

**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:** \*

**BRIAN AND ELLEN KADOW** \*

Petitioners \*

\*

Brian Kadow \*

Ellen Kadow \*

Michele Rosenfeld, Esquire \*

For the Petition \*

\*\*\*\*\*

Cynthia Caudillo \*

Department of Housing and \*

Community Affairs \*

Susan Scala-Demby \*

Department of Permitting Services \*

Malcolm Spicer, Esquire \*

Attorney for DPS \*

\*\*\*\*\*

Board of Appeals Case No. S-2824  
(OZAH Case No. 12-13)

Before: Martin L. Grossman, Hearing Examiner

**HEARING EXAMINER’S REPORT AND RECOMMENDATION**

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## I. STATEMENT OF THE CASE

Petition No. S-2824, filed on August 15, 2011, seeks a special exception, pursuant to §59-G-2.00 of the Zoning Ordinance, to permit an accessory apartment use in the basement of an existing single-family home located at 3603 Thornapple Street, Chevy Chase, Maryland, on land in the R-60 (Residential, One-family, Detached) Zone. The property's legal description is Lot 2, Block 4 of the Otterbourne Subdivision of Chevy Chase. The tax account number is 07-01523995.

The Hearing was scheduled for February 2, 2012, by notice dated September 22, 2011 (Exhibit 12). Technical Staff at the Maryland-National Capital Park and Planning Commission (M-NCPPC), in a report issued January 27, 2012, recommended approval of the special exception, with conditions, one of which was that Petitioners obtain a variance regarding required side-yard setbacks. Exhibit 14, p. 1.<sup>1</sup> The need for the variance was further confirmed by a January 31, 2012 Addendum to Technical Staff's report. Exhibit 15.

The Department of Housing and Community Affairs (DHCA) inspected the property on January 26, 2012. Housing Code Inspector Cynthia Caudillo reported her findings in a memorandum dated January 31, 2012 (Exhibit 17(a)). Ms. Caudillo determined that the accessory apartment has 473.47 square feet of habitable space, and occupancy will be limited to two persons.

A public hearing was convened on February 2, 2012, as scheduled, and Petitioners Brian and Ellen Kadow appeared *pro se*.<sup>2</sup> Also testifying were Inspector Cynthia Caudillo of the Department of Housing and Community Affairs and Susan Scala-Demby, Zoning Manager for the Department of Permitting Services (DPS), the latter being represented by Malcolm Spicer, Esquire.

Petitioners filed a copy of their deed (Exhibit 21), executed an affidavit of posting (Exhibit 20), and identified photos of the premises. Except with regard to the need for a variance, they

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<sup>1</sup> The Technical Staff report is frequently quoted and paraphrased herein. On February 1, 2012, Staff issued a correction to the Development Standards Table on page 10 of its report, noting that the figure for the existing side-yard setbacks should read "5±ft./ 9±ft." Exhibit 16.

<sup>2</sup> Petitioners subsequently retained counsel, Michele Rosenfeld, Esquire, to pursue a variance application.

adopted the findings in the Technical Staff Report (Exhibit 14) and in the Housing Code Inspector's Report (Exhibit 17(a)), as Petitioners' own evidence (Tr. 8-12). They also agreed to meet all the conditions set forth in both reports, except with regard to obtaining a variance. Tr. 8-12.

The record was held open till February 17, 2012, to give Petitioners time to decide on whether they intended to apply for a variance. At the request of Petitioners' counsel, the Hearing Examiner extended that deadline until Petitioners completed their application for a variance from the side-yard setback requirements, and on March 21, 2012, entered an Order keeping the special exception record open until after the Board of Appeals acted on the variance application. Exhibit 29. Petitioners' variance application (BOA Case No. A-6382) was accepted by the Board for filing on April 9, 2012. Exhibit 30.

On May 23, 2012, the Board voted to approve the variance, which is reflected in the Board's resolution effective July 13, 2012. Exhibit 35.<sup>3</sup> By Order of July 13, 2012, the Hearing Examiner took official notice of the Board's resolution granting the variance, and directed that the record close on July 23, 2012, following a 10-day notice period. Exhibit 34.

There is no opposition to this special exception, and except for the side-yard setbacks, the petition meets all of the statutory criteria. Given the Board of Appeals' grant of a variance from the side-yard setback requirement (Exhibit 35), the Hearing Examiner recommends that the petition be granted, with conditions.

## **II. FACTUAL BACKGROUND**

### **A. The Subject Property and the Setback Issue**

The subject property is located at 3603 Thornapple Street, Chevy Chase, Maryland in the Otterbourne Subdivision. Petitioners' home is on the north side of Thornapple, just west of

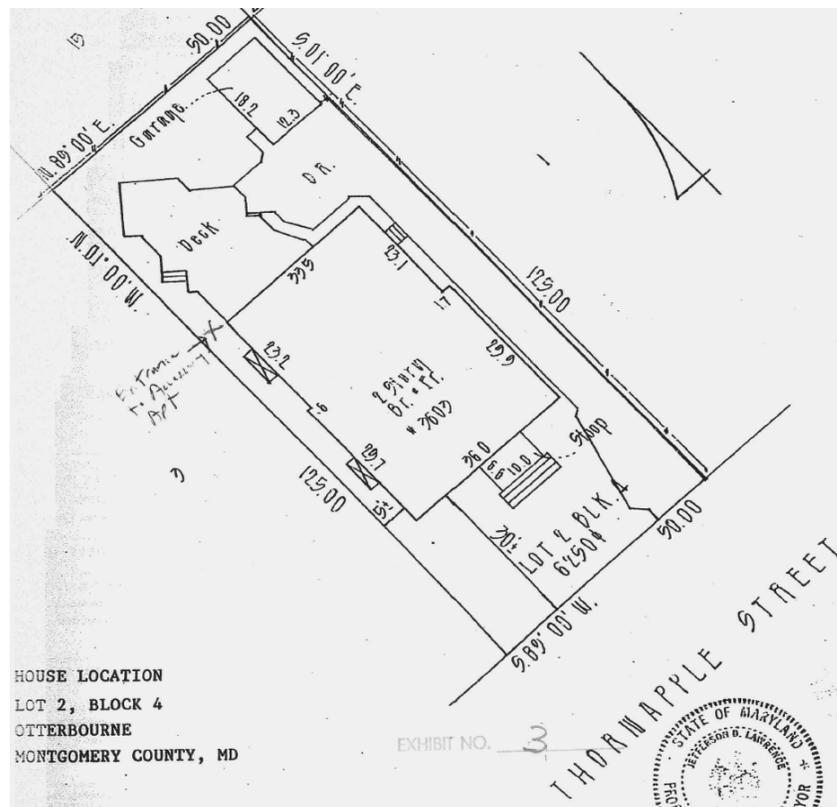
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<sup>3</sup> The Board's original resolution effective July 13, 2012 is contained in Exhibit 32. Exhibit 35 contains the same resolution with a clerical correction (*i.e.*, the variance pertains to the western, not eastern, side-yard setback).

