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TRUDY A. MITCHELL-GILKEY

Applicant

Trudy Mitchell-Gilkey

For the Application

* * * * *

Cece Kinna

Housing Code Inspector III

For the Department of Housing and

Community Affairs

* * * * *

Before: Tammy J. CitaraManis, Hearing Examiner

OZAH Case No. CU 17-07

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I. STATEMENT OF THE CASE

On October 26, 2016, the Applicant, Trudy A. Mitchell-Gilkey, filed an application seeking approval of a conditional use to allow an Attached Accessory Apartment (Apartment) in the basement of a single-family detached home at 702 Auburn Avenue, Takoma Park, Maryland 20912 (Subject-property or Property). The subject property is identified as Lot 2, Block 109, in the Glazewood Manor Subdivision. It is zoned R-60 (Residential Detached). Records from the Maryland State Department of Assessment and Taxation (SDAT) reflect that the Applicant owns the subject property (Exhibit 5).

Most accessory apartments may be licensed without a conditional use approval provided they meet certain standards in the Montgomery County Code. *Montgomery County Code*, §29-19(b). The licensing requirements in the Code require compliance with standards in the Montgomery County Zoning Ordinance. *Id.*; *Montgomery County Zoning Ordinance*, §§59.3.3.3.A and B. Two of these Zoning Ordinance criterion require that (1) the property have a minimum number of on-site parking spaces, and (2) the proposed accessory apartment be separated by a minimum distance from another accessory apartment. *Zoning Ordinance*, §§59.3.3.3.A.2.a.iii. (b); 59.3.3.3.B.2.d. When the application does not meet these standards, the Applicant must apply for a conditional use to be decided by the Hearing Examiner following the procedures of Section 59.7.3.1 of the Zoning Ordinance.¹ *Id.*, §59.3.3.3.A.2.c. These procedures require a review and recommendation on the application from Staff of the Montgomery County Planning Department (Technical Staff or Staff) and a public hearing before the Hearing Examiner.

In February 2013, the Department of Housing and Community Affairs (DHCA) inspected and

¹ All citations in this Report and Decision are to the 2014 Zoning Ordinance for Montgomery County, adopted September 30, 2014 (Ordinance No. 17-52), as amended effective December 21, 2015, in ZTA 15-09 (Ordinance No. 18-08, adopted December 1, 2015).

approved the basement of Applicant's house for use as a Registered Living Unit (RLU). Exhibit 28, p. 1. The RLU was eliminated as a permitted residential use under the 2014 Zoning Ordinance. As a result, Applicant contacted DHCA to obtain a Class 3 Accessory Apartment License for the basement of her home. In a follow-up letter from DHCA dated August 23, 2016, Applicant was advised that her property did not meet the on-site parking requirements for an Accessory Apartment license. DHCA referred the Applicant to the Office of Zoning and Administrative Hearings (OZAH) to apply for a conditional use to deviate from the on-site parking requirements. Exhibits 1 and 2.

The public hearing was originally scheduled for February 13, 2017. Exhibit 3. At the Applicant's request, the public hearing was rescheduled for Monday, April 10, 2017, in a Notice of Hearing issued March 9, 2017. Exhibits 21 and 26. Technical Staff issued its report recommending approval of the application on March 27, 2017, subject to four conditions of approval as follows (Exhibit 28, p. 2):

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 on the subject site.
4. The Applicant must extinguish the Owner-Occupied Group House Certificate of Registration with the City of Takoma Park prior to issuance of use and occupancy permits for the conditional use.

Ms. Cece Kinna (Ms. Kinna), DHCA Housing Code Inspector III, inspected the property on March 28, 2017. She reported her preliminary findings and observed Housing Code violations in a Memorandum dated April 3, 2017.² Exhibit 29(a).

The hearing went forward as scheduled on April 10, 2017, and the Applicant appeared *pro se*. The Applicant adopted the findings and conclusions in the Technical Staff report as her own evidence and agreed to comply with Staff's proposed conditions of approval

² The substance of Ms. Kinnas' report is on pages 12-13 of this Report and Decision.

with a request for clarification of condition number 3. Specifically, Applicant questioned whether this condition would limit her ability to reside in the accessory apartment and to rent out the main dwelling.³ Tr. 9, 12. Applicant submitted an executed Affidavit of Posting. Exhibit 32. Ms. Kinna presented the results of her inspection of the apartment and analysis on whether the accessory apartment complied with the Housing Code (Chapter 26 of the Code). Their testimony is summarized in detail below, where relevant. There were no other individuals in support or opposition of the application at the hearing.

The record was left open for ten (10) days to receive the hearing transcript. The record closed as scheduled on April 21, 2017. The Hearing Examiner reopened the record on May 18, 2017, to allow time for Applicant to respond to the Hearing Examiner's request for additional documentation and photographs needed to complete the Report and Decision. Exhibit 33. Applicant filed the requested information and photographs before the record closed on June 8, 2017.⁴ Exhibits 34-37.

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 on-site parking requirements for an attached accessory apartment pursuant to Section 59.3.3.3.A.2.c of the Zoning Ordinance. Further, the Hearing Examiner finds the standards for a conditional use application for an attached accessory apartment in Sections 59.3.3.3.A and B will be satisfied with conditions as proposed.

Therefore, the Hearing Examiner approves the conditional use application for an

³ In an e-mail dated December 12, 2016, Staff advised Applicant that if she chose to reside in the accessory apartment she could rent the main dwelling. However, she would be required to extinguish the Owner-Occupied Group House Certificate of Registration (R0025) with the City of Takoma Park. Exhibit 22. References to the hearing transcript with page numbers are identified as "Tr. (page number)."

