BEFORE THE MONTGOMERY COUNTY
BOARD OF APPEALS

OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660

IN THE MATTER OF:	*	
RICHARD L. AND FLORENCE C. HOFF	*	
Petitioners	*	
Richard L Hoff	*	
Florence C. Hoff	*	
For the Petition	*	
	*	
* *		Board of Appeals Case No. S-2765
Kevin Martel, Program Manager II	*	(OZAH Case No. 10-15)
Department of Housing and	*	
Community Affairs	*	
* *		

Before: Martin L. Grossman, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDATION

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I. STATEMENT OF THE CASE

Petition No. S-2765, filed on December 2, 2009, seeks a special exception, pursuant to §59-G-2.00 of the Zoning Ordinance, to permit an accessory apartment use in the basement of Petitioners' home at 12212 Bradbury Drive, Gaithersburg, Maryland, on land in the R-200 Cluster Zone. The property's legal description is Lot 30, Block F of the Quince Orchard Valley Subdivision.

This matter was originally scheduled for a hearing on April 15, 2010. Exhibit 11. Technical Staff of the Maryland-National Capital Parks and Planning Commission (M-NCPPC), in a report issued March 29, 2010, recommended approval of the special exception, with conditions. Exhibit 13.[1]

This petition engendered a great deal of community opposition in the form of letters and e-mails and a few letters of support from the community. On April 6, 2010, Ellen Dimond, the primary opponent, requested that the hearing be continued for at least a month to allow the neighbors time to prepare evidence relevant to the case. Exhibit 23. On April 8, 2010, Mr. Hoff responded that there was no need for a continuance. Exhibit 25. Nevertheless, on April 8, 2010, the Hearing Examiner granted Ms. Dimond's the request for a continuance. Exhibit 26. On April 9, 2010, a formal notice was issued rescheduling the hearing to Friday, June 11, 2010, at 9:30 a.m. Exhibit 33.

By memorandum dated June 7, 2010, Housing Code Inspector Deborah Eaches of the Department of Housing and Community Affairs (DHCA), indicated that she had inspected the premises on April 8, 2010, and that there were a number of issues, which she listed. Exhibit 55. Kevin Martel, DHCA Program Manager was also present during the inspection. Tr. 33. Ms. Eaches stated in her memorandum that, based upon a habitable space of 265.2 square feet, the accessory apartment could house a maximum of two occupants.

A public hearing was convened as scheduled on June 11, 2010, at 9:30 a.m.; however, because

[1] The Technical Staff report is frequently quoted and paraphrased herein.

an OZAH calendar published on the website erroneously listed the time of the hearing as 10:30 a.m. on June 11, the Hearing Examiner announced the calendaring error at the beginning of the hearing and recessed until 10:30 a.m. so that no one who saw the erroneous time on the internet would miss any portion of the hearing. The hearing in fact resumed at 10:33 a.m. Tr. 3-5.

Petitioners Richard and Florence Hoff appeared *pro se*. The only other witness to appear was Kevin Martel of the Department of Housing and Community Affairs. In spite of the flurry of opposition letters and the fact that the Hearing Examiner granted the opposition a continuance so that they could marshal their evidence, no opposition witnesses showed up for the hearing.

Petitioners produced a copy of their deed to the premises (Exhibit 81) and testified in support of their petition. With some minor qualifications,[2] they adopted the findings in the Technical Staff Report (Exhibit 13) and in the Housing Code Inspector's Report (Exhibit 55), as Petitioners' own evidence, and agreed to meet all the conditions set forth in both reports. Tr. 9-15. Testimony was received, as well, from Mr. Martel.

The record was held open until July 6, 2010, to give Petitioners time to file a revised site plan and landscape and lighting plan and to give Technical Staff time to review the revised plans. Petitioners filed the revised plans (Exhibits 85(a) and (b)), showing a walkway to the accessory apartment, on June 18, 2010, and on June 30, 2010, Technical Staff approved the modified plans (Exhibit 86). The record closed, as scheduled, on July 6, 2010.

Since Petitioners satisfy all the requirements for the special exception, the Hearing Examiner recommends that it be granted, subject to the conditions set forth in Part V of this report.

II. FACTUAL BACKGROUND

A. The Subject Property and the Neighborhood

The subject property consists of 10,400 square feet in the R-200 zone. As pointed out by

[2] The qualifications were that the Technical Staff report had understated the amount of lighting outside the home, which will remain as it has existed for many years (Tr. 9-10), and Petitioners have some reservations about two of the changes suggested by the Housing Inspector (adding a walkway and moving a dresser). Tr. 12-14.

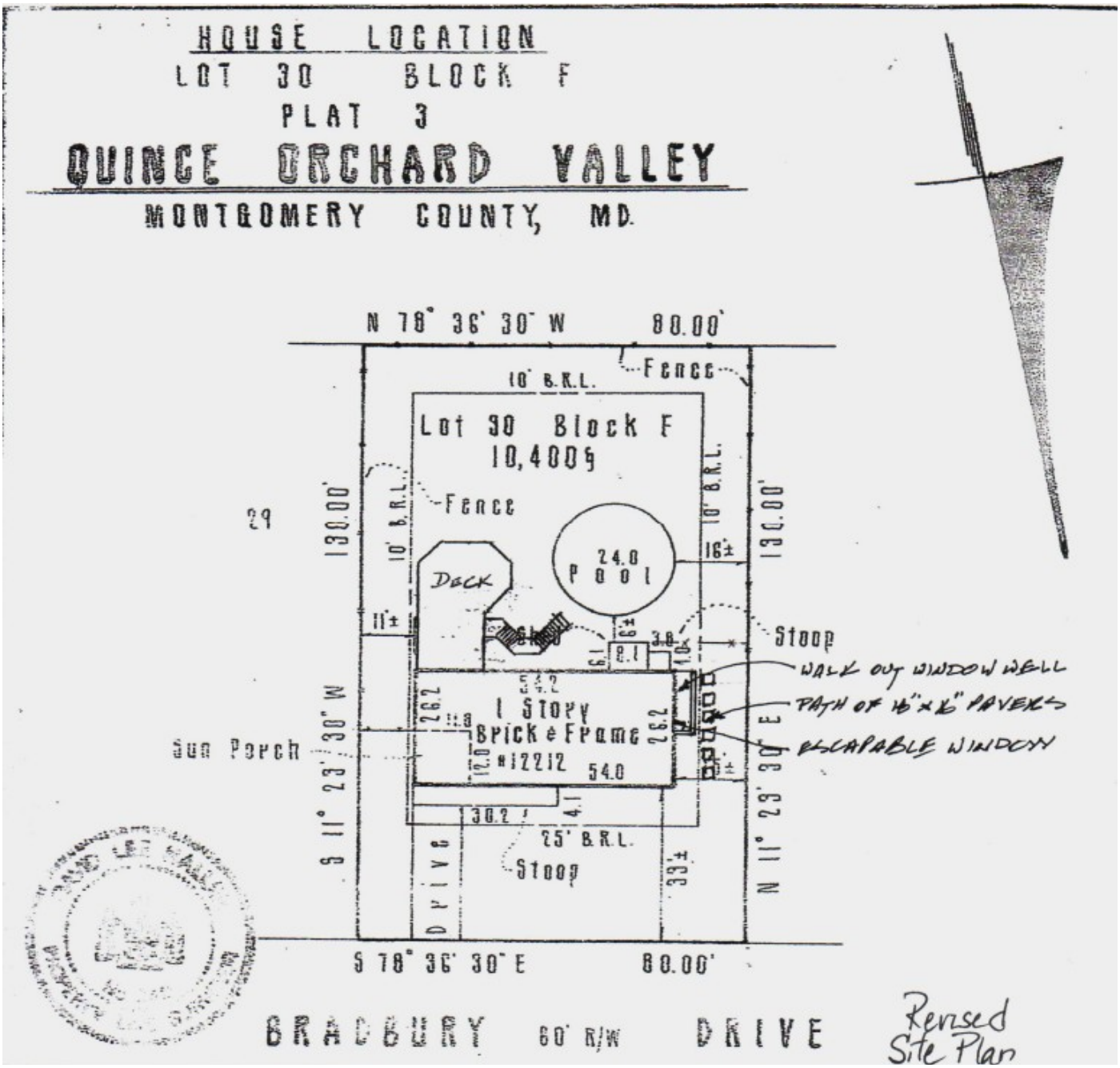
Technical Staff (Exhibit 13, p.2), the standard lot size in the R-200 zone is 20,000 square feet; however, this subdivision is a cluster development that allows for variation in lot sizes. The lot fronts onto Bradbury Drive and slopes significantly downward from front to rear. The location of the site can be seen on the following General Location Map provided by Technical Staff:

