OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
FOR MONTGOMERY COUNTY, MARYLAND
Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
(240) 777-6660
www.montgomerycountymd.gov/content/council/zah/index.asp

IN THE MATTER OF OBJECTIONS TO	*	
THE FINDINGS OF DHCA ON	*	
ACCESSORY APARTMENT LICENSE	*	
NO. 83032, for property at 16820 WESTBOURNE	*	
GAITHERSBURG, MD 20878	*	
	*	
Susan and Benjamin Overbey	*	
Anne M. Scott	*	
Objectors	*	
	*	
Susan Hayduk	*	
Janet Kotowski	*	
Paul Hayduk	*	
	*	
Supporting the Objections	*	
	*	OZAH Case No. AAO-14-02
* *		
	*	
Catherine Hartman	*	
License Applicant	*	
	*	
Opposing the Objections	*	
	*	
Marc R. Emden, Esquire	*	
Attorney for Ms. Hartman	*	
* *		

Before: Lynn A. Robeson, Hearing Examiner

HEARING EXAMINER'S OPINION AND DECISION

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I. STATEMENT OF THE CASE

This case arises from two objections to a conditional finding made by the Director of the Department of Housing and Community Affairs (DHCA) that property at 16820 Westbourne Terrace, Gaithersburg, Maryland, met all the requirements for a Class III accessory apartment license under Section 29-19 of the Montgomery County Code. Exhibits 3, 4, 6. The license applicants (Applicants) are Ms. Catherine Hartman and Mr. Aron Hubbard. The DHCA's conditional findings (contained in the "Director's Report") were issued on April 15, 2014, and both objections were timely filed on April 28, 2014.[1] Exhibits 4, 6. Mrs. Anne M. Scott objected to DHCA's conditional finding that the property was the owner's primary residence. She also asserted that on-street parking near her home was inadequate. She also cited a history of rental violations on the subject property. Exhibit 4. Mr. and Mrs. Overbey asserted that the basement of the home has been rented multiple times since 2009 without approval, and individuals other than the owner lived in the upper level of the home. Ms. Overbey further stated that the occupants of the dwelling have been inconsiderate to neighbors due to noise levels and use of profanity, and that the insufficient on-street parking created a traffic hazard for those on Westbourne Terrace and Fernshire Road. Exhibit 6.

On May 2, 2014, the Office of Zoning and Administrative Hearings (OZAH) scheduled and noticed a public hearing for May 16, 2014 (Exhibit 7), within the times required by §29-26(b)(4) of the Code.[2] Mrs. Scott requested a postponement of the

[1] Those wishing to object to DHCA's conditional findings must due so within 30 days of the date the Director's Report is issued. *Montgomery County Code,* §29-26(b)(3).

[2] Section 29-26(b)(4) requires OZAH to do the following: (1) schedule a public hearing within twenty (20) days of the date it receives an objection, and (2) send notice of that hearing date within five (5) days of receiving the objection. *Id.,* §29-26(b)(4). The Hearing Examiner may postpone the hearing if she

public hearing because she was unable to change prior work commitments for May 16, 2014, and suggested rescheduling the hearing on May 19, 2014, still within the 20-day period required for the initial hearing. Exhibit 11. Mr. Hubbard objected to the postponement because he was going to be out of town on that date on May 19th. Exhibits 12-14. Ms. Hartman informed OZAH that she was in Afghanistan, but could participate by Skype. Exhibit 15. Coordination of a public hearing date acceptable to all parties resumed and the Hearing Examiner requested the parties to agree on a date prior to May 16, 2014, so she could convene the May 16, 2014, hearing solely to announce the new date. Exhibit 15. All parties agreed to reschedule the hearing to June 2, 2014, except Ms. Hartman, who informed the hearing Examiner at 7:47 p.m. on May 15, 2014, that she was unable to attend a June 2nd hearing because of "operations that day." Exhibits 15-18. The Hearing Examiner convened the May 16, 2014, public hearing and continued the case until June 26, 2014, in order to give the parties sufficient time to arrange personal and work schedules. Exhibit 19.

