

I. STATEMENT OF THE CASE

On October 16, 2017, Richard Newell (Applicant), filed an application seeking approval of a conditional use to permit an attached accessory apartment in the basement of a one-family detached home at 6412 Ridge Drive, Bethesda, Maryland. The subject property is identified as Lot 61, Block 7, of the Brookmont subdivision (Tax Account Number 07-03115563.) The Applicant's husband, a co-owner of the property, consented to the Application. Exhibit 21. The property is zoned R-60 (Residential-Detached).

If a proposed accessory apartment meets the criteria for a limited use under the Zoning Ordinance, an applicant can obtain a license to establish an accessory apartment within a dwelling by applying to the Department of Housing and Community Affairs (DHCA). *See, Montgomery County Code*, §29-19(b)(1)(C). The limited use standards require that the property have a minimum number of on-site parking spaces and that it be a certain distance from other existing accessory apartments. Approval of a conditional use is required, however, when the property cannot meet one or both of these requirements.¹ *Id.*; *Zoning Ordinance*, §59. 3.3.3. A.2.b.²

The Applicant initially filed a license application for a Class 3 Accessory Apartment with DHCA for approval as a limited use. DHCA referred the application to the Office of Zoning and Administrative Hearings (OZAH) because another accessory apartment was within the minimum distance required. Exhibit 6.

The public hearing before the Hearing Examiner was scheduled for February 5, 2018. Exhibit 18. On January 19, 2018, Staff of the Montgomery County Planning Department (Staff)

¹ In this case, the Zoning Ordinance requires three on-site parking spaces for approval as a limited use. Single-family detached homes must have two on-site parking spaces in addition to one on-site space for the accessory apartment. *Zoning Ordinance*, §§59.6.2.4.B; 59.3.3.3.A.2.a.iii(b). Accessory apartments in the R-60 Zone must be separated by at least 300 feet from any other detached or attached accessory apartment. *Id.*, §59.3.3.3.B.2.d.

² All citations in this Decision are to the 2014 Zoning Ordinance for Montgomery County (*Zoning Ordinance*), effective September 30, 2014 (Ordinance No. 17-52), as amended.

issued a report recommending approval of the application, subject to three conditions (Exhibit 18, p. 2):

1. The Applicant is bound by all submitted statements and materials of record.
2. The total number of occupants residing in the accessory apartment who are 18 years or older is limited to 2.
3. No other rental residential uses are to be located on the subject site.

Upon review, Staff advised that the proposed apartment had only two on-site parking spaces, rather than the required three. Therefore, approval of a conditional use is required to deviate both from the number of on-site parking spaces required and the minimum distance separation. Exhibit 19, p. 11.

Ms. Cece Kinna, Housing Code Inspector III, submitted a report of her inspection of the property on January 31, 2018. Exhibit 23. The report included a revised floor plan. According to the report, the revision is necessary to comply with the Montgomery County Housing Code. *Id.*; *Montgomery County Code*, Chapter 26. The report also lists one repair needed to meet the Code (Exhibit 23):

- 3) Install exterior lighting fixtures to provide adequate lighting from driveway to Accessory Apartment entrance. Motion or photocell fixtures recommended.

The hearing went forward on February 5, 2018, and the Applicants appeared *pro se*.³ Mr. Newell adopted the findings of the Staff Report as his own testimony and agreed to comply with all conditions of approval contained in the Staff Report. T. 6. He also agreed to comply with the revised floor plan and make the repair required by DHCA. T. 8, 12.

Based on a thorough review of the entire record, the Hearing Examiner finds that on-street parking is available for residents within 300 feet of the accessory apartment and that the apartment