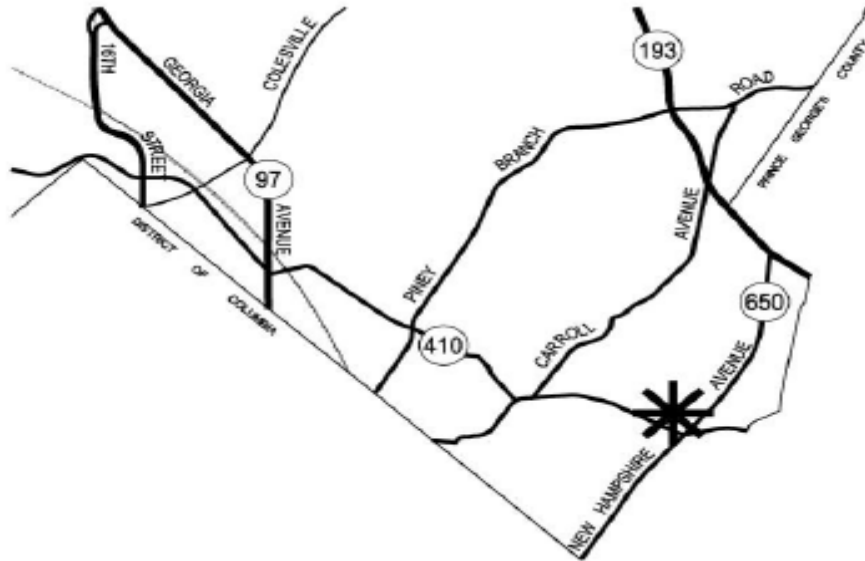
⁴ See footnote 6.

attached accessory apartment, subject to the conditions set forth in Part IV of this Report and Decision.

II. FACTUAL BACKGROUND

A. The Subject Property

The property consists of 5,013 square feet located on the northeast side of Auburn Avenue in Takoma Park, Maryland.⁵ Auburn Avenue is bound by New Hampshire Avenue to the east and Elm Avenue to the west. The general location of the property is shown on a vicinity map in the Staff Report (Exhibit 28, p. 1).

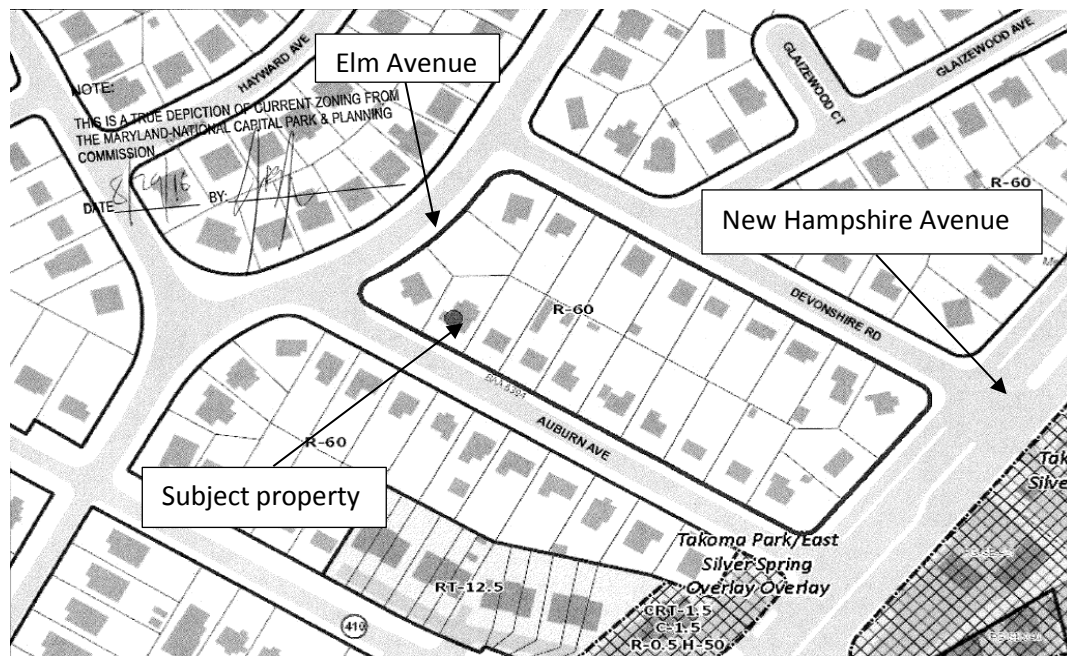


Vicinity Map
Exhibit 28, p. 1

The irregularly shaped lot is approximately 475 feet from the intersection of Auburn Avenue and New Hampshire Avenue (MD 650) and one lot from the intersection of Auburn Avenue and Elm Avenue. The property is located in the R-60 (Residential Detached) Zone “with

⁵ The SDAT property records indicate the lot is 5,013 square feet which is incorrectly listed as 5,012 square feet on the Application. Exhibit 3 and Exhibit 5.

approximately 50 feet of frontage on Auburn Avenue.” Exhibit 28, p. 2. The exact location of the subject property is shown below on the Zoning Map of the area (Exhibit 6):