Prior to the June 26th public hearing, DHCA denied the license application (Exhibit 21(b)), because the improvements required in the Housing Inspector's initial report had not been made within 30 days and because the sign required had not been visible to the public. Improvements required from the initial inspection included the following:

1. Install 1/2" drywall on the kitchen, dining room, and hallway ceilings. (spackle, sand, paint)
2. Install door lock on basement door from the accessory apartment to the main house.
3. Install smoke detector outside of bedroom.

"determines that necessary parties are unable to meet that schedule." *Id.*

4. Repair the walkway to the accessory apartment to correct a trip hazard.
5. Driveway must be increased [to] the required minimum of 480 square feet. Driveway must be installed in the same material (asphalt) as the existing driveway. Permit required through Department of Permitting Services.
6. A re-inspection will be conducted on May 7, 2014 @11:30 a.m.

Exhibit 2. Because DHCA's denial could render the objections moot, the Hearing Examiner stayed proceeding on the objections until DHCA or the Landlord Tenant Commission issued a final decision on DHCA's denial of the application. She also postponed the public hearing on the objections indefinitely. Exhibit 23(a). On June 4, 2014, DHCA notified the Hearing Examiner that Ms. Hartman and Mr. Hubbard appealed DHCA's decision to the Landlord Tenant Commission and that "in lieu of the appeal," DHCA had granted an extension of time to complete repairs until July 7, 2014. Exhibit 24(c). The new list of repairs that had to be performed did not include paving the driveway:

1. Painting of kitchen, dining room, and hallway ceilings must be painted.

2. Door lock (door knob with lock) must be installed on door which leads from the main house to the accessory apartment. The door lock (door knob) cannot be a double-cylinder lock.

3. All electrical junction boxes must have covers. Exhibit 24(a).

OZAH again forwarded possible hearing dates (after the July 7, 2014, final inspection) to the parties. Exhibit 25. The Hearing Examiner received responses from Mrs. Overbey and Mrs. Scott, but did not receive any response from either of the Applicants. The Hearing Examiner notified both Applicants that she must receive a response no later than June 16, 2014, as to whether they would be available on the same dates as the Objectors. Exhibit 29. Ms. Hartman replied that there were many operation

uncertainties in Afghanistan, including the outcome of Afghan elections, transfer of power, security agreement, and troop numbers as "we go to a resolute support mission." She did, however, agree to try to settle on a date before June 16, 2014. Exhibit 32. She notified the Hearing Examiner on June 16, 2014, that she could attend a public hearing (either in person or by Skype) on July 21, 2014, but would be unavailable on any other date. She also informed the Hearing Examiner that her son, Aron, would be able to attend on July 21st as well. Exhibit 32. The Hearing Examiner issued notice of the July 21, 2014, hearing. Exhibit 34.

On July 15, 2014, OZAH informed Ms. Hartman that they would be using Skype to connect her to the public hearing as she had requested. Ms. Hartman contacted the office with certain procedural questions, and also informed OZAH that she was aware of e-mails circulating that contain false, misleading and inaccurate statements that she perceived as "malicious gossip." She also maintained that the e-mails referred to "offline" conversations with officials regarding the inspection of the property. She did not identify these e-mails. Exhibit 39. The Hearing Examiner responded to the procedural questions, but not to the allegation of spurious e-mail because (1) she did not know to what Ms. Hartman referred, and (2) that these should be addressed within record of the public hearing. Exhibit 40.

DHCA received the Housing Inspector's final inspection report on July 18, 2014, indicating that the Applicants had made all repairs required. Exhibit 42.

The public hearing proceeded as scheduled on July 21, 2014. Ms. Hartman attended in person, but Mr. Hubbard did not. The record closed on July 30, 2014, after receipt of the transcript. Exhibit 48.