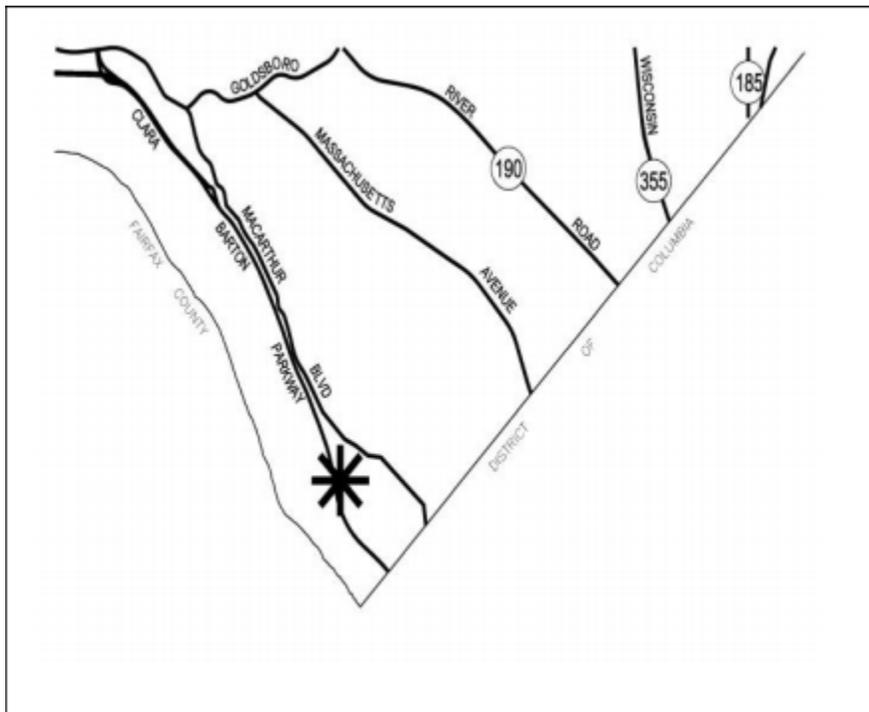
³ The public hearing was delayed for two hours because the Montgomery County Schools were closed due to inclement weather. OZAH's weather policy states, "When Montgomery County Schools are closed due to the weather, OZAH hearings will **not** be held. When Montgomery County Schools announce a late opening, OZAH hearings will be correspondingly delayed." <http://www.montgomerycountymd.gov/ozah/>.

will not cause an overconcentration of similar uses in the neighborhood. Therefore, she grants the Applicants' request for an attached accessory apartment and approves the conditional use application, subject to the conditions listed in Part IV, below.

II. FACTUAL BACKGROUND

A. The Subject Property

The property consists of 6,000 square feet located on the west side of Ridge Drive between Ridge Drive and Clara Barton Parkway. Exhibit 19, p. 3. A vicinity map included in the Staff Report shows the general location of the property (Exhibit 21, p. 1).