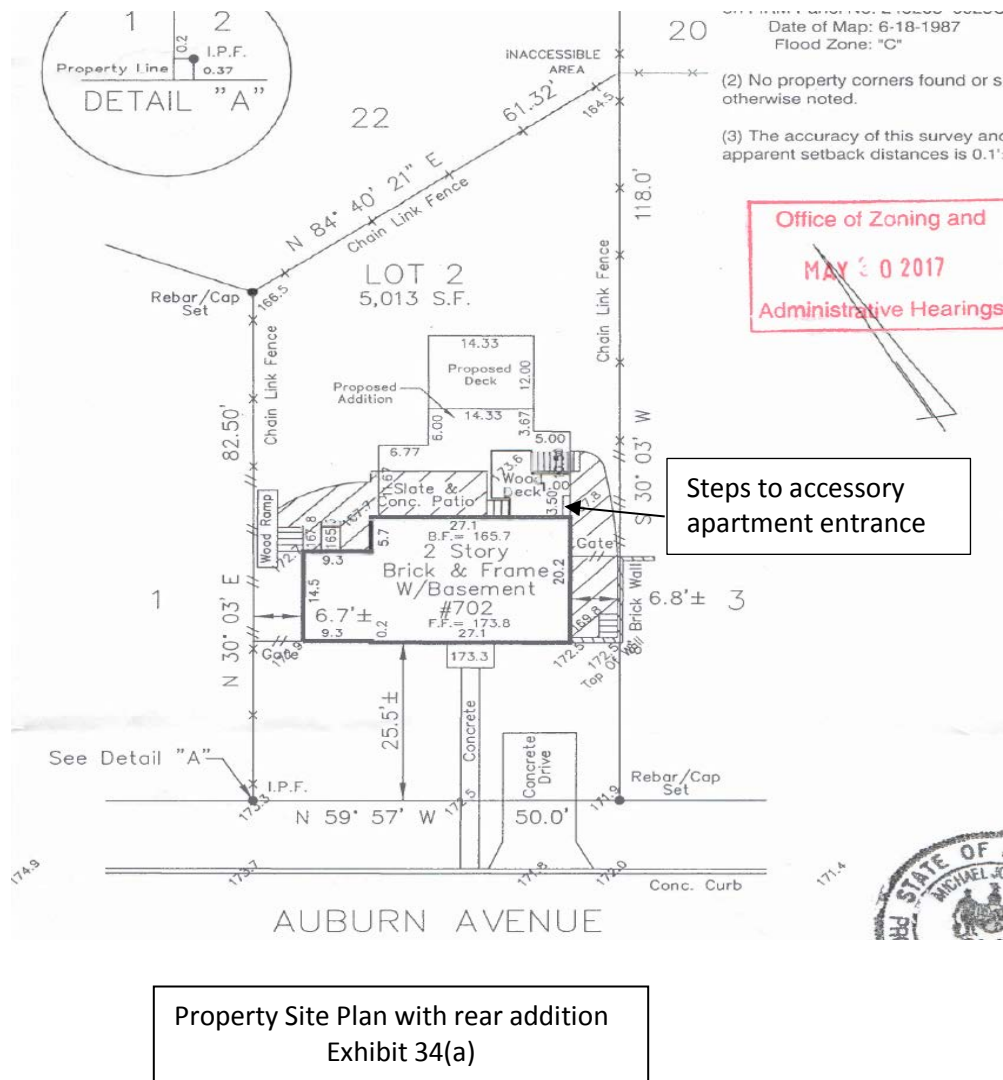
Zoning Map
Exhibit 6

According to the SDAT property records, the lot is improved with a two-story, single family detached home with an extension on the left side (i.e., library) and finished basement built in 1940. The property records indicate the above-grade enclosed area of the principal dwelling is 1,080 square feet and the finished basement area is 400 square feet. Exhibit 5. Applicant renovated the dwelling in 2011 to construct a two-story rear addition which added approximately 800 square feet to the above-grade enclosed area of the principal dwelling for a total of 1,880 square feet.⁶ Applicant renovated the basement in 2012 to remove the interior stairs to the main

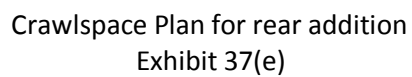
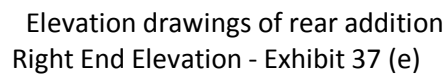
⁶ Because the quality of the site plan submitted with the application was poor the Hearing Examiner was unable to confirm that the 2011 renovation added 800 square feet to the main dwelling. Exhibit 7. The Hearing Examiner reopened the record on May 18, 2017, to provide Applicant time to provide documentation supporting the increase in square footage of the main dwelling. Applicant was also asked to provide color photographs of the property which were originally submitted as black and white copies. Exhibit 33. The requested documentation and photographs were filed and admitted into the record prior to the close of the record on June 8, 2017. Exhibits 34-37.

dwelling and to open a wall. She reported the accessory apartment will be approximately 500 square feet in size.⁷ Exhibit 4, p. 6; Tr. 12-13. To support the increase in square footage of the main dwelling, Applicant provided a site plan, elevation drawings of the two-story rear addition and a floor plan for the accessory apartment. Exhibits 11, 34(a), 37(a)-(e).

The site plan and right end elevation drawing are shown below (Exhibit 34(a)) and on the following page (Exhibit 37(e)):



⁷ Applicant did not provide the measurements for the footprint of the existing basement. Instead, she provided the square footage of the living area or habitable space based on the room measurements shown on the floor plan. Exhibit 4, p. 6, and Exhibit 11.



As noted on the site plan previously shown on page 7 (Exhibit 34(a)), vehicular access to the property is via a driveway off Auburn Avenue. The driveway is 112 square feet in size and can accommodate one vehicle. A concrete sidewalk from the curb provides pedestrian access to the front door of the main dwelling. The rear yard is enclosed with a wood and chain link fence.

Staff provided a summary of prior and current approved uses for the main dwelling and basement as follows (Exhibit 28, p. 1):

The Applicant was issued a Registered Living Unit (RLU) permit for the basement of her home in February 2013. RLUs ceased to exist as permitted residential uses under the 2014 Montgomery County Zoning Ordinance. On August 15, 2016, the City of Takoma Park issued the Applicant an Owner-Occupied Group House Certificate of Registration (R0025) to permit one room in her home to be rented by a tenant. As a condition of approval for the requested accessory apartment the Applicant will be required to work with the City to have this certificate extinguished. On August 29, 2016, the Montgomery County of Department of Permitting Services. (MCDPS) issued the Applicant a no-impact home occupation certificate No. (#353964) for a home health practitioner.