Brookville Road, as can be seen in the aerial photograph from the Technical Staff Report (Exhibit 14, p. 5) reproduced below:



The home is in the R-60 Zone, on a 6,250 square-foot lot, as is depicted in the site plan (Ex. 3).

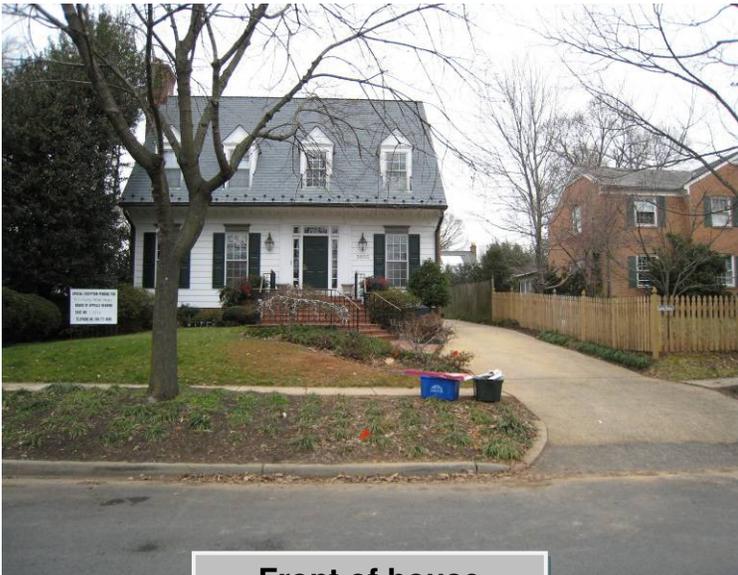


Technical Staff described the property as follows (Exhibit 14, p. 2):

The subject property contains approximately 6,250 square feet of land, is rectangular in shape, with 50 feet of frontage on Thornapple Street. The lot was recorded by plat (B-43) in 1894. The site is classified under the R-60 Zone in the Bethesda-Chevy Chase Master Plan. The property is developed with a 2 ½ story, one family dwelling unit, a paved driveway with parking pad, a detached one car garage, and a large at-grade deck sited at the rear of the dwelling. The dwelling unit was constructed in 1987 and contains approximately 3,490 square feet. The lot is a well-maintained and carefully landscaped property in the Otterbourne subdivision of Chevy Chase.

The site and surrounding and adjacent properties receive access from Thornapple Street, a 26 foot wide public right-of-way. Entrance to the main dwelling unit is from a brick path with steps adjacent to the driveway. On street parking exists along both sides of Thornapple Street. . . .

Staff also provided a photograph of the front of the house (Exhibit 14, p. 3), and a photo of the rear of the house was provided by Petitioners (Exhibit 9):



**Front of house**



**Rear of house**

The Housing Code Inspector reports that the driveway measures 103 feet by 17 feet of area in front of the garage and 15 feet by 85 feet from the entrance along the length of driveway just before the front of the garage. The total area is 1766 square feet. She concludes, “There is adequate off street parking.” Exhibit 17(a), p. 2.

As reported in Part I of this report, there is one unusual condition of this site which affects its

eligibility for a special exception – the required side-yard setbacks in the R-60 Zone are specified in Zoning Ordinance §59-C-1.323 as not less than 8 feet on each side, with a combined total of not less than 18 feet. The subject site has side-yard setbacks of approximately 5 feet on the western side and 9 feet on the eastern side, for a total of 14 feet. Exhibit 14, p. 9 and Exhibit 16. It is for that reason that Technical Staff recommended approval of the special exception only if Petitioners obtained a variance. Exhibit 14, p. 1.

Petitioners argued that the applicable setback standards in earlier Zoning Ordinance had been satisfied (Tr. 16-17), but the Hearing Examiner's review of the evidence did not bear out that allegation.

Technical Staff stated (Exhibit 14, p. 9):

The existing house meets all the R-60 zone standards, except for the required side yard setback of 8 feet and a total of 18 feet. The lot was recorded in the county land records prior to adoption of any county Zoning Ordinances. Under the R-60 Zone, the lot must have a minimum side yard setback of 8 feet and a combination for both side yards of 18 feet. As shown on the submitted plat (Attachment 3), the western side yard setback is approximately 5 + feet, while the eastern side yard setback measures approximately 9+ feet. The first county Zoning Ordinance was adopted in 1928 followed by subsequent versions. Staff's review of the current Zoning Ordinance did not uncover any exemptions contained in this ordinance with respect to side yard setbacks; nor does it appear to qualify for any exemptions contained in earlier versions of the ordinance. As submitted the dwelling unit cannot meet the required side yard setback and the application is not in conformance with the R-60 development standards. [Emphasis added.]

The Hearing Examiner agrees with Staff's conclusion. Since the lot was recorded in 1894 (Exhibit 14, p. 2), which was prior to passage of any County Zoning Ordinance, it appears that, pursuant to Zoning Ordinance §59-B-5.3, the 1928 Zoning Ordinance applies. Zoning Ordinance §59-B-5.3 provides, in relevant part:

*Any one-family dwelling in a residential zone or agricultural zone that was built on a lot legally recorded by deed or subdivision plat before June 1, 1958, is not a nonconforming building. The dwelling may be altered, renovated, or enlarged, or replaced by a new dwelling, under the zoning development standards in effect when the lot was recorded, except that:*

***(a) a lot recorded before March 16, 1928, in the original Maryland-Washington Metropolitan District, must meet the development standards in the 1928 Zoning Ordinance;*** [Emphasis added.]