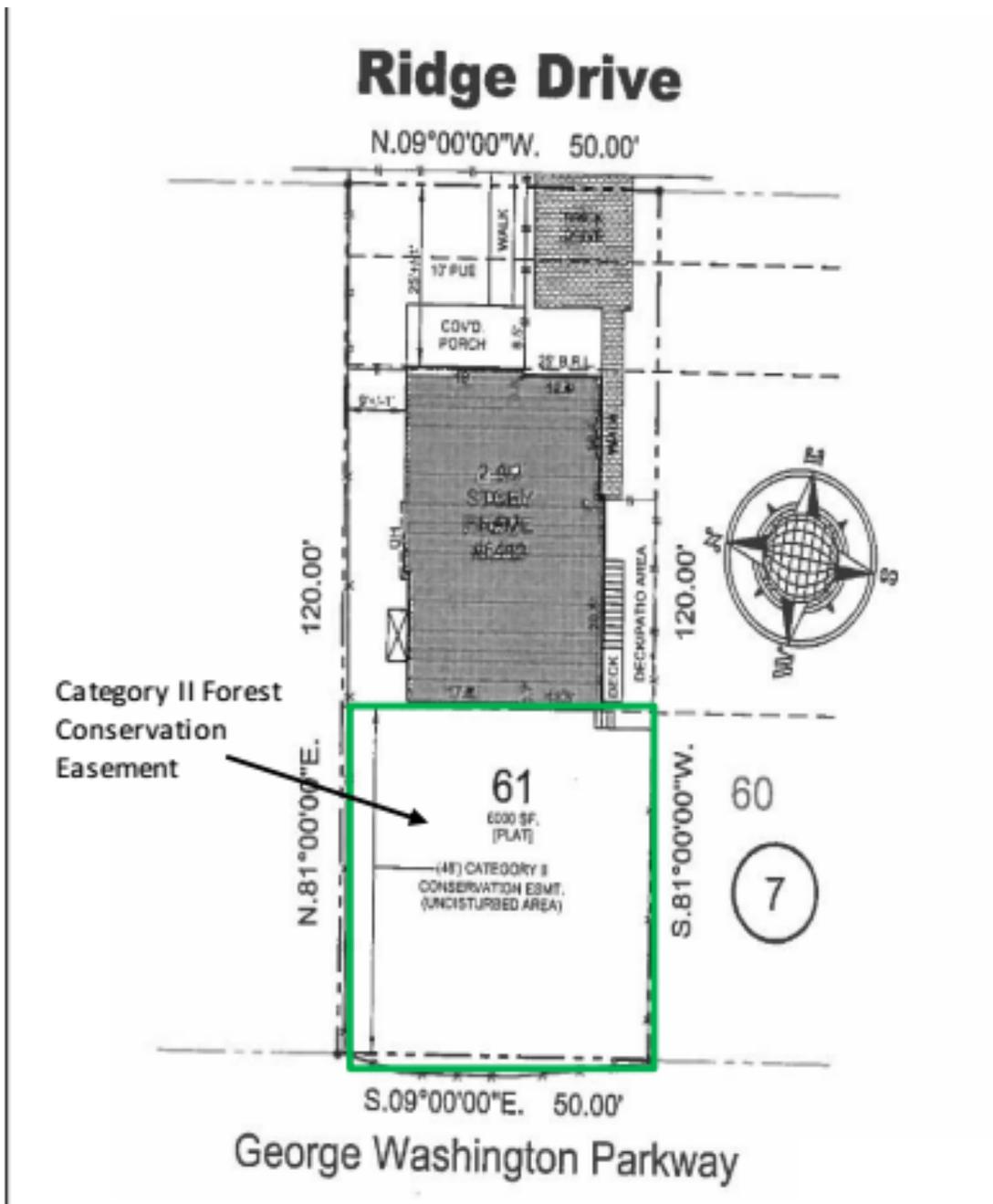
Vicinity Map
Exhibit 19, p. 1

The property is improved with a two-story detached house constructed in 2007. Staff reports that the rear of the property slopes steeply toward the Parkway. Exhibit 19, p. 3. For this reason, the entire back yard is subject to a Category II Forest Conservation Easement to ensure

that it remains undisturbed. *Id.* Staff states that the dwelling has an enclosed area of 4,233 square feet. *Id.*, p. 5. A parking pad in front of the house can accommodate two vehicles. Exhibit 19. An aerial photograph of the property (from the Staff Report) shows the existing home and the paved parking area (Exhibit 19, p. 3, below):



A site plan (Exhibit 19, p. 5, on the next page) shows the layout of all improvements to the site as well as the forest conservation easement. Photographs from the Staff Report (Exhibit 19, pp. 5-6, on page 7) show the front entrance of the dwelling with the parking pad and the slope of the rear yard down to Clara Barton Parkway. *Id.*



Site Plan
Exhibit 19, p. 5



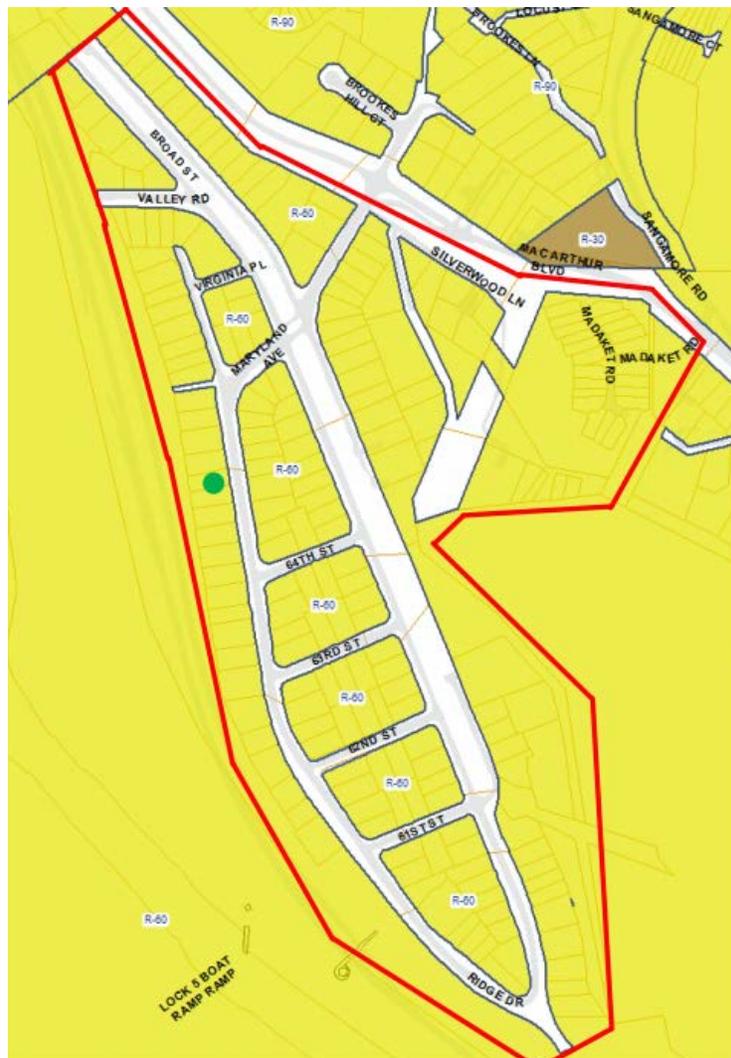
**Front View from
Ridge Drive
Exhibit 19**