The property is developed with a detached single-family dwelling that consists of one-story in the front and two stories in the rear. According to Technical Staff, the dwelling was constructed in 1971, and is setback approximately 33 feet from Bradbury Drive. The dwelling has a left side yard of

approximately 12 feet, a right side yard of approximately 15 feet, and a rear yard of approximately 65 feet. It is depicted below in a photograph supplied by Petitioners at the hearing (Exhibit 82(b)):

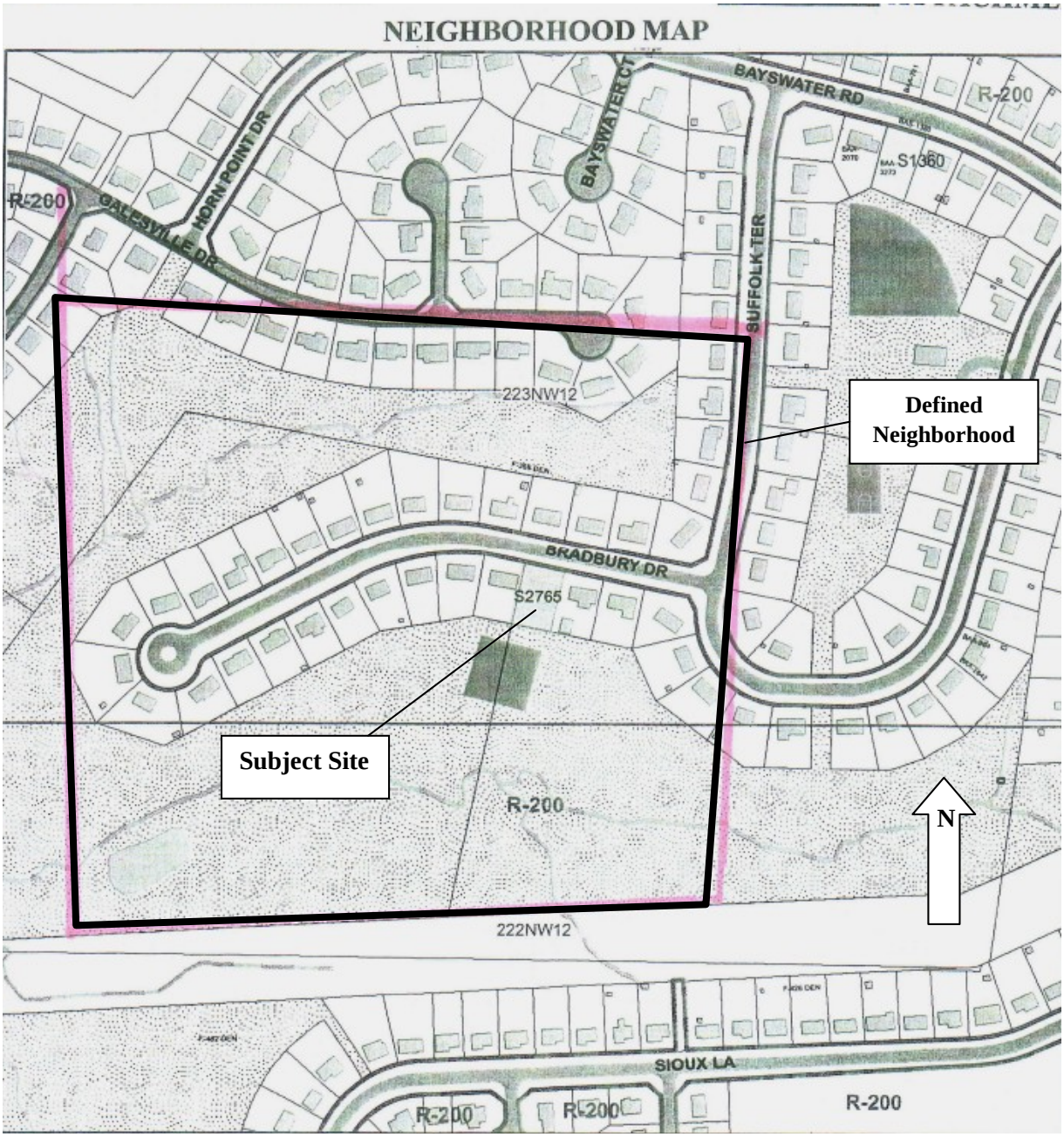
As can be seen from this photograph, there is a one-car garage and a large paved driveway extending from Bradbury Drive to the front of the dwelling. Staff reports that the driveway measures approximately 15 feet wide by 30 feet deep and will be able to accommodate at least three vehicles. Parking is also permitted on both sides of Bradbury Drive. Kevin Martel, the Housing Code Inspector, indicates that the driveway can actually hold four cars and that an additional pad at the end of the driveway allows parking of a fifth car. Moreover, the garage can hold a sixth. Tr. 34. According to Technical Staff, the property is well landscaped with a wide array of mature trees in addition to various shrubs and flowers.

