory apartments were modified by amendments to the 2014 Zoning Ordinance, adopted on December 1, 2015 in ZTA 15-09 (Ordinance No. 18-08) and effective December 21, 2015. The major change was to specify that the general findings required for other kinds of conditional uses “are not applicable to this type of conditional use.” Section 59.3.3.3.A.2.c. This change eliminated not only general assessments of compatibility and impacts on the neighborhood, but also any evaluation of master plan conformance and compliance with requirements of zone and development standards. The limited use standards of Section 3.3.3.A.2.a and Section 3.3.3.A.2.c continue to apply to all accessory apartment conditional use applications, and standards in Section 3.3.3.B.2 apply only to attached accessory apartment applications.

The December 21, 2015 amendments to the Zoning Ordinance did not change the Conditional Use application requirement regarding ownership of the subject property, specified in Section 59.7.3.1.B.1.

A. Application Requirements Regarding Ownership of the Subject Property

The application requirements for all conditional uses are set forth in Section 59.7.3.1.B. of the Zoning Ordinance:

1. Ownership:

- a. An applicant must own the subject property or be authorized by the owner to file the application.*
- b. If any land or right-of-way is owned or controlled by the State, County, or any other entity or agency, written authorization from that entity or agency must be submitted with the application.*

Conclusion: The Applicant has provided records from the Maryland State Department of Assessments and Taxation (SDAT) listing him and his wife as the owners of the property. He also

submitted a Purchase Money Deed of Trust securing an interest in the property and identifying him and his wife as the borrowers. Exhibits 3, 5. This is sufficient proof that the Applicant owns the property.

B. Use Standards for Accessory Apartments, in General (Section 59.3.3.3.A.)

The Applicant must comply with general standards applicable to all accessory apartments, except that they may deviate from the number of parking spaces normally required if the conditional use application is approved. *Zoning Ordinance*, §59.3.3.3.A.2.b. When there are fewer than the required number of parking spaces, the Applicant must demonstrate that on-street parking is sufficient to serve the 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 only one accessory apartment on the subject site. Following approval of the conditional use, the Applicant must obtain a license for the accessory apartment from DHCA.

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

Conclusion: The accessory apartment will be located in the basement of the dwelling and have the same address as the principal dwelling (2610 Arcola Avenue, Silver Spring, Maryland.)

Exhibit 19, p. 6.

(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: This conditional use application is required because the property has no on-site parking. The Zoning Ordinance normally requires a total of three on-site parking spaces: two spaces for the main dwelling (Section 59.6. 2.4. B.) plus one for the accessory apartment (Section 59.3.3.3.A.2.a.iii.(b)). Section 59.3.3.3.A.2.b. permits a conditional use to deviate from the on-site parking space requirements if the conditions listed in Section 59.3.3.3.A.2.c. are met. The adequacy of available parking will be discussed under that section.

(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 site plan for the renovation lists the floor area of the proposed accessory apartment as 598.9 square feet (Exhibit 13(a)), which is clearly less than the maximum of 1,200 square feet. The same plan identifies the total floor area of the dwelling (including the accessory apartment) at 1,972.6 square feet. The accessory apartment is 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: While the Applicant recently completed an addition that increased the footprint of the dwelling, the addition will be used as the kitchen for the main dwelling. The Applicant testified that the basement accessory apartment lies within the original footprint of the home. T. 10-11. Thus, this standard is not applicable. Even if it were, the accessory apartment proposed is less than 800 square feet.

(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 limit the total number of occupants to 2 persons who are 18 years or older. 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: The property is within the R-60, (Residential Detached) Zone. Staff recommended a condition of approval that prohibits other rental uses on the property. Exhibit 19, p. 6. Such a condition is included in Part IV of this Report and Decision. Therefore, the Hearing Examiner finds that the use as proposed and conditioned will have no other residential 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 screening requirements for conditional uses in Division 6.5 of the Zoning Ordinance.