**View of Rear Yard
Exhibit 19**

B. General Neighborhood

When a proposed accessory apartment does not meet the minimum distance requirements for a limited use, the Applicant must demonstrate that it does not result in an overconcentration of similar uses in the “general neighborhood.” *Zoning Ordinance*, §59-3.3.3.A.2.c.ii. That term has been traditionally defined as the area that will be most directly impacted by the proposed use. Staff defined the general neighborhood as bounded by MacArthur Boulevard to the north, federal parkland to the east and south, and Clara Barton Parkway to the west. Staff characterized the area as consisting of single-family dwelling in the R-60 Zone. Exhibit 19, p. 6. The Staff report includes a graphic depicting these (*Id.*, below):



General Neighborhood
Exhibit 19, p. 6

Staff determined that there are eight conditional uses within the surrounding area, as follows (*Id.* at 4):

- S-989 located at 6417 Broad Street approved 9/11/84;
- S-1260 located at 6021 Broad Street approved 3/18/86;
- S-1971 located at 6105 Ridge Drive approved 11/24/86;
- S-1848 located at 6425 Ridge Drive approved 5/6/91;
- BAS-1917 located at 6037 Board Street approved 2/3/92;
- S-2773 located at 6430 Ridge Drive approved 3/6/11;
- AA 2014-05 located at 4105 Maryland Avenue approved 6/5/15; and
- CU 16-05 located at 6043 Broad Street approved 3/3/16.

One of these accessory apartments, 6430 Ridge Drive, is located less than 300 feet from the subject property (Exhibit 19, p. 14):



C. The Proposed Use

The Applicant proposes an accessory apartment in the basement of the existing dwelling. Staff determined that the apartment will be 1,132 square feet based on the floor plans submitted by the Applicant. Exhibit 19, p. 14. Ms. Kinna testified that the revised floorplan submitted with

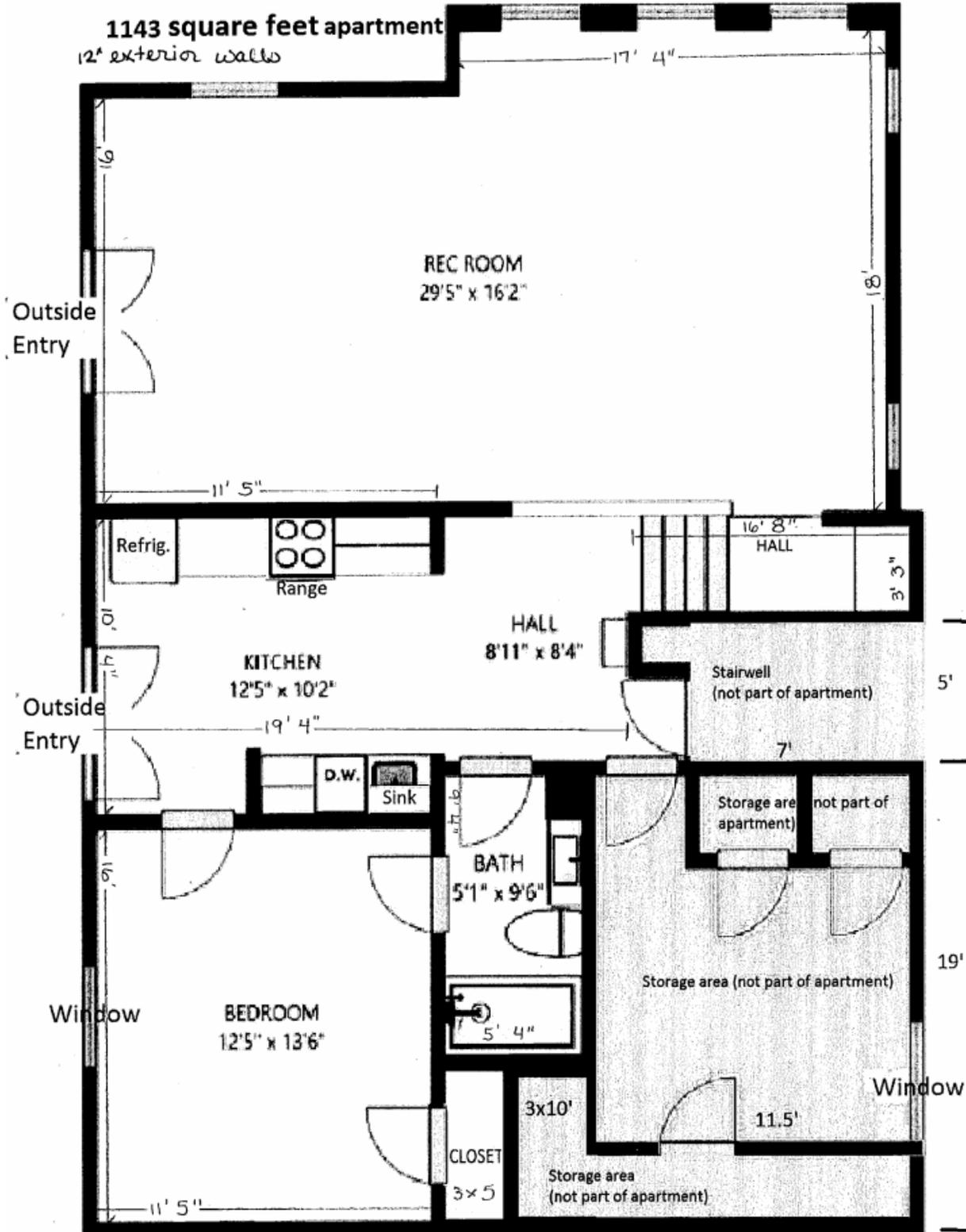
her inspection report measures 1,124 gross square feet. T. 10. The entrance to the apartment is on the southern side of the home and is accessed from stairs leading from the parking pad. Other than installation of lighting on the exterior path, no new exterior changes are needed or requested for this application. A photograph of the side entrance and pathway is shown below (Exhibit 19, p. 8):



