

BOARD OF APPEALS
for
MONTGOMERY COUNTY
Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
(240) 777-6600

Case No. S-2579

PETITION OF LORNA RAMOS CALABON

OPINION OF THE BOARD

(Public Hearing Date: July 16, 2003)

(Effective Date of Opinion: September 11, 2003)

Case No. S-2597 is an application for a special exception pursuant to Section 59-G-2.00 (Accessory Apartment) of the Zoning Ordinance to permit an existing accessory apartment.

The Board of Appeals held a public hearing on the application on July 16, 2003. Lorna Ramos Calabon appeared in support of the application. Marsha Kadesch, Maryland National Capital Park and Planning Commission (MNCPPC) technical staff testified. Theresa Pelicano, Housing Code Inspector, and Robert Dejter, Housing Code Field Supervisor, Department of Housing and Community Affairs (DHCA) also testified.

The Board received no testimony or correspondence in opposition to the application.

Decision of the Board: Special Exception **granted**, subject to
the conditions enumerated below.

EVIDENCE PRESENTED

1. Lorna Calabon requests approval of a special exception for an existing accessory apartment in the basement of her home. The subject property is Lot 27, Block B, Connecticut Avenue Hills Subdivision, 3941 Lantern Drive, Silver Spring, Maryland, 20902 in the R-60 Zone.
2. Theresa Pelicano, DHCA Housing Code Inspector inspected the accessory apartment and submitted a report into the record. [Exhibit No. 9]. The report notes various corrections needed to make the accessory apartment compliant with the requirements of the Housing Code. In addition, Ms. Pelicano

states that, based upon a habitable area of 433 square feet, the accessory apartment is suitable for occupancy by no more than two unrelated persons or a family of not more than three. Ms. Pelicano submitted photographs that depict the availability of on-street parking at the subject property [Exhibit No. 20]. She stated that the accessory apartment has separate kitchen and bath facilities, but that there may not be a door separating the apartment from the main dwelling unit. Robert Dejter submitted a floor plan of the accessory apartment from DHCA [Exhibit No. 19].

3. Marsha Kadesch, MNCPPC technical staff reviewed the application and recommends approval. [Exhibit No. 12]. Staff finds the application consistent with the land use objectives of the Kensington-Wheaton Master Plan. Staff finds that the single-family residential appearance of the house is preserved, and that on-street parking is adequate to allow approval of the accessory apartment with one off-street parking space. Staff finds that the accessory apartment is subordinate to the main dwelling and otherwise also meets all development standards of the R-60 Zone and for the approval of accessory apartments. Staff finds that there are no other approved accessory apartments in the general neighborhood, and that the accessory apartment will not therefore, alter the residential nature of the area. Staff finds that approval of the accessory apartment will have no adverse effect on the neighborhood road network. In a supplemental report [Exhibit No.13] staff notes that the accessory apartment was created after Ms. Calabon became the owner of the home. The application was filed April 11, 2003, at which time Ms. Calabon stated she had owned the home for eight months. To ensure compliance with Section 59-G-2.00(b)(5), staff recommends a condition of approval that the special exception not become effective until one year from the date of settlement.

4. The house was built in 1956. [Exhibit No. 3a].

5. The lot size is 6469 square feet, and the habitable area of the accessory apartment is 433 square feet. [Exhibit No. 9].

6. The accessory apartment is located in the basement of the house and has the same entrance and the same address as the house. [Exhibit No. 3a].

7. The house is served by public facilities. [Exhibit No. 3a].

8. Ms. Calabon stated that she is willing to correct all of the deficiencies noted in the DHCA inspection report, and that she will receive compensation for only one dwelling unit.

FINDINGS OF THE BOARD

GENERAL STANDARDS

Sec. 59-G-1.2. Conditions for granting a special exception.

59-G-1.2.1. Standard for evaluation. A special exception must not be granted absent the findings required by this Article. In making these findings, the Board of Appeals, Hearing Examiner or District Council, as the case may be, must consider the inherent and non-inherent adverse effects of the use on nearby properties and the general neighborhood at the proposed location, irrespective of adverse effects the use might have if established elsewhere in the zone. Inherent adverse effects are the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations. 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. Non-inherent adverse effects, alone or in conjunction with the inherent effects, are a sufficient basis to deny a special exception.

The physical and operational characteristics necessarily associated with an accessory apartment include: the existence of the apartment as a separate entity from the main living unit, but sharing a party wall with the main unit; the provision within the apartment of the necessary facilities and spaces and floor area to quality as a habitable space under the Building Code; provision of a separate entrance and walkway, and sufficient lighting; additional activity from that household, including more use of the outdoor space and more pedestrian and automobile traffic and parking activity; and the potential for additional noise from the additional household.

The accessory apartment in the instant application is subordinate to the main dwelling, shares the entrance with the house, maintaining the single family appearance of the house, and has one off-street parking space, together with adequate on-street parking.

The Board finds that none of the physical or operational characteristics from the proposed accessory apartment exceed what would be expected with the use. The Board finds that there will be no non-inherent adverse effects from this proposed accessory apartment.

59-G-1.21. General Conditions.

(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.

Accessory apartments are permitted by special exception in the R-60 Zone.

- (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.*

As discussed below, the accessory apartment, as conditioned by the Board, meets these standards.

- (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 an approved and adopted 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.*

The Board adopts MNCPPC staff's finding that the apartment is consistent with the land-use objectives of the Kensington-Wheaton 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.*

No new structures are proposed. With 433 square feet of habitable area, the accessory apartment will house no more than three individuals, and will generate relatively low levels of activity. One off-street space and adequate on street parking spaces are available. The single-family residential appearance of the home will be preserved. Thus, the accessory apartment will be in harmony with the general character of the neighborhood.

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

Because of its low visual and operational impacts, the Board finds that the accessory apartment will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site.

- (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.*

No activities associated with the accessory apartment are anticipated to produce any of the listed, objectionable effects.

- (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 recommendation of a master or sector plan do not alter the nature of an area.*

The Board adopts MNCPPC technical staff's finding, based upon the absence of other approved accessory apartments, that the requested accessory apartment will not create an over-concentration of special exception uses and will not 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.*

No activity associated with the accessory apartment is anticipated to have these adverse effects.

- (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.*

- (i) *If the special exception use requires approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of the special exception.*

The subject property is served by adequate public facilities.

- (ii) *With regard to findings relating to public roads, the Board, the Hearing Examiner, or the District Council, as the case may be, must further determine that the proposal will have no detrimental effect on the safety of vehicular or pedestrian traffic.*

The Board adopts MNCPPC staff's finding that the accessory apartment will have no adverse effect on local pedestrian or vehicular safety.

SPECIFIC STANDARDS

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.*

There is only one accessory apartment at the subject property.

- (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.*

The accessory apartment, located in the basement of the subject house, shares at least one party wall in common with the house.

- (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.

No addition or extension is proposed.

(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.

The house was built in 1956 and is therefore 47 years old.

(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.*

None of these conditions is present at the subject property.

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

The apartment shares an entrance with the house, thus preserving its single-family appearance.

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

No external modifications are proposed.

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

The accessory apartment has the same address as the house.

(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.

The apartment, occupying part of the basement, and with 433 square feet of habitable area, is subordinate to the main dwelling, and measures less than 1200 square feet.

(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.*

Ms. Calabon resides in the main dwelling unit.

(2) *Except in the case of an accessory apartment that exists at the time of the acquisition of the home by the applicant, 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.*

Ms. Calabon applied for the accessory apartment in April, 2003, stating that she had owned the house for eight months. The Board will condition approval of the special exception upon its effective date being at least one year from the date of settlement.

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

Ms. Calabon affirmed at the public hearing that she will comply with this requirement.

(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.*

Ms. Calbon owns the subject 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.*

Not applicalble

(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.

The lot size is 6469 square feet.

- (2) *An accessory apartment must not, when considered in combination with other existing or approved accessory apartments, result in an excessive concentration of similar uses in the general neighborhood of the proposed use (see also Section 59-G-1.21(a)(6) which concerns excessive concentration of special exceptions in general).*

Based upon the absence of other approved accessory apartments in the general neighborhood, the Board adopts staff's finding that the requested apartment will not result in an over-concentration of such uses.

- (3) *There shall be adequate water supply and sewage disposal systems to serve the occupants of both the accessory apartment and the main dwelling.*

The subject property is served by adequate facilities.

- (4) *Adequate parking shall be provided. There must be a minimum 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 shall not be located in the yard between the front of the house and the street right-of-way line.

One off-street space is available. The Board finds persuasive both MNCPPC and DHCA staffs' observations that adequate on-street parking is available to allow approval of the accessory apartment with one off-street space.

- (5) *Accessory apartments shall not be detrimental to the use and peaceful enjoyment of surrounding properties or the general neighborhood, and shall cause no objectionable noise, traffic or other adverse impacts.*

Because of its low visual and operational impacts, the Board finds that the accessory apartment will not be detrimental to the use, peaceful

enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site.

Therefore, based upon the foregoing, the Board grants the special exception, subject to the following conditions:

1. Petitioner shall be bound by her testimony and exhibits of record, including but not limited to Exhibit Nos. 3, 5 and 6, to the extent that such evidence and representations are identified in the Board's opinion granting the special exception.

2. Petitioner shall make all of the corrections noted in the DHCA inspection report of June 25, 2003, and shall ensure a structural separation between the main dwelling unit and the accessory apartment prior to the special exception becoming effective.

3. Pursuant to the provisions of the Montgomery County Housing Code, and based upon its 433 square feet of habitable area, occupancy of the accessory apartment shall be limited to two unrelated persons or a family of three.

4. The special exception will not be effective until at least one-year has elapsed from the date Ms. Calabon purchased the subject property.

On a motion by Allison Ishihara Fultz, seconded by Angelo M. Caputo, with Donna L. Barron and Donald H. Spence, Jr., Chairman in agreement and Louise L. Mayer, necessarily absent:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland, that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled case.

Donald H. Spence, Jr.
Chairman, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 11TH day of September, 2003.

Katherine Freeman
Executive Secretary to the Board

Note:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure.