

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
(240) 777-6600

www.montgomerycountymd.gov/content/council/boa/board.asp

Case No. S-2627

PETITION OF EDEN CRANE

OPINION OF THE BOARD

(Opinion Adopted April 20, 2005)
(Effective Date of Opinion: May 17, 2005)

Case No. S-2627 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 Hearing Examiner for Montgomery County held a hearing on the application on March 4, 2005, closed the record in the case on April 1, 2005, and on April 4, 2005 issued a Report and Recommendation for approval of the special exception.

The subject property is Lot 2, Block T, Rock Creek Forest Subdivision, located at 8600 Grubb Road, Chevy Chase, Maryland, 20815, in the R-60 Zone.

Decision of the Board: Special Exception **Granted**, Subject
To Conditions Enumerated Below.

The Board of Appeals considered the Hearing Examiner's Report and Recommendation at its Worksession on April 20, 2005. After careful consideration and review of the record in the case, the Board adopts the Hearing Examiner's Report and Recommendation and grants the special exception subject to the following conditions:

1. The Petitioner shall be bound by all of her testimony and exhibits of record, and by the testimony of her witnesses and representations of counsel to the extent that such testimony and evidence are identified in the Hearing Examiner's report and in the opinion of the Board.

2. The Petitioner will take the following steps to comply with the items set forth in the Memorandum of Stephen M. Morris, Housing Code Inspector, Division of Housing and Code Enforcement (Exhibit 19):

- a. Based on the square footage, no more than two unrelated persons, or a family of six may reside in the accessory apartment.
 - b. This unit may not be occupied until the Department of Housing and Community Affairs conducts its final inspection for code compliance and any code violations are corrected.
3. Petitioner must occupy one of the dwelling units on the lot on which the accessory apartment is located;
4. Petitioner must not receive compensation for the occupancy of more than one dwelling unit; and
5. Petitioner must include, in her lease agreement with the accessory apartment tenant, a provision that prohibits the tenant from parking more than one vehicle in the neighborhood, whether it is on or off the street.

On a motion by Louise L. Mayer, seconded by Donna L. Barron, with Angelo M. Caputo, Wendell M. Holloway and Allison Ishihara Fultz, Chair, in agreement, the Board adopted the following Resolution:

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 petition.

Allison Ishihara Fultz
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 17th day of May, 2005.

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.

See Section 59-A-4.53 of the Zoning Ordinance regarding the twenty-four months' period within which the special exception granted by the Board must be exercised.

**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:	*	
EDEN CRANE	*	
Petitioner	*	
Eden Crane	*	
For the Petition	*	
	*	
<u>Garland Stillwell, Esquire</u>	*	
Attorney for Petitioner	*	
*****	*	Board of Appeals Case
No. S-2627		
Dan McHugh	*	(OZAH Referral No. 05-18)
	*	
Department of Housing and Community Affairs	*	*

Paul Vicenzi	*	
Opposed to the Petition	*	

Before: Martin L. Grossman, Hearing Examiner

HEARING EXAMINER’S REPORT AND RECOMMENDATION

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I. STATEMENT OF THE CASE

Petition No. S-2627, filed on October 22, 2004, seeks a special exception, pursuant to §59-G-2.00 of the Zoning Ordinance, to permit an accessory apartment use in a single-family residential structure located at 8600 Grubb Road, Chevy Chase, which is Lot 2, Block T in the Rock Creek Forest Subdivision. It is zoned R-60, and the Tax Account Number is 01158311.

On October 29, 2004, the Board of Appeals issued a notice that a hearing in this matter would be held before the Office of Zoning and Administrative Hearings on March 4, 2005, at 9:30 a.m., in the Second Floor Hearing Room of the Stella B. Werner Council Office Building (Exhibit 11).

The Department of Housing and Community Affairs inspected the property on January 26, 2005, and reported the following issues in a memorandum dated January 27, 2005 (Exhibit 12):

The accessory apartment will be located in the cellar of the house. The issues regarding accessory apartment standards are as follows:

1. The petitioner has initiated construction of the cellar of the house into habitable living space, and plans to convert the area to an accessory apartment subsequent to approval of the special exception application. All required building, electrical and plumbing for an accessory apartment must be obtained and finalized prior to occupancy of the unit.
2. Total habitable area of the accessory apartment must be less than the total habitable area of the main structure.
3. Total habitable area of the accessory apartment must be less than 1200 square feet.
4. Occupancy of the unit is limited to two unrelated persons or to a family based on total habitable area of the unit. Every dwelling unit must contain at least 150 square feet of habitable floor area for the first occupant and at least 100 additional square feet of habitable floor area for each additional occupant.
5. There is only one off street parking space.

Technical Staff at the Maryland-National Capital Parks and Planning Commission (M-NCPPC), in a report issued February 23, 2005, recommended approval of the special exception, with conditions. (Exhibit 13).¹

A public hearing was convened as scheduled on March 4, 2005, and Petitioner Eden Crane appeared with her attorney, Garland Stillwell, Esquire. Also attending were Dan McHugh of the Department of Housing and Community Affairs, and Paul Vicenzi, a neighbor,