**Side Entrance
Exhibit 19, p. 8**

Based on the revised floor plan, the interior of the apartment will consist of one bedroom, a recreation room, a kitchen, bathroom and hall. A copy of the floor plan is shown on the following page (Exhibit 23).⁴

⁴ Notes on the floorplan indicate that the square footage of the apartment is 1,143 square feet. At the hearing, Mr. Newell clarified that these notes were his best estimate of the square footage. T. 10. Ms. Kinna actually measured the apartment and determined that the gross floor area is 1,124 square feet.



31 ft house width x 46 ft house length = 1426 sqft minus 283 sqft area not part of apartment equals 1143 sqft total apartment size

**Floorplan
Exhibit 23**

D. Community Response

There has been no community response to this application, either for or against. Exhibit 19, p. 11.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A conditional use is a zoning device that authorizes certain uses provided that pre-set legislative standards are met. The legislative standards for accessory apartments were modified by amendments to the 2014 Zoning Ordinance, adopted on December 1, 2015 in ZTA 15-09 (Ordinance No. 18-08) and effective December 21, 2015. The major change was to specify that the general findings required for other kinds of conditional uses “are not applicable to this type of conditional use.” Section 59.3.3.3.A.2.c. This change eliminated not only general assessments of compatibility and impacts on the neighborhood, but also any evaluation of master plan conformance and compliance with requirements of zone and development standards. The limited use standards of Section 3.3.3.A.2.a and Section 3.3.3.A.2.c continue to apply to all accessory apartment conditional use applications, and standards in Section 3.3.3.B.2 apply only to attached accessory apartment applications. The December 21, 2015, amendments to the Zoning Ordinance did not change the Conditional Use application requirement regarding ownership of the subject property, specified in Section 59-7.3.1.B.1.

A. Ownership of the Subject Property

The application requirements for all conditional uses are set forth in Section 59.7.3.1.B. of the Zoning Ordinance:

1. Ownership:

- a. An applicant must own the subject property or be authorized by the owner to file the application.*
- b. If any land or right-of-way is owned or controlled by the State, County, or any other entity or agency, written authorization from that entity or agency must be submitted with the application.*

Conclusion: The Applicant provided a deed dated August 24, 2017, into Richard Newell and Bonnie Nevel as owners of the property. This is sufficient proof that the Applicant owns the property.

B. Use Standards for Accessory Apartments, in General (Section 59-3.3.3.A.)

The Applicants must comply with general standards applicable to all accessory apartments, except that they may deviate from the number of parking spaces normally required if the conditional use application is approved. *Zoning Ordinance*, §59.3.3.3.A.2.b. When there are fewer than the required number of parking spaces, the Applicants must demonstrate that on-street parking is sufficient to serve the use. *Id.*, §59.3.3.3.A.2.c. Standards pertinent to this approval, and the Hearing Examiner's finding for each standard, are set forth below.

Section 59-3.3.3.A. – Accessory Apartments, In General⁵

1. Defined, In General

Accessory Apartment means a second dwelling unit that is subordinate to the principal dwelling. An Accessory Apartment includes an Attached Accessory Apartment and a Detached Accessory Apartment.

Conclusion: The revised floor plan (Exhibit 23) shows that the attached apartment will have independent eating, sleeping and sanitary facilities. It therefore meets the above definition.