II. STATUTORY SCHEME

As this is the first objection actually litigated under the new accessory apartment licensing law, the Hearing Examiner will deviate briefly from OZAH's regular format and provide an overview of the Montgomery County Code and Zoning Ordinance provisions relevant to this case.[3]

Effective on May 20, 2013, Council Bill 31-12 (Ch. 2, *Laws of Mont. Co. 2013)* and Zoning Text Amendment 12-11 (Ordinance No. 17-28) eliminated the requirement to obtain approval of a special exception for most accessory apartments. The legislation permits accessory apartments to be approved via a streamlined licensing process if the apartment meets requirements listed in the Zoning Ordinance and the County Code. *Montgomery County Zoning Ordinance,* §59-A-6.20; *Montgomery County Code,* §29-19.[4] The Council viewed accessory apartments as a relatively inexpensive means of providing affordable housing, and intended to streamline the approval process. *PHED Committee Packet,* pp. 13-14 (October 4, 2012, Worksession, October 8, 2012).

In order to balance the goal of simplified licensing procedures against the potential impact on the existing, residential character of a neighborhood, accessory apartments may only be approved by licensing if they meet the following land use standards (*Zoning Ordinance,* §59-A-6.20):[5]

> (a) Where an attached or detached accessory apartment is permitted in a zone, only one accessory apartment is permitted for each lot and it is only permitted under the following standards:

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[3] Three other accessory apartment objections were withdrawn (OZAH Case Nos. 14-03, 14-04, 14-06) and in another, the individual objecting did not appear (OZAH Case No. 14-01).

[4] The citation to the Zoning Ordinance currently appears in the County Code as Section 6.19. This citation was corrected in the final version of the bill, however, the online version of the Code still refers to Section 6.19 of the Zoning Ordinance.

[5] Proposed accessory apartments that do not meet these requirements may still receive approval through the special exception process. *See, Zoning Ordinance,* §59-G-2.00.1.

(1) the apartment was approved as a special exception before May 20, 2013 and satisfies the conditions of the special exception approval; or

(2) the apartment is licensed by the Department of Housing and Community Affairs under Section 29-19; and

(A) the apartment has the same street address as the principal dwelling;

(B) a separate entrance is located:

(i) on the side yard or rear yard;

(ii) at the front of the principal dwelling, if the entrance existed before May 20, 2013; or

(iii) at the front of the principal dwelling, if it is a single entrance door for use of the principal dwelling and the accessory apartment;

(C) one on-site parking space is provided in addition to any required on-site parking for the principal dwelling; however, if a new driveway must be constructed for the accessory apartment, then two on-site parking spaces must be provided;

(D) an attached accessory apartment:

(i) in the RE-2, RE-2C, RE-1, R-200, RMH-200, and R-150 zones is located at least 500 feet from any other attached or detached accessory apartment, measured in a line from side lot line to side lot line along the same block face;

(ii) in the R-90, R-60, and RNC zones is located at least 300 feet from any other attached or detached accessory apartment, measured in a line from side lot line to side lot line along the same block face;

The Zoning Ordinance limits the floor area of the accessory apartment to 50% of the total floor area of the dwelling, including the accessory apartment, or 1,200 square feet, whichever is less. There may be no more than two adult occupants of the apartment, and no other rental uses (i.e., boarders or roomers) on the property. *Montgomery County Code,* §59-A-6.20.

If these requirements are met, an accessory apartment need only obtain a Class III rental license under Section 29-19 of the Montgomery County Code. The licensing requirements contain additional criteria for approval, including:

> (A) the owner places a sign provided by the Director on the lot of the proposed accessory apartment within 5 days after the Director accepts an application license, unless a sign is required as part of an application for a special exception. The sign provided by the Director must remain in place on the lot for a period of time and in a location determined by the Director.
>
> (B) the principal dwelling on the lot or parcel required for the proposed accessory apartment is the owner's primary residence. Evidence of primary residence includes:
>
> (i) the owner's most recent Maryland income tax return;
> (ii) the owner's current Maryland driver's license; or
> (iii) the owner's real estate tax bill for the address of the proposed accessory apartment; and
>
> (C) the Director finds that:
>
> (i) the accessory apartment satisfies the standards for an accessory apartment in Section 59-A-6.20; or
>
> (ii) the accessory apartment was approved under Article 59-G as a special exception.