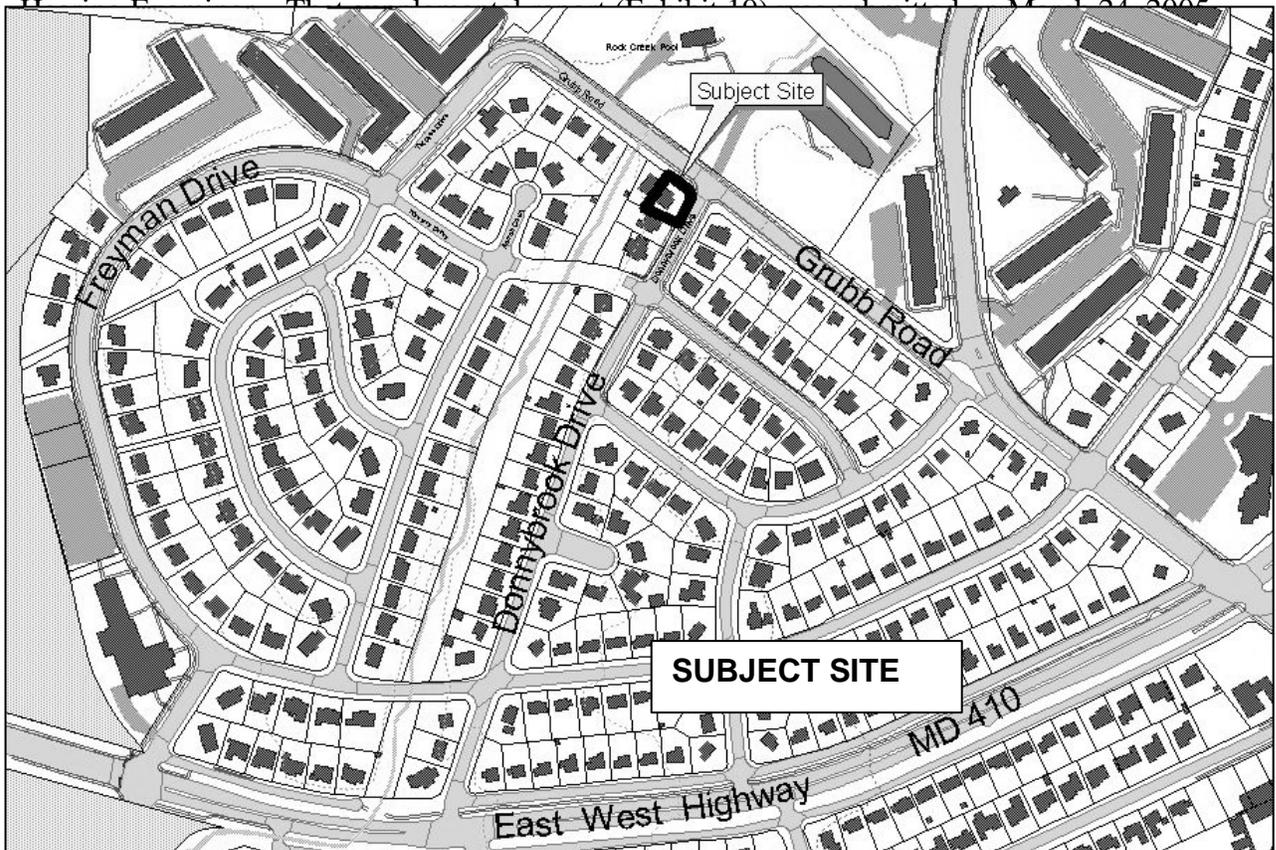
¹ The Technical Staff report is frequently quoted and paraphrased herein.

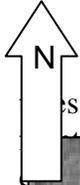
Front Elevation of 8600 Grubb Road



all of whom testified. Petitioner executed an affidavit of posting (Exhibit 14), and produced several photographs (Exhibits 9 (a) and (b)). Petitioner Eden Crane also agreed to meet all the conditions set forth in the Technical Staff Report (Exhibit 13) Tr. 6-7. The only opposition at the hearing came from Mr. Vicenzi's testimony and his letter, Exhibit 15.

The record was held open till March 18, 2005 to allow time for Petitioner to file a copy of the deed (Exhibit 18(b)) and a more descriptive floor plan for the accessory apartment (Exhibit 18(d)). Two letters of opposition were also received during that period (Exhibits 16 and 17), and a supplemental report from the Housing Code Inspector was requested by the





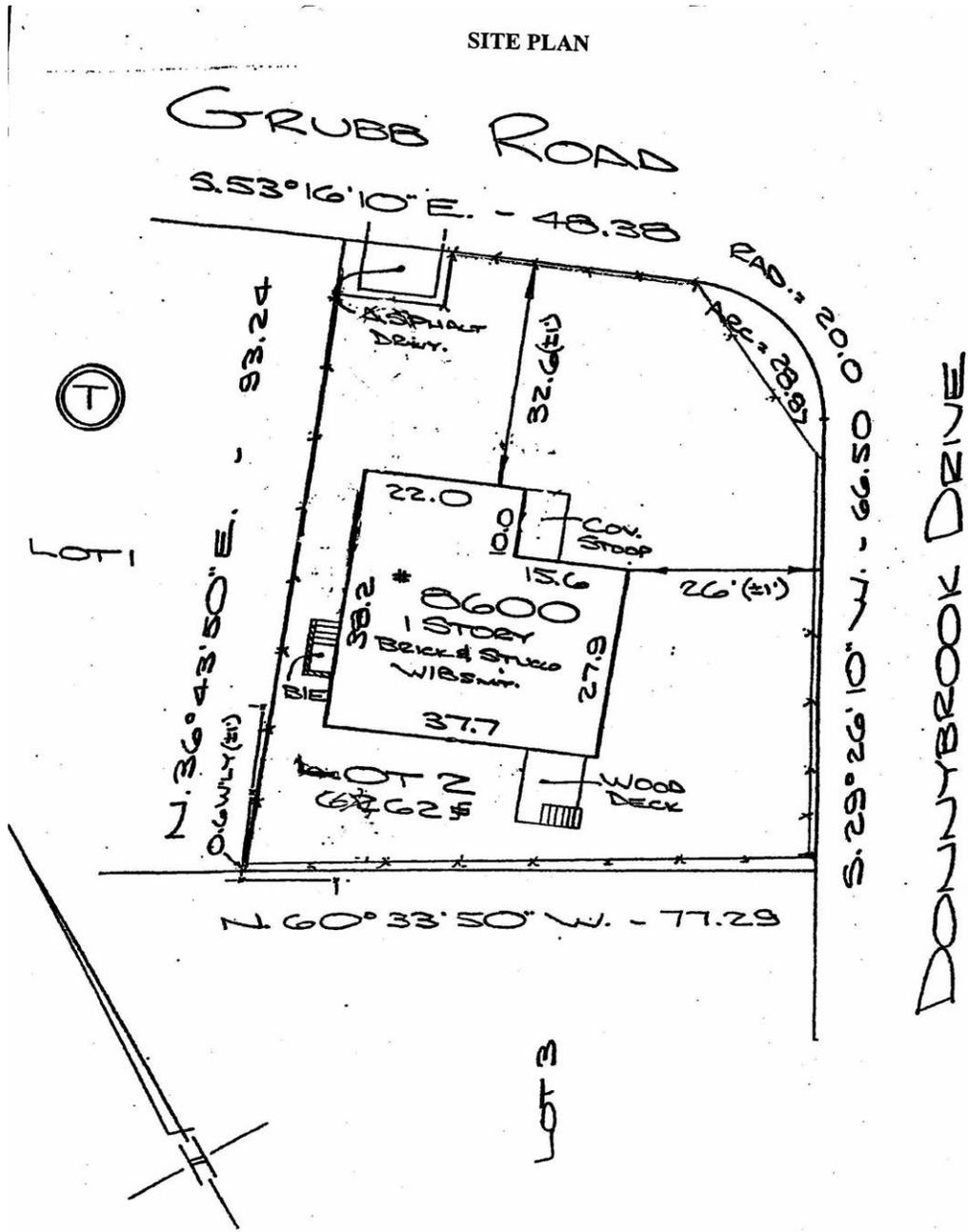
Technical Staff notes that the property has a sloping terrain, shrubbery and small trees. Existing improvements on the site include the main dwelling, driveway, covered



