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: *	
WINOA E. HIDEN AND KEVIN E. HIDEN [1] *	
Petitioners *	
Winoa E. Hiden *	
Kevin E. Hiden *	
Charles Gary Hiden *	
For the Petition *	
* *	Board of Appeals Case No. S-2798
Julia Thom, Housing Code Inspector *	(OZAH Case No. 11-23)
Department of Housing and *	
Community Affairs *	
* *	
Dr. Joseph Gitlin *	
Not Supporting or Opposing the Petition *	
* *	
Dr. Robert Yeck, for the Greater Colesville *	
Citizens Association (GCCA) *	
Louise Yeck *	
Ronald Bledsoe *	
Opposed to the Petition *	
* *	

Before: Martin L. Grossman, Hearing Examiner

HEARING EXAMINER'S REPORT AND RECOMMENDATION

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[1] The petition (Exhibit 1) lists Kevin E. Hiden, one of Winoa E. Hiden's sons, as a Petitioner, in addition to Winoa E. Hiden, who owns the property. Her other son, Charles Gary Hiden, testified at the hearing, but is not a Petitioner.

I. STATEMENT OF THE CASE

Petition No. S-2798, filed on December 3, 2010, seeks a special exception, pursuant to §59-G-2.00 of the Zoning Ordinance, to permit an accessory apartment use in the walk-out basement of Petitioners' home at 14212 Northwyn Drive, Silver Spring, Maryland, on land in the R-200 Zone. The property's legal description is Lot 12, Block A, Three Meadows Subdivision.

On January 21, 2011, the Board of Appeals issued a notice that a hearing in this matter would be held on April 14, 2011, before the Office of Zoning and Administrative Hearings (Exhibit 11). Eight letters of opposition to the application were received prior to the hearing (Exhibits 12, 13, 14, 16, 17, 18, 19 and 23), including two opposition letters from the Greater Colesville Citizens Association (GCCA). Exhibits 14 and 19. Technical Staff of the Maryland-National Capital Parks and Planning Commission (M-NCPPC), in a report issued April 7, 2011, recommended denial of the special exception, based on Staff's interpretation of the parking facility setback and screening provisions of the Zoning Ordinance, as they applied to a secondary gravel driveway. Exhibit 22.[2] The Hearing Examiner disagrees with Staff's legal interpretation, as will be discussed in Part II. B. 3. of this report. Moreover, the issue was mooted by a mid-hearing amendment to the petition, under which Petitioners agreed not to use the gravel driveway in question. Exhibit 26 and Tr. 14-18.

Julia Thom, Housing code Inspector for the Department of Housing and Community Affairs (DHCA), inspected the property on March 14, 2011, and reported a number of items in a memorandum dated April 5, 2011. Exhibit 21. She noted that the accessory apartment provides 475 square feet of habitable space, and that the unit can accommodate two unrelated people or a family of up to three.[3]

A public hearing was convened as scheduled on April 14, 2011, and Petitioners Winoa Hiden and Kevin Hiden appeared *pro se*. Petitioners agreed with the findings and conclusions of the housing

[2] The Technical Staff report is frequently quoted and paraphrased herein.
[3] Her memorandum initially indicated that the unit could house a family of up to four, but she corrected that to three at the hearing. Tr. 47.

inspector's report (Exhibit 21) and to meet all the conditions set forth therein. Tr. 22. Petitioners also agreed to abide by conditions usually imposed in accessory apartment cases and ones addressed to the specific issues in this case. Tr. 22-24. Petitioners plan no external changes to the property other than what may be required for compliance with the conditions imposed. Tr. 25-26. Most significantly, Petitioners amended their petition, agreeing to restrict all parking to the existing parking pad (*i.e.*, not to use a second "gravel" driveway) on their land. Exhibit 26 and Tr. 14-18.

Three witnesses from the community testified in opposition, Dr. Robert Yeck, on behalf of the Greater Colesville Citizens Association (GCCA); Louise Yeck and Ronald Bledsoe, all of whom live on Northwyn Drive. Dr. Joseph Gitlin, who also lives on Northwyn Drive, testified regarding his concerns and suggestions, but did not oppose the Petition.[4]

Testimony was received, as well, from Julia Thom, Housing Code Inspector of the Department of Housing and Community Affairs.

The record was left open until May 6, 2011, to allow for public commentary on the amendment to the petition and to give Petitioners an opportunity to file a copy of their deed and a response to any public commentary. No public comments were received in response to the amendment, and Petitioners timely filed a copy of their deed to the premises. Exhibit 30. The record closed as scheduled on May 6, 2011.

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

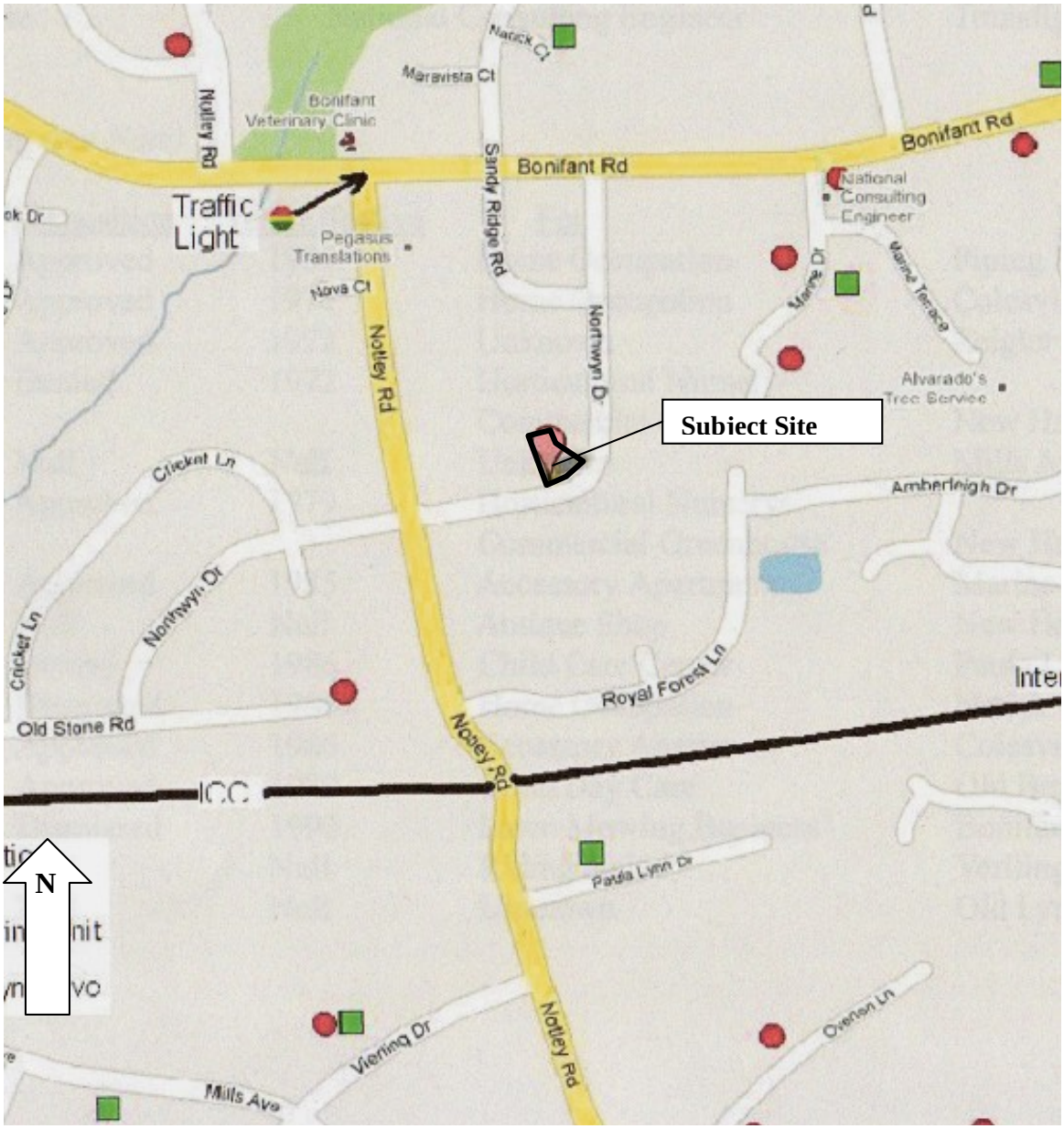
II. FACTUAL BACKGROUND

A. The Subject Property and the Neighborhood

The subject property consists of a one half-acre lot (21,568 square feet in size) located at 14212 Northwyn Drive, Silver Spring, Maryland, on land in the R-200 Zone. The property (Lot 12,