The revised Site Plan for the subject site (Exhibit 82(a)) is shown below:



For the purposes of this application, Technical Staff defined the neighborhood by the following boundaries, which are accepted by the Hearing Examiner: Galesville Drive to the north, Suffolk Terrace to the east, Quince Orchard Valley Park to the south, and Seneca Creek State Park to the west. The defined neighborhood is depicted below in a Neighborhood Map provided by

Technical Staff (Exhibit 13, Attachment 2):



Staff reports that the neighborhood is primarily zoned R-200 for detached single-family dwellings, but that this subdivision is a cluster development, and therefore lot sizes are smaller than the 20,000 square feet usually seen in the R-200 Zone. Single-family detached homes extend to the east and west of Bradbury Drive on both sides of the street. Property records show that there are no other accessory apartments in the general neighborhood.

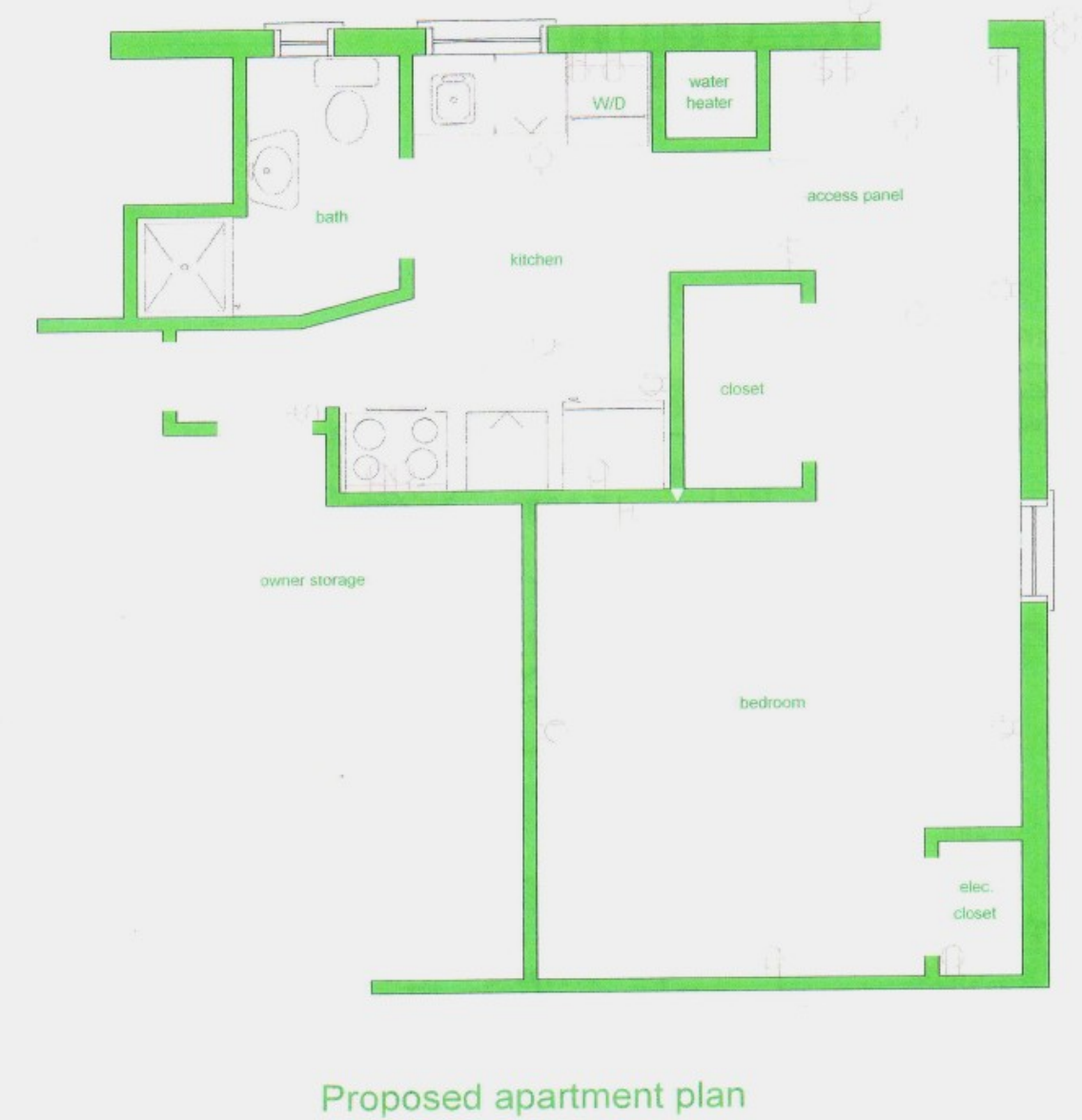
B. The Proposed Use

The Petitioners are requesting approval of an existing 375 square foot accessory apartment located in the basement of their home.[3] Petitioners live in the main part of the home, and the accessory apartment is currently occupied by a woman and her 13-year old daughter. Exhibit 3.

Since the accessory apartment is located in the basement of the home and will not require any addition or structural changes, it does not detract from the single-family residential appearance of the neighborhood. As the photograph below illustrates, the apartment entrance, on the rear of the home, appears to be part of a normal residential entry to the basement. (Exhibit 82(d)):

[3] Petitioners' statement in support of their petition (Exhibit 3) indicates that the apartment is 375 square feet, but the Housing Inspector's measurements reveal 265.2 square feet of habitable space. Exhibit 55, Item # 1.

The apartment's floor plan (Exhibit 6) is shown below:



The apartment contains a kitchen/dining area, a bedroom, a bathroom and a laundry area.

The June 7, 2010 memorandum from Housing Code Inspector Deborah Eaches (Exhibit 55), sets forth the following comments:

1. The efficiency unit consists of 265.2 square feet, which would allow for 2 occupants.
2. The unit is located on a licensed and approved lot consisting of 10,400.00 square feet.
3. There are a total of 0 accessory apartments in the general neighborhood. There are a total of 1 registered living units in the general neighborhood (not active —not being used according to owner).

> 4. A walkway from the front yard leading down the hill to the front door of the accessory apartment needs to be installed. Pavers, slate or gravel walkway is acceptable. Must be installed in a professional, workmanlike manner.
>
> 5. Dresser in front of egress window needs to be removed. Direct access to egress window is required at all times (remove potted plants, etc. from window sill).
>
> 6. A single cylinder deadbolt lock must be installed to the front door (thumb latch type lock).
>
> 7. Holes in shower stall need to be repaired.
>
> 8. All electrical circuits for the entire facility must be properly labeled.
>
> 9. A door must be installed to access water heater.
>
> 10. A pressure relief valve must be installed to the water heater.
>
> 11. Off street parking is available for 4 cars stacked. Driveway is wide enough to accommodate vehicles in household.

The Hearing Examiner recommends a condition limiting occupancy and requiring all repairs as specified by DHCA. Petitioners have agreed to make all required repairs.[4] Tr. 14.