**Accessory
Apartment
Entrance
(West Side)**

Subject Site

SITE PLAN



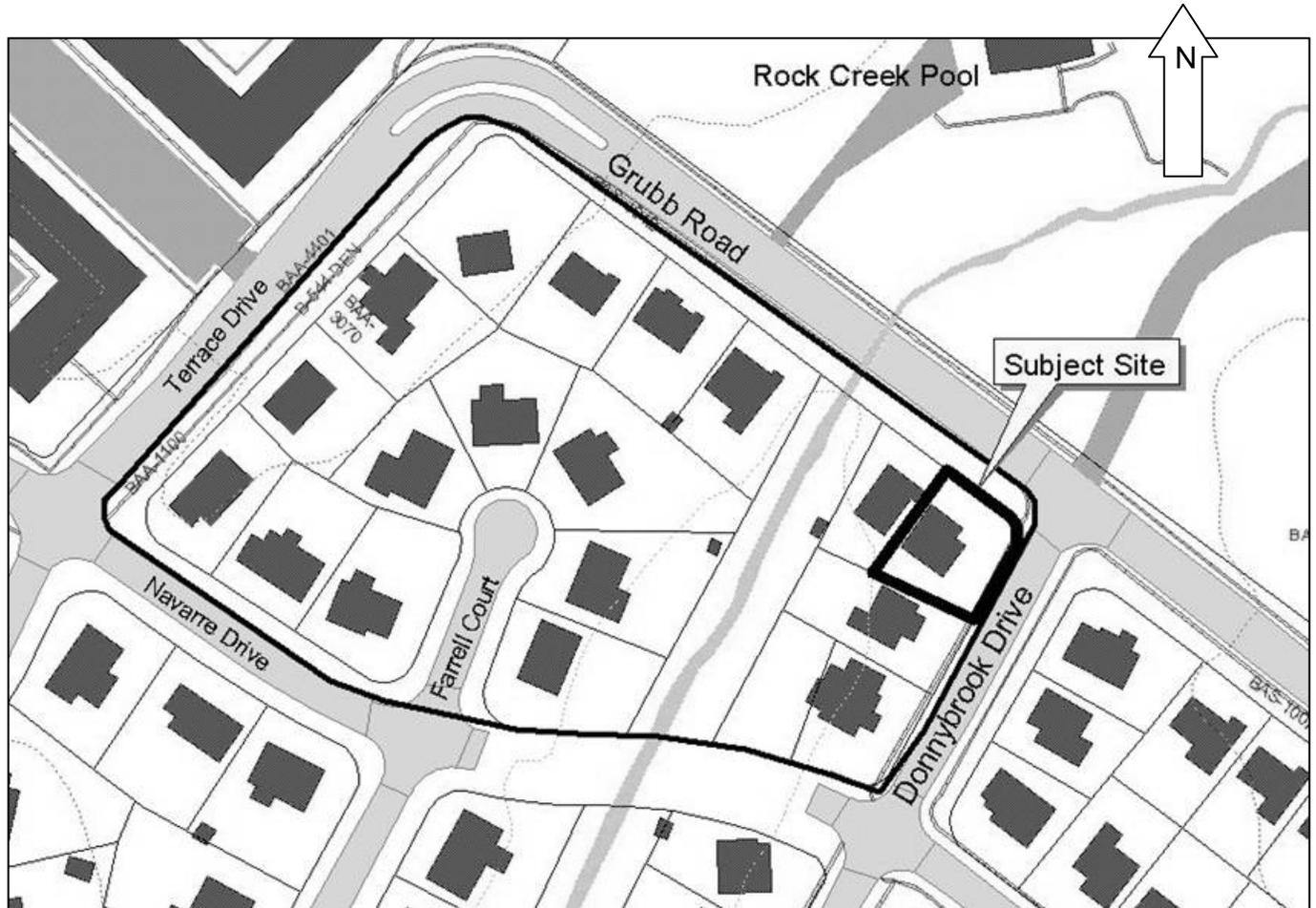
ADDRESS: 8600 GRUBB ROAD

Capitol Surveys, Inc.
10762 Rhode Island Avenue

NOTES: Plat is of benefit to a consumer only insofar as it is a lender or a title insurance company or its agent in connection with a plated transfer, financing or re-financing; the plat is not to be used for the establishment or location of fences, easements, buildings

Exhibit No. 4

The general neighborhood and the adjacent land uses are predominantly single-family detached homes, as shown below in the Neighborhood Area Map from the Technical Staff report.