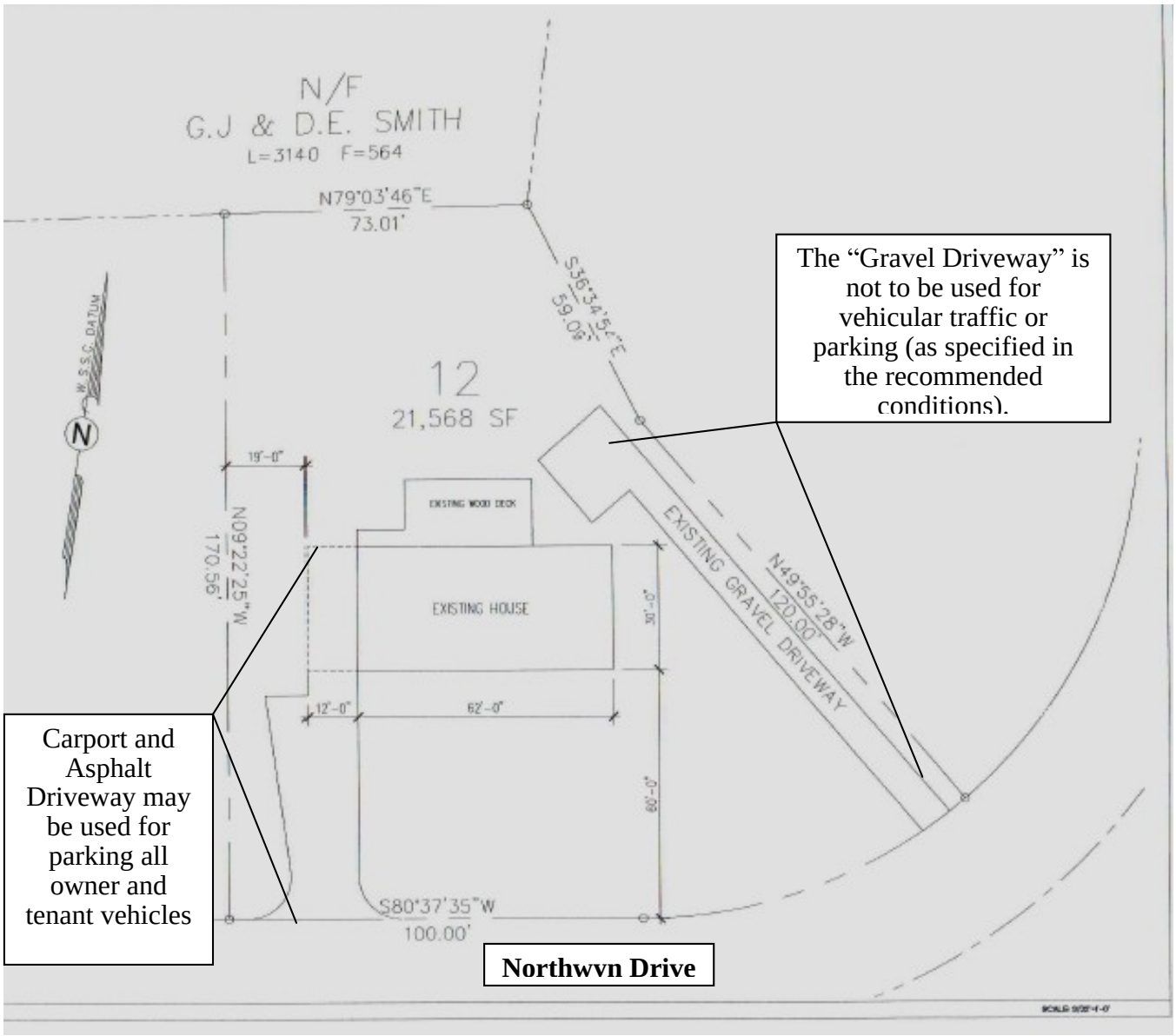
[4] Two other neighbors appeared, but elected not to testify – Katherine Weaver and Pete Balaras. Tr. 81.

Block A, Three Meadows Subdivision) is situated on the north side of Northwyn Drive, approximately 400 feet east of its intersection with Notley Road, as can be seen on the following map (portion of Google Map attached to Dr. Gitlin's letter, Exhibit 20):



According to Technical Staff, the lot slopes gently towards the rear property line, and existing landscaping is well-maintained. Exhibit 22, p. 2. The shape of the lot is not symmetrical because it is located adjacent to the point at which Northwyn Drive turns sharply in a north-south direction, as can

be seen on the above map and the following Site Plan (Exhibit 3):



As is evident, the site has access from Northwyn Drive through its own paved driveway and carport on the west side of the home. According to Housing Code Inspector Julia Thom, the paved driveway has space to park four vehicles, and the carport can hold another vehicle. Tr. 45-49. The Hearing Examiner has labeled the "Gravel Driveway" on the east side of the property, indicating it is not to be used for vehicular traffic or parking (as specified in the recommended conditions). That is

consistent with Petitioners' amendment to the Petition (Exhibit 26), which specified that all parking would occur on the existing parking pad (by which they meant the existing paved driveway and carport. Tr. 14-18. The reason for this restriction will be discussed in Part II. B. 3. of this report.[5]

Technical Staff reports that the existing house was constructed in 1967. The one-story home, with a basement, has 1,708 square feet of floor space, and it is depicted below in the following photographs from the Staff report ((Exhibit 22, p. 3):

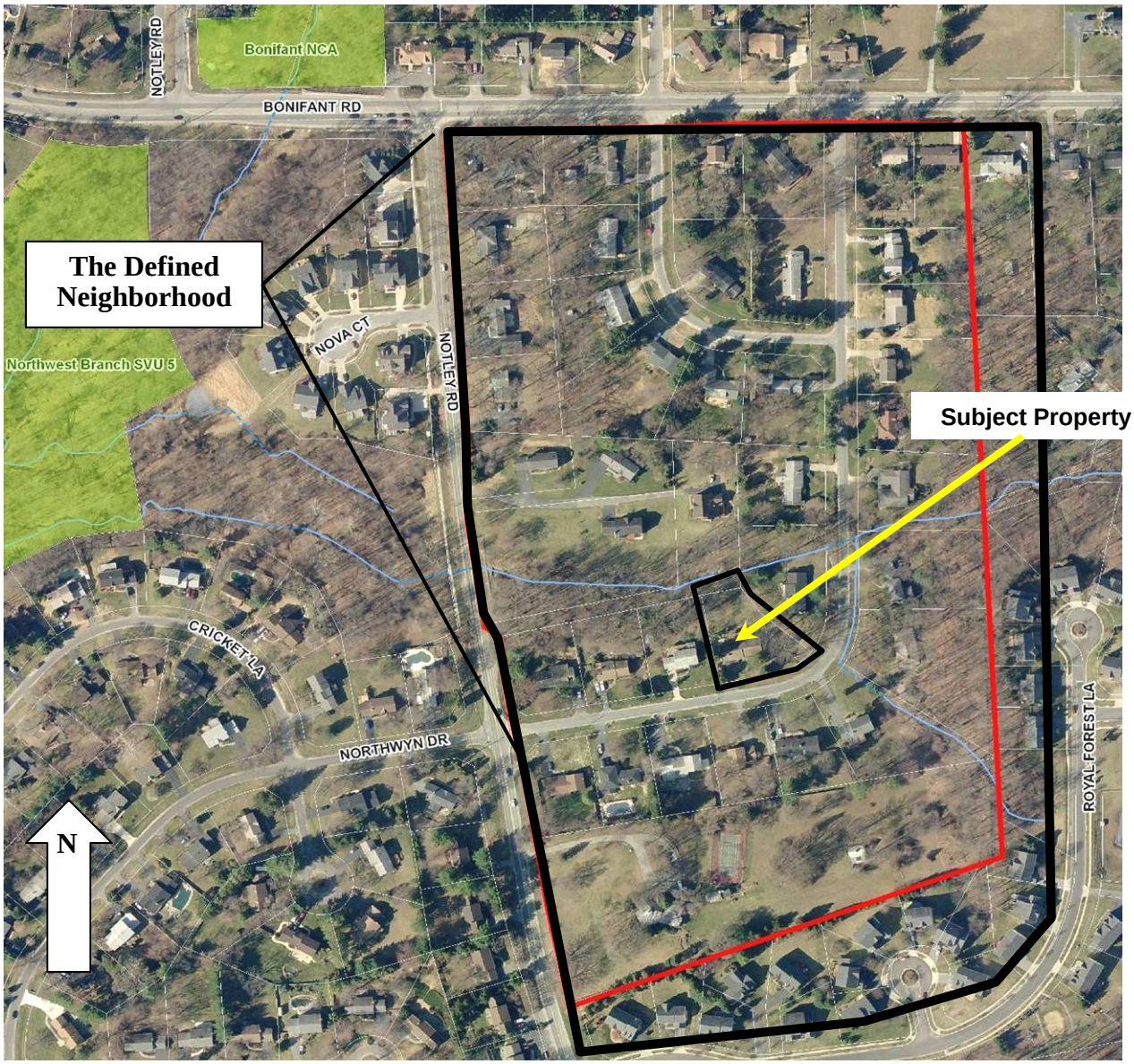
Front of House

Back of House

[5] The restriction has also been noted directly on the Site Plan (Exhibit 3) by the Hearing Examiner.