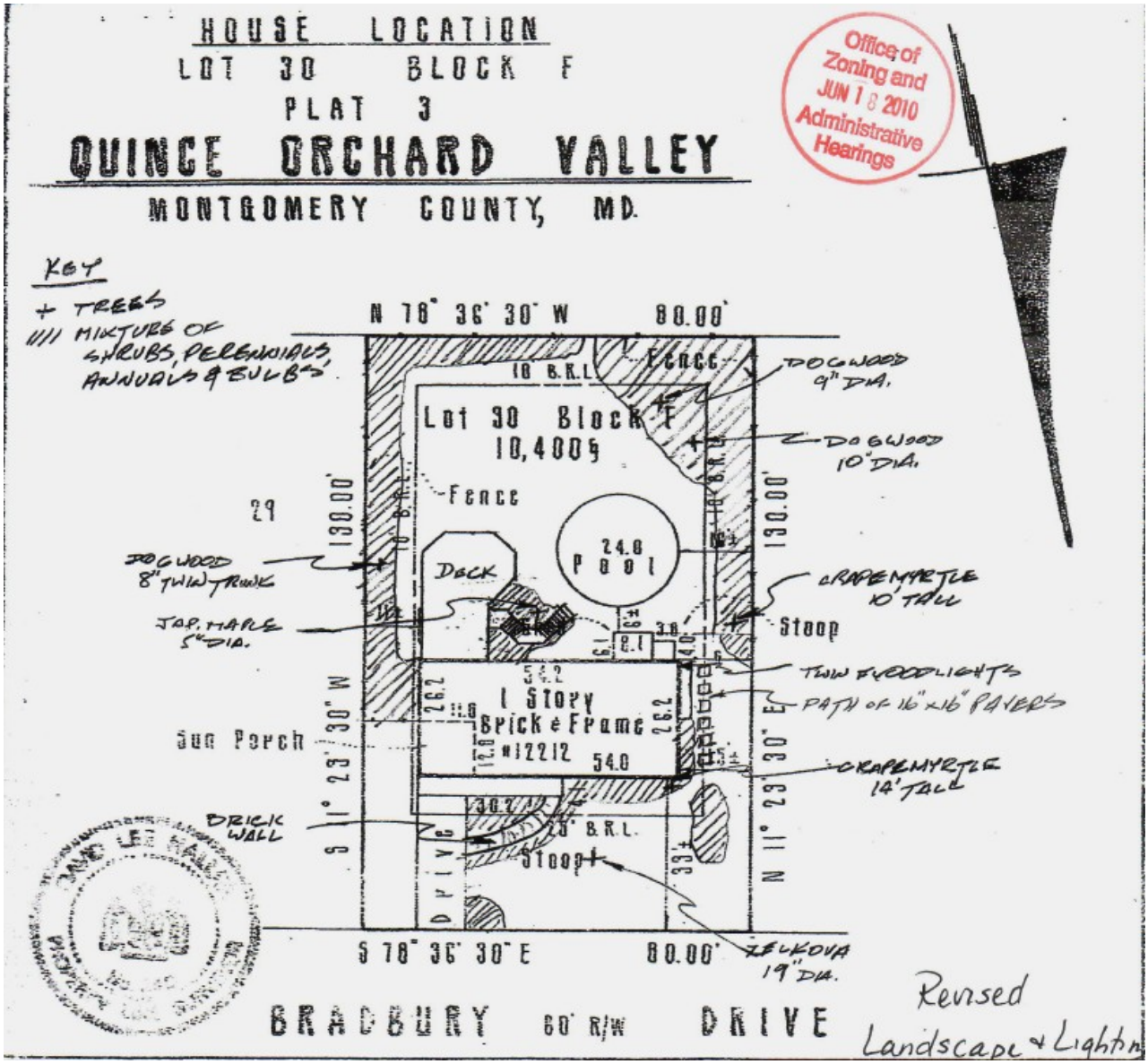
According to Technical Staff (Exhibit 13, p. 3),

> The doorways (front and basement entrance) are well lighted. At the front of the house, a light is on the side of the main door, at a height of about six feet. There are decorative lights on each side of the garage door. A light also hangs over the basement door. The front of the dwelling includes mature shrubbery and small trees. There are approximately 6 mature trees on the lot.

Petitioners noted that, in addition to the lights mentioned by Technical Staff, there is an existing light on the side of the house on a motion sensor. Tr. 9-10.

Petitioners do not plan any exterior modifications except to add a walkway made of pavers to access the accessory apartment as required by the Housing Code Inspector (Exhibit 55, Item #4) and approved by Technical Staff (Exhibit 86). Tr. 26. The walkway to be added is reflected in the revised site and landscape and lighting plans (Exhibits 85(a) and (b)). The landscaping and lighting are shown on the following page in the revised Landscape and Lighting Plan (Exhibit 85(b)):

[4] Mr. Hoff initially had a concern about two of the conditions proposed by DHCA, Items 4 and 5 in their report. These required an access path to the accessory apartment and that the dresser in the apartment be moved so as not to block access to the escapable window. Tr. 12-14. Both of those concerns were resolved. Upon hearing Mr. Martel testify that the dresser must be moved because the Code requires unobstructed access to the window, Mr. Hoff stated that the tenant would do so. Tr. 36. Following the hearing, Petitioners submitted revised plans showing the required path. Exhibits 85(a) and (b).



The site has been exempted from forest conservation requirements by Technical Staff (Exhibit 7). Staff indicates that there are no environmental issues or concerns. Exhibit 13, p. 4.

Transportation Planning staff found that "[t]he proposed accessory apartment would generate a minimum number of peak-hour trips," and therefore no traffic study is required to satisfy the Local Area Transportation Review (LATR) and the Policy Area Mobility Review (PAMR) tests. Staff concluded that "approval of the subject special exception petition will not adversely affect the

surrounding roadway system." Exhibit 13, Attachment 9.

C. The Master Plan

Petitioner's property is subject to the 1985 *Gaithersburg Vicinity Master Plan*, as amended in 1990. The Master Pan does not make specific land use and zoning recommendations for the area in which the subject site is located; however, Technical Staff correctly observes that a primary objective of the Master Plan is "Increasing the County's total housing stock, and concurrently providing an appropriate mix of affordable housing." Master Plan, p. 1. The accessory apartment special exception application is consistent with this objective. Exhibit 13, p. 3.

An accessory apartment would maintain the existing scale and type of housing, while providing for additional affordable housing in the area. Technical Staff found the proposed use to be consistent with the *Gaithersburg Vicinity Master Plan*, as does the Hearing Examiner.

D. Neighborhood Opposition

As noted in the first section of this report, there is substantial opposition in the neighborhood to the proposed accessory apartment. Opposition concerns, exacerbated by a great deal of misinformation, included the following beliefs:

1. This will change the neighborhood to a multi-family zone;
2. It will encourage other accessory apartments;
3. There will be excessive traffic;
4. It will create noise;
5. Parking will be a problem;
6. Property values and quality of life will be adversely affected;
7. There may be excessive occupancy of the apartment; and
8. The accessory apartment may be transferred to the next owner without a hearing.