Photographs of the front and rear of the home, are shown below (Exhibits 36(h) and 36(d)):



Front of house
Exhibit 36(h)

Rear of house
Exhibit 36(d)

B. The Proposed Use

The accessory apartment will be located in the basement of the existing dwelling on the subject property. A stone and concrete path from the front sidewalk provides access to the rear yard

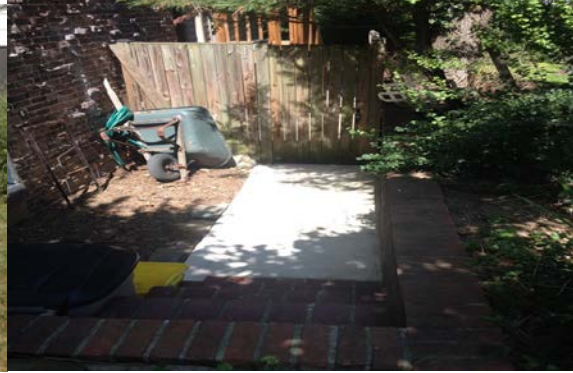
and accessory apartment entrance located on the east side of the dwelling. Applicant described access to and lighting for the accessory apartment entrance as follows (Exhibit 4, p. 2):

A six-foot wooden fence with an entry gate encloses the entrance to the accessory apartment and extends back 14.5 feet from the entrance, shielding the right side of the home and the steps descending into the apartment. A double set of flood lights illuminate the sidewalk leading to the apartment, and an exterior light fixture is installed at the actual apartment entrance.

Photographs of the path to the rear yard and steps to the accessory apartment entrance are shown below (Exhibits 36(i), 36(k), 36(m) and 28, p. 4)):



Stone path from front yard to concrete path
Exhibit 36 (i)



Concrete path to rear yard
Exhibit 36 (k)



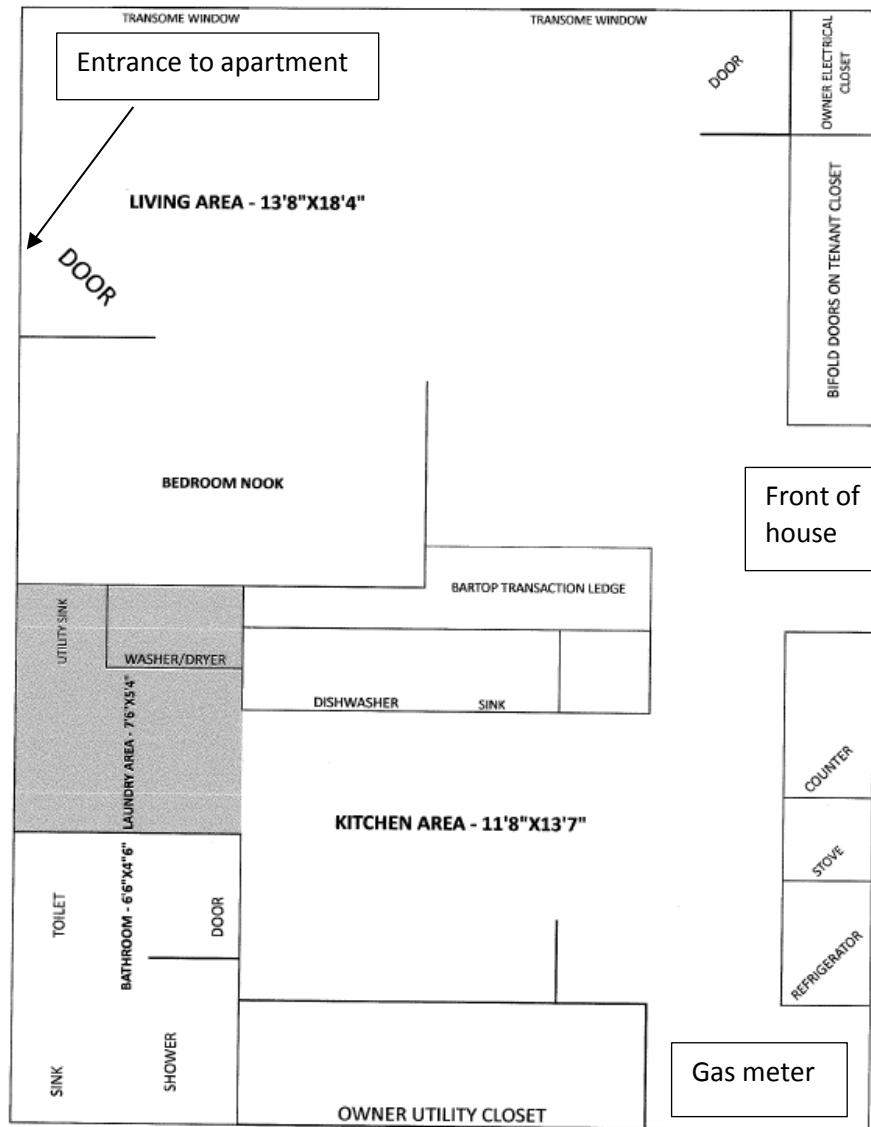
Steps to apartment entrance
Exhibit 36 (m)



Accessory apartment entrance
Exhibit 28, p. 4.

The accessory apartment is an efficiency unit because it does not have a separate bedroom.

The site plan reflects the footprint for the basement is 20'2" x 27'1" which is approximately 547 square feet. Exhibit 34(a). The apartment entrance opens into a large open living area that includes a "bedroom nook" and two closets. The kitchen includes a refrigerator, gas stove, dishwasher, sink and bar-top. The bathroom, laundry area, utility closet and gas meter are located off the kitchen area. The floor plan for the accessory apartment is shown below (Exhibit 11):



Accessory apartment floor plan
Exhibit 11

Ms. Kinna inspected the apartment and reported her preliminary findings in a Memorandum dated April 3, 2017, which states in pertinent part (Exhibit 29(a)):

An inspection of the premises was conducted on March 28, 2017. The existing Accessory Apartment (AA) is located in the basement of the home with a separate entrance on the right-side. The accessory apartment is an efficiency unit, approximately 918 gross square feet. The driveway is 112 square feet and does not meet the required 320 square feet. There is no garage. High efficiency furnace and water heater tank serves the entire house. Observed final inspection approval sticker for building (572626), electrical (590937) and mechanical (592580) dated 5/16/2012. DPS Residential Inspection Manager, Jim Sackett, advised the permits were not for construction of an accessory apartment. Observed approved permit for WSSC Gas Close In (594853) tag dated 1/22/2013 on the furnace.