The site has been exempted from forest conservation requirements by Technical Staff (Exhibit 7). Staff indicates that there are no environmental issues or concerns. Exhibit 22, p. 8.

For the purpose of this application, Technical Staff defined the neighborhood by the following boundaries: "Bonifant Road to the north, Notley Road to the west, and Mr. D'Epagnier's property to the south." Exhibit 22, p. 4. The Hearing Examiner generally accepts this definition, although he would substitute Royal Forest Lane as the boundary to the south and east because it is identifiable on the map, unlike "Mr. D'Epagnier's property," suggested by Staff. The neighborhood is depicted below in an aerial photo provided by Technical Staff (Exhibit 22, p. 5):



Staff reports that all uses in the neighborhood are single-family detached homes, and the entire neighborhood is zoned R-200. The neighborhood boundary includes nearby properties that may be affected by their view of the site and/or by a potential increase in density or traffic. According to Technical Staff (Exhibit 22, p. 4) and the Housing Code Inspector (Exhibit 21), there are no other accessory apartment special exceptions within the neighborhood boundaries.

B. The Proposed Use

1. The accessory apartment:

The Petitioners are requesting approval of an existing 576 square foot accessory apartment located in the walkout basement of their home.[6] Petitioner Winoa Hiden lives in the home, and the accessory apartment is currently occupied by two tenants, a Medical Assistant/Interpreter and an electrician. Tr. 33-34. No external modifications are required to accommodate the special exception, and none are planned. Tr. 25-26.

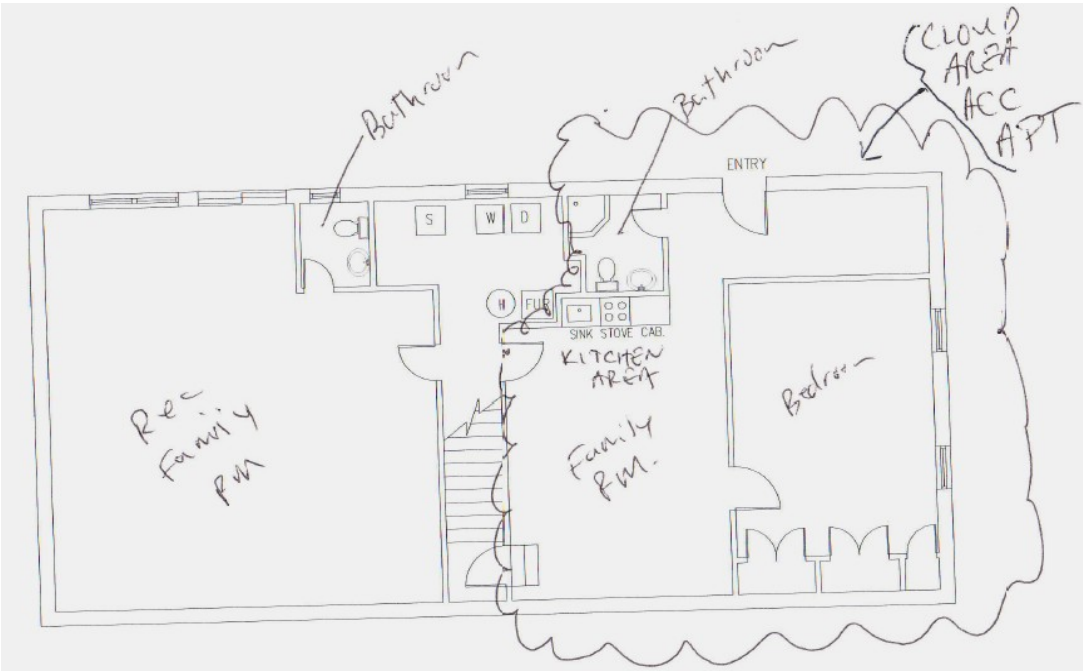
The accessory apartment entrance is located on the rear of the home and, as noted by Technical Staff, does not detract from the residential appearance of the neighborhood.[7] Exhibit 22, pp. 5-6. Its location is depicted in the following photograph from the Staff report (Exhibit 22, p. 6):

[6] Petitioners' statement in support of their petition (Exhibit 3) indicates that the apartment is 576 square feet, but the Housing Inspector's measurements reveal 475 square feet of habitable space. Exhibit 21.

[7] As will be discussed in Part II. D. of this report, the Hearing Examiner does not agree with GCCA's suggestion that an entry to the accessory apartment on the rear of the home diminishes the home's residential appearance.

A photograph supplied by Petitioner (Exhibit 28(a)) shows the paved walkway along the west side of the home from the paved driveway to the patio in the rear, and another photo (Exhibit 28(b)), taken from where the patio meets the walkway, depicts the patio, looking in the direction of the accessory apartment entrance:

The apartment's floor plan (Exhibit 6) is shown below (the apartment is in the circled area):



The apartment contains a family room with a kitchen area, one bedroom and a bathroom.

The April 5, 2011 memorandum from Julia Thom, DHCA Housing Code Inspector (Exhibit 21), sets forth the following comments:

> The preliminary inspection was conducted on March 14, 2011. The accessory apartment is located in the cellar of the house. The issues regarding accessory apartment standards are follows:
>
> 1. There are no accessory apartments in the surrounding area.
>
> 2. The unit is located on a lot consisting of 21,568 square feet.
>
> 3. The unit has off street parking consisting of a covered carport that will accommodate one vehicle and 750 square feet of paved driveway that will accommodate an additional four vehicles if parked side by side.
>
> 4. There is a secondary gravel driveway that is on the right side of the property which goes to the rear yard. This driveway will accommodate two cars.
>
> 5. The unit consists of two rooms. the living/kitchen room is 235 square feet and the bedroom is 240 square feet. The unit is a total of 475 square feet of habitable space.
>
> 6. The unit will accommodate 2 unrelated people or a family of 3 based on square footage code requirements.[8]
>
> 7. The kitchen area can not be used for sleeping purposes.
>
> 8. One window in the bedroom must be enlarged to meet the following emergency egress standards for Montgomery County.
>
> - The minimum net clear opening of 5.7 square feet.
> - The minimum net clear opening height shall be 24 inches.
> - The minimum net clear opening width shall be 20 inches.
> - The window sill height can not be more than 44 inches above the floor.
> - Emergency escape and rescue openings shall be operational from the inside of the room without the use of keys, tools or special knowledge.