In fact, the evidence in this case does not support any of these concerns. Even if a special exception is granted, it does not constitute a rezoning and does not convert the neighborhood into a multi-family zone. The Zone will remain R-200 (Cluster), as it was before.

The term "special exception" is really a misnomer. It is not an "exception" or variance from the Zoning Ordinance but rather a use conditionally permitted by the Ordinance, if certain conditions are met. The role of the Hearing Examiner in these cases is not to determine whether accessory apartments should be prohibited in the zone, since Zoning Ordinance §59-C-1.531 expressly permits accessory apartments in the R-200 Cluster Zone, as long as it is not "in a townhouse, one-family attached dwelling unit or mobile home."

Rather, the Hearing Examiner's role is to determine whether the specific use proposed (*i.e.*, an accessory apartment at this address) would create adverse conditions that are not inherent in this type of use in general (*i.e.*, accessory apartments anywhere is this zone). If the only adverse effects on the community are those that are inherent in this type of use, Zoning Ordinance §59-G-1.2.1. expressly prohibits denial of the special exception petition. "*Inherent adverse effects alone are not a sufficient basis for denial of a special exception.*"

Even if there are some non-inherent adverse effects, a determination must be made as to whether they are sufficient in the particular case to warrant denial of the petition. Usually, conditions can be imposed on the special exception which will protect the community.

By statute, the addition of an accessory apartment also does not convert the use into a multi-family dwelling. Zoning Ordinance §59-A-2.1 defines a One-family Dwelling Unit:

> "*A dwelling containing not more than one dwelling unit. An accessory apartment, if approved by special exception, or a registered living unit may also be part of a one-family dwelling. A one-family dwelling with either of these subordinate uses is not a two-family dwelling, as defined in this section*." [Emphasis added.]

There is no evidence that this application will encourage other accessory apartments in the neighborhood. In fact, the establishment of an accessory apartment makes additional ones less likely because Zoning Ordinance §59-G-2.00(c)(2) prohibits an "*excessive concentration of such uses*." Currently there are no other accessory apartments in the neighborhood. Exhibit 13, p, 2.

There is no evidence in this record that the legalization of this accessory apartment, which has existed without benefit of a special exception for 10 years (Tr. 10), will create excessive traffic, noise or parking issues; nor is there any competent evidence that property values or quality of life in the neighborhood will be adversely affected by this accessory apartment. Technical Staff indicates that transportation facilities will not be adversely affected (Exhibit 13, p. 3), and the use is not expected to cause excessive noise. Exhibit 13, p. 7.

Technical Staff reports that parking on the property is more than adequate (Exhibit 13, p. 12.), and Mr. Martel of DHCA also confirmed that there is ample parking, in that there are six off-street spaces, including five on the driveway and one in the garage (Tr. 34). Mr. Hoff testified that he and his wife own only one car and the tenant has only one car. Both cars are parked in the driveway, so there will be no on-street parking from the accessory apartment, although there are no on-street parking prohibitions of any kind (Tr. 18-19) and on-street parking was ample when the DHCA Housing Inspectors arrived in three cars. Tr. 42.

As to property values and quality of life, Technical Staff found that the proposed use "will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood."[5] Exhibit 13, p. 7. The worry about excessive occupancy of the apartment is also unfounded because it will be limited to two persons as a condition of the grant, based on the habitable space determined by the Housing Code Inspector.

The final specific concern raised some neighbors was that an owner of the property after the Hoffs would acquire the right to the special exception without going through the hearing process. Board of Appeals Rules 12.1 and 12.2 indicate that a transfer of a special exception is considered to be a Modification under Zoning Ordinance §59-G-1.3(c)(1). Under that statutory provision, a

[5] Mr. Hoff noted in his testimony (Tr. 22-23) that a real estate agent who is a friend of his wrote in to state that apartments typically increase the value of a home by $20,000 to $40,000. She also states that the community benefits because the homeowner is present on the premises rather than having an absentee landlord, home maintenance tends to be better because the money is available to fix up, and the future purchasers are more likely to be owners rather than investors because investors would rather deal with only one tenant. Exhibit 52.

modification may be granted without a hearing under certain conditions, but a copy of the modification resolution must be sent to "all parties entitled to notice at the time of the original filing, and current adjoining and confronting property owners [, and] . . . [i]f a request for a hearing is received [within 15 days of the mailing of the notice], the Board must suspend its decision and conduct a public hearing to consider the action taken." Moreover, ". . .if the matter involves an accessory apartment, the Board must not act until 10 days after the posting of the property with a special exception for accessory apartment sign under Section 59-A-4.43. The sign must remain posted until at least 15 days after the mailing of the Board's resolution." Thus, any neighbor who wishes to challenge the transfer of the accessory apartment special exception will have the opportunity to request a hearing from the Board.

The more general complaint of the neighbors (*i.e.*, that they oppose the grant of any accessory apartment in their neighborhood fearing that such a use would have negative effects) cannot be a basis for denial because the County has established its policy, through Zoning Ordinance §59-C-1.531, that accessory apartments are permitted as special exceptions in the R-200 Cluster Zone.

While it is clear that some of the neighbors do not want an accessory apartment in their neighborhood, the Hearing Examiner must assess this case based on the statutory criteria for approving an accessory apartment special exception, not on whether the idea of having an accessory apartment in the neighborhood is unpopular. The decision on a zoning application "is not a plebiscite." *Rockville Fuel v. Board of Appeals*, 257 Md. 183, 192, 262 A.2d 499, 504 (1970). The Hearing Examiner finds that the points raised by the neighbors do not form a basis for denying the special exception petition before the Hearing Examiner, and that the conditions recommended in Part V of this report will sufficiently protect the neighborhood against adverse effects.

III. SUMMARY OF HEARING

A public hearing was convened as scheduled on June 11, 2010, at 9:30 a.m.; however, because an OZAH calendar published on the website erroneously listed the time of the hearing as 10:30 a.m. on June 11, the Hearing Examiner announced the calendaring error at the beginning of the hearing and recessed until 10:30 a.m. so that no one who saw the erroneous time on the internet would miss any portion of the hearing. The hearing in fact resumed at 10:33 a.m. Tr. 3-5.

At the hearing, testimony was heard from Petitioners Richard and Florence Hoff, who appeared *pro se*, and Kevin Martel of the Department of Housing and Community Affairs. There were no other witnesses.

A. Petitioners' Case

Petitioners Richard and Florence Hoff (Tr. 9-33; 36; 42-46):

Petitioner Richard Hoff executed an affidavit of posting (Exhibit 80) and submitted a copy of Petitioners' deeds to the premises (Exhibits 81(a) and(b)). With some minor qualifications,[6] Petitioners adopted the findings in the Technical Staff Report (Exhibit 13) and in the Housing Code Inspector's Report (Exhibit 55), as Petitioners' own evidence, and agreed to meet all the conditions set forth in both reports. Tr. 9-15.