2. Use Standards for all Accessory Apartments

- a. Where an Accessory Apartment is allowed as a limited use, it must satisfy the following standards:***
- i. Only one Accessory Apartment is permitted for each lot.*
 - ii. The Accessory Apartment was approved as a conditional use before May 20, 2013 and satisfies the conditions of the conditional use approval; or*

⁵ Three of the Zoning Ordinance standards for all accessory apartments are not applicable to this application and are therefore are not discussed in this Report. Section 59-3.3.3.A.2.v applies only to Agricultural and Rural Residential Zones, Section 59-3.3.3.A.2.vi. clarifies accessory apartments do not need to comply with screening requirements elsewhere in the Zoning Ordinance, and Section 59-3.3.3.A.2.vii. applies only to the Agricultural Reserve Zone. This property is within a Residential Detached Zone.

- iii. *The Accessory Apartment is licensed by the Department of Housing and Community Affairs under Chapter 29 (Section 29-19); and*

Conclusion: The Applicants are requesting approval for only one accessory apartment on the subject site. Exhibit 12. Following approval of the conditional use, the Applicants must obtain a license for the accessory apartment from DHCA, which will be a condition of this approval.

- (a) *The apartment has the same street address as the principal dwelling;*

Conclusion: The accessory apartment will be located in the basement of the dwelling. Mr. Newell testified that it will have the same address as the principal dwelling (T. 13), which is confirmed by Staff. Exhibits 7, 19. The use as proposed meets this requirement, which is also a condition of approval.

- (b) *One on-site parking space is provided in addition to any required on-site parking space for the principal dwelling; however, if a new driveway must be constructed for the Accessory Apartment, then 2 on-site parking spaces must be provided;*

Conclusion: The Zoning Ordinance normally requires a total of three on-site parking spaces for an accessory apartment: two spaces for the main dwelling (Section 59-6.2.4.B) plus one for the accessory apartment (Section 59-3.3.3.A.2.a.iii (b)). Section 59-3.3.3.A.2.b. permits a conditional use to deviate from the on-site parking space requirements where on-street parking is readily available for residents within 300 feet. *Zoning Ordinance*, §59-3.3.3.A.2.c.ii. The Hearing Examiner discusses whether on-street parking is sufficient to serve the use on pages 16-17 of this Report.

- (c) *The maximum gross floor area for an Accessory Apartment, including any floor area used for an Accessory Apartment in a cellar, must be less than 50% of the total floor area in the principal dwelling, including any floor area used for an Accessory Apartment in the cellar of the principal dwelling, or 1,200 square feet, whichever is less;*

Conclusion: Staff stated that the proposed apartment is 1,132 square feet based on the submitted floor plan. Exhibit 19, p. 11. The Housing Inspector physically measured the apartment and concluded that it is 1,124 gross square feet *without* the two bedrooms shown in the original plan. For this reason, the Hearing Examiner accepts Ms. Kinna's measurements of the size of the accessory apartment. Based on the measurements of the second bedroom and storage space shown on the revised floorplan, the size of the apartment would exceed the maximum permitted if the second bedroom is used. Therefore, the Hearing Examiner conditions approval of this application upon compliance with the revised floor plan. As conditioned, the proposed apartment meets the standards of this section.

(d) The maximum floor area used for an Accessory Apartment in a proposed addition to the principal dwelling must not be more than 800 square feet if the proposed addition increases the footprint of the principal dwelling; and

Conclusion: The accessory apartment does not require an addition to the home. This standard is not applicable to the application.

(e) The maximum number of occupants is limited by Chapter 26 (Section 26-5); however, the total number of occupants residing in the Accessory Apartment who are 18 years or older is limited to 2.

Conclusion: Conditions listed in Part IV of this Report and Decision limit the total number of occupants who are 18 years or older to 2 persons. A condition of approval will require the Applicant to limit total occupancy to the number permitted under the Housing Code, as determined by DHCA.

iv. An Accessory Apartment must not be located on a lot where any other allowed rental Residential use exists; however, an Accessory Apartment may be located on a lot in an Agricultural or Rural Residential zone that includes a Farm Tenant Dwelling or a Guest House.