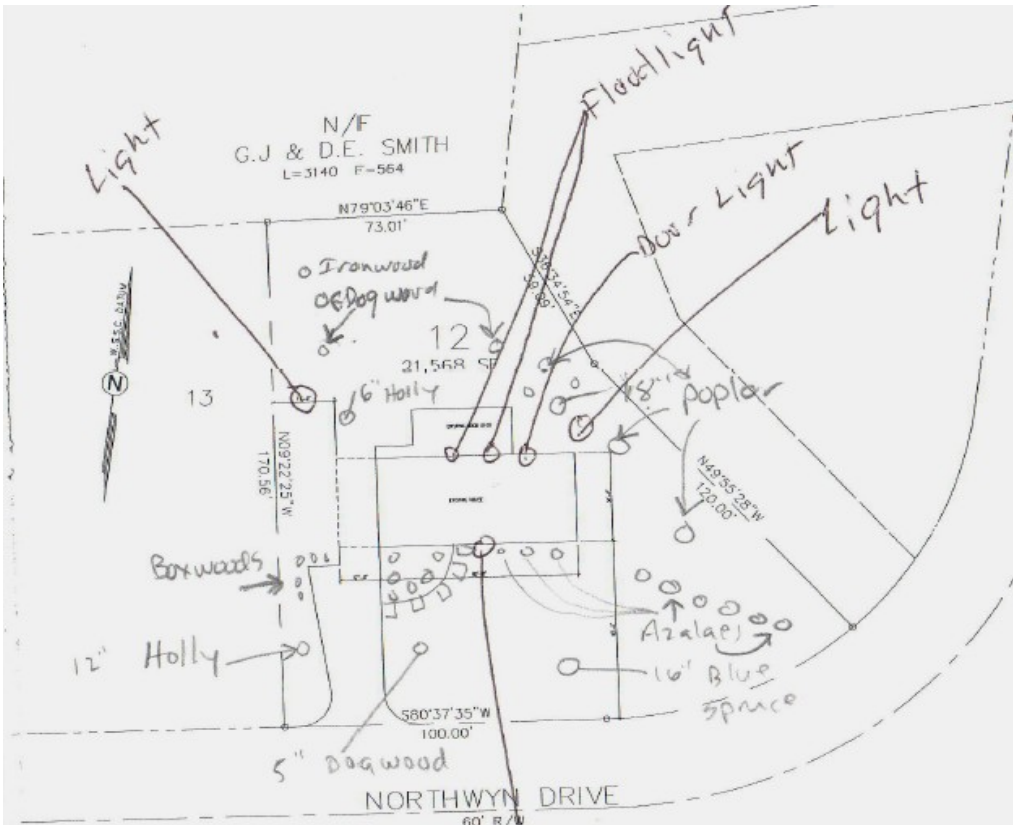
At the hearing , Ms. Thom clarified that the size of the window that had to be modified and the brick work around it would not change, only the ability to open it out more easily. Tr. 69-70. Ms. Thom also identified the photographs she took on March 14, 2011, as Exhibits 29 (a) through (n), and stated that she knew of no reason why the special exception should not be granted if the issues specified in her memorandum are addressed. Tr. 53-56. One of the photographs she took inside of the accessory apartment (Exhibit 29(l)) is reproduced on the next page:

[8] Ms. Thom's memorandum originally indicated that the unit could house a family of up to four, but she corrected that to three at the hearing. Tr. 47.

The Hearing Examiner recommends a condition limiting occupancy as specified by DHCA and requiring compliance with Ms. Thom's other recommendations.

2. Landscaping and Lighting:

The existing landscaping and lighting are shown below on the Landscape and Lighting Plan (Exhibit 5):



Technical Staff reports that no new plantings are proposed with the application, and that the plan falls within the standards expected for a single-family home. Exhibit 22, p. 8. Staff also found that the on-site lighting would not cause undue illumination or glare affecting surrounding properties. Exhibit 22, p. 13.

3. Parking and Related Issues:

The major issue in this case concerned the use of a "gravel driveway" on the eastern side of the property, as shown in the Site Plan (Exhibit 3) reproduced on page 5 of this report and in the following photograph provided by Technical Staff (Exhibit 22, p. 4):

The use of this unofficial driveway[9] for parking and for vehicular access to the rear of the home was a source of complaints from the neighbors both in pre-hearing letters (Exhibits 12, 14 and 16) and in testimony at the hearing. Tr. 43-44; 80-81. It also resulted in a recommendation by Technical Staff to deny the special exception petition, based on Staff's interpretation of the parking

[9] Technical Staff reports that "No permit has been found for the second (*i.e.*, gravel) driveway, and staff from DPS indicate that they do not typically permit two driveways." Exhibit 22, p. 11. The gravel was put there in the 1970s to allow heavy trucks access to the back to build a patio, and now grass has grown up though the gravel. Tr. 16-17.

facility setback and screening provisions of Zoning Ordinance §59-E-2.83. As mentioned earlier, the Hearing Examiner disagrees with Staff's legal interpretation of this section.

Zoning Ordinance §59-E-2.83 provides, in relevant part:

Parking and Loading facilities for special exception uses in residential zones.

This Section applies to an off-street parking facility for a special exception use that is located in a one-family residential zone if 3 or more parking spaces are provided. These standards are intended to mitigate potential adverse visual, noise, and environmental impacts of parking facilities on adjacent properties. In addition, these requirements improve the compatibility and attractiveness of parking facilities, promote pedestrian-friendly streets, and provide relief from un-shaded paved areas.

(a) Location. Parking facilities must be located to maintain a residential character and a pedestrian-friendly street orientation.

(b) Setbacks. Each parking and loading facility, including each entrance and exit driveway, must be set back a distance not less than the applicable building front and rear yard and twice the building side yard required in the zone. The following additional setbacks must be provided for each parking facility:

(1) if 150 to 199 parking spaces are provided, the required side and rear parking facility setbacks must be increased by 5 feet;

(2) if 200 or more parking spaces are provided, the required side and rear parking facility setbacks must be increased by 10 feet.

(c) Screening. Each parking and loading facility, including driveway and dumpster areas, must be effectively screened from all abutting lots. Screening must be provided in a manner that is compatible with the area's residential character. Screening must be at least 6 feet high, and must consist of evergreen landscaping, a solid wood fence, a masonry wall, a berm, or a combination of them. Along all street right-of-ways screening of any parking and loading facility must be at least 3 feet high and consist of evergreen landscaping, a solid wood fence, or masonry wall.

(d) Shading of paved areas. Trees must be planted and maintained throughout the parking facility to assure that at least 30 percent of the paved area, including driveways, are shaded. Shading must be calculated by using the area of the tree crown at 15 years after the parking facility is built.

* * *

Technical Staff stated that two vehicles had been proposed to park on the gravel driveway to serve the accessory apartment. Exhibit 22, p. 11. Staff then found that the gravel driveway was not

set back from the lot line or screened in the manner that §59-E-2.83 requires "*for a special exception use that is located in a one-family residential zone if 3 or more parking spaces are provided."* Since only two of the spaces were being proposed for the gravel driveway, Staff must have been counting the parking spaces in the existing paved residential driveway towards its count of the size of the special exception parking facility.

The Hearing Examiner does not believe that is the intent of the section because, if applied generally in this way, it would require setbacks, screening and shading every time a residence with a special exception provides parking spaces for three or more vehicles in total, regardless of whether two of the three spaces are merely provided for the owners of the home.[10] It could not have been the intent of the Council, in framing this provision, to impose setback, screening and shading requirements on every home with an accessory apartment that has a driveway which can hold three or more cars. Undoubtedly, very few homes would be compliant under this view since the required setback for a driveway under this provision is "*not less than the applicable building front and rear yard and twice the building side yard required in the zone."*

The applicable rule of statutory construction was set forth by the Maryland Court of Appeals in *Trembow v. Schonfeld*, 393 Md. 327, 336-337, 901 A.2d 825, 831 (2006),

> Our goal is to ascertain and implement the legislative intent, and, if that intent is clear from the language of the statute, giving that language its plain and ordinary meaning, we need go no further. . . .

The Hearing Examiner concludes that the reasonable way to interpret the language of that section is that it applies to the <u>additional</u> spaces required by the special exception use, whether or not it is an accessory apartment or other special exception, not to the spaces already there which are reserved for the residents. Thus, if a home has two or three spaces used by current residents and wants to add an accessory apartment that requires the addition of 3 or more spaces, the new spaces would have to be

[10] It should be noted that, in the experience of the Hearing Examiner, Technical Staff has not previously applied this provision in this manner in other cases. Reorganization within Park and Planning Staff may have resulted in some institutional discontinuity.

screened and set back as required by Zoning Ordinance §59-E-2.83, but if it requires two or fewer additional spaces, the section does not apply. This interpretation makes sense since the statute specifically restricts its application to "*an off-street parking facility for a special exception use . . .*" The original spaces are not for the special exception use unless designated as such.

Applying this rationale to the case at bar, the gravel driveway, if restricted to parking of two cars for the accessory apartment, would not be subject to §59-E-2.83. It would, however, still not be permitted in this case because it is not a legal driveway, according to Technical Staff, and therefore its use for parking would violate the final sentence in Zoning Ordinance §59-G-2.00(c)(3):

> *. . . 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.*

In any event, the gravel driveway in question is no longer an issue in this case because Petitioners amended their petition, in mid-hearing, by agreeing to restrict all parking to the existing parking pad (*i.e.*, not to use a second "gravel" or "grassy area" driveway) on their land. Exhibit 26 and Tr. 14-18. The Hearing Examiner has incorporated this restriction into a proposed condition in Part V of this report, and has noted the restriction on the Site Plan (Exhibit 3).

