

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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Case No. S-2701

PETITION OF SUSAN YANG

OPINION OF THE BOARD

(Opinion Adopted: December 19, 2007)

(Effective Date of Opinion: January 28, 2008)

Case No. S-2701 is an application for a special exception, pursuant to Section 59-G-2.00 of the Montgomery County Zoning Ordinance, to permit an existing accessory apartment. The Hearing Examiner for Montgomery County held a hearing on the application on June 28, 2007, closed the record in the case on July 20, 2007, and on July 23, 2007 issued a Report and Recommendation for approval of the special exception. The Board of Appeals considered the Report and Recommendation at its Worksession on September 5, 2007. The Board also had before it a request, dated August 1, 2007 [Exhibit No. 30] from David Gardner, Esquire, on behalf of Susan Yang, for oral argument before the Board, pursuant to Section 59-A-4.16(e), on two of the conditions of approval that the Hearing Examiner recommended. Craig Zaller, Esquire also requested the opportunity to give oral argument on behalf of the Fairland Green Association, Inc., in a letter dated August 31, 2007 [Exhibit No. 31].

The Board held oral argument on December 19, 2007. David Gardner, Esquire appeared on behalf of Susan Yang. Craig Zaller, Esquire appeared on behalf of Fairland Green Association, Inc.

The subject property is Lot 50, Block F, located at 2601 Hershfield Court, Silver Spring, Maryland, 20904, in the R-90/TDR Zone.

Decision of the Board:

Special Exception **Granted**, Subject to the
Revised Conditions Enumerated Below

FINDINGS OF FACT

1. The Board finds that the Hearing Examiner's Report and Recommendation is comprehensive and thorough.
2. Ms. Yang's request for Oral Argument was based upon Conditions of approval Nos. 6 and 8, recommended by the Hearing Examiner, which state as follows:
 - "6. There must be no guest room for rent, boardinghouse or registered living unit on the premises in addition to the accessory apartment. Petitioner must not receive compensation for the occupancy of more than one dwelling unit. In this case, that means that Petitioner also may not accept a reduction in childcare fees (in exchange for occupying her dwelling) from anyone other than the accessory apartment tenants. *Petitioner must allow Housing Code Inspectors access to her entire dwelling to insure for compliance*" [emphasis added]; and
 - "8. The tenants of the accessory apartment may have no more than two cars, in total, housed within the general neighborhood, and Petitioner must include, in her lease agreement with any new accessory apartment tenants, a provision that restricts the tenants to parking either in the garage or on the driveway of her home. *For enforcement purposes, the names of accessory apartment tenants and their vehicle tag numbers should be filed with the Board of Appeals*" [emphasis added].
3. Ms. Yang objected to the requirement in proposed Condition No. 6 that she be required to allow Housing Code inspectors access to her entire dwelling, and to the requirement in proposed Condition No. 8, that she be required to provide the names and vehicle tag numbers of her tenants to the Board of Appeals.
4. With respect to Condition No. 6, Mr. Gardner argued on Ms. Yang's behalf that the requirement to give Housing Code Inspectors access to her entire dwelling is beyond the scope of the special exception, and unnecessary. Mr. Gardner argued that the inspection and enforcement authority of the Department of Housing and Community Affairs in the case of an accessory apartment special exception is limited to the accessory apartment itself. He argued further that Chapter 26-11 of the County Code gives Housing Code Inspectors the ability to gain access to dwellings in general, and that making access to the entire dwelling a condition of the special exception would be unnecessary and onerous.
5. With respect to Condition No. 8, Mr. Gardner argued on Ms. Yang's behalf that the requirement to provide tenant names and vehicle tag numbers is not necessary to prevent on-street parking because there is ample parking in Ms. Yang's driveway, and she has agreed to a condition of approval that her lease

agreements with accessory apartment tenants require that they park in her garage or in her driveway. Mr. Gardner further argued that the names of vehicle owners are not generally treated as public information, citing the fact that the Maryland Motor Vehicle Administration does not give out names of vehicle owners.

6. Mr. Zaller argued that the disputed provisions enhance the enforceability of the conditions of approval which contain them, and that they would help avoid the need for neighbors to file complaints in the event of violations of the special exception.
7. He questioned the ability of a Housing Code Inspector to determine whether the special exception is compliant with Condition No. 6 without knowing specifically who lives in the apartment and who lives in the rest of the house. He asked "...why would Ms. Yang deny an inspector the right to get in unless there's something fishy going on violating a zoning ordinance?" [Transcript, December 19, 2007, page 24].
8. Mr. Zaller also questioned the enforceability of the requirement that tenants of the accessory apartment park only in the driveway or garage of the subject property, without the ability of an inspector to specifically identify their vehicles.