Because the accessory apartment is an efficiency unit, Ms. Kinna testified she is required to “calculate gross square footage not just habitable space.” Tr. 27. This required her to measure the entire basement, including the exterior walls, which she reported is approximately 34’ x 27’ (918 gross square feet). Tr. 27-28. By these measurements and as reflected on the site plan previously shown on page 7, it appears that Ms. Kinna measured the exterior walls of the existing dwelling (excluding the library extension) and rear addition. The elevation drawings for the rear addition, previously shown on page 8, shows a heated crawlspace for storage with no connection to or expansion of the 547 square foot basement. Exhibit 37(b).

Ms. Kinna also observed and noted the following Housing Code violations during her inspection of the apartment (Id.):

1. A building permit for altering the single-family dwelling for the creation of the accessory apartment must be obtained and finalized through the Department of Permitting Services (DPS).
2. The existing gas stove/oven in the efficiency unit prohibits any sleeping in the efficiency unit due to the presence of combustion gas. Replace gas stove/oven with electric appliance.
3. Install ½” drywall ceiling in the gas meter alcove. Drywall must be spackled, sanded and painted.

4. Install ½” drywall ceiling in the laundry area. Drywall must be spackled, sanded and painted.
5. Close off all open areas of the ceiling around ductwork in the laundry area. Fireproof foam acceptable for the gaps.

Referring to item # 1 in the inspection report, Applicant questioned why and whether she will be required to obtain a new or separate building permit to create an accessory apartment that already exists in the basement of her home. Applicant confirmed she did not obtain a building permit to create an accessory apartment because she purchased the property with a finished basement. She does not recall applying for a building permit when she renovated the basement in 2012, only that she obtained final inspection approval from DPS for the electrical and gas. She stated that in February 2013, Housing Code Inspector Robert Goff and his supervisor inspected and approved the basement for use as an RLU. She reported there have been no changes to the basement since that time and Ms. Kinna inspected the property as it existed when it was approved for use as a RLU. Tr. 14-16.

In response, Ms. Kinna explained that under the 2014 Zoning Ordinance, DHCA is required to pull all building permits issued for the subject property as part of the accessory apartment license application process. She clarified that this was not a requirement for issuance of a RLU permit. Thus, the building permits for the property were not reviewed for compliance with the Housing Code in February 2013. Tr. 17.

Ms. Kinna reported that the building permits on file with DPS for the property relate to the rear addition to the dwelling. She confirmed with DPS that none of the building permits issued for the property were for the creation of an accessory apartment. Further, DPS reported there was no information on file to indicate the basement was intended to be used as an apartment. Because it will be used for sleeping, Ms. Kinna testified the accessory apartment must be

inspected by DPS to ensure it complies with the Housing Code requirements for an accessory apartment use. However, Ms. Kinna was unsure if Applicant would be required to obtain a new or separate building permit to create an accessory apartment. She advised Applicant to contact DPS directly to find out what information they require for her to obtain the required building permit and/or final inspection approval so that the basement as improved complies with the Housing Code for an accessory apartment use. Tr. 17-24.

Ms. Kinna testified that the basement cannot be used for sleeping because there is no separation of the living/sleeping areas from the kitchen which has a gas stove. She reviewed the Housing Code violations that must be corrected and pass final approval inspection by DPS prior to DHCA issuing an accessory apartment license. Applicant expressed concern that she may not have the physical strength or financial resources to make the corrections needed to obtain an accessory apartment license. Tr. 24-38. Ms. Kinna advised Applicant that if she ultimately decides not to make the corrections and apply for an accessory apartment license, she must remove the gas stove from the basement. Ms. Kinna stated she will conduct a final inspection of the basement to ensure that the gas stove has been removed. Tr. 38-39; Exhibit 30.

Applicant testified she would like the option to reside in the accessory apartment and rent out the main dwelling. Tr. 7. In her written statement, she expressed her intent as follows: “[t]he accessory apartment will be used as either an owner-occupied apartment or a rental unit for 1 person, usable 24/7 365 days a year [and it] will not be used for business or any other purpose.” Exhibit 4, p. 4.

Prior to the hearing, Applicant sought clarification from Staff on whether she would be able to live in the accessory apartment and maintain the owner-occupied group house in the main dwelling. Exhibit 22. Staff advised that an Owner-Occupied Group House is defined by the

City of Takoma Park as (Exhibit 28, p. 10):

A single-family home that is occupied by the owner or a family member as their primary residence and by one or more non-related individuals who pay rent or share in the costs of utilities. The kitchen, bathrooms and common areas are shared by everyone living in the house. The registration process is designed to ensure that the house is safe for all occupants.

In an e-mail dated December 12, 2016, Staff advised Applicant that “based on the City’s definition of an owner-occupied group house and [Section 59.3.3.3.A.2.a.iv of the Zoning Ordinance], only one rental residential use can exist on a lot.”⁸ Exhibit 28, pp. 11-12. Therefore, as a condition of approval, “[t]he Applicant must extinguish the Owner-Occupied Group House Certificate of Registration with the city of Takoma Park prior to issuance of use and occupancy permits for the conditional use.” Id., p. 2. Applicant agreed to comply with this condition of approval. Tr. 8-12, 40.