There are two other parking issues which should be mentioned. The first goes to another difference in statutory interpretation between the Hearing Examiner and Technical Staff in this case. Technical Staff, relying on language in Zoning Ordinance §59-G-2.00(c)(3), stated, "The existing driveway off Northwyn Drive can only accommodate one additional vehicle for the accessory apartment, which does not meet the requirement for two parking spaces." Exhibit 22, p. 7.

Zoning Ordinance §59-G-2.00(c)(3) provides:

> *(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.*

The Hearing Examiner interprets this provision as requiring a total of two off-street parking spaces for a home with an accessory apartment, jut like any one-family dwelling, unless the Board of Appeals finds that more are required under the circumstances of a particular case. There is no evidence that the Council intended a residence to be considered other than a one-family dwelling, which requires two parking spaces, merely because an accessory apartment was added. On the contrary, the Council expressly provided in Zoning Ordinance §59-A-2.1 that a one-family dwelling, with an accessory apartment, remains a one-family dwelling. Moreover, there is no reason to assume that an accessory apartment, which is restricted by statute to under 1200 square feet, would add the need for two additional parking spaces. There are many situations where a homeowner has one vehicle and an accessory apartment tenant adds only one vehicle. Thus, it makes sense to require at least two off-street spaces to accommodate both the home owner and the tenant, unless the evidence demonstrates the need for more off-street parking.

In the case at bar, Housing Code Inspector Thoms testified that, even without the secondary gravel driveway, there is adequate parking in the main driveway for four cars, arranged two by two, in addition to space for one car in the carport. Exhibit 21, ¶3 and Tr. 45-49. Petitioner Kevin Hiden testified that his family parks only one vehicle at the subject site (his mother's car) unless he is visiting. The accessory apartment tenants have two vehicles, so that the existing paved driveway and the carport are adequate to handle those three vehicles, and Petitioners have no problem in allowing the accessory apartment tenant to use the driveway spaces. Tr. 49-50.

It is thus clear from the evidence that there is adequate off-street parking to meet the statutory off-street parking requirement, even under Technical Staff's interpretation of the applicable provision.

Finally, concerns have been raised in this case about traffic safety if the people park on the curve in Northwyn Drive abutting the southeastern frontage of the subject site, and in fact, this was

an issue raised by both GCCA and the neighbors. Tr. 59 and Exhibits 12, 14 and 16. Given the sharp curve at this location, which can be seen on the following Google aerial photograph supplied by a confronting neighbor (Exhibit 16), the Hearing Examiner finds this to be a valid concern and has recommended a condition under which Petitioners would be required to have a lease provision prohibiting tenants from parking on the curve:

4. Transportation Facilities:

Technical Staff found that the proposed use satisfies the Local Area Transportation Review (LATR) and the Policy Area Mobility Review (PAMR) tests and will have no adverse effects on area roadway conditions or nearby pedestrian facilities. Exhibit 22, p.7. As stated by Staff:

> The proposed accessory apartment meets the transportation related requirements of the Adequate Public Facilities (APF) Ordinance. The LATR guidelines require a traffic study to be performed if the applicants' action generates 30 or more peak-hour trips. The proposed accessory apartment is expected to

> generate a de minimus number of peak-hour trips during the weekday morning (6:30 a.m. to 9:30 a.m.) and evening (4:00 p.m. to 7 p.m.) peak periods, far below the 30-trip threshold. Therefore, no traffic study is required to satisfy the LATR and Policy Area Mobility Review (PAMR) test. This minimal amount of traffic increase can be accommodated by the existing road network in the neighborhood. Furthermore, the proposed use is not likely to negatively impact the safety of vehicular or pedestrian traffic as the use will not generate a substantial increase in either form of traffic.

Although the community raised concerns about traffic volume and safety (especially from cut-through traffic using Northwyn Drive to avoid a slow traffic light at Bonifant and Notley Road), there was no evidence presented (other than the dangerous curve matter addressed above) that any traffic volume or traffic safety issue would be affected by the proposed accessory apartment. Based on the evidence from Technical Staff that the proposed use would not create a traffic volume or safety hazard, the Hearing Examiner so finds. This proceeding is limited to addressing the application for a special exception, and the Hearing Examiner does not have authority to use it to address all the unrelated traffic concerns of the neighborhood.

C. The Master Plan

The subject site is governed by the *Cloverly Master Plan*, approved and adopted in 1997. The *Cloverly Master Plan* "is guided by two fundamental planning concepts: **Protect Watersheds and Reinforce the Character of Cloverly's Communities**." [Emphasis in original] *Cloverly Master Plan* at 13. The Plan does not specifically address the accessory apartment special exception sought in this case; however, it does set out guidance for evaluating Cloverly special exception cases, in general (at page 37):

- Maintenance of a residential appearance, where feasible.
- Compatibility with the scale and architecture of the adjoining neighborhood, consistent with the proposed use.
- The impact of signs, lighting, and other physical features on surrounding residential communities.
- Location of parking, loading, and other service areas to maintain residential appearances to the extent feasible.

- Options for landscaping that minimizes the non-residential appearance of the site and the view from surrounding properties and roads. It is preferable for landscaping to reinforce Cloverly's rural character and be consistent with the streetscape standards . . . of the Master Plan and the landscaping standards for special exceptions.
- When special exceptions are adjacent to each other or to commercial properties, review whether it is feasible and reasonable to consolidate driveways and connect parking areas.
- Any special exception application that exceeds the recommended imperviousness level for a particular watershed in a SPA must be reviewed to determine compliance with the appropriate laws.

Technical Staff found that the application complies with all the factors listed in the Master Plan, except for landscaping as it relates to screening the gravel driveway. Exhibit 22, p.7. Since that issue has been mooted by the amendment to the petition which eliminates the use of the gravel driveway and by a condition recommended by the Hearing Examiner, as previously discussed, there is no evidence that the proposed use would be inconsistent with the Master Plan.

The Hearing Examiner finds that, with the recommended conditions, there will be no signs, lighting, parking or other physical features that would reduce the residential appearance of the subject site. Since the exterior of Petitioners' home will not be changed, it will retain the residential appearance and compatibility sought by the Master Plan. The Hearing Examiner finds that the proposed use is consistent with the *Cloverly Master Plan.*

D. Neighborhood Concerns

As noted in the first section of this report, there is considerable opposition in the neighborhood to the proposed accessory apartment. This opposition consists of eight pre-hearing letters (Exhibits 12, 13, 14, 16, 17, 18, 19 and 23), including two opposition letters from the Greater Colesville Citizens Association (Exhibits 14 and 19), and testimony at the hearing. Tr. 58-66 (Dr. Yeck on behalf of GCCA); Tr. 43-44; 67-71 (Mrs. Yeck); and Tr. 80-81 (Ronald Bledsoe).

Additional neighborhood concerns were presented by Dr. Joseph Gitlin, who testified as to what he called, "the middle ground and the factual approach," rather than in support or opposition.

Tr. 6. His testimony mostly addressed neighborhood traffic issues. According to Dr. Gitlin, the proximity of the Inter-County Connector (ICC) and New Hampshire Avenue, and the long traffic light at the intersection of Notley and Bonifant Roads, combine to cause many drivers to use Northwyn Drive to avoid the backups. These external influences create traffic speed and volume problems in his neighborhood. Tr. 71-79. As mentioned in Part II. B. 4. of this report, the evidence in this case supports that conclusion that the proposed special exception will not worsen these effects, and this proceeding is limited to addressing the application for a special exception. The Hearing Examiner does not have authority to use it to address all the unrelated traffic concerns of the neighborhood.

Most of the opposition was addressed to concerns about crime in the neighborhood; the nature of some of the former tenants of the Hiden home; inappropriate parking on the "gravel driveway" and in the rear of the home; dangerous parking on the curve in Northwyn Drive adjacent to the southeastern frontage of the subject site; and the impact on the character of the neighborhood which might result from the granting of an accessory apartment special exception.

The Hearing Examiner has already addressed the parking issues at great length in Part II. B. 3. of this report. Suffice it to say that, with the conditions recommended in Part V of this report, parking should no longer be an issue in the neighborhood.

There was no evidence presented from which the Hearing Examiner could conclude that the accessory apartment use had created the reported crime problem in the neighborhood, and certainly no evidence tying the current tenants to that problem. The concerns about the way this particular accessory apartment has been managed over the years without benefit of a special exception may be remedied, rather than exacerbated, by the granting of a special exception, with the enforceable conditions that have been recommended.