After an application is filed, the Director of DHCA is responsible for making preliminary or "conditional" findings on all the criteria for approval in both the Zoning Ordinance and the Code; DHCA publishes it's findings in a "Director's Report." DHCA relies on the documents listed in the licensing law for its findings; it does not investigate whether the accessory apartment will impact on-street parking for nearby neighbors nor does DHCA do in-depth research on other criteria, and may rely solely on an applicant's driver's license. This curtailed review speeds the licensing approval. *Council Worksession Packet, Bill 31-12,* (November 1, 2012, Worksession November 5, 2012).

Because DHCA does not perform in depth investigation of all of the criteria for approval, the Council included a process for those that disagree with the Director's preliminary findings or who assert that the apartment will restrict their ability to park on-street near their homes. This escape valve is the objection procedure. *Id.* Anyone objecting (or disagreeing) to the approval of the accessory apartment may file an objection within 30 days of the date of the Director's Report. Parking is deemed inadequate when:

> (A) the available on-street parking for residents within 300 feet of the proposed accessory apartment would not permit a resident to park on-street near his or her residence on a regular basis; and
>
> (B) the proposed accessory apartment is likely to reduce the available on-street parking within 300 feet of the proposed accessory apartment. *Montgomery County Code,* §29-26(b)(6).

Once an objection is filed, the Hearing Examiner may consider only the issues raised in the objection. *Id.*

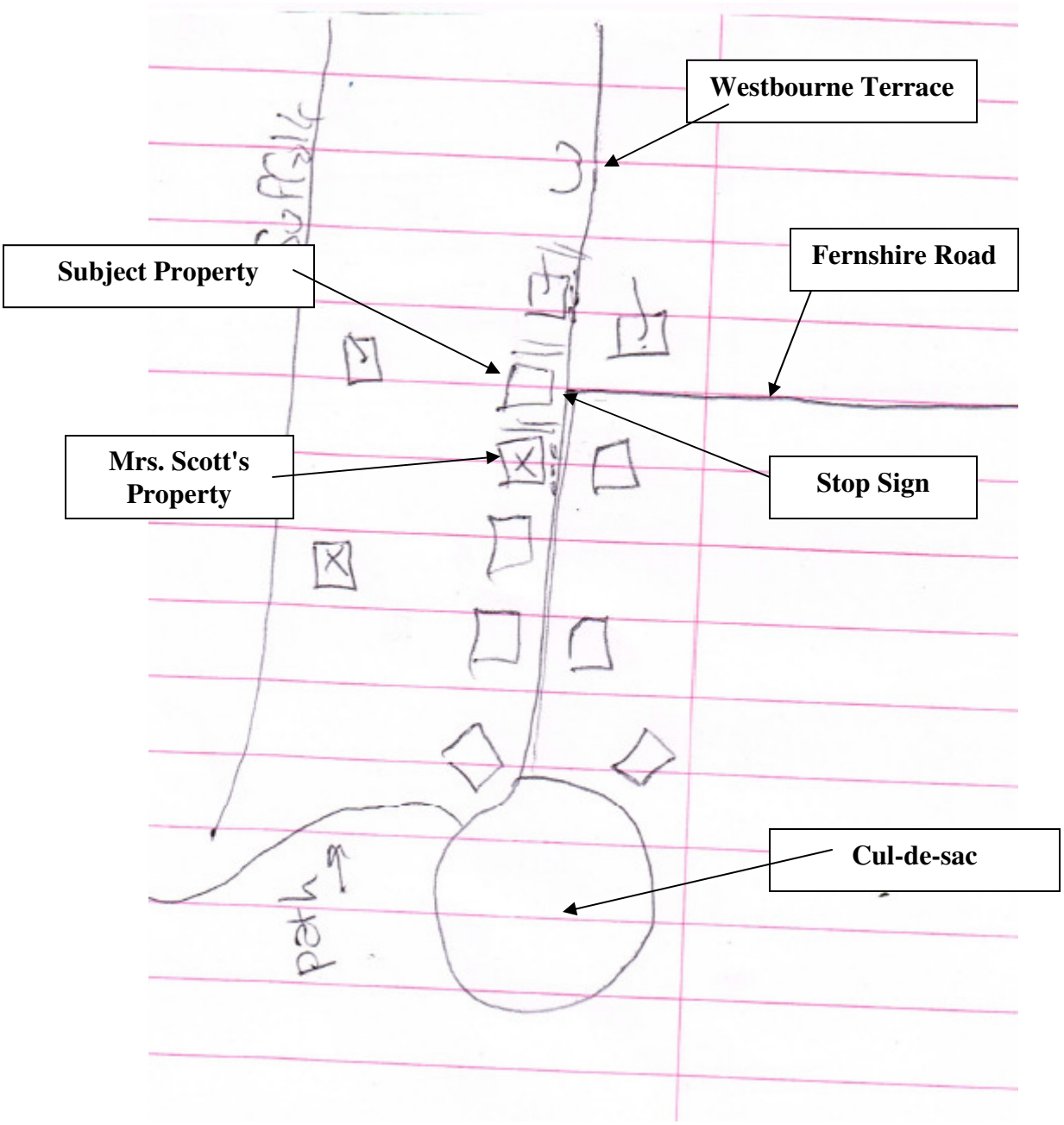
III. SUMMARY OF EVIDENCE AND TESTIMONY[6]