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: The property has no on-site parking and the Applicant does not propose to install a driveway. For this reason, 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: Staff advises that the property meets the minimum distance required from other accessory apartments, based on the accessory apartment map posted on DHCA's website. Exhibit 19, p. 7. Having no evidence to the contrary, the Hearing Examiner finds that the property meets this standard.

c. Where an Accessory Apartment conditional use application is filed under Section 3.3.3.A.2.b, the Hearing Examiner may approve a conditional use for the Accessory Apartment under Section 7.3.1, except that the findings under Section 7.3.1 E are not applicable to this type of conditional use. The limited use standards of Section 3.3.3.A.2.a and Section 3.3.3.A.2.c apply to all accessory apartment conditional use applications. In addition, the limited use standards of Section 3.3.3.B.2 apply to the Attached accessory Apartment applications and the limited use standards of Section 3.3.C.2 apply to the Detached Accessory Apartment applications.

- 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: The property is a corner lot, which has frontage on two roads. Despite a restriction prohibiting on-street parking within 35 feet of the corner of Arcola and Galt Avenues, Staff advises that there is still sufficient room for 5 vehicles to park along the streets abutting the property. Staff further states (Exhibit 19, p. 8):

Most of the properties that front on Arcola Avenue within 300 feet of the proposed accessory apartment, including the properties that abut and confront the Property, have driveways that accommodate at least one vehicle. Thus, demand for on-street parking on Arcola Avenue is likely relatively low. On the other streets within 300 feet of the property, some of the properties have driveways, and all properties without driveways have front lot line widths that can accommodate two vehicles parked along the frontage. On-street parking within 300 feet of the proposed accessory apartment is adequate to permit a resident to parking on-street near his or her residence on a regular basis.

To support its rationale, staff included an aerial photograph of property within 300 feet of the subject property (Exhibit 19, p. 8, shown below.) The photograph demonstrates that many homes within the 300-foot radius have driveways. The photograph also supports Mr. Boschma's testimony that his is the only property along Arcola Avenue in the vicinity without a driveway. T. 12. Mr. Eloisa agreed that on-street parking is usually available in the neighborhood based on his personal observation. T. 13. Mrs. Boschma correctly pointed out that the property is proximate to transit, thereby reducing the need for vehicles and demand for on-street parking. T. 13.



Figure 4: Property with Parking Re

Aerial View of Properties within 300 Feet (Ex. 19, p. 8)

Based on this evidence, the Hearing Examiner finds that on-street parking is regularly available to residents within 300 feet of the proposed accessory apartment. She also finds that the accessory apartment, which allows only two adult tenants, will not reduce the availability of on-street parking.

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: As discussed, the proposed apartment will be more than 300 feet (the required distance) away from another accessory apartment. Because the application does not deviate from the distance requirement, no analysis of this issue is necessary. Exhibit 19, p. 9.

C. Use Standards for Attached Accessory Apartments (Section 59.3.3.3.B)

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: The site plan (Exhibit 13(a)) and photographs of the property (shown in Part II.B. of this Decision) demonstrate that there is a separate entrance to the accessory apartment located on the side of the dwelling that faces Galt Avenue. The Hearing Examiner finds that this standard has 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 SDAT records, the existing dwelling was built in 1949. Exhibit 5. The Hearing Examiner finds that 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. 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: Because the property is zoned R-60, this section is applicable. As discussed above, no other accessory apartments are located within 300 feet.

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

IV. CONCLUSION AND DECISION

Weighing all the testimony and evidence of record under the “preponderance of the evidence” standard required by Section §59.7.1.1, the Hearing Examiner concludes that the conditional use proposed in this application, subject to the conditions set forth below, would satisfy all of the requirements for an accessory apartment.

Based on the foregoing, the application of Luke Boschma (CU 16-12), for a conditional use, under Section 59.3.3.3.A. and B. of the Zoning Ordinance, to operate an attached accessory apartment at 2610 Arcola Avenue, Silver Spring, 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. The Applicant must make all repairs listed in the Housing Inspector's Report (Exhibit 20);
5. The Applicant must obtain an accessory apartment license from the Department of Housing and Community Affairs under Section 29-19 of the Montgomery County Code;
6. The Applicant must comply with any directions of the Housing Code Inspector to ensure safe and code-compliant occupancy; and
7. 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 1st day of August, 2016.



Lynn A. Robeson
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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