

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
(240) 777-6600

CASE NO. S-2519

PETITION OF PEGGY SUE ZABRISKIE

OPINION OF THE BOARD

(Public Hearing Date: May 28, 2003
(Effective Date of Opinion: August 21, 2003)

Case No. S-2519 is an application pursuant to Section 59-G-2.00 (Accessory Apartment) of the Zoning Ordinance to permit an existing accessory apartment. The Board of Appeals held a public hearing on the application on May 28, 2003.

Peggy Sue Zabriskie appeared in support of the application. Barbara Thorn, Gloria Coe, Grantland Shipp, Paul Fricks, Esther Ottley, Stephanie Rubin, and Christie Jacobs testified in opposition to the application.

Robert Dejter, Housing Code Field Supervisor, testified regarding his inspection of the accessory apartment.

Decision of the Board: Special Exception **granted** subject
to conditions enumerated below.

EVIDENCE PRESENTED

1. The subject property is Lot 5, Block C, Sligo Park Hills, Section One Subdivision, located at 19 Parkside Road, Silver Spring, Maryland 20910 in the R-60 Zone.
2. The lot size is 6,324 feet. [Exhibit No. 3(b)].
3. The house was built in 1961. Ms. Zabriskie has owned it since 1980, and created the accessory apartment in 1990 [Exhibit No. 3(b)].

4. The accessory apartment is located in the basement of the house and has a total square footage of approximately 1,308 square feet, with one bedroom and 795 square feet of habitable space. There is a separate entrance to the apartment at the side of the house [Exhibit Nos. 3(b), 6, 13 and 14].

5. Three off-street parking spaces are available [Exhibit Nos. 3(b), 7 and 14].

6. Robert Dejter inspected the accessory apartment on October 14, 2002. A report of his findings is Exhibit No. 14 in the record. Mr. Dejter states that the window in the bedroom must be brought up to housing code standards for egress. He states that the habitable area of the apartment is approximately 795 square feet, and that it is therefore suitable for occupancy by no more than two unrelated persons or a family not to exceed two persons. Mr. Dejter found no other accessory apartments in the surrounding neighborhood bounded by Piney Branch Road, Mississippi Avenue, Hilltop Road and Park Valley Road. Mr. Dejter stated that off-street parking is available in the two drive ways, one of which can accommodate one car, the other has room for two cars. Mr. Dejter noted that the applicant intends to live in the accessory apartment and rent out the upper portion of her home. He stated that the habitable area of that portion of the house consists of approximately 815 square feet, with three bedrooms, which may be occupied by no more than two unrelated persons or a family of no more than seven persons.

7. Ms. Zabriskie stated that she intends to live in the accessory apartment and rent out the upper level of her home. She stated that she needs the income from renting out one dwelling unit in her home. Ms. Zabriskie stated that she is a foreign service officer and that therefore, she is sometimes out of the country for extended periods. With respect to the requirement of Section 59-G-2.00(b)(1), she stated that she could be reasonably sure she will be in the country for five months during a year, but that given the nature of foreign service work, it is difficult for her to be completely precise in that regard. She requested that the Board increase the permitted period of temporary absences.

8. Maryland National Capital Park and Planning Commission (MNCPPC) technical staff analyzed the request and recommend approval [Exhibit No. 13].

9. OPPOSITION TESTIMONY

Barbara Thorn lives at 106 Parkside Road. She expressed concern about parking on the narrow, two lane street and stated that the neighborhood is a single family area, not a rental area.

Gloria Coe lives at 23 Parkside Road. She believes that the single family neighborhood should remain single family.

Grantland Shipp expressed concern that the apartment cannot accommodate the number of tenants living there, he also expressed concern about transient residents in the neighborhood.

Paul Fricks lives at 22 Parkside Road. He stated that he would like the neighborhood to stay a nice, R-60 neighborhood.

Esther Ottley stated that she assumed the status quo would continue at the subject property, and was unaware of the changes the accessory apartment would bring. She stated she does not know the current tenants of the accessory apartment.

Stephanie Rubin lives at 18 Parkside Road. She stated that she wants to live in a neighborhood of single family homes where people know each other. She finds it troubling to see different people all the time at the subject property. She also expressed concern about parking impacts from the accessory apartment.