The more general complaint of the neighbors exemplified in Exhibits 13 17 and 18 (in effect that they oppose the grant of any accessory apartment in their neighborhood fearing that such a use would have negative effects) cannot be a basis for denial because the Council has established its policy, through Zoning Ordinance §59-C-1.31(a), that accessory apartments are permitted as special exceptions in the R-200 Zone.

While it is clear that some of the neighbors do not want an accessory apartment in their neighborhood, the Hearing Examiner must assess this case based on the statutory criteria for approving an accessory apartment special exception, not on whether the idea of having an accessory apartment in the neighborhood is unpopular. The decision on a zoning application "is not a plebiscite." *Rockville Fuel v. Board of Appeals,* 257 Md. 183, 192, 262 A.2d 499, 504 (1970).

Some of the other points raised by the neighbors and GCCA are discussed below:

According to Dr. Yeck, GCCA doesn't believe the applicant will operate the apartment such that the home will maintain the appearance of a single-family house in conformance of Section 59(g)-2.00. This conclusion is based on GCCA's reading of Zoning Ordinance §59-G-2.00(a)(6), which requires that "Any separate entrance must be located so that the appearance of a single-family dwelling is preserved." GCCA believes that provision would prohibit separate access to an accessory apartment in the rear of a home.

Both Technical Staff (Exhibit 22, pp. 5-6; 16-17) and the Hearing Examiner disagree with that interpretation of the Code. In fact, the reverse is true. Most single-family homes have a rear entry, as well a single front entry. Therefore, permitting access to the accessory apartment through an existing rear entry does not change the appearance of a single-family residence. Adding a second entrance in the front of the home, on the other hand, might well give the appearance of a two-family residence. Most accessory apartments are routinely accessed though separate rear or side entrances.

Dr. Yeck also suggested that under the language of the Zoning Ordinance, an accessory

apartment was primarily established to provide for a family member or healthcare provider. The Hearing Examiner concludes that Mr. Yeck's comment in this regard is based on a misreading of the Zoning Ordinance. The provision to which he referred, which is the last sentence of Zoning Ordinance §59-G-2.00(a)(2), is, by its own terms, limited to accessory apartments "in a separate accessory structure built after December 2, 1983. . . [Emphasis added]," and thus does not apply to accessory apartments within the same structure as the main unit.

Finally, there was a concern raised by Mrs. Yeck about whether the change in the accessory apartment bedroom window required by the Housing Code Inspector would change the outward appearance of the residence. In response to these concerns, Ms. Thom testified that the size of the window that had to be modified and the brick work around it would not change, only the ability to open it out more easily. Tr. 69-70.

In sum, the Hearing Examiner finds that the points raised by the neighbors do not form a basis for denying the special exception petition before the Hearing Examiner, but some of their concerns do warrant additional conditions, as recommended in Part V of this report.

III. SUMMARY OF HEARING

A public hearing was convened as scheduled on April 14, 2011, and Petitioners Winoa Hiden and Kevin Hiden appeared *pro se*. Three witnesses from the community testified in opposition – Dr. Robert Yeck, on behalf of the Greater Colesville Citizens Association (GCCA); Louise Yeck and Ronald Bledsoe, all of whom live on Northwyn Drive. Dr. Joseph Gitlin, who also lives on Northwyn Drive, testified regarding his concerns and suggestions, but did not oppose the Petition.[11] Testimony was received, as well, from Julia Thom, Housing Code Inspector of the Department of Housing and Community Affairs.

Because the petition was amended during the hearing, the record was left open until May 6,

[11] Two other neighbors appeared, but elected not to testify – Katherine Weaver and Pete Balaras. Tr. 81.

2011, to allow for public commentary on the amendment to the petition and to give Petitioners an opportunity to file a copy of their deed and a response to any public commentary.

A. Petitioners' Case

1. Petitioners Winoa and Kevin Hiden (Tr. 14-39; 49-50; 81-82):

Petitioner Kevin Hiden executed an affidavit of posting (Exhibit 27). Petitioners agreed with the findings and conclusions of housing inspector's report (Exhibit 21) and agreed to meet all the conditions set forth therein. Tr. 22. Petitioner also agreed to abide by conditions usually imposed in accessory apartment cases and ones addressed to the specific issues in this case. Tr. 22-24.

Petitioners plan no external changes to the property other than what may be required for compliance with the conditions imposed. Tr. 25-26. Most significantly, Petitioners amended their petition, agreeing to restrict all parking to the existing parking pad (*i.e.*, not to use a second "gravel" or "grassy area" driveway) on their land. Exhibit 26 and Tr. 14-18. The so-called "gravel driveway" was created in the 1970s when gravel was deposited there to allow heavy trucks access to the back to build a patio, and now grass has grown up though the gravel. Tr. 16-17.

Petitioner Kevin Hiden identified the photos in Exhibits 9 and 28. He also modified the landscape and Lighting Plan (Exhibit 5) to show the existing lighting on the site, all of which he indicated was residential in style. Tr. 30-33. No lighting will be added.

Petitioner Kevin Hiden testified that there are two people currently living in the apartment, and Petitioner Winoa Hiden testified that "it's protection to me to have two well-educated, young people there. She's a Medical Assistant and an Interpreter and he's an Electrician . . ." Tr. 33-34.

Petitioner Kevin Hiden also specified the portion of the Floor Plan (Exhibit 6) that is actually within the accessory apartment by drawing a line around it. It contains a family room, a bedroom , a bathroom and a kitchen area. Tr. 35-39.

Petitioner Kevin Hiden further testified that his family parks only one vehicle at the subject

site (his mom's) unless he is visiting. The accessory apartment tenants have two vehicles, so that the existing actual driveway plus the carport is adequate to handle those three vehicles, and Petitioners have no problem in allowing the accessory apartment tenant to use the driveway spaces. Tr. 49-50.

In rebuttal, Petitioner Winoa Hiden testified that the car parked on the bend [on Northwyn Drive] was not Petitioners'. Tr. 81-82.

2. Charles Gary Hiden (Tr. 82-84):

Charles Gary Hiden, the other son of Petitioner Winoa Hiden, testified that he appreciated all the neighbors time spent at the hearing, but felt that they could better spend their time working together to solve the crime and traffic issues which do not emanate from the subject site.

B. Government Witnesses

Julia Thom, DHCA Housing Code Inspector (Tr. 45-49; 53-57; 69-70):

Julia Thom, DHCA Housing Code Inspector testified that she inspected the property on March 14, 2011, and reported a number of items in a memorandum dated April 5, 2011. Exhibit 21. According to Ms. Thom, there are no other accessory apartments in the surrounding area.

The proposed apartment is located on a lot consisting of 21,568 square feet. The unit has off-street parking consisting of a covered carport that will accommodate one vehicle and 750 square feet of paved driveway that will accommodate additional four vehicles if parked side by side. There is a secondary gravel driveway that is on the right side of the property, which goes to the rear yard. The accessory apartment consists of two rooms. The living room/kitchen area is 235 square feet and the bedroom is 240 square feet. The unit has a total of 475 square feet of habitable space. The unit will accommodate two unrelated people or a family of three, based on square footage code requirements. Although her memo had indicated that four family members could reside in the apartment, she modified that to three at the hearing because the Code requires 150 square feet per person of habitable space, and the existing 475 square feet will therefore accommodate only three people.

Housing Code Enforcement notes that one window in the bedroom must be modified to meet the emergency egress standards for Montgomery County, which, among other things, requires that emergency escape and rescue openings shall be operational from the inside of the room without the use of keys, tools, or special knowledge.

Ms. Thoms testified that even without the secondary gravel driveway, there is adequate parking in the main driveway for four cars, arranged two by two, in addition to whatever is in the carport. Tr. 45-49.

Ms. Thom identified the photographs she took on March 14, 2011, as Exhibits 29 (a) through (n), and stated that she knew of no reason why the special exception should not be granted if the issues specified in her memorandum are addressed. Tr. 53-57.

In response to a concern raised by Mrs. Yeck, Ms. Thom testified that the size of the window that had to be modified and the brick work around it would not change, only the ability to open it out more easily. Tr. 69-70.