Conclusion: The property is zoned R-60 (Residential Detached). Staff recommended a condition of approval that prohibits other rental uses on the property, to which the Applicant agreed. T. 6. Exhibits 19, 13. Such a condition is included in Part IV of this Report and Decision. Therefore, the Hearing Examiner finds that the use as proposed and conditioned will meet this standard.

b. An Accessory Apartment conditional use application may be filed with the Hearing Examiner to deviate from the following limited use standards;

i. The number of on-site parking spaces; or

Conclusion: The property has two of the three required on-site parking spaces. For this reason, the Applicants filed this conditional use application seeking approval to deviate from the on-site parking requirements.

ii. The minimum distance from any other Attached or Detached Accessory Apartment

Conclusion: There is one accessory apartment within the 300-foot minimum separation required by the R-60 Zone, necessitating this conditional use.

c. Where an Accessory Apartment conditional use application is filed under Section 3.3.3.A.2.b, the Hearing Examiner may approve a conditional use for the Accessory Apartment under Section 7.3.1, except that the findings under Section 7.3.1 E are not applicable to this type of conditional use. The limited use standards of Section 3.3.3.A.2.a and Section 3.3.3.A.2.c apply to all accessory apartment conditional use applications. In addition, the limited use standards of Section 3.3.3.B.2 apply to the Attached accessory Apartment applications and the limited use standards of Section 3.3.3.C.2 apply to the Detached Accessory Apartment applications.

i. Fewer off-street spaces are allowed if there is adequate on-street parking. On-street parking is inadequate if:

(a) the available on-street parking for residents within 300 feet of the proposed Accessory Apartment would not permit a resident to park on-street near his or her residence on a regular basis; and

(b) the proposed Accessory Apartment is likely to reduce the available on-street parking within 300 feet of the proposed Accessory Apartment.

Conclusion: Three parking spaces are needed for the accessory parking and the dwelling. Two are on the parking pad in front of the dwelling. Staff advises that the property has 50 feet of frontage on Ridge Drive, although 20 feet of the frontage taken up by the parking pad. Staff estimates that one vehicle can park on the remaining street frontage. Exhibit 19, p. 15. On-street parking is unrestricted on Ridge Drive. Staff determined that there is sufficient parking for the apartment because the majority (i.e., 22 of the 31 properties) within 300 feet have driveways, so it is unlikely that many residents within 300 feet need to park on the street. *Id.* Ms. Kinna testified that she was able to park nearby even with construction vehicles located on the street. Mr. Newell testified that, while there are usually cars parked on the street, spots are generally available. Based on this evidence, the Hearing Examiner finds that on-street parking is regularly available to residents within 300 feet of this property and that on-site parking is adequate to serve the proposed use.

ii. When considered in combination with other existing or approved Accessory Apartments, the deviation in distance separation does not result in an excessive concentration of similar uses, including other conditional uses, in the general neighborhood of the proposed use.

Conclusion: There are eight accessory apartments in the defined neighborhood. Exhibit 19, p. 15. Staff found that the addition of this apartment did not result in an overconcentration of these uses in the neighborhood (*Id.*):

The neighborhood is overwhelmingly residential in character and consists of over 175 one-family residences. Accessory apartments are deemed a compatible accessory use to a primary residential use. While maintaining the residential character of a neighborhood, accessory apartments are also viewed as a mechanism to provide additional affordable housing choices in the county. Thus, approval of the requested conditional use will not create an excessive concentration of similar uses in the general neighborhood as the appearance of the existing one-family residence will remain unchanged and retain its residential appearance with nearby residential uses.

Conclusion: The Hearing Examiner agrees that the addition of this accessory apartment will not result in an overconcentration of similar uses. The existence of eight apartments among the 175 homes is negligible, particularly as no exterior changes are planned to the existing dwelling. This standard has been met.

C. Use Standards for Attached Accessory Apartments (Section 59-3.3.3.B)

Section 59-3.3.3.B. – Attached accessory Apartment

1. *Defined*

Attached Accessory Apartment means a second dwelling unit that is part of a detached house building type and includes facilities for cooking, eating, sanitation, and sleeping. An Attached Accessory Apartment is subordinate to the principal dwelling.

2. *Use Standards*

Where an Attached accessory Apartment is allowed as a limited use, it must satisfy the use standards for all Accessory Apartments under Section 3.3.3.A.2 and the following standards:

a. A separate entrance is located:

- i. On the side or rear of the dwelling;*
- ii. At the front of the principal dwelling, if the entrance existed before May 20, 2013; or*
- iii. At the front of the principal dwelling, if it is a single entrance door for the use of the principal dwelling and the Attached accessory Apartment.*

Conclusion: The photographs of the property (shown in Part II.C. of this Decision) and the floor plan demonstrate that there is a separate entrance to the accessory apartment located on the side of the dwelling. The Hearing Examiner finds that this standard has been met.

- b. The detached house 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 the application for a license or a conditional use.***

Conclusion: Staff advises that the existing house was built in 2007, more than five years prior to the date this application was filed (i.e., October 16, 2017.) Exhibit 19, p. 16. The Hearing Examiner finds that this condition has been met.