Section III.(C)3. of the 1928 Zoning Ordinance provides:

3. *Side Yard: There shall be a side yard of not less than seven (7) feet in width on each side of a dwelling, except as provided in Section VIII.*

The only arguably relevant exception in Section VIII of the 1928 code is Section VIII. 3, which provides:

3. *In the case of a lot or parcel of land having a width of forty (40) feet or less, and which is included in a plat of record at the time of the passage of this ordinance, there shall be a side yard on each side of a dwelling of not less than five (5) feet in width.*

Unfortunately for Petitioners, their parcel has a width of 50 feet (Exhibit 3 and Exhibit 14, p. 10), not “*forty (40) feet or less,*” so the exception does not apply, and the side setbacks must be at least 7 feet. This conclusion was supported by the testimony of Malcolm Spicer, Esquire, the County attorney representing the Department of Permitting Services. As stated by Mr. Spicer (Tr. 36):

Given the facts and the history of the ordinances involved, we could not find any circumstance whereby this permit should have been approved to allow for a five foot side yard given the width of the lot.

Petitioners also argued that Section 5-114 of the Maryland Courts and Judicial Proceedings Article “grandfather[ed]” the Kadows' home for purposes of approving the pending special exception application. Exhibits 18 and 18(f). Section 5-114(b)(2) prohibits the government from “*initiat[ing] an action or proceeding arising out of a failure of a building or structure to comply with a setback line restriction more than 3 years after the date on which the violation first occurred if the building or structure was constructed or reconstructed . . .*” in compliance with an otherwise valid building permit.

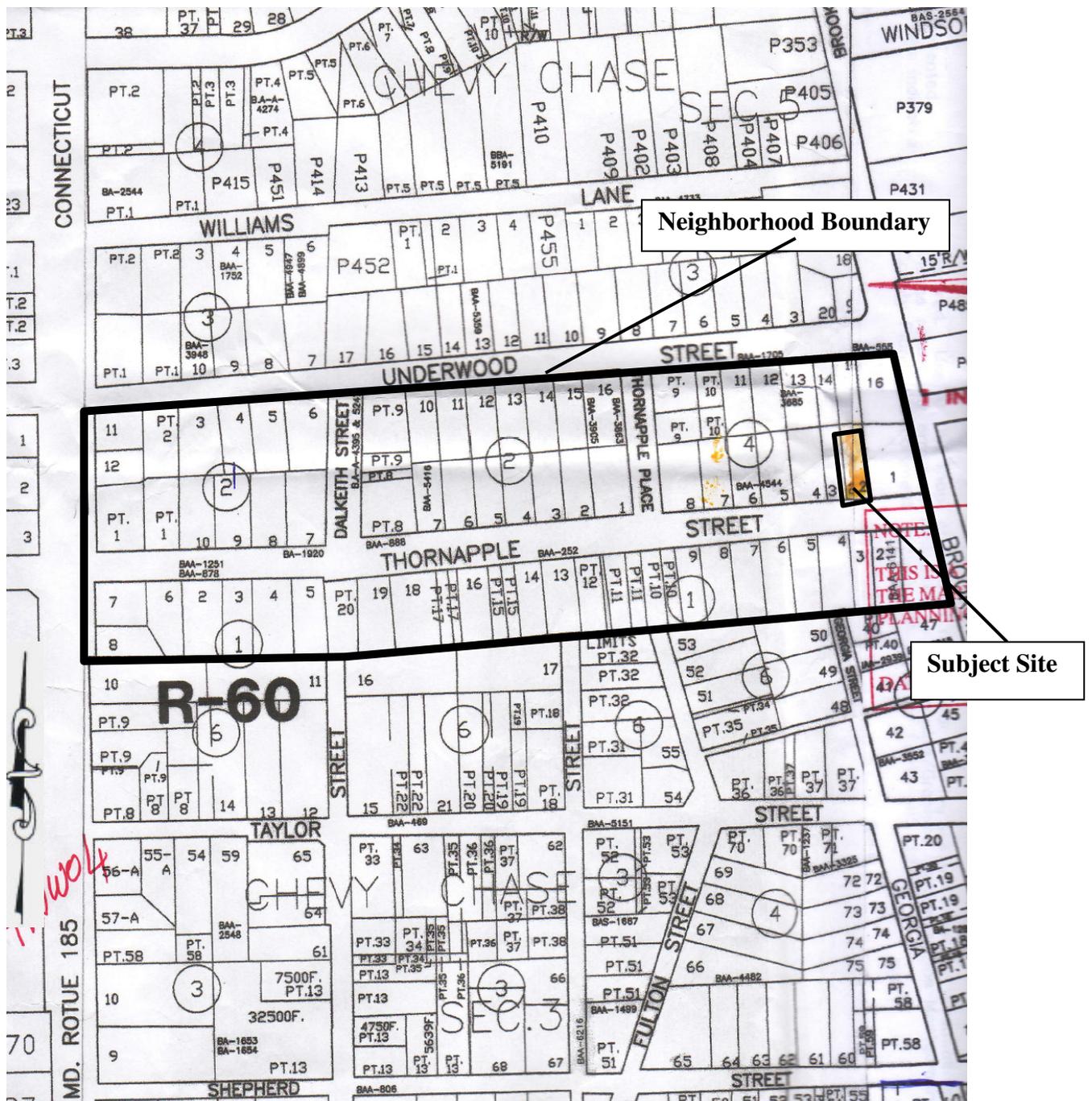
After some discussion of this provision, the Department of Permitting Services elected not to take a position on its application to this case. Tr. 41-44.

The Hearing Examiner finds that this section does not apply because the County is not “initiating” an action here; nor is it challenging the Kadows’ building permit. Rather, the action was initiated by the Kadows to obtain a special exception. To obtain it, Zoning Ordinance §59-G-2.00(c)(1) provides, in relevant part, that, “. . . *All other development standards of the zone must also apply, including setbacks, lot width, lot coverage, building height [etc.] . . .*” Thus, Petitioners do not qualify for a special exception because their property does not conform to the applicable development standards.

Nevertheless, the Maryland Court of Appeals held, in *Alviani v. Dixon*, 365 Md. 95, 775 A.2d 1234 (2001), that a special exception applicant may also apply for a variance to obtain a special exception. Petitioners did so in this case, and on May 23, 2012, the Board of Appeals voted to grant them a variance from the side-yard setback requirements. The Board’s Resolution in Case A-6382, effective July 13, 2012, is included in this file as Exhibit 35. Thus, side-yard setbacks are no longer an issue in this case.

### **B. The Neighborhood**

Technical Staff defined the general neighborhood as bounded on the north by the one-family detached homes along the south side of Underwood Street; on the east by one-family detached homes along the west side of Brookeville Road; on the south by one-family detached homes along the south side of Thornapple Street; and by Connecticut Avenue to the west. The Hearing Examiner accepts this neighborhood definition, and it is shown below on the following Zoning Map (Exhibit 11(a)):



According to Technical Staff, the neighborhood consists of approximately 68 one-family homes which are zoned R-60. The neighborhood boundary, shown on the map above is depicted to include properties that may be affected by a potential increase in density or traffic. Staff reports that there are no other approved special exceptions within the neighborhood boundaries. Exhibit 14, p. 3.

### C. The Proposed Use

The Petitioners are seeking a special exception to allow a 902 square-foot accessory apartment in the basement level of their existing home.<sup>4</sup> Exhibit 4. The apartment entrance will be on the northwest corner, towards the rear of the home, as shown in the Site Plan (Exhibit 3), depicted on page 4 of this report. A close-up of the apartment entrance was provided in a photograph supplied by Petitioners (Exhibit 9), reproduced below:



**Entrance to  
Accessory  
Apartment**

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<sup>4</sup> Technical Staff refers to the location of the accessory apartment as the “basement level” of the home (Exhibit 14, p. 5), while the Housing Code Inspector’s report refers to “the cellar of the house.” Exhibit 17(a).

As noted by Technical Staff, the entrance to the apartment is distinct from the entrance to the main dwelling and has the appearance of a typical rear entry into a one-family home. Staff found that “The accessory apartment entrance will not detract from the appearance of the neighborhood.” Exhibit 14, p. 5. Staff also noted that adequate lighting, residential in character, is located above the apartment’s entrance door. To reach the proposed use, one walks across the at-grade deck and down two wooden steps to a concrete landing and then down a flight of concrete steps that leads to the apartment’s entrance.

As previously noted, the property has a paved driveway with a parking pad, and a detached one car garage. The driveway area provides three parking spaces. Exhibit 14, p. 8. Both Technical Staff and the Housing Code inspector found that there is adequate off-street parking. Exhibit 14, p. 13 and Exhibit 17(a). There is also on-street parking available along both sides of Thornapple Street. Exhibit 14, p. 2.

The Landscape and Lighting Plan (Exhibit 6), is reproduced below and on the next page:

Front of property

Large Holly 30 feet  
 Small Holly 8 feet  
 Japanese Maple 4 feet

West Side of Property ( front to back) –All these trees belong to the neighbor

2 Crepe Myrtles  
 1 Large Holly  
 7 Pines 12 feet  
 1 Large Pine 30 feet  
 1 Red Maple 20 feet  
 7 Smaller Pines 8 feet

Rear Property Line

1 Large Magnolia 35 feet  
 3 Crepe Myrtles 15 feet

East Side of Property

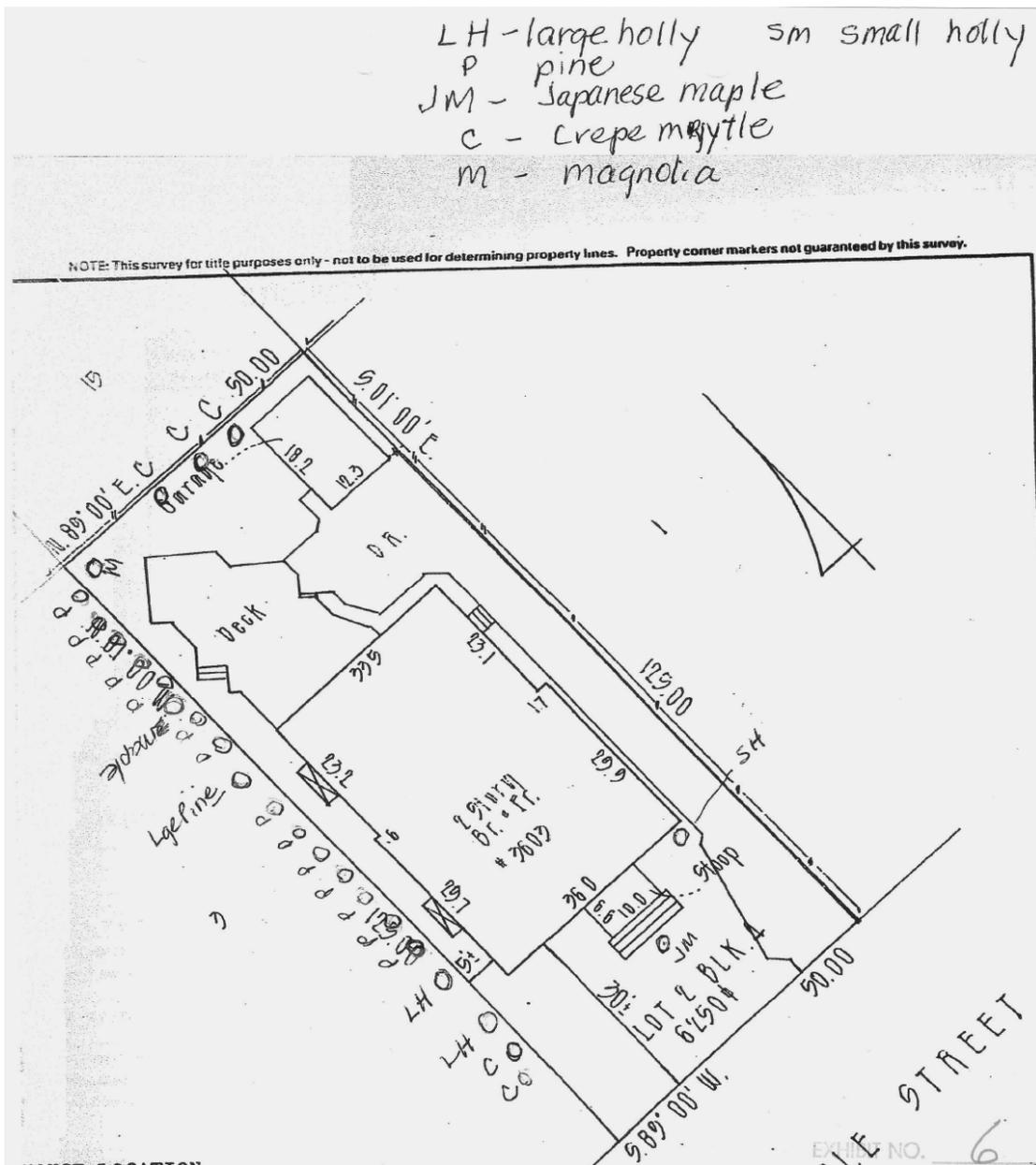
Fenced 6 feet high to street

Dedicated Parkway in Front

2 Maples 30 feet

Illumination:

