

**BOARD OF APPEALS  
for  
MONTGOMERY COUNTY**

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**Case No. S-2792**

**PETITION OF JAIME AND ANGELA ENRIQUEZ**

OPINION OF THE BOARD

(Opinion Adopted July 13, 2011)

(Effective Date of Opinion: July 29, 2011)

Case No. S-2792 is an application, under Section 59-G-2.00 of the Zoning Ordinance, to permit a special exception for an accessory apartment. The subject property is Lot 12, Block 7, located at 2301 Hermitage Avenue, Silver Spring, Maryland, 20902, in the R-90 Zone.

The Hearing Examiner for Montgomery County held a public hearing on the application on March 3, 2011, closed the record in the case on April 8, 2011, and on May 3, 2011, issued a Report and Recommendation for denial of the special exception.

**ORAL ARGUMENT**

On July 13, 2011, the Board heard oral argument on the Hearing Examiner's Report and Recommendation from Jaime and Angela Enriquez, by their son, Jaime Enriquez, and from Dr. Geoff Patton.

Mr. Enriquez stated that Petitioners have obtained all necessary permits and tried to meet all pertinent regulations. He stated that Petitioners are willing to try to meet the requirement that the accessory apartment not exceed 1,200 square feet, and that to do that, they propose to reconfigure the floor plans for the accessory apartment, rent out the original portion of the house, and live in the newer addition. Mr. Enriquez stated that they are hoping to get the special exception in order to be able to meet the mortgage. Mrs. Enriquez stated that after the Hearing Examiner's hearing on the application there was an inspection of the parking area and that the inspector said that the parking is okay. However, she does not have a written report of that inspection.

Dr. Patton stated that he supports the Hearing Examiner's Report and Recommendation. He stated that the special exception application followed numerous violations and that the Petitioners had already proposed reconfiguring the floor plans for the accessory apartment during the special exception hearing but that they were still unable to meet the square footage requirement for the accessory apartment.

Referring to Exhibit No. 4, Site Plan, the Board discussed whether the property's parking area is located on county-owned property. The Board discussed remanding the application to the Hearing Examiner to allow the Petitioners to revise the application to meet the requirement of Section 59-G-2.00(a)(9) that the floor area of the accessory apartment is limited to a maximum of 1,200 square feet, and for clarification of whether the parking is located on the Petitioner's property. A motion for remand received no second.

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After careful consideration and review of the record in the case, on a motion by Stanley B. Boyd, seconded by Carolyn J. Shawaker, with Catherine G. Titus, Chair, in agreement, David K. Perdue, Vice-Chair not in agreement, and Walter S. Booth necessarily absent, the Board adopts the Hearing Examiner's Report and Recommendation and **denies** the special exception.

In particular the Board notes:

1. The Hearing Examiner's finding that the application fails to meet the requirement of Section 59-G-2.00(a)(9) that the floor area of the accessory apartment is limited to a maximum of 1,200 square feet [Exhibit No. 46, p. 31]. The Hearing Examiner considered Petitioners' proposal to rent out the main dwelling unit in the house, and live in the accessory apartment [Exhibit No. 31(b)], but found that the area of the accessory apartment still exceeded 1200 square feet.

2. The Hearing Examiner's finding that the application does not meet the requirement in Section 59-G-2.00(c)(3) that adequate parking must be provided [Exhibit No. 46, p. 33]. The Hearing Examiner found that the off-street parking area and driveway access for the subject property are at least partially located on Martin Avenue, a county-owned paper street, and thus the applicants have not demonstrated their legal right to use the parking so located and that evidence in the record indicates that there is an increased volume of cars and traffic on neighborhood streets [Exhibit No. 46, p. 22, citing Transcript, March 3, 2011, p. 38; Exhibit No. 46, p. 33]. The Hearing Examiner found that because the Applicants currently have four vehicles parked on the property, and because the accessory

apartment could have two cars associated with it, due to the unavailability of the on-site parking, six cars from the property might have to park on local streets.

3. The Hearing Examiner's finding that the size of the accessory apartment and the existing home are not consistent, as required by Section 59-G-1.21(a)(3) of the Zoning Ordinance, with the goal of the 1989 Master Plan for the Communities of Kensington Wheaton, to maintain the "low to medium-density residential character that prevails in the area." The Hearing Examiner also found inconsistency with the Master Plan's designation of Martin Avenue for use as a planned bikeway and pedestrian walkway. [Exhibit No. 46, p. 25].

4. The Board also notes that Section 59-G-1.21(c) of the Zoning Ordinance requires that "The applicant for a special exception has the burden of proof to show that the proposed use satisfies all applicable and general and specific standards under this Article [Article 59-G]. This includes the burden of going forward with the evidence, and the burden of persuasion on all questions of fact." Section 59-G-1.21(a) provides that the Board can grant a special exception "when the Board or the Hearing Examiner finds from a preponderance of the evidence of record that the proposed use" will meet the general and specific standards for the use in the Zoning Ordinance.

5. The Board further notes that, under Section 59-A-4.61(e) and (f), the Board's action on a special exception Report and Recommendation from the Hearing Examiner is limited to the evidence compiled by the Hearing Examiner, unless the Board elects to remand a matter for further evidence. The Board finds that the Petitioners had ample opportunity to present evidence in support of their case to the Hearing Examiner during the public hearing process, and that no remand is necessary for the Board to be able to render a decision.

6. The Board adopts the Hearing Examiner's findings, as described above, that the Applicants in this case have not met their burden of proof that the proposed accessory apartment will comply with the applicable general and specific standards.

**BE IT RESOLVED** by the Board of Appeals for Montgomery County, Maryland that Case No. S-2792, Petition of Jaime and Angela Enriquez, is **denied**.

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Catherine G. Titus  
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book  
of the Board of Appeals for  
Montgomery County, Maryland  
This 29<sup>th</sup> day of July, 2011.

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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. It is each party's responsibility to participate in the Circuit Court action to protect their respective interests. In short, as a party you have a right to protect your interests in this matter by participating in the Circuit Court proceedings, and this right is unaffected by any participation by the County.