- c. In the RE-2C, RE-1, and R-200 zones the Attached Accessory Apartment is located at least 500 feet from any other Attached or Detached Accessory Apartment, measured in a line from side lot line to side lot line along the same block face.*

Conclusion: The property is located in the R-60 (Residential Detached) Zone. This standard is not applicable to this case.

- d. In the RNC, R-90, and R-60 zones the Attached accessory Apartment is located at least 300 feet from any other Attached or Detached Accessory Apartment, measured in a line from side lot line to side lot line along the same block face.*

Conclusion: Because the property is zoned R-60, this section is applicable. As discussed above, there is one accessory apartment within 300 feet of this property, necessitating this conditional use application. For the reasons already set forth, the Hearing Examiner finds that a deviation in the minimum distance between the apartments will not alter the existing residential character of the neighborhood.

In sum, the application satisfies all of the applicable use standards in Code §59.3.3.3.A. and B.

IV. CONCLUSION AND DECISION

Weighing all the testimony and evidence of record, the Hearing Examiner concludes that the Applicants have shown by a preponderance of evidence that the conditional use proposed in this application, subject to the conditions set forth below, will satisfy all of the requirements for an accessory apartment. *See, Zoning Ordinance, §59-7.1.1.*

Therefore, the application of Richard G. Newell (CU 18-03), for a conditional use under Sections 59-3.3.3.A. and B. of the Zoning Ordinance to operate an attached accessory apartment at 6412 Ridge Drive, Bethesda, Maryland, is hereby **GRANTED**, subject to the following conditions:

1. The total number of occupants residing in the accessory apartment who are 18 years or older is limited to 2;
2. Total occupancy of the apartment is limited to the number permitted by the Housing Code, Chapter 26 of the Montgomery County Code, as determined by DHCA.
3. No other residential rental uses are allowed to be located on the subject site;
4. The use and layout of the apartment must conform to the revised floor plan (Exhibit 23);
5. The Applicants must make those repairs listed in the Housing Inspector's Report (Exhibit 23);
6. The accessory apartment must have the same address as the principle dwelling.
7. The Applicants must obtain an accessory apartment license from the Department of Housing and Community Affairs under Section 29-19 of the Montgomery County Code.
8. The Applicants must comply with any directions of the Housing Code Inspector to ensure safe and code-compliant occupancy; and
9. The Applicants 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 conditional use premises and operate the conditional use as granted herein. The Applicants shall at all times ensure that the conditional 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, including the annual payment of conditional use administrative fees assessed by the Department of Permitting Services.

Issued this 21st day of February, 2018.



Lynn A. Robeson
Hearing Examiner

NOTICE OF RIGHT TO REQUEST ORAL ARGUMENT

Any party of record may file a written request to present an appeal and oral argument before the Board of Appeals, within 10 days after the Office of Zoning and Administrative Hearings issues the Hearing Examiner's Report and Decision. Any party of record may, no later than 5 days after a request for oral argument is filed, file a written opposition to it or request to participate in oral argument. If the Board of Appeals grants a request for oral argument, the argument must be limited to matters contained in the record compiled by the Hearing Examiner. A person requesting an appeal, or opposing it, must send a copy of that request or opposition to the Hearing Examiner, the Board of Appeals, and all parties of record before the Hearing Examiner.

Contact information for the Board of Appeals is listed below, and additional procedures are specified in Zoning Ordinance §59.7.3.1.F.1.c. The Board of Appeals may be contacted at:

Montgomery County Board of Appeals
100 Maryland Avenue, Room 217
Rockville, MD 20850
(240) 777-6600

<http://www.montgomerycountymd.gov/boa/>

The Board of Appeals will consider your request for oral argument at a work session. Agendas for the Board's work sessions can be found on the Board's website and in the Board's office. You can also call the Board's office to see when the Board will consider your request. If your request for oral argument is granted, you will be notified by the Board of Appeals regarding the time and place for oral argument. Because decisions made by the Board are confined to the evidence of record before the Hearing Examiner, no new or additional evidence or witnesses will be considered. If your request for oral argument is denied, your case will likely be decided by the Board that same day, at the work session.

Parties requesting or opposing an appeal must not attempt to discuss this case with individual Board members because such *ex parte* communications are prohibited by law. If you have any questions regarding this procedure, please contact the Board of Appeals by calling 240-777-6600 or visiting its website: <http://www.montgomerycountymd.gov/boa/>.

Notifications To:

Richard G. Newell
Barbara Jay, Executive Director
Montgomery County Board of Appeals
Kathy Reilly, Planning Department
Cece Kinna, Housing Code Inspector
Ehsan Motazed, Department of Permitting Services
Greg Nichols, Manager, SPES at DPS
Alexandre A. Espinosa, Director, Finance Department
Charles Frederick, Esquire, Associate County Attorney