At the hearing, Applicant questioned whether Staff recommended condition No. 3 (i.e., “No other rental residential uses are allowed on the subject site.”) would prohibit her ability to reside in the accessory apartment and rent out the main dwelling. In the December 12, 2016, e-mail, Staff stated that under Section 59.3.3.3.A.2.a.iv of the Zoning Ordinance Applicant is “permitted to have only one rental unit on [her] property [and] if [she resides] in the accessory apartment unit, the remaining portion of [her] house can be a rental unit.” Exhibit 22. Based on this information, the Hearing Examiner will modify Staff’s condition of approval No. 3 to read: “No more than one rental residential use is allowed on the subject property.” With this clarification, Applicant agreed to comply with the conditions of approval incorporated herein in Part V of this Report and Decision. Exhibit 28, p. 2; Tr. 8-12, 40.

Technical Staff advises that there are two approved accessory apartments located within

⁸ Section 59.3.3.3.A.2.a.iv states in pertinent part: “[a]n Accessory Apartment must not be located on a lot where any other allowed rental Residential use exists[.]”

the general neighborhood of the proposed accessory apartment. They are located at 1101 Elm Avenue (S-2288 approved 1/12/99) and 914 Larch Avenue (S-2847 approved on 1/18/13). In the R-60 Zone, the minimum distance between the proposed accessory apartment and another accessory apartment is 300 feet. *Zoning Ordinance*, §59.3.3.3.B.2.d. Staff reports “[t]he nearest approved accessory apartment is 863 feet northeast of the site, well beyond the 300-foot minimum distance requirement.” Exhibit 28, p. 11.

Staff identified the location of the existing approved accessory apartments on a map of the neighborhood from the Staff Report, shown on the following page (Exhibit 28, p. 6):



C. Adequacy of Parking

For an accessory apartment use, Applicant is required to provide one on-site parking space for the proposed use in addition to the two on-site parking spaces required for the main

dwelling. The existing driveway is approximately 112 square feet in size and can only accommodate one parked vehicle. Based on information contained in a letter from DHCA dated August 23, 2016, Applicant indicated that the existing driveway cannot be expanded to meet the 320 square feet minimum requirement for a driveway. Exhibit 1. DHCA referred Applicant to OZAH to file a conditional use application seeking a waiver of the on-site parking requirements as provided in Section 59.3.3.3.A.2.b of the Zoning Ordinance. Exhibits 1-2. In order to grant Applicant's request, the Hearing Examiner must find that there is adequate on-street parking to accommodate the proposed use without adversely affecting or reducing the availability of on-street parking for residents located within 300 feet of the subject property. *Zoning Ordinance*, §59.3.3.3.A.2.c.i. (a)-(b).

Staff advises that Auburn Avenue is a "low-volume secondary residential public roadway within a 50-foot-wide right-of-way [and] is improved to a width of approximately 26 feet along the site's frontage to accommodate two-way traffic in a yield condition and two lanes of on-street parking." Exhibit 28, p. 8. There are no parking restrictions on Auburn Avenue. Staff found that "[t]he 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 use." *Id.*, p. 12.

In support of this finding, Technical Staff describes the availability of on-site and on-street parking for properties located within 300 feet of the subject property as follows (*Id.*):

Unrestricted on-street parking is adequate. The existing one family house has one on-site parking space. There are 38 one-family residential properties within 300 feet of the subject site and 18 of these residential properties have driveways. The remaining 20 residential properties do not have driveways or garages. However, two of the 20 residential properties are corner lots that have street frontages that range from 121 feet to 207 feet which can sufficiently accommodate more than one vehicle. The remaining 18 residential properties have street frontages that vary from 50 feet to 80 feet. The subject property has approximately 50 feet of frontage on Auburn Avenue. Based on the property's frontage minus the existing

driveway with an 11-foot width, one averaged size car or two compact sized cars could be parked directly in front of the property. Thus, 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 their residence on a regular basis.

Applicant testified that in the 13 years she has lived in her home, she has never had a problem with parking in front of her house or within the neighborhood. She confirmed that there are no parking restrictions on Auburn Avenue or on nearby streets. She testified that there is ample on-street parking in front of her house to accommodate two vehicles. Further, she stated that the neighbors to her left and right and across the street from her property have on-site parking for one or two cars (depending on the length of the driveway) and ample on-street parking in front of their property to park their vehicles on a regular basis. Tr. 44-48.

Staff provided photographs of the available on-street parking in front of the property and along Auburn Avenue, shown below and on the next page (Exhibits 28, pp. 3,4)



On-street parking in front of subject property
Exhibit 28, p. 3



Unrestricted parking along both sides of Auburn Avenue
(view looking east towards New Hampshire Avenue)
Exhibit 28, p. 4

D. Community Response

There was no community response, written or by testimony, received in this case by the Hearing Examiner or Technical Staff.

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. Ordinarily, an Applicant may establish an accessory apartment without the need for conditional use approval. This is accomplished by approval of a Class 3 Accessory Apartment license from DHCA under Section 29-19(b) of the Montgomery County Code (Code). The Code requires compliance with “limited use” standards in the Zoning Ordinance as well as other licensing standards. *Zoning Ordinance*, §59.3.3.3.A.2; 59-3.3.3.B.2. Two of the Zoning Ordinance standards require that the proposed accessory apartment (1) meet minimum on-site parking requirements and (2) be more than 300 feet from another accessory apartment. *Id.*, §§59.3.3.3.A.2.a.iii. (b), 59.3.3.3.B.2.d. If a proposed accessory apartment does not meet these two

standards, it may still be approved by filing an application for a conditional use. *Id.*, §59.3.3.3.A.2.b.

For approval of the conditional use where the minimum on-site parking requirement is not met, an Applicant must demonstrate that there is adequate on-street parking to support the use (§59.3.3.3.A.2.c.i):

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.