C. Community Testimony

1. Dr. Robert Yeck, on behalf of the Greater Colesville Citizens Association (GCCA) (Tr. 58-66):

Dr. Robert Yeck, who lives on Northwyn Drive, testified on behalf of the Greater Colesville Citizens Association (GCCA). The Association feels that the applicant had a long history of operating an illegal accessory apartment, and that operation has had a major negative impact on the neighborhood. According to Dr. Yeck, the neighbors have tried to work with the applicant, but without success, and GCCA doesn't believe the applicant will operate the apartment such that the home will maintain the appearance of a single-family house in conformance of Section 59(g)-2.00. [This conclusion is based on GCCA's reading of Zoning Ordinance §59-G-2.00(a)(6), which requires that "Any separate entrance must be located so that the appearance of a single-family dwelling is preserved." GCCA believes that provision would prohibit separate access to an

accessory apartment in the rear of a home. The Hearing Examiner noted that he disagreed with that interpretation of the code, in that accessory apartments are routinely accessed though separate rear or side entrances. Tr. 13].

If the Board decides to grant a Special Exception, GCCA requests restrictions that address the prior problems. Parking of vehicles needs to occur on the driveway and should be prohibited on the curve on Northwyn Drive for safety reasons.

Dr. Yeck noted that in the past two years, ten homes within five block radius of the applicant have suffered burglary and other criminal acts, so the community is very concerned about being able to observe where the point of entry is. [The Hearing Examiner advised that he could not fairly require that the tenants not use the door to the accessory apartment which is in the rear, and that in almost every accessory apartment case, there is a door that's either in the rear or the side that gives entry to the accessory apartment.]

Dr. Yeck also suggested that under the language of the Zoning Ordinance, an accessory apartment was primarily established to provide for a family member or healthcare provider. [The Hearing Examiner advised that the provision to which he referred, which is the last sentence of Zoning Ordinance §59-G-2.00(a)(2), was, by its own terms, limited to accessory apartments "in a separate accessory structure built after December 2, 1983. . .," not to accessory apartments within the same structure as the main unit.] Tr. 58-66.

2. Louise Yeck (Tr. 43-44; 67-71):

Louise Yeck, a neighbor living on Northwyn Drive who had worked with GCCA for many years, testified there were never was a legitimate gravel driveway on the site, going all the way to the road. She said that Petitioners put gravel back there and parked their boats and car there, but the Department of Permitting Services indicated that there never was a legal permit for a driveway to be put at that location. Mrs. Yeck stated that the parking of cars in that location has been "a very serious

problem for us in the neighborhood." Tr. 43-44.

Mrs. Yeck further testified that Mrs. Hiden was renting her unapproved apartment for many, many years, and "she's had some very unusual renters through the years." Tr. 67. Mrs. Yeck stated that she is very concerned about crime in the neighborhood, including many break-ins, but she had no knowledge of any of Petitioner's tenants being criminally prosecuted for such acts. She was also concerned about the possibility that a window would be changed in Petitioners' home and thereby change the look of the neighborhood, but was reassured by the Housing Code Inspector's testimony that the size of the window and the brick work around it would not change, only the ability to open it out easily. Tr. 67-71.

3. Dr. Joseph Gitlin (Tr. 6; 71-79):

Dr. Joseph Gitlin is a Professor at Johns Hopkins University who lives on Northwyn Drive. He testified as to what he called, "the middle ground and the factual approach," rather than in support or opposition. Tr. 6.

Dr. Gitlin testified that the neighborhood in question is a somewhat unusual because of the proximity of the Inter-County Connector (ICC) and New Hampshire Avenue, and the way traffic is controlled in the area (*i.e.*, many drivers use Northwyn Drive to avoid the traffic light at the intersection of Notley and Bonifant Roads). These external influences create traffic speed and volume problems which suggest that the neighborhood should be looked at in the larger scheme of things. [The Hearing Examiner explained that the impacts we are looking at here are those that would be generated by the Special Exception request, and they are very small here according to Technical Staff, which concluded that the roadway is adequate to provide for the minimal additional traffic that would be generated.] Dr. Gitlin indicated that he understood the narrow view and accepted it. Tr. 75-76.

Dr. Gitlin had also expressed a concern about the possible precedent that would be set by

approval of an accessory apartment. Tr. 73 [The Hearing Examiner explained that approval of a particular accessory apartment does not make a second approval any more likely. Actually, it makes it somewhat less likely because the Zoning Ordinance requires that we look at whether there is an excessive concentration of similar uses. Tr. 77]

Finally, Dr. Gitlin noted that the Google Map and attachments to his letter (Exhibit 20) showed additional factors that may not have been considered by the County and which may be useful in evaluating these kinds of cases. Tr. 78-79.

4. Ronald Bledsoe (Tr. 80-81):

Ronald Bledsoe, who lives on Northwyn Drive, asked how the restrictions against using the gravel driveway would be enforced, and the Hearing Examiner explained the process.

IV. FINDINGS AND CONCLUSIONS

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

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

A. Standard for Evaluation

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

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

The following are inherent characteristics of accessory apartments, as spelled out by Technical Staff (Exhibit 22, p. 10):

> (1) the existence of the apartment as a separate entity from the main living unit but sharing a party wall with it;
> (2) the provision within the apartment of the necessary facilities, spaces, and floor area to qualify as habitable space under the applicable code provisions;

(3) a separate entrance and walkway and sufficient exterior lighting;
(4) sufficient parking;
(5) the existence of an additional household on the site with resulting additional activity including more use of outdoor space and more pedestrian, traffic, and parking activity; and
(6) the potential for additional 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.

Technical Staff found that, except for the gravel driveway issue, which has been rectified as discussed earlier, there are no non-inherent adverse effects or unusual site conditions (Exhibit 22, pp. 10-11):

> In this case, there are no adverse effects that will negatively impact the community above and beyond those necessarily inherent to an accessory apartment. The apartment will be located in the basement of the main dwelling and is non-identifiable from the street. The apartment is set up to provide all the spaces and facilities necessary for an apartment use.
>
> The accessory unit has a separate entrance apart from the main dwelling. The apartment entrance is typical of a side-entry to a single-family basement, making it difficult to distinguish from any other neighborhood home. The walkway and grounds of the accessory apartment will be safe and illuminated, consistent with typical residential standards.

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

B. General Conditions

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

Sec. 59-G-1.21. General conditions.

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

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

Conclusion: An accessory apartment is a permissible special exception in the R-200 Zone, pursuant to Code § 59-C-1.31(a).

(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 IV. C, below.

(3) *Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.*

Conclusion: Petitioners' property is subject to the *1997 Cloverly Master Plan*. For the reasons set forth in Part II. C. of this report, the Hearing Examiner finds that the planned use, an accessory apartment in a single-family detached home, is not inconsistent with the goals and objectives of the Master Plan.

(4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*[12]

Conclusion: Technical Staff concluded that the proposed use will be in harmony with the general character of the surrounding residential neighborhood. As stated by Staff (Ex. 22, p. 13):

> The proposed special exception will be in harmony with the general character of the neighborhood as the design and scale will not change. It will have only a slight impact on population density; it will result in only a modest increase in the intensity of use of the property with no change in the character of the use; it will result in only a minimal increase in vehicular traffic; . . .[Technical Staff's comments about parking setbacks have been omitted because that issue is now moot]; and if approved, would be the only accessory apartment within the neighborhood.

The Hearing Examiner agrees and so finds.

(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 present only minimal impacts to the immediate area, and that "the special exception will not be detrimental to the use, peaceful enjoyment, economic value, or development of the surrounding properties or the defined neighborhood provided that the special exception is operated in compliance with the Zoning Ordinance and the listed conditions of approval are satisfied.. . ." Exhibit 22, p. 13. The Hearing Examiner agrees for the reasons stated in response to the previous provision, and so finds.

[12] This section was amended, as set forth here, by Zoning Text Amendment 10-13 (Ord. No. 17-01, effective 2/28/11).

(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. Technical Staff has found that the use would not likely cause these objectionable factors. Exhibit 22, p. 13. Given the indoor and residential nature of the use, the Hearing Examiner finds that the accessory apartment would not produce these 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 recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: Technical Staff reports that there are no other accessory apartments in the neighborhood, and the addition of this special exception "will not increase the intensity or scope of special exception uses sufficiently to affect the area adversely." Exhibit 22, p.14. Because the proposed use is a residential use by definition, the special exception will not alter the predominantly residential nature of the area. Therefore, the Hearing Examiner finds that the proposed special exception will not increase the number, scope, or intensity of special exception uses sufficiently to affect the area adversely; nor will it alter the predominantly residential nature of the area.

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

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

(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: The subject site is already subdivided, and according to Technical Staff, the accessory apartment "will be adequately served by existing public services and facilities." Exhibit 22, p. 15. The evidence supports this conclusion.