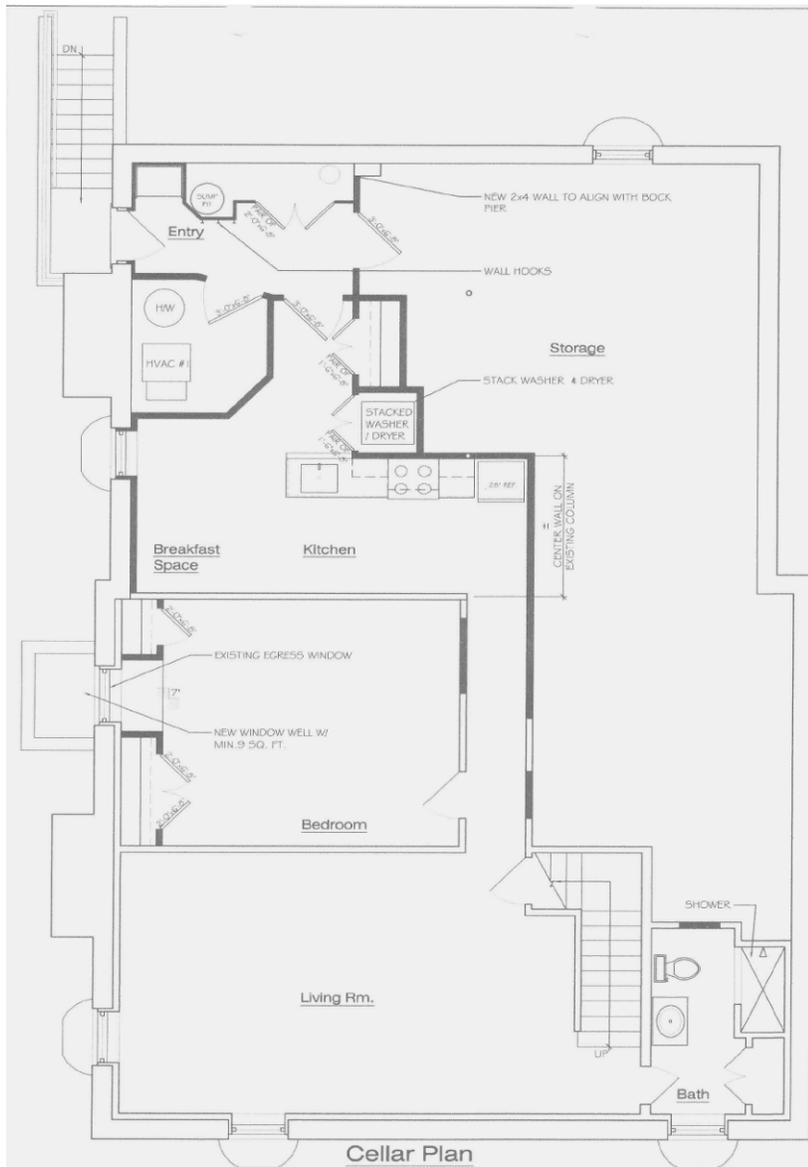
- 2 carriage lights at front (4 x 40 wts)
- 1 Side Door light 60 wts
- 1 carriage light at rear door (2 x 40 wts)
- 3 spot lights on second floor rear (3 x 60 wts)
- 1 light at basement entrance 60 wts
- 1 light on garage side door (2 x 40 wts)



As described by Technical Staff, “the entire property is well landscaped.” Exhibit 14, p. 1. Staff added, “The site contains well developed and maintained landscaping and trees. No new plantings are proposed under the application. There are no landscaping or environmental issues associated with this application.” Exhibit 14, pp. 8-9.

Technical Staff also described the lighting as residential in character. “The use will cause no objectionable illumination or glare as the existing lighting at the apartment’s entrance is residential in character.” Exhibit 14, p. 13.

The Floor Plan of the accessory apartment (Exhibit 5) is shown below:



The overall net floor area of the apartment is approximately 902 square feet, and includes a living room, a bedroom, a kitchen, a “breakfast space” and a bathroom, as shown above. The Department of Housing and Community Affairs (DHCA) inspected the property on January 26, 2012, and Housing Code Inspector Cynthia Caudillo reported her findings in a memorandum dated January 31, 2012 (Exhibit 17(a)). Ms. Caudillo determined that the accessory apartment has 473.47 square feet of habitable space, and occupancy will be limited to two persons. The substance of her report is set forth below:

. . . The proposed Accessory Apartment will be located in the cellar of the house. The issues regarding Accessory Apartment standards are as follows:

1. The plans submitted by the owner reference modifications must meet Housing Code requirements. The plans submitted for the proposed unit must include modifications to the center of the wall
2. Doors must be installed that provide complete separation for both units
3. Owner must obtain all proper permits for construction and modifications from Montgomery County and the Town of Chevy Chase
4. Must install a window in the bedroom that is at least (5.7) square feet in clear opening and must be able to open without the use of a tool with a minimum net clear height of twenty-four (24) inches and a net clear opening of twenty (20) inches with the bottom of the opening not more than forty-four (44) inches above the floor (a window that opens down or otherwise blocks a way out is unacceptable). The minimum horizontal area of the window well shall be 9 square feet, with a minimum horizontal projection and width of 36 inches. The area of the window well shall allow the emergency escape and rescue opening to be fully opened. Window wells with a vertical depth greater than 44 inches shall be equipped with a permanently affixed ladder or steps. (permit may be required)
5. Based on the proposed Accessory Apartment plans the door that leads to the unit located between the HVAC and laundry area must be an egress door. This door must be no less than 3 feet in width and 6 feet 8 inches in height and must be fire rated to meet the IRC requirements.
6. Owner must contact the Department of Permitting Services to verify that hard wired smoke detectors are installed in accordance with current requirements for proposed Accessory Apartment
7. Must investigate and correct the cause of the mold and mildew on the ceiling (around light fixture) in the living room- mold and mildew must be eradicated from the area (restore surface finishes as needed)

NOTE: Total habitable space measures approximately 473.47 square feet (proposed kitchen area not included). Two (2) occupants may reside in the unit if the window in the bedroom meets Housing Code compliance.

There is a driveway that extends a length of 103 feet by 17 feet of

area in front of the garage, 15 feet by 85 feet from entrance along the length of driveway just at the area before the front of the garage. Total square footage is 1766. There is adequate off street parking.

Ms. Caudillo testified that she sees no reason why the accessory apartment cannot be approved, if the recommended conditions are met. Tr. 63. Ms. Caudillo confirmed that there is ample off-street and on-street parking available. Tr. 64.