Christie Jacobs lives at 6 Parkside Road. She is concerned that the presence of the accessory apartment will have a detrimental effect on her property value. She stated that people generally do not park in the driveways on the subject property, and expressed concern that the Board of Appeals cannot control what happens in connection with the accessory apartment after the special exception is granted.

FINDINGS OF THE BOARD

Specific Standards

Sec. 59-G-1.2. Conditions for granting a special exception.

59-G-1.2.1. Standard for evaluation. A special exception must not be granted absent the findings required by this Article. In making these findings, the Board of Appeals, Hearing Examiner or District Council, as the case may be, must consider the inherent and non-inherent adverse effects of the use on nearby properties and the general neighborhood at the proposed location, irrespective of adverse effects the use might have if established elsewhere in the zone. Inherent adverse effects are the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations. 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. Non-inherent adverse effects, alone or in conjunction with the inherent effects, are a sufficient basis to deny a special exception.

The physical and operational characteristics necessarily associated with an accessory apartment include: the existence of the apartment as a separate entity from the main living unit but sharing a party wall with the main unit; the provision within the apartment of the necessary facilities and spaces and floor area to qualify as a habitable space under the Building Code; provision of a separate entrance and walkway, and sufficient lighting; provision of sufficient parking; the existence of an additional household on the site; additional activity from that household, including more use of the outdoor space and more pedestrian, traffic, and parking activity; and the potential for additional noise from that additional household.

The Board finds that none of the physical or operational characteristics of the proposed accessory apartment exceed what would be expected to be associated with this use. There are no non-inherent adverse effects of this accessory apartment.

59-G-1.21. General Conditions.

(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.*

An accessory apartment is a permissible use in the R-60 Zone.

(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.*

As discussed further below, the Board finds that the use complies with these requirements.

(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 an approved and adopted 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.*

The Board concurs with technical staff's findings that the application is consistent with the east Silver Spring Master Plan which, while silent on accessory

apartments, supports the property's R-60 Zoning for the subject property, which allows accessory apartments by special exception.

- (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.*

No new structures and no exterior modifications are proposed. The entrance to the accessory apartment is at the side of the house, preserving the single family appearance of the house. Three off-street parking spaces are available. Occupancy of the apartment is limited to no more than two individuals, and the Board finds that this level of impact remains harmonious with the character of activity, traffic and parking conditions in the neighborhood. Finally, the Board accepts DHCA's definition of the neighborhood, and finds that there are no other accessory apartments within that 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.*

As discussed above, the Board finds that the level of activity associated with the accessory apartment and with the conditions imposed in this opinion, the accessory apartment will not be detrimental to the use, peaceful enjoyment economic value or development of surrounding properties or of the general neighborhood.

The Board takes heed of neighbors' concerns about parking along Parkside Road, and will impose a condition that residents of the subject property park on site, or directly in front of the house. The Board here notes that accessory apartments as a land use are well regulated and subject to annual inspection by the Department of Housing and Community Affairs.

- (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.*

The accessory apartment will have none of 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 recommendation of a master or sector plan do not alter the nature of an area.*

As stated above, there are no other approved accessory apartments within the defined neighborhood for this accessory apartment.

- (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.*

The Board finds that the accessory apartment has none of these effects. The Board understands some neighbors concerns about traffic conditions in the neighborhood, but notes that the apartment exceeds the zoning ordinance requirement for two off-street parking spaces. In addition, the Board will condition approval of the apartment on the residents of the apartment to park on site or in front of the subject property.

- (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.*

The subject property is served by adequate public facilities.

- (i) *If the special exception use requires approval of a preliminary plan of subdivision, the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of the special exception.*

N/A

- (ii) *With regard to findings relating to public roads, the Board, the Hearing Examiner, or the District Council, as the case may be, must further determine that the proposal will have no detrimental effect on the safety of vehicular or pedestrian traffic.*

The Board finds that, as conditioned below, the accessory apartment will not have these detrimental effects.

- (b) *Nothing in this Article relieves an applicant from complying with all requirements to obtain a building permit or any other authorization or approval required by law, nor does the Board's finding of facts regarding public facilities bind any other governmental agency or department responsible for making a determination relevant to the authorization, approval or licensing of the project.*

The applicant has stated her intention to comply with all relevant requirements.