Petitioners noted that, in addition to the lights mentioned by Technical Staff, there is an existing light on the side of the house on a motion sensor. Tr. 9-10. They do not plan any exterior modifications except as necessary to comply with DHCA directives. Tr. 26.

Mr. Hoff had a concern about two of the conditions proposed by DHCA, Items 4 and 5 on their report. One of the suggestions was to put down pavers or gravel for a walkway to go down the side yard. Because it's a sloped area he is not certain that that's going to prevent slippage any more than what it is right now with grass, but the biggest problem is getting his riding lawn mower

[6] The qualifications were that the Technical Staff report had understated the amount of lighting outside the home, which will remain as it has existed for many years (Tr. 9-10), and Petitioners have some reservations about two of the changes suggested by the Housing Inspector (adding a walkway and moving a dresser). Tr. 12-14.

through the gate and up the side yard because of the slope. Mr. Hoff also noted that the tenant right now has a dresser in front of the escapable window, which the Inspector said should be moved. The dresser is of the same height as the window sill, and when talking with the tenant she finds that it would be a lot easier trying to get out if the dresser remains there. She can move it to the side, but she finds that it also provides additional space where it is. Tr. 12-14.

Mr. Hoff stated that "all the other conditions that he puts in there we're going to take care of." Tr. 14. Upon hearing Mr. Martel testify that the dresser must be moved because the Code requires unobstructed access to the window, Mr. Hoff stated that the tenant would do so. Tr. 36.

Mr. Hoff made the following statement (Tr. 15-16):

> We've had this apartment for, in the lower level of our house for approximately 10 years and are seeking to make it legal. And it is a permissible use in our zoning district by special exception. Our apartment hasn't caused any problems in the neighborhood because it's very unobtrusive and tenants have not caused any problems. Except for those residents that live right around our house, I doubt if most people in the neighborhood know that we even had this apartment. . . . The only negative feature is the [zoning notice] sign in the front yard.

Mr. Hoff indicated that those to whom he has rented are people that find it difficult to obtain an affordable apartment in Montgomery County on their limited income. The present tenants are a mother and her 15-year old daughter, "who are a blessing to have and who have been living here for almost four years." Tr. 16.

Mr. Hoff testified that he and his wife own only one car and the tenant has only one car. Both cars are parked in the driveway, so there will be no on-street parking from the accessory apartment, although there are no on-street parking prohibitions of any kind. Tr. 18-19.

Mr. Hoff criticized Ms. Dimond, who is the main opponent to this petition, for "trying to basically create mass hysteria by blanketing two whole neighborhoods with a bright yellow flyer without giving all the correct facts . . ." Tr. 20. He stated that property values can be driven down when people do not maintain their homes, but Petitioners have lived in Prince Orchard Valley for 38

years and take pride in the way their property looks.

Mr. Hoff noted that a real estate agent who is a friend of his wrote in (Exhibit 52) to state that apartments typically increase the value of a home by $20,000 to $40,000. She also states that the community benefits because the homeowner is present on the premises rather than having an absentee landlord, home maintenance tends to be better because the money is available to fix up, and the future purchasers are more likely to be owners rather than investors because investors would rather deal with only one tenant. Tr. 22-23.

Mr. Hoff identified the photos in Exhibits 9(a) –(d) and 82 (a) –(f).

B. Government Witnesses

DHCA Program Manager II Kevin Martel (Tr. 33-42):

Kevin Martel, DHCA Program Manager II, testified that he was present during the inspection of the premises. Tr. 33. He identified photos that were taken inside and outside the premises (Exhibits 83 and 84(a) – (f)), and confirmed that there is ample parking, in that there are six off-street spaces, including five on the driveway and one in the garage. Tr. 34. He also noted that three county cars parked right in front of the house, so there was more than ample on-street parking. Tr. 42.

Mr. Martel further testified that the dresser must be moved because the Code requires unobstructed access to the window. Tr. 36.

As to the need for a walkway to access the accessory apartment, Mr. Martel testified that there has to be some kind of a walkway, but he was not dictating the specifics of what it should be. Pavers would be fine. Tr. 38-40.

Mr. Martel's final summary was that "it's a nice unit, nice people, nice house." Tr. 42.

IV. FINDINGS AND CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions, and the Petitioners have the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Technical Staff concluded that Petitioners will have satisfied all the requirements to obtain the special exception, if they comply with the recommended conditions (Exhibits 13).

Weighing all the testimony and evidence of record under a "preponderance of the evidence" standard (Code §59-G-1.21(a)), the Hearing Examiner concludes that the instant petition meets the general and specific requirements for the proposed use, as long as Petitioners comply with the conditions set forth in Part V, below.

A. Standard for Evaluation

The standard for evaluation prescribed in Code § 59-G-1.2.1 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. Inherent adverse effects are "the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations." Code § 59-G-1.2.1. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are "physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site." *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with an accessory apartment. Characteristics of the proposed accessory apartment that are consistent with the "necessarily associated" characteristics of accessory apartments will be considered inherent adverse effects, while those characteristics of the proposed use that are not necessarily associated with accessory apartments, or that are created by unusual site conditions, will be considered non-inherent effects. The inherent and non-inherent effects thus identified must then be analyzed to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

The following are inherent characteristics of accessory apartments, as spelled out by Technical Staff (Exhibit 13, p. 5):

> (1) the existence of the apartment as a separate entity from the main living unit but sharing a party wall with the main unit;
> (2) the provision within the apartment of the necessary facilities and spaces and floor area to qualify as a habitable space under the Building Code;
> (3) provision of a separate entrance and walkway and sufficient lighting;
> (4) provision of sufficient parking;
> (5) the existence of an additional household on the site; and
> (6) additional activity from that household, including potential for additional noise from that additional household.

The Hearing Examiner concludes that, in general, an accessory apartment has characteristics similar to a single family residence, with only a modest increase in traffic, parking and noise that would be consistent with a larger family occupying a single family residence. Thus, the inherent effects of an accessory apartment would include the fact that an additional resident (or residents) will be added to the neighborhood, with the concomitant possibility of an additional vehicle or two.

Technical Staff found no unusual site conditions, and stated (Exhibit 13, p. 5):

> . . . staff finds that the size, scale and scope of the requested use are minimal, and that any noise, traffic, and disruption, or any other environmental impacts

associated with the use would be slight. There are no unusual characteristics of the site. Thus, staff finds that there are no non-inherent adverse effects arising from the accessory apartment as detailed in the application.

The Hearing Examiner agrees with Staff. Based on the evidence in this case, and considering size, scale, scope, light, noise, traffic and environment, the Hearing Examiner concludes that there are no non-inherent adverse effects warranting denial of this petition.