Technical Staff discussed the transportation issues in their report (Exhibit 14, pp. 7-8):

The proposed accessory apartment meets the transportation related requirements of the Adequate Public Facilities (APF) Ordinance. The existing one-family dwelling is estimated to generate one peak-hour trip during the weekday morning (6:30 a.m. to 9:30 a.m.) and evening (4:00 p.m. to 7:00 p.m.) peak-periods. The proposed accessory apartment is estimated to generate one additional peak hour trip during the weekday peak periods using the trip generation rates included in the Local Area Transportation Review (LATR) Policy Area Mobility Review (PAMR) guidelines. Since the number of peak hour trips, when combined, will generate fewer trips than the threshold figure requiring a traffic study (30 peak-hour trips), a traffic study is not required and the proposed accessory apartment satisfies the LATR requirement of the APF test.

Vehicular access to the existing house and accessory apartment will be from Thornapple Street. Parking for the main dwelling and the accessory apartment can be accommodated in the driveway area which can provide three parking spaces. On-street parking is also permitted along both sides of Thornapple Street.

Sidewalks exist along the site's frontage (on the north side of Thornapple Street) and along the west side of Brookville Road. The special exception will not have an adverse effect on vehicular and pedestrian access or pedestrian safety.

Transit services in the area include Ride-On Routes 1 and 11 (between Silver Spring Metro Station and Friendship Heights Metro Station) and Metrobus route L8 (between Friendship Heights Metro Station and Aspen Hill) along Connecticut Avenue. Bus stops for these routes are approximately 1,400 feet west of the property at the intersection of Connecticut Avenue and Thornapple Street.

The one-family dwelling and the accessory apartment on the property together generate less than four peak-hour trips during the weekday morning and evening peak periods. The subject application, therefore, is not subject to the PAMR requirements of the APF test. . . .

Given this evidence, the Hearing Examiner finds that the proposed accessory apartment will not unduly burden local transportation facilities and that there is adequate parking to accommodate

both the owners and the accessory apartment tenants.

Finally, Technical Staff reports that the subject site is not identified in the Locational Atlas or designated in the Master Plan for Historic Preservation, although there are five properties that are individually designated in the Master Plan for Historic Preservation within a 0.5 mile radius of the subject property. According to Staff, “The subject application has no direct impact on any Locational Atlas or Master Plan resources.” Exhibit 14, p. 7.

Based on this record, the Hearing Examiner finds that the proposed special exception will not cause non-inherent adverse effects on the neighborhood warranting denial of the petition.

#### **D. Neighborhood Response**

There has been no response from the community, either positive or negative to the subject petition. There is no opposition in the case.

#### **E. The Master Plan**

The subject property lies within the area covered by the 1990 Bethesda Chevy Chase Master Plan. Technical Staff advises that there are no Master Plan recommendations specific to this site. Exhibit 14, p. 7. However, the Master Plan does recommend special exception uses “that contribute to the housing objectives in the Master Plan” (p. 31, ¶ numbered 4). In fact, the Plan specifically “endorses expanding choices of housing types by provision of accessory apartments” (p. 33, ¶ numbered 4). Since the subject application furthers the Plan’s general guidance, Technical Staff found the proposed use to be consistent with the Bethesda-Chevy Chase Master Plan, as does the Hearing Examiner.

An accessory apartment maintains the existing scale and type of housing, while providing for additional housing in the area. This accessory apartment is not visible from the street and therefore does not change the existing structure’s appearance as a single-family dwelling, compatible with the

surrounding neighborhood.

Thus, it is fair to say that the planned use, an accessory apartment in a single-family, detached home, is not inconsistent with the goals and objectives of the Bethesda Chevy Chase Master Plan.

### **III. SUMMARY OF HEARING**

At the hearing, testimony was heard from Petitioners Brian and Ellen Kadow and from Housing Code Inspector Cynthia Caudillo, DPS Zoning Manager, Susan Scala-Demby, and her attorney, Malcolm Spicer, Esquire. There was no opposition. The Hearing Examiner noted corrections made to the Staff report. See footnote 1. The record was held open to give Petitioners an opportunity to determine whether to file for a variance.

#### Brian and Ellen Kadow (Tr. 5-33; 53-62; 67-68):

Petitioners executed an affidavit of posting (Exhibit 20), submitted a copy of their deed (Exhibit 21) and identified photos they took (Exhibit 9) and those in the Staff report. Tr. 53-59. They also identified their submitted plans (Exhibits 3, 5 and 6), and modified the Site Plan (Exhibit 3) to show the location of the entrance to the accessory apartment. Tr. 53-59. They adopted the findings in the Technical Staff Report (Exhibit 14) and in the Housing Code Inspector's Report (Exhibit 17(a)), as Petitioners' own evidence (Tr. 8). They also agreed to meet all the conditions set forth in both reports, except for Technical Staff's conclusion that they needed to obtain a variance. Tr. 8-12.

Mr. Kadow testified that no lighting would be added to the lighting already present. Tr. 59. He noted that there is probably room on his driveway for five cars, but he would prefer to have the tenant park on the street, where there is ample parking available, unless a condition requires that a driveway space be made available. Tr. 60-62.

Mr. Kadow further testified that the property has a valid building permit issued on May 2,

1986, and he introduced copies of that permit, the location plat and other documents (parts of Exhibit 18) to support his argument that the side-yard setbacks on his property are compliant with the applicable zoning ordinance, or alternatively, that the County cannot deny his special exception application based on the incorrect setbacks based on Section 5-114 of the Maryland Courts and Judicial Proceedings Article. Tr. 14-33.

Mrs. Kadow testified that the reason they applied for a special exception is that they'd like to age in place if they can, and given their expenses, this seemed like a good plan. Also, it offers low cost housing to residents in Montgomery County, and there is none available in their area. Tr. 67-68.

Department of Permitting Services—Susan Scala-Demby and Malcolm Spicer (Tr. 33-52):

Susan Scala-Demby, Zoning Manager for Department of Permitting Services, deferred to her attorney, Malcolm Spicer, Esquire. Mr. Spicer reviewed the history of the building permit in question and testified (Tr. 36):

Given the facts and the history of the ordinances involved, we could not find any circumstance whereby this permit should have been approved to allow for a five foot side yard given the width of the lot.

After some discussion of Section 5-114 of the Maryland Courts and Judicial Proceedings Article, the Department of Permitting Services elected not to take a position on its application to this case. Tr. 41-44.