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

(B) *If the special exception:*[13]
(i) does not require approval of a new preliminary plan of subdivision; and
(ii) the determination of adequate public facilities for the site is not currently valid for an impact that is the same as or greater than the special exception's impact;
then the Board of Appeals or the Hearing Examiner must determine the adequacy of public facilities when it considers the special exception application. The Board of Appeals or the Hearing Examiner must consider whether the available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the application was submitted.

Conclusion: The special exception sought in this case would not require approval of a preliminary plan of subdivision, and there is no currently valid determination of the of adequacy of public facilities for the site, taking into account the impact of the proposed special exception. Therefore, the Board must consider whether the available public facilities and services will be adequate to serve the proposed development under the applicable

[13] This section was amended, as set forth here, by Zoning Text Amendment 10-13 (Ord. No. 17-01, effective 2/28/11).

Growth Policy standards. These standards include Local Area Transportation Review (LATR) and Policy Area Mobility Review (PAMR). As indicated in Part II. B. 4. of this report, Technical Staff did do such a review, and found that the proposed accessory apartment use would generate only minimal traffic during the peak periods, and therefore no traffic study is required to satisfy the Local Area Transportation Review (LATR) and the Policy Area Mobility Review (PAMR) tests. Staff concluded that the "minimal amount of traffic increase can be accommodated by the existing road network in the neighborhood." Exhibit 22, p. 7. Therefore, the Hearing Examiner finds that the instant petition meets all the applicable Growth Policy standards.

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

Conclusion: Based on the evidence of record, especially the Technical Staff's conclusion that "the proposed use is not likely to negatively impact the safety of vehicular or pedestrian traffic," the Hearing Examiner so finds. Exhibit 22, p. 7.

C. Specific Standards

The testimony and the exhibits of record, especially the Technical Staff Report (Exhibit 22), provide sufficient evidence that the specific standards required by Section 59-G-2.00 are satisfied in this case, as described below.

Sec. 59-G-2.00. Accessory apartment.

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

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

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

Conclusion: Only one accessory apartment is proposed.

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

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

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

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

Conclusion: No addition or extension will be constructed.

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

Conclusion: The house was built in 1967. 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: Petitioner Winoa Hiden occupies the main residential unit, and except for the proposed accessory apartment, no other residential uses will exist on the lot.

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

Conclusion: A separate entrance to the accessory apartment is located on the rear of the house. The GCCA argued that undermined the appearance of a single-family dwelling. For the reasons discussed in Part II. D. of this report, the Hearing Examiner disagrees and finds that this provision is satisfied. As stated by Technical Staff (Exhibit 22, pp. 16-17):

> The entrance to the proposed accessory apartment preserves the appearance of a single-family dwelling. The apartment entrance is located at the rear of the home on the eastern side, separate from the main entrance. The apartment entrance has the appearance of a typical rear-entry to the basement of a home. It is clearly a subordinate entrance as compared to the main entrance of the home.

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

Conclusion: No external modifications or improvements 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 be subordinate to the main dwelling, as it will occupy approximately 576 square feet of space (475 square feet of which is habitable), in a dwelling which has about 1,708 square feet of floor area. It also is well within the 1,200 square foot cap.

(b) ***Ownership Requirements***

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

Conclusion: The home is occupied by Winoa Hiden, who is an owner of the property. Exhibit 3.

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

Conclusion: Petitioners acquired the property in 1968, according to the deed. Exhibit 30. Thus, more than one year has elapsed.

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

Conclusion: A condition to this effect is recommended in Part V of this report.

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

Conclusion: The Petitioners are the owners of the property.

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

Conclusion: Not applicable

(c) Land Use Requirements

(1) The minimum lot size must be 6,000 square feet, except where the minimum lot size of the zone is larger. A property consisting of more than one record lot, including a fraction of a lot, is to be treated as one lot if it contains a single one-family detached dwelling lawfully constructed prior to October, 1967. All other development standards

of the zone must also apply, including setbacks, lot width, lot coverage, building height and the standards for an accessory building in the case of conversion of such a building.

Conclusion: The subject lot is 21,568 square feet in area, well over the 6,000 square foot minimum. The following chart from the Technical Staff Report (Exhibit 22, p. 9) demonstrates compliance with all development standards for the R-200 Zone:[14]

Development Standard	Min/Max Required	Approximately Provided	Applicable Zoning Provision
Maximum Building Height	50 feet	2 stories	§ 59-C-1.327
Minimum Lot Area	20,000 sq. ft.	21,568 sq. ft.	§ 59-C-1.322(a)
Minimum Lot Width at Front Building Line	100 ft.	140 ft.	§ 59-C-1.322(b)
Minimum Lot Width at Street Line	25 ft.	100 ft.	§ 59-C-1.322(b)
Minimum Setback from Street	40 ft.	40 ft.	§ 59-C-1.323(a)
Minimum Side Yard Setback	12 ft. one side; sum of 25 ft. both sides	31 ft west side; 45 ft. east side; 76 ft. sum of both	§ 59-C-1.323(b)(1)
Minimum Rear Yard Setback	30 ft.	Approx 70 ft.	§ 59-C-1.323(b)(2)
Maximum Building Coverage	25 percent	5 percent	§ 59-C-1.328
Maximum Floor Area for Accessory Apartment	1,200 sq. ft.	576 sq. ft.	§ 59-G-2.00(a)(9)
Off-street Parking Requirement	2 parking spaces plus additional spaces as determined by the BOA	5 parking spaces in the car port and paved driveway	§ 59-E-3.7 and G-2.00(c)(3)

[14] The Hearing Examiner has modified the Table to be consistent with the discussion herein of the proper interpretation of the statutory parking requirements, and to accurately reflect the evidence regarding available parking on the subject site produced at the hearing.

(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: As stated by Technical Staff, "Out of the approximately 40 homes within the neighborhood, there are no existing accessory apartments. The proposed accessory apartment, if granted, will not result in an excessive concentration of similar uses in the general neighborhood." The Hearing Examiner agrees and so finds.

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

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

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

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

Conclusion: As previously discussed, there are five off-street parking spaces available on the site, one in the carport and four on the paved driveway. The resident owner, Winoa Hiden, has only one vehicle and the tenants, who have permission to park on the driveway, have only two vehicles. Thus, there is more than adequate space for parking, and the "gravel driveway" will not be used for vehicles in the future.

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

Conclusion: Not applicable.

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

Conclusion: Not applicable.

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

Conclusion: Not applicable.

D. Additional Applicable Standards

Not only must an accessory apartment comply with the zoning requirements as set forth in 59-G, it must also be approved for habitation by the Department of Housing and Community Affairs. As discussed in Part II. B. of this report, the Housing Code Inspector's memorandum (Exhibit 21) notes that the repairs that are needed, and that occupation of the accessory apartment must be limited to no more than two unrelated persons or a family of up to three. As mentioned above, Petitioners have agreed to meet all conditions. Those conditions are reflected in the following recommendations.

V. RECOMMENDATION

Based on the foregoing analysis, I recommend that Petition No. S-2798 for a special exception to permit an accessory apartment located at 14212 Northwyn Drive, Silver Spring, Maryland, be GRANTED, with the following conditions:

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

2. Petitioners must comply with DHCA's determination of the maximum permitted occupancy for the accessory apartment (*i.e.*, the accessory apartment may be occupied by no more than two (2) unrelated persons or a family not to exceed three (3) persons), and the other DHCA directives needed to ensure that the accessory apartment is maintained up to Code, as listed in Exhibit 21:

   a. The unit will accommodate 2 unrelated people or a family of 3 based on square footage code requirements.

   b. The kitchen area cannot be used for sleeping purposes.

c. One window in the bedroom must be enlarged to meet the following emergency egress standards for Montgomery County.

- The minimum net clear opening of 5.7 square feet.
- The minimum net clear opening height shall be 24 inches.
- The minimum net clear opening width shall be 20 inches.
- The window sill height can not be more than 44 inches above the floor.
- Emergency escape and rescue openings shall be operational from the inside of the room without the use of keys, tools or special knowledge.

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

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

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

6. Petitioners must make parking spaces available for their accessory apartment tenants, either on their legal driveway or on the street directly in front of Petitioners' home; however, Petitioners must provide in their lease for the accessory apartment that tenants must not park on the curve in Northwyn Drive abutting the southeastern frontage of the subject site.

7. Petitioners must also provide in their lease for the accessory apartment that tenants must not park in the grass on any yard on the site and must not use the unapproved gravel/grass driveway on the site for parking or vehicular traffic.

8. Petitioners must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioners shall at all times ensure that the special exception use and premises comply with all applicable codes (including but

not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: May 20, 2011

Respectfully submitted,

_____
Martin L. Grossman
Hearing Examiner