B. General Conditions

The general standards for a special exception are found in Zoning Ordinance §59-G-1.21(a). The Technical Staff report, the Housing Code Inspector's report, the exhibits in this case and the testimony at the hearing provide ample evidence that the general standards would be satisfied in this case.

Sec. 59-G-1.21. General conditions.

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

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

Conclusion: An accessory apartment is a permissible special exception in the R-200 Cluster Zone, pursuant to Code § 59-C-1.531.

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

Conclusion: The proposed use complies with the specific standards set forth in § 59-G-2.00 for an accessory apartment, as outlined in Part C, below.

(3) *Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny*

> *special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.*

Conclusion: Petitioners' property is subject to the 1985 *Gaithersburg Vicinity Master Plan*, as amended in 1990. For the reasons set forth in Part II. C. of this report, the Hearing Examiner finds that the planned use, an accessory apartment in a single-family detached home, is not inconsistent with the goals and objectives of the Master Plan.

(4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses. The Board or Hearing Examiner must consider whether the public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the special exception application was submitted.*

Conclusion: Technical Staff concluded that the proposed use will be in harmony with the general character of the surrounding residential neighborhood. As stated by Staff (Exhibit 13, p. 7):

> The use will be in harmony with the general character of the surrounding residential neighborhood. The accessory apartment will be located in the basement of the existing dwelling and will not require construction of an addition to provide additional floor space. There is adequate parking: in the driveway, and garage. Traffic conditions will not be affected adversely. There are no other similar special exception uses located in the neighborhood.

The Hearing Examiner agrees and so finds. Moreover, as found by Staff, "The subject site is already subdivided and will continue to be adequately served by public facilities." Exhibit 13, p. 8.

(5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Technical Staff found the accessory apartment will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood. The Hearing Examiner agrees for the reasons stated in response to the previous provision, and so finds.

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

Conclusion: There is no evidence that the special exception would cause objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site. Given the indoor and residential nature of the use, the accessory apartment would not produce these effects. Exhibit 13, p. 7.

(7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: Technical Staff reports that the addition of this special exception "will not increase the number, intensity or scope of special exception uses sufficiently to affect the area adversely, nor to alter the predominantly single-family residential character of the area. Since no new construction is proposed, the residential character of the neighborhood will not be altered." Exhibit 13, pp. 7-8. Because the proposed use is a residential use by definition, the special exception will not alter the predominantly

residential nature of the area. Therefore, the Hearing Examiner finds that the proposed special exception will not increase the number, scope, or intensity of special exception uses sufficiently to affect the area adversely; nor will it alter the predominantly residential nature of the area.

(8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The evidence supports the conclusion that the proposed use would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site. Exhibit 13, p. 8.

(9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

Conclusion: Technical Staff indicates that "The subject site is already subdivided and will continue to be adequately served by public facilities." Exhibit 13, p. 8.

(A) *If the special exception use requires approval of a preliminary plan of subdivision, the Planning Board must determine the adequacy of public facilities in its subdivision review. In that case, approval of a preliminary plan of subdivision must be a condition of the special exception.*

(B) *If the special exception does not require approval of a preliminary plan of subdivision, the Board of Appeals must determine the adequacy of public facilities when it considers the special exception application. The Board must consider whether the available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the special exception application was submitted.*

Conclusion: The special exception sought in this case would not require approval of a preliminary plan of subdivision. Therefore, the Board must consider whether the available public facilities and services will be adequate to serve the proposed development under the

applicable Growth Policy standards. These standards include Local Area Transportation Review (LATR) and Policy Area Mobility Review (PAMR). As indicated in Part II. B. of this report, Technical Staff did do such a review, and concluded that the proposed accessory apartment use would add "a minimum number of peak-hour trips" during each of the weekday peak-hour periods. Exhibit 13, Attachment 9. Since the existing house, combined with the proposed accessory apartment, would generate fewer than 30 total trips in the weekday morning and evening peak hours, the requirements of the LATR are satisfied without a traffic study. Staff indicated that PAMR is also satisfied. Therefore, the Transportation Staff concluded, as does the Hearing Examiner, that the instant petition meets all the applicable Growth Policy standards.

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

Conclusion: Based on the evidence of record, especially the Technical Staff's conclusion that "the application satisfies transportation related requirements and will not reduce the safety of vehicular or pedestrian traffic," the Hearing Examiner so finds. Exhibit 13, p. 8.

C. Specific Standards

The testimony and the exhibits of record, especially the Technical Staff Report (Exhibit 13), provide sufficient evidence that the specific standards required by Section 59-G-2.00 are satisfied in this case, as described below.

Sec. 59-G-2.00. Accessory apartment.

A special exception may be granted for an accessory apartment on the same lot as an existing one-family detached dwelling, subject to the following standards and requirements:

(a) ***Dwelling unit requirements****:*

(1) Only one accessory apartment may be created on the same lot as an existing one-family detached dwelling.

Conclusion: Only one accessory apartment is proposed.

(2) The accessory apartment must have at least one party wall in common with the main dwelling on a lot of one acre (43,560 square feet) or less. On a lot of more than one acre, an accessory apartment may be added to an existing one-family detached dwelling, or may be created through conversion of a separate accessory structure already existing on the same lot as the main dwelling on December 2, 1983. An accessory apartment may be permitted in a separate accessory structure built after December 2, 1983, provided:

(i) The lot is 2 acres or more in size; and
(ii) The apartment will house a care-giver found by the Board to be needed to provide assistance to an elderly, ill or handicapped relative of the owner-occupant.

Conclusion: The apartment is located in the basement of an existing dwelling, thus sharing at least one party wall in common with the main dwelling.

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

Conclusion: No addition or extension will be constructed.

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

Conclusion: The house was built in 1971. It therefore meets the "5 year old" requirement.

(5) The accessory apartment must not be located on a lot:

(i) That is occupied by a family of unrelated persons; or
(ii) Where any of the following otherwise allowed residential uses exist: guest room for rent, boardinghouse or a registered living unit; or
(iii) That contains any rental residential use other than an accessory dwelling in an agricultural zone.

Conclusion: There is only one accessory apartment on the premises, and Petitioners live in the main unit of the house. Conditions have been recommended specifying that Petitioners may not have a guest room for rent, a boardinghouse or a registered living unit, in addition to the accessory apartment; that they must not receive compensation for the occupancy of more than one dwelling unit on the property; and that they must not have unrelated persons living on the premises in addition to the tenants.

(6) Any separate entrance must be located so that the appearance of a single-family dwelling is preserved.

Conclusion: A separate entrance to the accessory apartment is located on the rear of the house. Access to this entrance is via a new walkway made of pavers. Technical Staff reports that the appearance of a single-family dwelling unit has been preserved.

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

Conclusion: No external modifications or improvements are proposed, except the walkway required by DHCA.

(8) The accessory apartment must have the same street address (house number) as the main dwelling.

Conclusion: The accessory apartment will have the same address as the main dwelling.

(9) The accessory apartment must be subordinate to the main dwelling. The floor area of the accessory apartment is limited to a maximum of 1,200 square feet.

Conclusion: The accessory apartment will be subordinate to the main dwelling, as it will occupy approximately 375 square feet of space (of which 265.2 square feet of space is habitable), in a dwelling which has about 1,272 square feet of space in the main unit. It also is well within the 1,200 square foot cap.

(b) ***Ownership Requirements***

(1) *The owner of the lot on which the accessory apartment is located must occupy one of the dwelling units, except for bona fide temporary absences not exceeding 6 months in any 12-month period. The period of temporary absence may be increased by the Board upon a finding that a hardship would otherwise result.*

Conclusion: Petitioners occupy the main unit of the home. Exhibit 13, p. 11.

(2) *Except in the case of an accessory apartment that exists at the time of the acquisition of the home by the Petitioner, one year must have elapsed between the date when the owner purchased the property (settlement date) and the date when the special exception becomes effective. The Board may waive this requirement upon a finding that a hardship would otherwise result.*

Conclusion: Petitioners acquired the property in 1971. Thus, more than one year has elapsed.

(3) *Under no circumstances, is the owner allowed to receive compensation for the occupancy of more than one dwelling unit.*

Conclusion: A condition to this effect is recommended in Part V of this report, as discussed in answer to subsection (a)(5) above. It appears from the record that Petitioners are receiving compensation for only one dwelling unit at this time.

(4) *For purposes of this section owner means an individual who owns, or whose parent or child owns, a substantial equitable interest in the property as determined by the Board.*

Conclusion: The Petitioners are the owners of the property.

(5) The restrictions under (1) and (3) above do not apply if the accessory apartment is occupied by an elderly person who has been a continuous tenant of the accessory apartment for at least 20 years.

Conclusion: Not applicable

(c) Land Use Requirements

(1) The minimum lot size must be 6,000 square feet, except where the minimum lot size of the zone is larger. A property consisting of more than one record lot, including a fraction of a lot, is to be treated as one lot if it contains a single one-family detached dwelling lawfully

constructed prior to October, 1967. All other development standards of the zone must also apply, including setbacks, lot width, lot coverage, building height and the standards for an accessory building in the case of conversion of such a building.

Conclusion: The subject lot is 10,400 square feet in area, well over the 6,000 square foot minimum. The following chart from the Technical Staff Report (Exhibit 13, p. 4) demonstrates compliance with all development standards for the R-200 Cluster Zone, as stated by Staff:

Development Standard	*Required*	*Provided*
Minimum Lot Area (square feet)	10,000	10,400
Minimum lot width (feet) at front building line for 1-family detached dwelling	N/A	80 feet
At existing street line	25	80 feet
Minimum street setback (feet)	25	33 feet
Minimum Setback from adjoining lot (feet)		
--One side	10	12
--Sum of both sides	25	27
--Rear	40	Approx. 65
Maximum Building Height	50	One-story
Maximum Coverage	25%	14%

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

Conclusion: According to the Technical Staff report (Exhibit 13, p. 2) and a memorandum from DHCA (Exhibit 55, Item #3), there are no other approved accessory apartments currently in the defined neighborhood. The proposed accessory apartment, if granted, therefore will not result in an excessive concentration of similar uses in the general neighborhood.

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

(i) More spaces are required to supplement on-street parking; or

(ii) Adequate on-street parking permits fewer off-street spaces.

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

Conclusion: As previously discussed there are six off-street parking spaces available on the site (five in the driveway and one in the garage). Thus, there is more than adequate space for parking.

***(d) Data to accompany application**. The Board may waive for good cause shown any of the data required to accompany an application for special exception upon written request of the applicant. The Board may accept plans or drawings prepared by the applicant so long as they are substantially to scale and provide information the Board determines is adequate.*

Conclusion: Not applicable.

***(e)** Any accessory apartment approved by the Board between December 2, 1983, and October 30, 1989, in accordance with the standards in effect during that period, is a conforming use and it may be continued as long as the accessory apartment complies with the conditions imposed by the Board and all provisions of Division 59-G-1.*

Conclusion: Not applicable.

(f) ***Notice by sign required for continuation of use by new property owner****. If a new property owner applies to continue an existing accessory apartment as a minor modification, a sign giving notice of the application must be erected and maintained as required by Sec. 59-G-1.3(c).*

Conclusion: Not applicable.

D. Additional Applicable Standards

Not only must an accessory apartment comply with the zoning requirements as set forth in 59-G, it must also be approved for habitation by the Department of Housing and Community Affairs. As discussed in Part II. B. of this report, the Housing Code Inspector's memorandum (Exhibit 55) notes the repairs that are needed, and that occupation of the accessory apartment must be limited to no more than two persons. As mentioned above, Petitioners have agreed to meet all conditions. Those conditions are reflected in the following recommendations.

V. RECOMMENDATION

Based on the foregoing analysis, I recommend that Petition No. S-2765 for a special exception to permit an accessory apartment located at 12212 Bradbury Drive, Gaithersburg, Maryland, be GRANTED, with the following conditions:

1. The Petitioners shall be bound by all of their testimony, representations and exhibits of record identified in this report;

2. Petitioners must comply with DHCA's determination of the maximum permitted occupancy for the accessory apartment (*i.e.*, the accessory apartment may be occupied by no more than two (2) persons, and the other DHCA directives needed to ensure that the accessory apartment is maintained up to Code, as listed in Exhibit 55:

a. The efficiency unit consists of 265.2 square feet, which would allow for 2 occupants.

b. A walkway from the front yard leading down the hill to the front door of the accessory apartment needs to be installed. Pavers, slate or gravel walkway is acceptable. Must be installed in a professional, workmanlike manner.

c. Dresser in front of egress window needs to be removed. Direct access to egress window is required at all times (remove potted plants, etc. from window sill).

d. A single cylinder deadbolt lock must be installed to the front door (thumb latch type lock).

e. Holes in shower stall need to be repaired.

f. All electrical circuits for the entire facility must be properly labeled.

g. A door must be installed to access water heater.

h. A pressure relief valve must be installed to the water heater.

3. Petitioners must occupy one of the dwelling units on the lot on which the accessory apartment is located;

4. Petitioners must not have a guest room for rent, a boardinghouse or a registered living unit, in addition to the accessory apartment, and they must not receive compensation for the occupancy of more than one dwelling unit;

5. The accessory apartment must not be located on a lot that is occupied by a family of unrelated persons;

6. Petitioners must make off-street parking spaces available for all vehicles they permit their accessory apartment tenants to house on the premises; and

7. Petitioners must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioners shall at all times ensure that the special exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: July 30, 2010

Respectfully submitted,

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Martin L. Grossman
Hearing Examiner