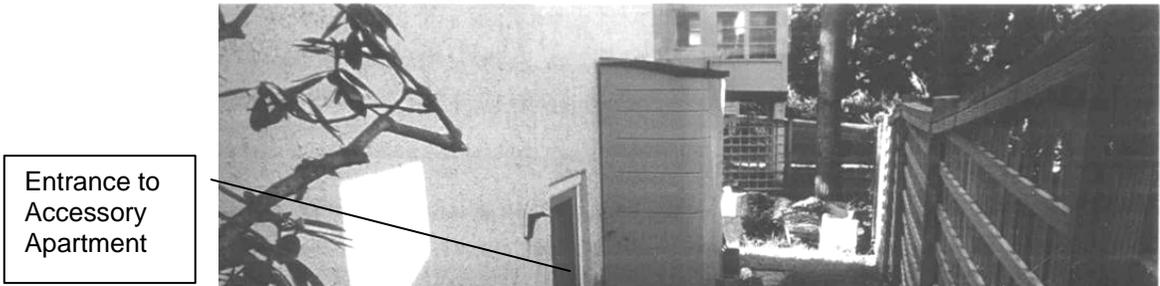
8610 Grubb Road	Lot 12, Block 7	(BAS-1012)	1985	Accessory Apartment
8514 Grubb Road	Lot 21, Block P	(BAS-1007)	1985	Accessory Apartment
8512 Grubb Road	Lot 1, Block P	(SE 278)	1978	Home Occupation (milliner)
2703 Navarre	Lot 10, Block P	(SE-94)	1963	Catering Service
8619 Grubb Road	N231, Parcel "A" Rock Creek	(BAS 404)	1975	Tennis Courts and multipurpose court

B. The Proposed Use

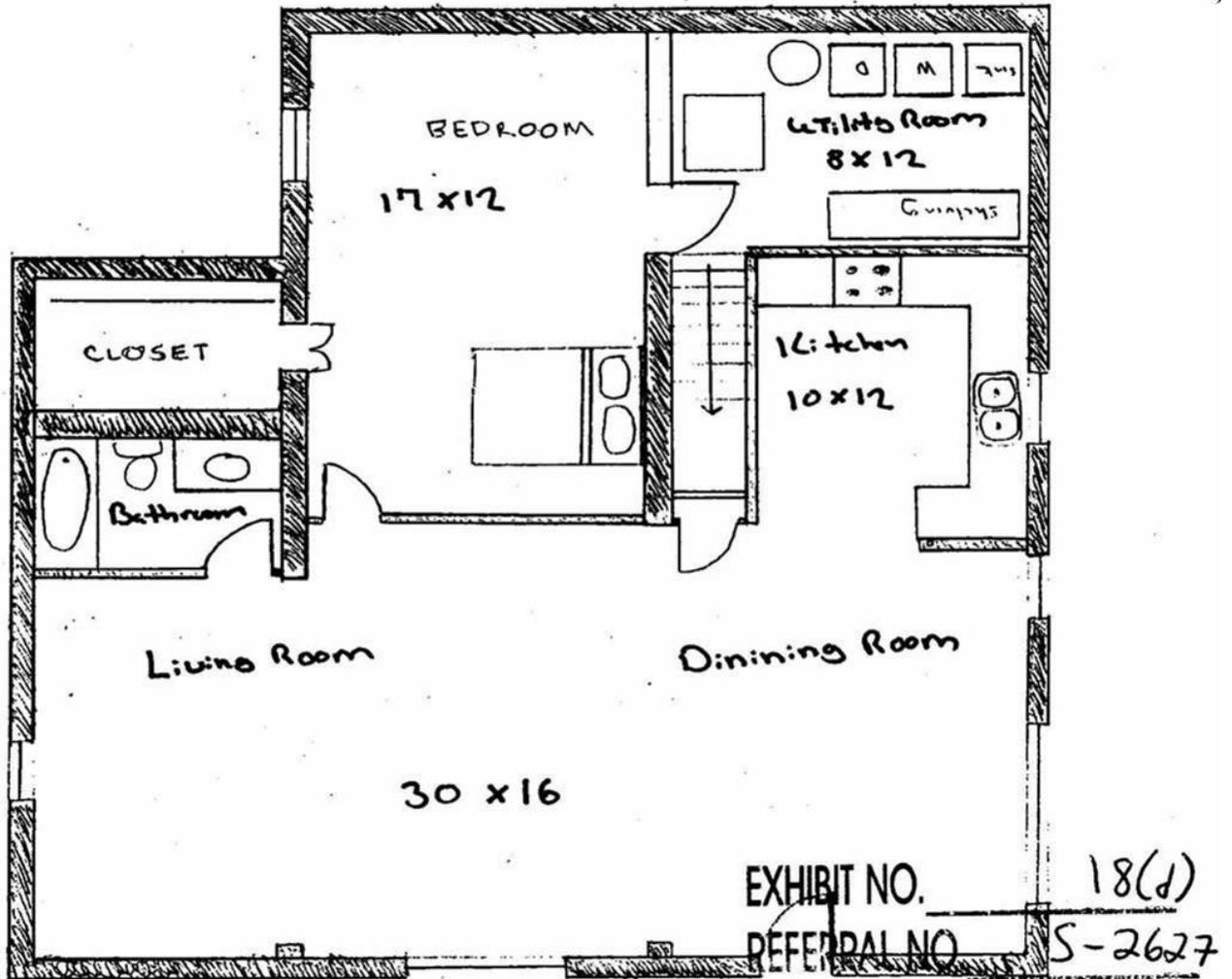
The proposed accessory apartment will be located in the basement of an existing single-family residence. There is an existing entrance on the west side of the house which will serve as the entrance for the accessory apartment. The entrance is screened from the adjacent property's view by a 6 ft. high fence, as can be seen in the following picture from Exhibit 9(a):

Petitioner is in the process of constructing the apartment. According to her statement in Exhibit 3, Petitioner plans for the apartment to be 920 square feet, although she testified that it would be about 1,000 square feet. Tr. 12. The Housing Code Inspector estimated the habitable space as 700 square feet, and

Basement Entrance from West Side
Yard to accessory apartment.



PROPOSED



that it could accommodate a family of six, or two unrelated individuals. Exhibit 19. The proposed apartment area will include a kitchen, a utility room for laundry, a bathroom, a bedroom and a combined Living Room/Dining Room area. These features can be seen on the following Floor Plan (Exhibit 18(d)):

There is an existing driveway/parking pad on the property with ingress and egress from Grubb Road (See aerial photo on page 5 of this report). It can accommodate only one car, and therefore parking is an issue in this case which is discussed on page 13 of this report. Parking is also available along Donnybrook Drive and Grubb Road, and even the neighbor who opposes this petition, Paul Vicenzi, admitted during the hearing that parking is only a problem on Grubb Road when there is a swim meet across Grubb Road, and he is not aware of it being a problem on Donnybrook Drive. Tr. 46-47.

There are no environmental issues in this case. The proposal does not involve any new construction outside the house, and there are no streams, wetlands or other environmentally sensitive areas on the property.

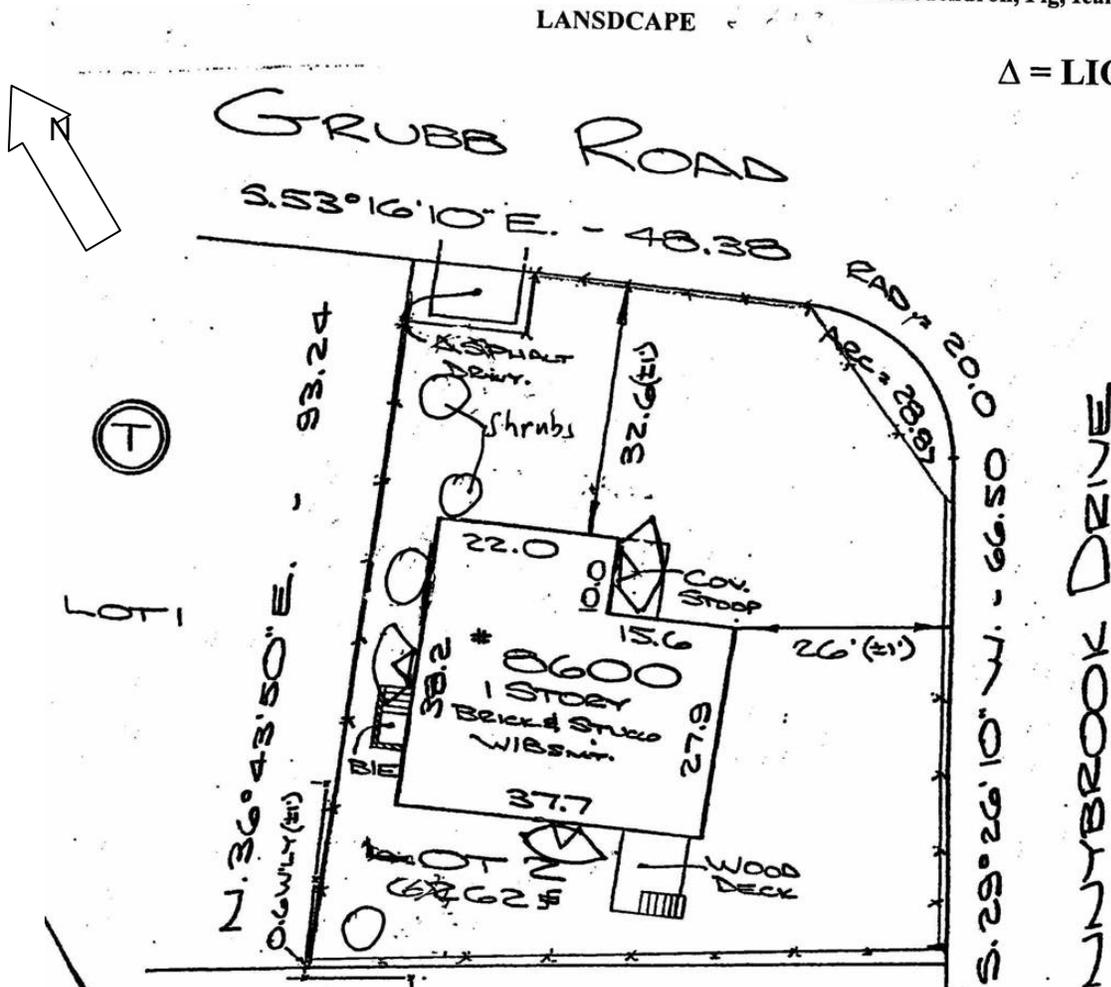
Landscaping and lighting are shown on a Plan by that name, Exhibit 5: Shrubs and trees are located in various places surrounding the main

Landscape Index

○ = TREES

Rhododendron, Fig, Icanthus, Walnut

△ = LIGHTS



dwelling. Technical Staff found that the property was adequately screened from the adjacent property with existing shrubbery and vegetation. The entrance to the proposed accessory apartment on the west side of the main dwelling is screened from the adjacent property with shrubbery, in addition to the already mentioned six-foot lattice fence.

Technical Staff also reviewed the location of the existing exterior lighting on the west side of the house, directly over the stairs leading to the basement accessory apartment. The lighting is approximately 3 feet above grade. Staff concludes that this proposed lighting will not cause any objectionable illumination, glare or spillover effect to the adjacent property because of the low installation height of the light and because of the screening which is present. No changes to the existing lighting are proposed.

C. Neighborhood Opposition

The only testimonial opposition to the instant petition came from neighbor Paul Vicenzi, who also wrote a letter in opposition (Exhibit 15). Mr. Vicenzi lives at 2614 Colston Drive, Chevy Chase, Maryland, which is outside of the General Neighborhood outlined by Technical Staff, but less than a half mile away from the subject site. The same is true of the two other neighbors who wrote letters in opposition after the hearing, Sean Urban of 8433 Freyman Drive, Chevy Chase, MD (Exhibit 16) and Jim Keil, of 8421 Freyman Drive, Chevy Chase, MD (Exhibit 17). Messrs. Vicenzi and Keil base their strongest opposition to the accessory apartment on the theory that it will bring crime to their neighborhood, especially if the owner does not live on the premises. Mr. Urban opposes because he feels that too many renters detract from the neighborhood, which "already serves Montgomery County's low-income citizens" and because he speculates that Petitioner will rent the apartment and then sell the rental property at a financial gain.

Mr. Vicenzi also raised concerns about the possible generation of parking in a busy area (Tr. 41), and the two letter writers raised the question of whether there were too many apartments in the area, which they felt reduced the sense of community found in home owners.

With regard to the neighbors' fears about crime, no probative evidence has been produced that accessory apartments in single family homes produce an increased level of crime when compared to other forms of housing.

Under Maryland law, probative evidence, such as that provided by Technical Staff in their report, cannot be outweighed by contentions that amount to little more than generalized concerns and unsupported allegations. See *Rockville Fuel & Feed Co. v. Board of Appeals*, 257 Md. 183, 192-93, 262 A.2d 499, 504-505 (1970); *Moseman v. County Council of Prince George's County*, 99 Md. App. 258, 265, 636 A.2d 499 (Ct. Spec. App. 1994). The Hearing Examiner is not saying that the neighbors concerns about crime are unsupported; rather, their assumption that the addition of an accessory apartment to a single family home will increase crime in the area is unsupported in the evidence.

Mr. Keil's letter references crimes in the area, but does not tie them to accessory apartments, except to the extent he reports what other unnamed neighbors have told him. The Hearing Examiner cannot credit such unreliable

double-hearsay evidence, with neither the original declarant (*i.e.*, the unnamed neighbor) nor Mr. Keil available for cross-examination. Mr. Vicenzi recites anecdotal evidence of a violent crime by an accessory apartment tenant and “flagrant[] disregard[] of neighborhood norms” by another accessory apartment tenant, but there is no statistical comparison made between numbers of crimes and abuses generated by accessory apartment tenants and those generated by other neighborhood residents. There is therefore no basis to conclude that such tenants affect the neighborhood more adversely than any other residents.

Even more fundamentally, a petition for a special exception is not the same as a request for a variance. A special exception is a statutorily permitted use if certain general and specific conditions are met. The opposition here seems to be saying that higher crime and disregard of neighborhood norms are inherent characteristics of all accessory apartments. As set forth in Part IV of this report, our law does not permit us to deny a special exception petition based solely on inherent adverse effects, because the Council has decided to permit accessory apartments as a special exception in the R-60 Zone, and it thus must have intended to permit whatever effects are inherent in the use.

If there is evidence of non-inherent adverse effects that would be generated by this particular accessory apartment, it has not been produced by these opponents, other than the parking issue and the bald speculation that Petitioner might move out after renting the apartment. Of course, the law prohibits absentee landlords for accessory apartments, and that will also be a condition recommended by the Hearing Examiner.

There are two concerns raised by the opponents in this case which do have to be addressed, the concern about possible over-concentration of accessory apartments in the area and the question as to whether there is adequate on-street parking to compensate for the fact that Petitioner has only one off-street space, while two are required. As to the over-concentration issue, the evidence is that there are only two approved accessory apartments in the neighborhood. Neither the Technical Staff nor the Hearing Examiner considers that to be excessive.

As to the parking issue, Technical Staff stated that “[t]he available parking will be adequate for the proposed use.” The undisputed evidence is that there is adequate parking on both Grubb Road and Donnybrook Drive. Tr. 27-28; Exhibit 13, p 6. Even Mr. Vicenzi admitted during the hearing that parking is only a problem on Grubb Road when there is a swim meet across Grubb Road, and he is not aware of it being a problem on Donnybrook Drive at all. Tr. 46-47. Thus, the Hearing Examiner must find that adequate on-street parking is available to compensate for the lack of two off-street spaces that are ordinarily required for an accessory apartment by Zoning Ordinance §59-G-2.00(c)(3)(ii). The law expressly permits fewer than two off-street spaces when such a finding is made. In addition, the Hearing Examiner will recommend a condition that Petitioner must include, in her lease agreement with the accessory apartment tenant, a provision that prohibits the tenant from parking more than one vehicle in the neighborhood. Such a condition will be enforceable by the Department of Permitting Services.

In sum, the Hearing Examiner has no basis for concluding that granting a special exception in this case will change the character of neighborhood. The accessory apartment will be located in the existing basement of an existing dwelling and will not require any exterior construction; there is sufficient parking on the street to compensate for Petitioner's failure to have two off-street spaces; traffic conditions will not be affected adversely; there is no excess of similar uses in the defined neighborhood, and special exceptions for accessory apartments are expressly permitted by the Zoning Code for the R-60 Zone. Therefore, the Hearing Examiner concludes that the use will be in harmony with the general character of the surrounding residential neighborhood.

D. The Master Plan

Petitioner's property is subject to the *2000 North and West Silver Spring Master Plan*, which recognizes that the West Silver Spring area has "a diverse collection of housing types – single-family homes, townhouses, condominiums, garden and high-rise apartments, and elderly housing. This wide variety . . . provides a full range of choices for many incomes, ages and lifestyles." Page 23. As noted by Community Planning Staff, accessory apartments "augment the range of housing choices without negatively impacting the character of residential neighborhoods." Exhibit 13, Attachment 6.

The subject property is zoned R-60 for single-family detached housing, and Zoning Code §59-C-1.31(a) permits accessory apartments by special exception in the R-60 Zone. In discussing Special Exceptions (pages 42-43), the Master Plan's recommendation is to scrutinize applications for special exceptions on corner lots for visibility of parking area, and presence of signs and excessive lighting. The Plan also recommends maintaining a residential appearance and minimizing traffic generation.

Petitioner has proposed to maintain the residential appearance of the property and limit parking to a space already provided on site, rather than add additional asphalt parking on site. Petitioner also proposes to limit the lighting for the apartment to an existing light over the entrance to the apartment. No signage is proposed. Traffic generation will be minimal. Because Petitioner plans no external structural modifications to the subject property, and her proposed use will not generate excessive traffic, parking, glare or other adverse effects, the requested special exception will maintain the residential character of the area.

Thus, it is fair to say that the planned use, an accessory apartment in a single family detached home, is not inconsistent with the goals and objectives of the *2000 North and West Silver Spring Master Plan*.

III. SUMMARY OF HEARING

At the hearing, testimony was heard from Petitioner, Eden Crane, from Housing Code Inspector, Dan McHugh, and from a neighbor, Paul Vicenzi.

Petitioner, Eden Crane:

Petitioner Eden Crane executed an affidavit of posting (Exhibit 14), and promised to

submit a copy of Petitioner's deed and a revised floor plan.² She adopted the Technical Staff Report as her evidence in the case (Exhibits 13; Tr. 6-7) and also agreed to the contents and analysis set forth therein and in the Housing Code Inspector's Report (Exhibit 12). Tr. 24-25. Her attorney also noted that she concurs with the conditions set forth in the Technical Staff report. Tr. 11.