CONCLUSIONS OF LAW

1. The Board finds that the sentence in Condition No. 6 which states "Petitioner must allow Housing Code Inspectors access to her entire dwelling to insure for compliance," should be deleted. The Petitioner has agreed to comply with the rest of that condition [Report and Recommendation, Exhibit No. 31, p. 31].
2. The Board finds that the sentence in Condition No. 8 which states, "For enforcement purposes, the names of accessory apartment tenants and their vehicle tag numbers should be filed with the Board of Appeals," should be deleted, and the following sentence inserted in its place, "The special exception holder shall make a true and correct copy of the accessory apartment lease available upon request of any Montgomery County Inspector or the Board of Appeals."
3. Section 59-G-1.22(a) of the Zoning Ordinance provides: "The Board, the Hearing Examiner, or the District Council, as the case may be, may supplement the specific requirements of this Article with any other requirements necessary to protect nearby properties and the general neighborhood." The Board will not impose the requirements in the disputed sentences in anticipation of violation of the conditions, but notes that in the event of violation of the terms and conditions of the special exception, that it has the authority to revise the conditions of approval to address violations which have occurred.

4. Finally, because the Homeowners' Association Covenants, over which the Board has no jurisdiction, were the subject of some discussion during the case, the Board notes that any affected party is free to pursue any available remedy with regard to enforcement of private covenants in an appropriate forum, and the Board's decision that the special exception be granted in this case should not be taken as reflecting any opinion with regard to the covenants in question.

Therefore, based upon the foregoing, on a motion by David K. Perdue, seconded by Catherine G. Titus, Vice-Chair, with Wendell M. Holloway, Caryn L. Hines, and Allison Ishihara Fultz, Chair, in agreement, 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, representations and exhibits of record identified in the Hearing Examiner's Report and Recommendation and in this Opinion.
2. Occupancy of the accessory apartment is limited to no more than two unrelated persons or a family not to exceed three persons.
3. The Petitioner shall take steps to correct the following deficiencies set forth in the Memorandum of Cece Kinna, Housing Code Inspector, Division of Housing and Code Enforcement (Exhibit 14) prior to occupancy:
 - a. Exterior - stairways leading around both sides of the house are not level and are missing handrails.
 - b. Unit Entrance - the storm door is missing door glass or screening.
 - c. Bedroom & Den - both rooms have unprotected ceiling light fixtures. Fixtures in habitable areas require a globe or cover.
 - d. Den - Cable junction box in the wall is missing the cover plate.
 - e. Den - The window does not meet the requirements for emergency egress. This room cannot be used for sleeping.
 - f. Bathroom - Unprotected wall light fixture. Fixtures in habitable areas require a globe or cover; the bathtub perimeter caulk is deteriorated/moldy.
4. The accessory apartment must also be equipped with a stove or other device for cooking food approved by DHCA, a requirement the Housing Code Inspector mentioned in her testimony (Transcript, June 28, 2007, pp. 61-62), but not in her report.
5. Petitioner must occupy one of the dwelling units on the lot on which the accessory apartment is located;
6. There must be no guest room for rent, boardinghouse or registered living unit on the premises in addition to the accessory apartment. Petitioner must not receive compensation for the occupancy of more than one dwelling unit. In this case, that

means that Petitioner also may not accept a reduction in childcare fees (in exchange for occupying her dwelling) from anyone other than the accessory apartment tenants;

7. Petitioner shall have any new tenants of the accessory apartment sign a lease agreement, for a minimum of one year, with clearly stated provisions controlling noise, litter, pets, parking and other activities and actions that could have an adverse impact on neighboring properties;
8. The tenants of the accessory apartment may have no more than two cars, in total, housed within the general neighborhood, and Petitioner must include, in her lease agreement with any new accessory apartment tenants, a provision that restricts the tenants to parking either in the garage or on the driveway of her home. The special exception holder shall make a true and correct copy of the accessory apartment lease available upon request of any Montgomery County Inspector or the Board of Appeals; and
9. Petitioner 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. Petitioner 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.

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 28th day of January, 2008.

Katherine Freeman
Executive Director

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.