Where the minimum separation requirement is not met, an Applicant must demonstrate (*Id.*, §59.3.3.3.A.2.c.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.

An analysis of the applicable limited standards, and whether the proposed use may deviate from the on-site parking and minimum separation requirements, is set forth below.

A. Limited Use Standards for Accessory Apartment, in General (Section 59.3.3.3.A)

This section contains standards for all accessory apartments, whether they are attached to or detached from a single-family home:

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.

Conclusion: The Zoning Ordinance defines a “dwelling unit” as “a building or portion of a building providing complete living facilities for not more than one household, including, at a minimum, facilities for cooking, sanitation, and sleeping.” Section §59.1.4.2 of the Zoning Ordinance. The proposed accessory apartment has a large living/sleeping area, a full kitchen for cooking, and one bathroom. It meets this definition. It is approximately 547 square feet in size and is located in the basement of an existing single-family home with an above-grade enclosed area of approximately 1,880 square feet. The accessory apartment is subordinate to the principal dwelling.

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.

Conclusion: Applicant is requesting approval for only one accessory apartment on the subject property. Therefore, the Hearing Examiner finds that this standard has been met.

ii. The Accessory Apartment was approved as a conditional use before May 20, 2013 and satisfies the conditions of the conditional use approval; or

Conclusion: Staff reports that the basement was inspected and approved for use as a RLU in February 2013. This residential use “ceased to exist as a permitted use under the 2014 Zoning Ordinance.” Exhibit 28, p. 9. No approval for an accessory apartment at the subject property was requested or approved as a conditional use before May 20, 2013. Therefore, the Hearing Examiner finds that this standard does not apply to this application.

iii. The Accessory Apartment is licensed by the Department of Housing and Community Affairs under Chapter 29 (Section 29-19); and

Conclusion: Accessory apartments are not permitted by the Zoning Ordinance unless they can be licensed by DHCA. Applicant could not obtain a Class 3 Accessory Apartment license because the property did not meet the minimum on-site parking requirements. In a Letter and Notice of Referral dated August 23, 2016, DHCA referred Applicant to file a conditional use application for an attached accessory apartment with OZAH seeking approval to deviate from the on-site parking requirements. Exhibits 1-2. The conditional use application for an attached accessory apartment was filed with OZAH on October 26, 2016. Exhibit 3. Applicant will file for a Class 3 Accessory Apartment license upon approval of this conditional use application. As a condition of approval, Applicant must obtain a Class 3 Accessory Apartment license. Therefore, the Hearing Examiner finds that as conditioned, this standard will be met.

(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 at 702 Auburn Avenue, Takoma Park, Maryland. Therefore, the Hearing Examiner finds that this standard has been met.

(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: The existing driveway on the subject property is 112 square feet and does not meet the 320 square feet minimum. The driveway cannot be enlarged and can only accommodate on-site parking for one vehicle. The Zoning Ordinance requires two parking spaces for the principal dwelling and one space for the accessory apartment use. Section §59.6.2.4.B of the Zoning Ordinance. Therefore, the Hearing Examiner finds that the property does not meet the on-site parking requirements. However, as provided in Section §59.3.3.A.2.b, the Hearing Examiner

may allow an Applicant to deviate from this requirement if the application meets certain standards in the conditional use process. These are set out in detail in pp. 26-27 of this Report and Decision.

(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 SDAT records for the property indicate that the above-grade enclosed area for the principal dwelling is 1,080 square feet and the finished basement is 400 square feet. Exhibit 5. Applicant renovated the principal dwelling in 2011 to construct a two-story rear addition which added 800 square feet to the above-grade enclosed area for a total of 1,880 square feet. The Housing Code Inspector confirmed a building permit was issued in 2011 for a two-story rear addition to the dwelling. This major renovation is not recorded on the SDAT property records. However, the evidence of record, including Applicants testimony, the site plan and elevation drawings support the increase in square footage for the above-grade enclosed area. Therefore, having no evidence to the contrary, the Hearing Examiner accepts Applicant's testimony and evidence of record and finds that the above-grade enclosed area of the principal dwelling, including the two-story rear addition, is approximately 1,880 square feet. The accessory apartment is an efficiency unit because it does not have a separate bedroom. It will be located in the basement of the main dwelling built in 1940. The site plan shows the basement is 20'2" x 27'1", approximately 547 square feet. Based on exterior measurements of the main dwelling and the rear addition, the Housing Code Inspector determined the accessory apartment is 34' x 27', approximately 918 gross square feet. The elevation drawings for the rear addition shows a heated crawlspace for storage with no connection to or expansion of the 547 square foot basement. Exhibit 37(b). Based on the

evidence of record and absent evidence to the contrary, the Hearing Examiner finds the size of the accessory apartment is approximately 547 square feet and not 918 gross square feet. Thus, the total floor area for the principal dwelling is approximately 2,427 square feet (i.e., $1,880 + 547 = 2,427$). Based on these figures, the Hearing Examiner finds that the accessory apartment at 547 square feet is less than 50% of the total floor area in the principal dwelling (i.e., $547 \div 2,427 = 22\%$) and less than the 1,200 square feet maximum. Therefore, the Hearing Examiner finds that this standard is met.

(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: The accessory apartment will be located in the basement of the existing dwelling on the subject property. No addition is proposed. Therefore, the Hearing Examiner finds that this standard is not applicable to this application.

(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: Applicant agreed to comply with this standard. This approval will be conditioned on occupancy of no more than two persons over 18 years of age. This condition of approval is listed in Part IV of this Report and Decision. Therefore, the Hearing Examiners finds that the use, as conditioned, will meet this standard.