Housing Code Inspector Cynthia Caudillo (Tr. 62-64):

Housing Code Inspector, Cynthia Caudillo, testified that she inspected the premises on January 26, 2012, and that her findings are set forth in her report of January 31, 2012 (Exhibit 17(a)). She stated that the unit measures 473.47 square feet of habitable space which would allow for the occupancy of two people. Tr. 62-64.

Ms. Caudillo confirmed that there is ample off-street and on-street parking available and

said she saw no reason to deny the special exception if the conditions in her memo are complied with. Ms. Caudillo also indicated that there are no other accessory apartments in the neighborhood Tr. 62-64.

#### **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. Technical Staff concluded that Petitioners will have satisfied all the requirements to obtain the special exception, if they comply with the recommended conditions (Exhibit 14).

Weighing all the evidence of record under a “preponderance of the evidence” standard (Code §59-G-1.21(a)), including the variance granted by the Board of Appeals in BOA Case No. A-6382, 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. 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.

Technical Staff lists the following inherent characteristics of accessory apartments (Exhibit 14, p. 11):

- (1) the existence of the apartment as a separate entity from the main living unit but sharing a party wall;
- (2) the provision within the apartment of the necessary facilities, spaces, and floor area to qualify as a 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 greater 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 (Exhibit 14, p. 11):

Under the subject application, there are no adverse effects that will negatively impact the community above those necessarily inherent to an accessory apartment. The apartment will be located in the basement of the main dwelling and is not identifiable from the street. The apartment will provide space and facilities necessary for an apartment use.

The accessory unit has its own separate entrance apart from the entrance to the main dwelling. The apartment's entrance appears typical of a rear entrance to a one-family house, which makes it difficult to distinguish it from any other neighborhood home. The accessory apartment's entrance will be illuminated consistent with typical residential standards.

Vehicular parking for the accessory apartment will be located in the driveway via Thornapple Street. The driveway can accommodate three vehicles on site including the two required spaces for the main dwelling unit. On street parking is also available. . . .

Based on these findings, Staff concluded (Exhibit 14, p. 11):

The operational and physical characteristics of the proposed accessory apartment are consistent with the inherent characteristics of an accessory apartment use. There are no non-inherent adverse effects present in this case.

The Hearing Examiner essentially agrees with Staff's assessment. Although the non-conforming side-yard setbacks should be recognized as "unusual characteristics of the site," they do not appear to create adverse effects in this case, and due to the grant of a variance, they do not constitute a legal impediment to granting the special exception. Considering size, scale, scope, light, noise, traffic and environment, the Hearing Examiner concludes, as did the Technical Staff, that there would be no non-inherent adverse effects from the proposed use.

## **B. General Conditions**

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

### **Sec. 59-G-1.21. General conditions.**

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

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

Conclusion: An accessory apartment is a permissible special exception in the R-60 Zone, pursuant to Code § 59-C-1.31(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: Given the variance granted by the Board of Appeals in BOA Case No. A-6382, 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: The subject property is covered by the Bethesda-Chevy Chase Master Plan, approved and adopted in 1990. Technical Staff advises that there are no Master Plan recommendations specific to this site. Exhibit 14, p. 7. However, the Master Plan does recommend special exception uses “that contribute to the housing objectives in the Master Plan” (p. 31, ¶ 4). In fact, the Plan specifically “endorses expanding choices of housing types by provision of accessory apartments” (p. 33, ¶ 4). An accessory apartment would maintain the existing scale and type of housing, while providing for additional housing in the area. Technical Staff therefore found the proposed use to be consistent with the Bethesda-Chevy Chase Master Plan, as does the Hearing Examiner.

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

Conclusion: The accessory apartment is located in an existing dwelling and will not require external changes. It therefore will maintain its residential character. There will be sufficient parking, considering the availability of both off-street and on-street parking. Traffic conditions will not be affected adversely, according to Transportation Planning Staff. There are no other accessory apartments in the defined neighborhood, and the addition of this use will not affect the area adversely. Based on these facts and the other evidence of record, the Hearing Examiner concludes, as did Technical Staff, that the proposed use will be in harmony with the general character of the neighborhood.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: For the reasons set forth in answer to the previous section of this report, 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 listed conditions of approval.

(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: Technical Staff found that “Based on the nature of the use, the proposed special exception will cause no objectionable noise, vibrations, fumes, odors, dust, or physical activity. The use will cause no objectionable illumination or glare as the existing lighting at the apartment’s entrance is residential in character.” Exhibit 14, p. 13. Based on this record, the Hearing Examiner so finds that the use will be indoors and residential, and that it will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site.

(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: As discussed above, 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 or 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: Technical Staff indicates that the subject site will be adequately served by existing public services and facilities (Exhibit 14, p. 14), and 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:*
- (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 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 Growth Policy standards. These standards include Local Area Transportation Review

(LATR) and Policy Area Mobility Review (PAMR). As indicated in Part II. B. of this report, Transportation Planning Staff did do such a review, and concluded that the proposed accessory apartment use would add one additional trip during each of the peak-hour weekday periods. Exhibit 14, p. 14. Since the existing house, combined with the proposed accessory apartment, would generate fewer than 30 total trips in the weekday morning and evening peak hours, the requirements of the LATR are satisfied without a traffic study. Since the proposed use is estimated to generate only one additional peak-hour trip, PAMR is also satisfied. Therefore, the Transportation Staff concluded, as does the Hearing Examiner, 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 as the use will not generate a substantial increase in either form of traffic," the Hearing Examiner so finds. Exhibit 14, p. 15.

### **C. Specific Standards**

The testimony and the exhibits of record, especially the Technical Staff Report (Exhibit 14) and the variance granted by the Board of Appeals in BOA Case No. A-6382, 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 basement of an existing house, and therefore shares a wall in common, as required for a lot of this size (under an acre).

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

**Conclusion:** No new addition or extension of the main dwelling is proposed. The accessory apartment is located in an existing dwelling.

*(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 1987. Exhibit 14, p. 16. It therefore meets the “5 year old” requirement.

*(5) The accessory apartment must not be located on a lot:*

- (i) That is occupied by a family of unrelated persons; or*
- (ii) Where any of the following otherwise allowed residential uses exist: guest room for rent, boardinghouse or a registered living*

- unit; or*
- (iii) *That contains any rental residential use other than an accessory dwelling in an agricultural zone.*

Conclusion: The proposed use will not violate any of the provisions of this subsection. A condition is recommended in Part V of this report to ensure compliance with this provision.

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

Conclusion: Access to the accessory apartment will preserve the appearance of a one-family dwelling. The apartment entrance is separate from the main entrance and screened from view by its location. As noted by Technical Staff, the apartment entrance will have the appearance of a typical basement entry to a one-family home. There will thus be no change to the home's residential appearance.

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

Conclusion: No external improvements are planned by Petitioners. Exhibit 14, p. 17.

- (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, at 902 square feet (with habitable space of 473.47 square feet), is well below the 1,200 square foot maximum for an accessory apartment. It will also clearly be subordinate to the main dwelling, which according to Technical Staff, has a total floor area of 3,490 square feet. Exhibit 14, p. 17.

**59-G § 2.00(b) Ownership Requirements**

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

Conclusion: The Petitioners will live in the main dwelling unit on the property.

- (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: According to Petitioners' deed (Exhibit 21), they purchased the property on October 7, 1974. The one-year rule has therefore been satisfied.

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

Conclusion: The Petitioners will receive compensation for only one dwelling unit as a condition of the special exception.

- (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. Exhibit 21.

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

Conclusion: Not applicable.

**59-G § 2.00(c) Land Use Requirements**

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

*constructed prior to October, 1967. All other development standards of the zone must also apply, including setbacks, lot width, lot coverage, building height and the standards for an accessory building in the case of conversion of such a building.*

**Conclusion:** The subject lot is approximately 6,250 square feet in size, and therefore satisfies this requirement. According to Technical Staff, the subject property conforms to all applicable development standards of the zone, except for the side-yard setbacks, as discussed in Part II. A. of this report. That deficiency has been remedied by the variance granted in BOA Case No. A-6382 (Exhibit 35). The following table from the Technical Staff report (Exhibit 14, p. 10), as corrected regarding the side yard setbacks, summarizes the relevant development standards for the application.

#### Development Standards for the R-60 Zone

Development Standards	Min/Max Required	Existing	Applicable Zoning Ordinance Provisions
Lot Area	6,000 sq ft	6,250 sq ft	§59-C-1.322 (a)
Lot width at street line	25 ft	50 ft	§59-C-1322 (b)
Minimum lot width at front bldg line	60 ft	50 ft <sup>1</sup>	§59-C-1322 (b)
Setbacks			
- front	25 ft	25 ft	§59-C-1.323
- side	7 feet on each side, per the 1928 Ordinance	5±/9±ft totaling 14± (Variance allowing 5 feet)	1928 Ordinance, §III.(C)3
- rear	20 ft	20 ft	§59-C-1.323
Maximum Building Height	35 ft	35 ft	§59-C-1.327
Maximum Building coverage	35%	31 %	§59-C-1.328
Maximum Floor area for accessory apartment	1,200 sq ft	902 sq ft	§59-G-2.00 (a) (9)

<sup>1</sup> Attachment to Article 59-B\*, Section III, ( C) (1) states that " each dwelling hereafter erected or altered in this zone shall occupy a lot with a minimum area of five thousand (5,000) square feet and a minimum lot width of fifty (50) feet at the front building line."

*(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 previously stated in this report, the Hearing Examiner concludes that the proposed special exception will not create an excessive concentration of similar uses since there are no other accessory apartments in the neighborhood.

(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 discussed in Part II. A. and C. of this report, there are off-street spaces on Petitioners' drive and in Petitioners' garage. There is also available on-street parking. Technical Staff found that "The subject property has adequate parking area for three vehicles in the driveway, one more than the two required for the existing dwelling and additional parking on the street." Exhibit 14, p. 19. The Housing Code Inspector agreed. Exhibit 17(a) and Tr. 64. The Hearing Examiner so finds.

#### **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. C. of this Report, the Housing Code Inspector's report (Exhibit 17(a)) specifies certain conditions. Petitioners have agreed to meet all conditions, and will comply with directives of the Housing Code Inspector. Tr. 8-12.

#### **V. RECOMMENDATION**

Based on the foregoing analysis, I recommend that the Petition of Brian and Ellen Kadow, BOA No. S-2824, which seeks a special exception for an accessory apartment to be located at 3603 Thornapple Street, Chevy Chase, Maryland, be GRANTED, with the following conditions:

1. The Petitioners are bound by their testimony, representations and exhibits of record;
2. The Petitioners must comply with the conditions set forth in the Memorandum of Cynthia Caudillo, Housing Code Inspector, Division of Housing and Code Enforcement (Exhibit 17(a)):
  - a. The plans submitted by the owner reference modifications must meet Housing Code requirements. The plans submitted for the proposed unit must include modifications to the center of the wall.
  - b. Doors must be installed that provide complete separation for both units.
  - c. Owner must obtain all proper permits for construction and modifications from Montgomery County and the Town of Chevy Chase.
  - d. Must install a window in the bedroom that is at least (5.7) square feet in clear opening and must be able to open without the use of a tool with a minimum net clear height of twenty-four (24) inches and a net clear opening of twenty (20) inches with the bottom of the opening not more than forty-four (44) inches above the floor (a window that opens down or otherwise blocks a way out is unacceptable). The minimum horizontal area of the window well shall be 9 square feet, with a minimum horizontal projection and width of 36 inches. The area of the window well shall allow the emergency escape and rescue opening to be fully opened. Window wells with a vertical depth greater than 44 inches shall be equipped with a permanently affixed ladder or steps. (permit may be required)
  - e. Based on the proposed Accessory Apartment plans the door that leads to the unit located between the HVAC and laundry area must be an egress door. This door must be no less than 3 feet in width and 6 feet 8 inches in height and must be fire rated to meet the IRC requirements.
  - f. Owner must contact the Department of Permitting Services to verify that hard wired smoke detectors are installed in accordance with current requirements for proposed Accessory Apartment.
  - g. Must investigate and correct the cause of the mold and mildew on the ceiling (around light fixture) in the living room- mold and mildew must be eradicated from the area (restore surface finishes as needed).
  - h. Total habitable space measures approximately 473.47 square feet (proposed kitchen area not included). Two (2) occupants may reside in the unit if the window in the bedroom meets Housing Code compliance.
3. Petitioners must comply with the determination of the Housing Code Inspector as to limits on occupancy in the accessory apartment and must comply with any other directions of the Housing Code Inspector to ensure safe and code-compliant occupancy;
4. Petitioners must occupy one of the dwelling units on the lot on which the accessory apartment is located;
5. The accessory apartment must not be located on a lot that is occupied by a family of

unrelated persons, or where there is a guest room for rent, a boardinghouse or a registered living unit;

6. Petitioners must not receive compensation for the occupancy of more than one dwelling unit; and
7. 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: July 24, 2012

Respectfully submitted,



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Martin L. Grossman  
Hearing Examiner