Ms. Crane testified that she plans to have two adults living in the accessory apartment, and that she will be living upstairs (*i.e.*, in the main unit). Tr. 12. She estimated the floor space of the accessory apartment at 1,000 square feet, and said the apartment will have its own entrance. It will be lighted, and an off-street parking space will be provided. Ms. Crane identified the photos in Exhibits 9(a) and (b). Windows serving the basement have been enlarged to allow emergency egress. Tr. 13-16. The window wells were expanded by Petitioner to 4 feet by 4 feet to meet the egress requirements, and the sill was placed 35 inches above the floor. Tr. 33-34.

Ms. Crane further testified that she has 60 watt lights on the front porch, the rear deck and at the basement door. A six foot tall lattice fence encloses the property Tr. 19-21. She identified the rooms in the accessory apartment on the floor plan, Exhibit 6, and stated that that apartment would be fully heated and air conditioned. Tr. 22-24. Ms. Crane stated that she has not received any expressions of opposition to her plans. Tr. 25-26.

According to Ms. Crane, in addition to her one off-street parking spot in front of her house, there is unrestricted parking on both Grubb Road and Donnybrook Drive, and it is not crowded except when there is a swimming meet across Grubb Road, which happens four or five times during the summer. Tr. 27-28. She would agree to giving the accessory apartment tenant priority in the off-street spot, but would prefer not to. Ms. Crane owns one vehicle and one 10 foot trailer, which is usually parked on Donnybrook Drive. Tr. 29-31.

Housing Code Inspector Dan McHugh:

Housing Code Inspector Dan McHugh testified by reading the Housing Code Inspector's report (Exhibit 12) which had been prepared by Inspector Stephen M. Morris. Tr. 32-38. He also stated that the window wells expanded by Petitioner to 4 feet by 4 feet would meet the egress requirements, as long as no tool was required to pop out the window. The sill must be no more than 44 inches above the floor, and it is met by the 35 inch sill Ms, Crane testified to. Tr. 33-34. Inspector McHugh could not testify as to the amount of habitable space because the apartment has not yet been constructed and he did not have floor plan, to scale. Tr. 35. He also stated that there were two other accessory apartment special exceptions in the neighborhood. Tr. 43.

Paul Vicenzi:

The only opposition at the hearing came from the testimony of Paul Vicenzi, who introduced his opposition letter (Exhibit 15) into evidence, and testified that, based on his experience with tenants and rental units, "they detract from the value of the neighborhood and, . . .while the owner or landlord . . . gets additional incidental income[,] it tends to depress or decrease the value of the community." Tr. 42. His letter cited examples of

² Petitioner submitted her deed and revised floor plan (Exhibits 18(b) and (d)) on March 11, 2005.

criminal and uncivil activities arising from a couple of accessory apartments in the area.³

On cross-examination, Mr. Vicenzi admitted that he was not aware of any felonious activity at the two other accessory apartments listed by Technical Staff as being in the general neighborhood. Tr. 44. He stated that he “did not intend to call into question the applicant's management of the property.” Rather, his concern was with “absentee landlords and the situations that those create.” Tr. 44. He would not object to the petition if there were a tenant in the subject premises who was a good citizen. Tr. 45.

Finally, Mr. Vicenzi mentioned that Grubb Road is busy, which might cause Ms. Crane or her tenant to park on Donnybrook Drive, but he was not aware of any parking problems on Donnybrook. Tr. 46. He agreed that the only parking problem on Grubb Road occurred during swimming meets, and even on those occasions, he was not aware of a problem on Donnybrook Drive. Tr. 47.

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 Petitioner has the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Technical Staff concluded that Petitioner will have satisfied all the requirements to obtain the special exception, if she complies 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 Petitioner complies with the conditions set forth in Part V, below.

A. Standard for Evaluation

The standard for evaluation prescribed in Code § 59-G-1.21 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-1.21. 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.

³ The Hearing Examiner excluded from evidence a picture (Exhibit 15(a)) which was attached to Mr. Vicenzi’s letter, because it did not depict the subject property and had no relevance to the proceedings. Tr. 45. The letter itself was admitted into evidence over Petitioner’s objection, but the references to crimes from accessory apartments were not accorded any weight for the reasons discussed in Part II. C. of this report.

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:

- the existence of the apartment as a separate entity from the main living unit;
- the provision within the apartment of the necessary facilities and floor area to qualify as a habitable space under the Building Code;
- the provision of a separate entrance and walkway;
- the provision of sufficient parking and lighting; and
- the added activity from an additional household, including the potential for more traffic, both pedestrian and vehicular, and more noise.

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. That is the case here.

The only unusual characteristic of the site is the fact that it can supply only one off-street parking space, while two are ordinarily required under Zoning Ordinance §59-G-2.00(c)(3). This creates the non-inherent adverse effect of forcing either one of Petitioner’s vehicles or the tenant’s vehicle into on-street parking. Although Petitioner has offered to allow the tenant to have priority on the one off-street parking place, the Hearing Examiner believes that the issue is not whether the space is occupied by tenant or Petitioner, but whether forcing another car into the neighborhood streets to find parking unduly burdens the neighborhood. As stated earlier in this report, all the evidence in this case (testimonial and Technical Staff report) supports the conclusion that there is adequate on-street parking, which permits fewer off-street spaces, and the Hearing Examiner so finds. Thus, the limited off-street parking, though a non-inherent characteristic, does not warrant denial of the petition.

Based on the evidence in this case, and considering size, scale, scope, light, noise, traffic and environment, the Hearing Examiner concludes, as did the Technical Staff, that there are no non-inherent adverse effects from the proposed use which would require denial of the petition.

B. General Conditions

The general standards for a special exception are found in Zoning Code §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-60 Zone, pursuant to Code § 59-C-1.31.

(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: Petitioner's property is subject to the *2000 North and West Silver Spring Master Plan*, which recognizes that the West Silver Spring area has "a diverse collection of housing types – single-family homes, townhouses,

condominiums, garden and high-rise apartments, and elderly housing. This wide variety . . . provides a full range of choices for many incomes, ages and lifestyles.” Page 23. As noted by Community Planning Staff, accessory apartments “augment the range of housing choices without negatively impacting the character of residential neighborhoods.” Exhibit 13, Attachment 6.

In discussing Special Exceptions (pages 42-43), the Master Plan recommends maintaining residential appearance and minimizing traffic generation, visibility of parking areas, and the presence of signs and excessive lighting. Petitioner has proposed to maintain the residential appearance of the property and limit parking to a space already provided on site, rather than adding additional asphalt parking on site. Petitioner also proposes to limit the lighting for the apartment to an existing light over the entrance to the apartment. No signage is proposed. Traffic generation will be minimal. Because Petitioner plans no external structural modifications to the subject property, and her proposed use will not generate excessive traffic, parking, glare or other adverse effects, the requested special exception will maintain the residential character of the area.

Thus, it is fair to say that the planned use, an accessory apartment in a single family detached home, is not inconsistent with the goals and objectives of the *2000 North and West Silver Spring Master Plan*. Technical Staff reached the same conclusion.

- (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.*

Conclusion: Technical Staff noted that “the use is consistent with the general character of the neighborhood, which includes similar single-family detached residential uses.” The accessory apartment will be located in an existing basement of the dwelling, and will not require external construction, thereby retaining its residential appearance. There is sufficient on-street parking to make up for the fact that there is only one parking space on site. Traffic conditions will not be affected adversely. Staff does not find an excess of similar uses in the general neighborhood, since there are only two other existing accessory apartment uses. Based on these facts and the other evidence of record, the Hearing Examiner concludes, as did Technical Staff, that the proposed use 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.

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.

- (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. Technical Staff indicated that the one 60 watt bulb that will be used to illuminate the entrance to the accessory apartment will cause no glare off premises, and the Hearing Examiner so finds.

- (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: There are only two other accessory apartments and three other special exceptions in the neighborhood (a home occupation, a catering service and some tennis courts) according to Technical Staff's report. 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. See discussion in Part II.C., above.

- (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 notes that the property is served by public utilities.

- (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. If the special exception does not require approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Board of Appeals when the special exception is considered. The adequacy of public facilities review must include the Local Area Transportation Review and the Policy Area Transportation Review, as required in the applicable Annual Growth Policy.*

Conclusion: The special exception sought in this case would not require approval of a preliminary plan of subdivision. Therefore, the public facilities review must include analysis of the Local Area Transportation Review ("LATR").⁴ The Technical Staff did do such a review, and concluded that the proposed accessory apartment use would add one additional trip during each of the peak hour weekday periods. 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

⁴ The Policy Area Transportation Review (PATR) was abolished as of July 1, 2004, pursuant to the FY 2003-5 Annual Growth Policy (AGP) – Policy Element.

without a traffic study. See the July 2004 LATR Guidelines, of which the Hearing Examiner takes official notice. Therefore, the Transportation Staff concludes, as does the Hearing Examiner, that the instant petition meets the LATR.

- (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.*

Conclusion: Based on the evidence of record, especially the Technical Staff's conclusion that the proposed use will "will have no adverse effect on the transportation system," the Hearing Examiner so finds.

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 a basement of the house, and therefore shares a wall in common, as required for a lot of this size (under an acre).

- (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 new addition or extension of the main dwelling is proposed. The accessory apartment will be located in an existing basement.

- (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 original house was built in 1951. 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: The proposed use does not violate any of the provisions of this subsection.

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

Conclusion: Access to the accessory apartment is through an existing door on the west side of the house. There will be no change to the residential appearance of the dwelling.

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

Conclusion: No external modifications are proposed.

(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 clearly be subordinate to the main dwelling, as it will occupy approximately 920 square feet (700 of which is habitable space) in the basement of Petitioner's home, which has approximately 1,256 square feet of floor space, not counting the basement.

59-G § 2.00(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: The Petitioner currently lives in the main dwelling, and she has agreed to Technical Staff's conditions, which include occupying one of the units.

(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: The Petitioner acquired the property in April of 2003, according to the deed (Exhibit 18(b)), more than one year before the filing of the petition in October of 2004.

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

Conclusion: The Petitioner will receive compensation for only one dwelling unit.

(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 Petitioner is the owner 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

59-G § 2.00(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 approximately 6,262 square feet in size. The following chart from the Technical Staff Report (Exhibit 13) demonstrates compliance with all development standards:

Table 2. Comparison of Development Standards:

Item	Required/Allowed	Proposed
Lot Area	6,000 sq. ft.	6,262 sq. ft.
Yard Requirements for Main Building:		
Front- Grubb Road	25 ft.	33 ft.
Front- Donnybrook Drive	25 ft.	26 ft.
Side-	8 ft.	Approximately 10 ft.
Rear-	20 ft.	Approximately 20ft.
Building Height	2.5 stories	1 story
Building Coverage	35%	20%

(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: There are only two other accessory apartments in the neighborhood. Thus, the Hearing Examiner concludes that the proposed special exception will not create an excessive concentration of similar uses.

(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: There is one off-street parking space on Petitioner's car pad, and for reasons previously stated, the Hearing Examiner finds that there is adequate, nearby on-street parking to permit fewer than the two off-street spaces ordinarily required. The Hearing Examiner has also added a condition which will insure that the tenant does not bring more than one car to the site.

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 reports (Exhibits 12 and 19) note certain issues, and have recommended that occupation of the accessory apartment be limited to no more than two unrelated persons or a family of six. As noted above, Petitioner has agreed to meet all conditions.

V. RECOMMENDATION

Based on the foregoing analysis, I recommend that Petition No. S-2627 for a special exception for an accessory apartment located at 8600 Grubb Road, Chevy Chase, Maryland, be GRANTED, with the following conditions:

1. The Petitioner shall be bound by all of her testimony and exhibits of record, and by the testimony of her witnesses and representations of counsel identified in this report.

2. The Petitioner will take the following steps to comply with the items set forth in the Memorandum of Stephen M. Morris, Housing Code Inspector, Division of Housing and Code Enforcement (Exhibit 19):

- a. Based on the square footage, no more than two unrelated persons, or a family of six may reside in the accessory apartment.
- b. This unit may not be occupied until the Department of Housing and Community Affairs conducts its final inspection for code compliance and any code violations are corrected.

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

4. Petitioner must not receive compensation for the occupancy of more than one dwelling unit; and

5. Petitioner must include, in her lease agreement with the accessory apartment tenant, a provision that prohibits the tenant from parking more than one vehicle in the neighborhood, whether it is on or off the street.

Dated: April 4, 2005

Respectfully submitted,

Martin L. Grossman
Hearing Examiner