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 that “only one rental residential use can exist on one lot.” Exhibit 28, p 11. On August 15, 2016, the City of Takoma Park issued Applicant an Owner-Occupied Group House Certificate of Registration (R0025) to permit Applicant to rent a room in her house. As a condition of approval, Applicant must extinguish the Owner-Occupied Group Certificate of Registration (R0025) with the City of Takoma Park prior to issuance of an accessory apartment license. *Id.*, p. 2. Staff advised Applicant that “if you reside in the accessory apartment unit, the remaining portion of your house can be a rental unit.” Exhibit 22. Applicant agreed to comply with the conditions of approval listed in Part IV of this Report and Decision. Therefore, the Hearing Examiner finds the use, as conditioned, will meet this standard.

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, the Hearing Examiner finds that this standard is not applicable to this application.

vi. Screening under Division 6.5 is not required.

Conclusion: No finding is required.

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

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

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 subject property does not meet the on-site parking requirements for a Class 3

Accessory Apartment license. The existing driveway is approximately 112 square feet and cannot be enlarged to meet the 320 square feet minimum requirement for on-site parking. Applicant filed this conditional use application on October 26, 2017, seeking approval to deviate from the on-site parking requirements. Exhibits 3. This is discussed below in §59.3.3.3.A.2.c.

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

Conclusion: The minimum distance required between the proposed accessory apartment and any other accessory apartments in the R-60 Zone is 300 feet. Section 59.3.3.3.B.2.d of the Zoning Ordinance. Technical Staff advises that there are no approved accessory apartments located within 300 feet from the proposed accessory apartment. Staff identified two approved accessory apartments located more than 300 feet from the subject property (i.e., 1101 Elm Avenue [S-2288] and 914 Larch Avenue [S-2847]). Staff advises that the closer of the two approved accessory apartments is located approximately 863 feet from the proposed accessory apartment. Thus, the Application does not propose to deviate from the minimum distance requirement because there are no other accessory apartments located within 300 feet of the subject property. Therefore, the Hearing Examiner finds that this standard is not applicable to this application.

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 Attached Accessory Apartment applications and the limited use standards of Section 3.3.3.C.2. apply to 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: Staff concluded that there is adequate on-street parking to serve the proposed accessory apartment use without adversely affecting or reducing the available on-street parking for residents located within 300 feet of the proposed accessory apartment. Parking on Auburn Avenue is unrestricted. The subject property has 50 feet of street frontage along Auburn Avenue. Staff determined the lot width provided sufficient on-street parking for one average size vehicle or two compact vehicles. Applicant testified she can park two vehicles in front of her property and there is ample on-street parking Auburn Avenue. Staff reports that there is adequate on-street parking for properties located within 300 feet of the subject property based on the varying street frontages ranging from 50 feet to 80 feet for interior lots and 121 feet to 207 feet for corner lots. Staff also noted that many of the properties have a driveway that can accommodate on-site parking for at least one vehicle (depending on the length of the driveway). Based on this record, the Hearing Examiner finds that on-street parking is adequate for the use and properties located within 300 feet of the proposed accessory apartment. Therefore, the Hearing Examiner finds and concludes that this standard has been met.

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 previously discussed, the conditional use application was filed to deviate from the on-site parking requirements under Section 59.3.3.3.A.2.b.i of the Zoning Ordinance. Staff reported there are no approved accessory apartments located within 300 feet of the proposed use.

As a result, no request to deviate from the minimum distance separation was made or is required as part of this application. Therefore, the Hearing Examiner finds that this standard is not applicable to this application.

B. Use Standard 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.

Conclusion: As previously noted, the proposed accessory apartment meets the definition of a dwelling unit. It will be located in the basement of the principle dwelling. It is less than 50% of the floor area of the principle dwelling and is therefore subordinate to the single-family detached home. Therefore, the proposed accessory apartment in this application meets the definition of an “attached accessory apartment.”

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 separate accessory apartment entrance is located on the side of the dwelling.

Therefore, the Hearing Examiner finds this standard has been be 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 two-story detached dwelling was built in 1940. The Hearing Examiner finds the dwelling in which the proposed accessory apartment will be located is more than 5 years old and therefore, this standard is 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, the Hearing Examiner finds that this standard is not applicable to this application.

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: Staff identified two approved accessory apartments that are located more than 300 feet from the subject property (i.e., 1101 Elm Avenue [S-2288] and 914 Larch Avenue [S-2847]). Staff advises that the closer of the two approved accessory apartments is located approximately 863 feet from the proposed accessory apartment. Therefore, the Hearing Examiner finds that there are no other accessory apartments located within 300 feet of the subject property. This standard has been met.

IV. CONCLUSION AND DECISION

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 of approval listed below, would satisfy all of the requirements for the use.

Based on the foregoing findings and conclusions and a thorough review of the entire record, the

application of Trudy Ann Mitchell-Gilkey (CU 17-07), for a conditional use under Section 59.3.3.3.A. and B. of the Zoning Ordinance, to operate an Attached Accessory Apartment at 702 Auburn Avenue, Takoma Park, Maryland, is hereby **GRANTED**, subject to the following conditions:

1. The total number of occupants residing in the accessory apartment who are 18 years or older is limited to 2;
2. No more than one rental residential use is allowed on the subject property;
3. The Applicant must extinguish the Owner-Occupied Group House Certificate of Registration (R0025) with the City of Takoma Park prior to issuance of a rental license from the Department of Housing and Community Affairs;
4. The Applicant must comply with the determination of the Housing Code Inspector as to the limits on occupancy in the accessory apartment and conditions of approval to ensure safe and code-compliant occupancy.
5. 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 attached accessory apartment as granted herein. Applicant shall at all times ensure that the conditional use premises comply with all applicable codes (including but not limited to building, life, safety and handicapped accessibility requirements), regulations, directives and other governmental requirements, including the annual payment of conditional use administrative fees assessed by the Department of Permitting Services.

Respectfully submitted,



Tammy J. CitaraManis
Hearing Examiner

Issued this 5th day of July, 2017.

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