- (c) *The applicant for a special exception has the burden of proof to show that the proposed use satisfies all applicable general and specific standards under this Article. This burden includes the burden of going forward with the evidence, and the burden of persuasion on all questions of fact.*

The Board finds that the applicant has satisfied both of these burdens.

Specific Standards

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.*

Only one accessory apartment exists on the site.

- (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.*

The accessory apartment is located in the basement of the house, thus sharing at least one party wall 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.*

N/A

- (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.*

The house, built in 1961, is 42 years old.

- (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.*

None of these conditions exist on the subject site.

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

The entrance to the apartment is located at the side of the house, which, together with established landscaping, preserves the single family appearance of the home.

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

No exterior modifications are proposed.

- (8) *The accessory apartment must have the same street address (house number) as the main dwelling.*

Located in the basement of the house, the accessory apartment has the same address as the house.

- (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.*

The accessory apartment occupies a portion of the basement of the house and is subordinate to the house. The habitable area of the accessory apartment is 795 square feet.

- (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.*

Ms. Zabriskie is a United States Foreign Service Officer. Her work sometimes requires her to be out of the United States for periods which may exceed six months. She has stated that she needs the income from renting the accessory apartment. The Board finds that it can increase the allowed period of temporary absence in this case to seven months, due to the Ms. Zabriskie's financial and professional exigencies.

- (2) *Except in the case of an accessory apartment that exists at the time of the acquisition of the home by the applicant, 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.*

Ms. Zabriskie has owned the house since 1980, and created the apartment in 1990.

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

Ms. Zabriskie has stated her understanding that she can receive compensation for only one dwelling unit.

- (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.*

As evidenced by a copy of the deed submitted with the application [Exhibit No. 5] Ms. Zabriskie owns the house.

- (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.*

N/A

(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.

The lot comprises 6, 324 square feet.

- (2) *An accessory apartment must not, when considered in combination with other existing or approved accessory apartments, result in an excessive concentration of similar uses in the general neighborhood of the proposed use (see also Section 59-G-1.21(a)(6) which concerns excessive concentration of special exceptions in general).*

The Board finds that there are no other accessory apartments within the neighborhood defined by the Department of Housing and Community Affairs.

- (3) *There shall be adequate water supply and sewage disposal systems to serve the occupants of both the accessory apartment and the main dwelling.*

The property is served by public water and sewer.

- (4) *Adequate parking shall be provided. There must be a minimum 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 shall not be located in the yard between the front of the house and the street right-of-way line.

Three off-street parking spaces are available. The Board takes note of some neighbors concerns about the impact of the accessory apartment on traffic and parking in the neighborhood. Therefore, the Board will impose the following condition of the special exception: residents of the subject property must park on site or in front of the subject property.

- (5) *Accessory apartments shall not be detrimental to the use and peaceful enjoyment of surrounding properties or the general neighborhood, and shall cause no objectionable noise, traffic or other adverse impacts.*

As detailed above, the Board finds that the proposed accessory apartment, approval of which will be conditioned on restricting parking to on site and directly in front of the subject property, will not be detrimental to surrounding properties or to the neighborhood. Occupancy of the apartment itself will be limited to no more than two individuals.

Therefore, based upon the foregoing, the Board Grants the special exception, subject to the following conditions:

1. Petitioner shall be bound by her testimony and exhibits of record to the extent that such evidence and representations are identified in the opinion of the Board.
2. Based upon the dimensions of its habitable space, and upon the Montgomery County Housing Code, occupancy of the accessory apartment shall be limited to no more than two individuals.
3. Residents of the subject property shall only park on site or on the street directly in front of the subject property.
4. There shall be no subleases among residents of the either of the dwelling units in the house.
5. Within 30 days of the effective date of this opinion, Ms. Zabriskie shall notify the occupants of the upper portion of the house that no more than two unrelated persons can live there, and must follow through with all actions necessary to ensure compliance with the Montgomery County Code.

On a motion by Angelo M. Caputo, seconded by Donna L. Barron, with Louise L. Mayer, Allison Ishihara Fultz and Donald H. Spence, Jr., Chairman in agreement, the Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled petition.

Donald H. Spence, Jr.
Chairman, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 21st day of August, 2003.

Katherine Freeman
Executive Secretary to the Board

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure.