

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
<http://www.montgomerycountymd.gov/boa/>

(240) 777-6600

Case No. CU 16-02

NEAL S. COHEN

OPINION OF THE BOARD

(Oral argument held: February 24, 2016)
(Effective Date of Opinion: March 10, 2016)

Case No. CU 16-02 is an application for a conditional use to allow an attached accessory apartment at 13 Columbia Avenue, in Takoma Park, Maryland. On December 23, 2015, the Hearing Examiner for Montgomery County issued a Report and Decision for approval of the conditional use, with conditions. The Board of Appeals has received a timely request for oral argument on the Report and Decision from Neal S. Cohen. Pursuant to Section 59-7.3.1.F.1.c of the Montgomery County Zoning Ordinance, such a request transfers jurisdiction over this matter to the Board of Appeals. The Board granted oral argument, which was heard on February 24, 2016.

The subject property is Lot 17, Block 18, B.F. Gilbert Addition to Takoma Park Subdivision, 13 Columbia Avenue, Takoma Park, Maryland, 20912 in the R-60 Zone.

Decision of the Board: **Conditional Use **Granted** Subject to
the Conditions Enumerated Below.**

The Board heard oral argument on a condition proposed by the Hearing Examiner which would limit the total number of occupants residing in the accessory apartment who are 18 years or older to one. Mr. Cohen states in his request for oral argument that he did not agree to this condition and asserts that to the contrary, he and the Hearing Examiner had discussed limiting occupancy to two such persons.

The Hearing Examiner's Report and Decision states that "[b]ased on the Applicant's statement in support of the conditional use application, the accessory apartment will be rented for single occupancy. Exhibit 15, p. 7. Therefore, the Hearing

Examiner finds that as a condition of approval, the total number of occupants residing in the accessory apartment who are 18 years or older is limited to one.” See 12/23/15 Hearing Examiner Report and Decision (HERD), page 20.

Mr. Cohen explained that he had to apply for a conditional use because his driveway could not accommodate the off-street parking otherwise required for an accessory apartment. He stated that he did not believe parking was an issue because of the proximity of his property to Metrorail and other transportation options such as Zipcar.

Mr. Cohen stated that he agrees with the Hearing Examiner’s Report and Decision granting his conditional use with the exception of condition 2, which contains the occupancy limitation. Mr. Cohen argued that the standards for this conditional use, set forth in Section 59-3.3.3.A.2.a.iii(e) of the Zoning Ordinance and referenced in the Hearing Examiner’s Report and Decision, limit the total number of occupants 18 years or older to two (2). See HERD, page 20. He asserted that during the hearing, there was no discussion of limiting occupancy to less than two such persons, and argued that there was no basis for the Hearing Examiner to limit occupancy to one person 18 years or older.¹ When asked by a Board member about the statement he provided with his conditional use application, in which (per the Hearing Examiner) he said that he anticipated the accessory apartment would be rented for single occupancy, Mr. Cohen stated that he viewed single occupancy as a single unit, for a person or couple. He stated that he did not know who would be occupying this unit, which has yet to be built, but that he envisioned that it would be rented to an individual or couple. The Board member then stated that it was possible to view Mr. Cohen’s statement about anticipated occupancy as one of intent and not of limitation, and that he would view it as such.

Section 59-3.3.3.A.2.a.iii(e) of the Zoning Ordinance states that “[t]he 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....” The Board finds that there is nothing in the Hearing Examiner’s Report and Decision which would support imposing a more stringent limitation on this use than the limitation set forth in the Zoning Ordinance, other than Mr. Cohen’s statement about anticipated occupancy. The Board further finds that Mr. Cohen’s statement regarding who he envisioned might occupy his yet-to-be-built accessory apartment was intended as a projection of who might live there, and not meant to serve as a limitation on who was permitted to live there. Finally, the Board finds, in accordance with Section 59-3.3.3.A.2.a.iii(e) and the conditions recommended by Technical Staff, that there is no

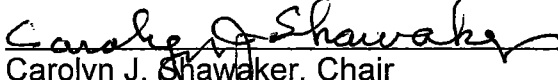
¹ The Board notes that the Technical Staff report recommended granting this conditional use with a condition limiting the total number of occupants who are 18 years or older to no more than two. See Exhibit 29, page 2. The Board further notes that the transcript from the hearing shows that the Hearing Examiner read Technical Staff’s proposed conditions to Mr. Cohen, including Staff’s proposed limitation on occupancy by persons 18 years or older to no more than two, and contains a statement from Mr. Cohen indicating that he had reviewed the Technical Staff report, that their proposed conditions seemed reasonable, and that he agreed to comply with their proposed conditions. Transcript, at pages 7 and 25.

reason that the total number of occupants of the proposed accessory apartment who are 18 years or older should be any less than two.²

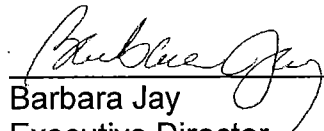
Therefore, on a motion by John H. Pentecost, Vice Chair, seconded by Bruce Goldensohn, with Carolyn J. Shawaker, Chair, Stanley B. Boyd, and Edwin S. Rosado in agreement, the Board adopts the Hearing Examiner's Report and Decision except insofar as it pertains to the occupancy limitation put forth by the Hearing Examiner at Condition No. 2, and grants the special exception subject to the following conditions:

1. The Applicants are bound by their testimony, representations and exhibits or record.
2. The total number of occupants residing in the accessory apartment who are 18 years or older is limited to two.
3. The Applicants must obtain all required building permits for construction of the new addition. If modifications to the site and other related plans filed in this case are required by the Department of Permitting Services, the Applicant must file a copy of the revised site or other related plans with the Board of Appeals.
4. The Applicants must comply with the determination of the Housing Code Inspector as to the limits on occupancy in the accessory apartment and conditions of approval to ensure safe and code-complaint occupancy.
5. No other rental Residential uses are permitted to be located on the subject property where the accessory apartment is located.
6. The Applicants must comply with the approved Historic Area Work Permit #718842 for any exterior modifications to the existing dwelling and property.
7. 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 attached accessory apartment as granted herein. Applicants shall at all times ensure that the conditional use premises comply with all applicable codes (including but not limited to building, life, safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

² Here the Board notes that one of the conditions for granting this conditional use requires compliance with the determination of the Housing Code Inspector as to the limits on occupancy, which will ensure compliance with Section 26-5 of the County Code.


Carolyn J. Shawaker, Chair
Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 10th day of March, 2016.


Barbara Jay
Executive Director

NOTE:

See Section 59-7.3.1.1.1 of the Zoning Ordinance regarding the twenty-four months' period within which the special exception granted by the Hearing Examiner or the Board must be exercised.

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. Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County, in accordance with the Maryland Rules of Procedure. It is each party's responsibility to participate in the Circuit Court action to protect their respective interests. In short, as a party you have a right to protect your interests in this matter by participating in the Circuit Court proceedings, and this right is unaffected by any participation by the County.