A. The Subject Property

The subject property is located at 16820 Westbourne Terrace, Gaithersburg, Maryland, directly across from its intersection with Fernshire Road. Westbourne Terrace terminates to the south in a cul-de-sac where Mrs. Hayduk lives. T. 28-29. Mrs. Scott's property adjoins the subject property on its southern side. T. 6-9. Both Mrs. Scott and Mrs. Hayduk testified that there is a stop sign at the intersection of Westbourne Terrace and Fernshire Road. According to them, Fernshire Road provides the primary access to homes along Westbourne Terrace. T. 35-36, 132-133. During the hearing, Ms. Hartman

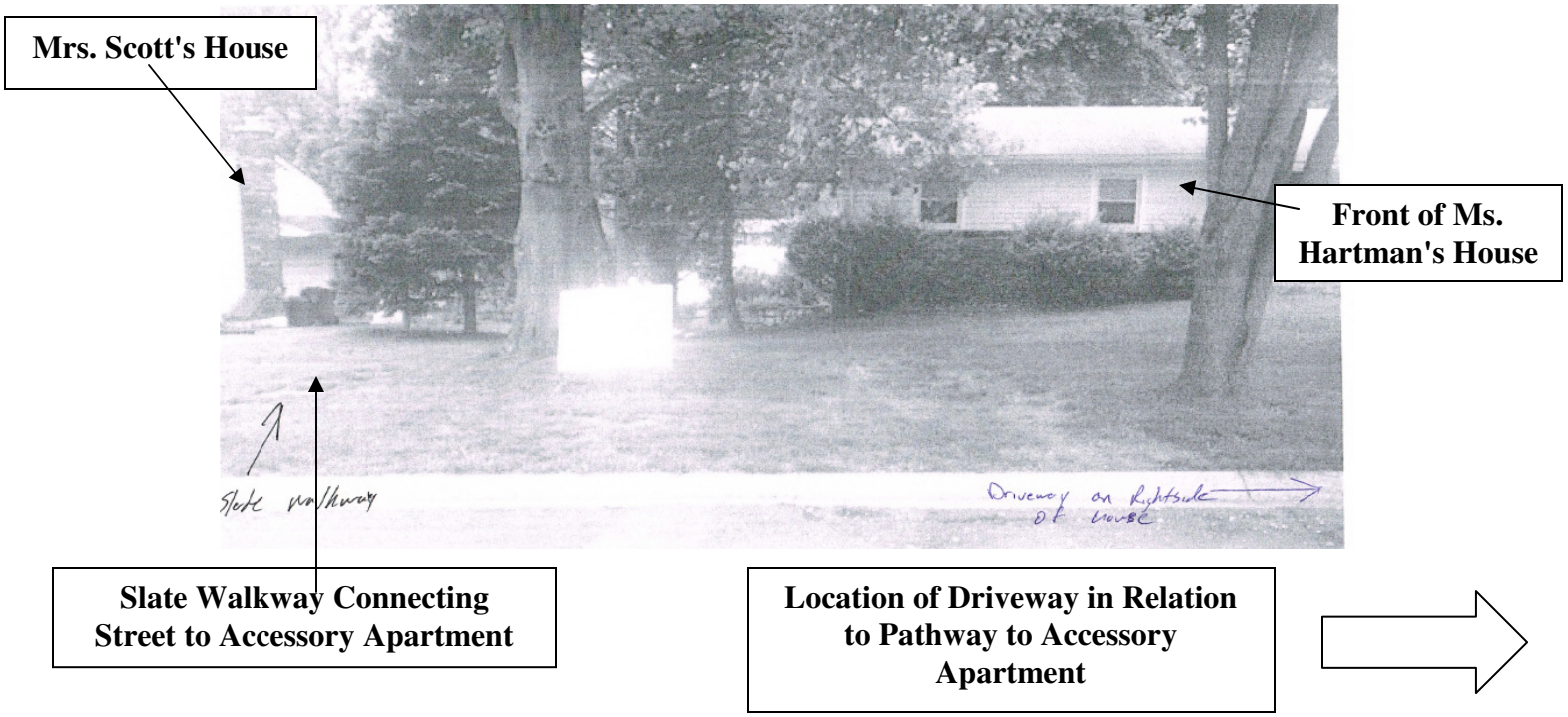
[6] All findings of fact are made based on the preponderance of evidence before the Hearing Examiner. *Cf., Montgomery County Code,* §2A-8(d). All transcript citations are to the transcript of the July 26, 2014, public hearing.

submitted a hand-drawn sketch of the immediate neighborhood (Exhibit 44), shown below (not to scale):



The property is improved with a single-family home that has a 10-foot wide driveway on the northern side that is 31 feet in length. T. 118. There is an 18-inch gap between the asphalt driveway and an area of brick pavers, similar in appearance to a

patio. The brick-paved area is approximately 11'6" wide and 17' in length. T. 119. The entrance to the apartment is located in the rear of the property. There is no pathway from the driveway to the apartment's entrance, but there is a pathway near Mrs. Scott's property that leads from the street to the apartment's entrance in the rear of the property. The path is in close proximity to Mrs. Scott's driveway. The relationship of the pathway to Mrs. Scott's property is shown in the photograph below taken by the Housing Inspector Exhibit 47, below:



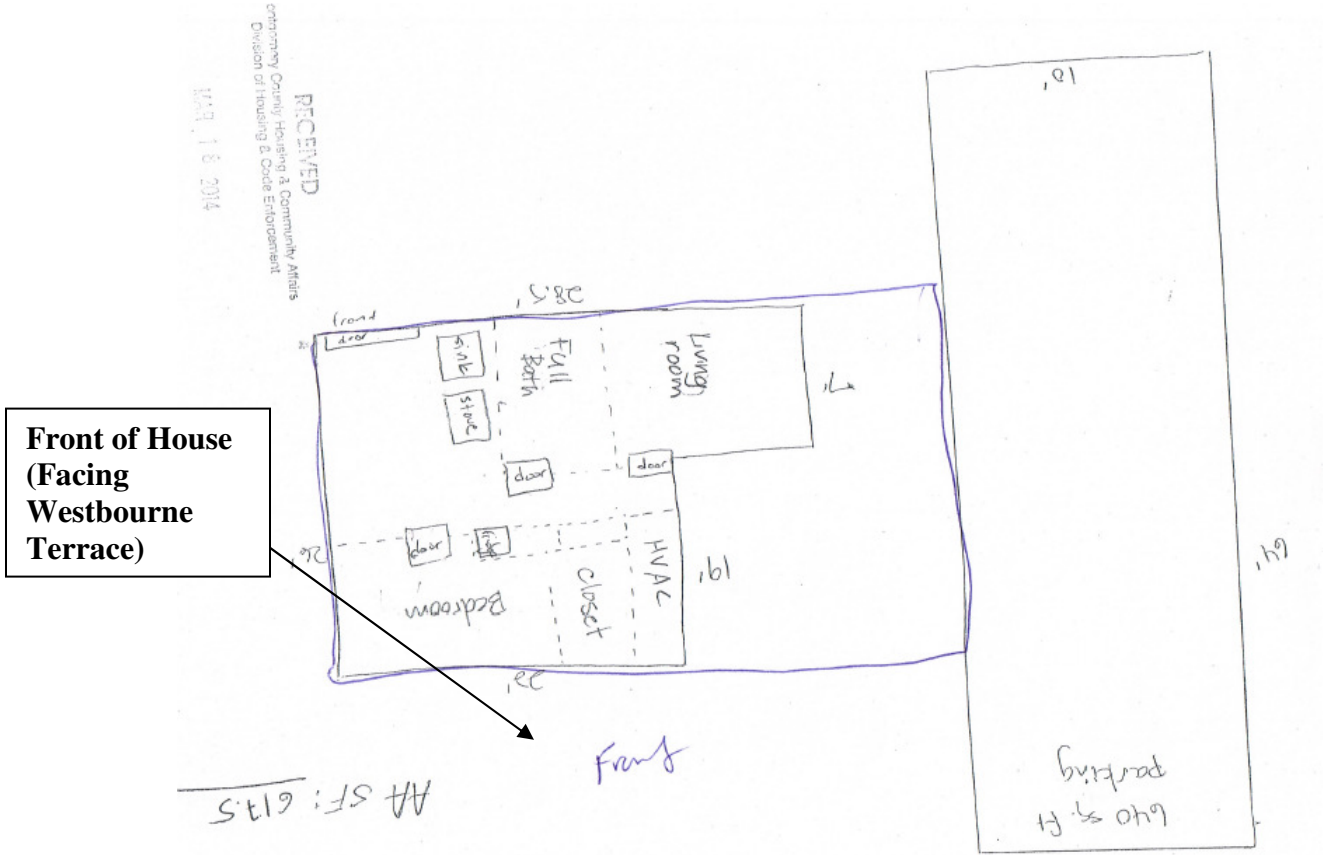
An area surfaced with brick pavers is located on the opposite side of the house from the Scott's property, and is shown on another photograph taken by the Housing Inspector (Exhibit 45, on page 13). According to Mrs. Hayduk, who has lived at her home since 1972, the brick pavers were originally a patio. T. 154. She has never seen the patio used for parking, although she acknowledged that she does not drive by there every day. *Id.* Mrs. Scott testified that she has "rarely" seen anyone park on the brick pavers. T. 130.

Exhibit 45

Mr. Goff, the Housing Inspector, testified that area covered by brick pavers may only hold one car due to steps that lead to a back gate. T. 120. Ms. Hartman asserts that the asphalt portion of the driveway may hold two more cars, so there is off-street parking

for three cars. All three cars (on the pavers and in the driveway) must be parked in tandem (i.e., one behind the other). T. 90.

A floor plan of the apartment is shown below, but unfortunately, does not include the exterior footprint of the home--only the floor plan of the accessory apartment (Exhibit 46, below).[7] Nor does the plan include the area of brick pavers within the measurements of the driveway, as this was not counted as parking until after the application was submitted.



[7] The Hearing Examiner does not imply that Ms. Hartman intended the drawing to be confusing. The new licensing law does not require scaled drawings of the exterior footprint of the house and so these were not submitted.

B. Ownership History

Ms. Hartman initially testified that that she owned the home in 2006-2007, and transferred it into her son Aron Hubbard's name for "financial reasons between herself and Aron." T. 86. Initially, she stated she was added to the title again in 2013. Mrs. Scott, however, testified that records from the Maryland State Department of Assessments and Taxation (SDAT) indicated that Ms. Hartman purchased the property in 2005, transferred it to her son Aron Hubbard in 2009, and that title was transferred into both her name and her son's name in February, 2014, just prior to applying for this license. T. 94. On cross-examination, Ms. Hartman acknowledged that she may have initially given incorrect dates as to her ownership of the property, stating that she had not reviewed her records prior to the public hearing. T. 94-95.

C. Primary Residence

Both Mrs. Scott and Mrs. Overbey objected to DHCA's preliminary finding that the property was Ms. Hartman's primary residence. Because it is a required finding, it is an objection that may be contested under the new licensing law. *Montgomery County Code,* §29-26(b)(2).

Mrs. Scott and Mrs. Hayduk testified that they have not seen Ms. Hartman at the property since the winter of 2013. Mrs. Scott testified that neither of the listed owners of the property has actually lived at the property since last winter. During that time, according to her, the occupants caused many problems, causing numerous calls to the police and animal control. On June 3, 2013, June 5, 2013 and June 29, 2013, the police made several arrests at the house. T. 14, 17-18. During the June 3, 2013, arrests, police cars blocked Mrs. Scott's driveway, causing her to have to wait to park in her driveway.

T. 14. She and her husband walked along the street in January and the driveway was not shoveled and Ms. Hartman's car was not there. There were several people in the house "having a good old time." T. 15. Since the winter, they have only seen Ms. Hartman at the house once in April doing yard work and more recently to do renovation. Mrs. Scott testified that Ms. Hartman was present on April 7, 2014, for the housing inspection. At that time, Ms. Hartman stated that she would be moving back in within two weeks, but did not do so. She observed Ms. Hartman return to the property two weeks later, but Ms. Hartman did not spend the night and her car had Virginia plates. Mrs. Scott observed Ms. Hartman again at the property on July 7, 2014, while some workers were cleaning out the house, but Ms. Hartman again did not spend the night. This time, her car had Massachusetts license plates. T. 14-15.

Ms. Hartman admitted that the co-owner, her son Aron Hubbard, has not lived at the property for the past year, and attributes her own absences to her work. T. 55, 67. Aron Hubbard submitted a driver's license and a change of address card, showing an address in Columbia, Maryland, with the application. Exhibit 1(b). Ms. Hartman testified that her driver's license and tax return show her permanent residence as the subject property. Her driver's license showing the subject property as her address is in the record of this case, although her tax returns are not. Exhibit 1(b). She testified that all of her possessions are at the subject property. She considers this property her primary address, and she has no other residences anywhere in the world. Exhibit 1(b), T. 54-55.

Ms. Hartman explained that she has three children. Zachary Hubbard lives in Annapolis, Maryland, Aron Hubbard lives in Columbia, Maryland, and Alexander Hubbard "has been living at home with me." T. 55.

Ms. Hartman testified that she is a civilian employee of the Department of Defense. She has twice accepted voluntary billets (special positions) that have required her to be overseas. While her permanent duty station is with the Office of Naval Intelligence in Washington, D.C., she is currently a "deployed civilian" under the Department of Defense serving for the U.S. Navy in Afghanistan. She has been deployed since October, 2013, and returns to the U.S. every three months. Her current deployment ends in October, 2014. She explained that the Navy recruits individuals with needed specialized skills to volunteer for defined "billet" positions. Currently, she serves as a public affairs officer and is a strategic communication advisor stationed in Kabul, Afghanistan. T. 52-53.

In 2011-2012, Ms. Hartman served in another billet position, this time under the Department of State, also in Afghanistan. Initially, she testified that civilian employees had to wait a minimum of three years between voluntary billets, although she wasn't sure. However, when the Hearing Examiner pointed out that she had had only two years between her work for the Department of State and the U.S. Navy, she felt it was because she had worked for the Statement Department the first time and the Department of Defense this time, and her skills were needed in Kabul. T. 89.

According to Ms. Hartman, these types of positions typically permit 90 days of leave during the year in order to maintain her home and her property. Her job requires that she be deployed at least 70 days prior to arriving and 60 days prior to leaving. Other than those restrictions, she is "free to come home when she wishes." T. 54. When asked by the Hearing Examiner whether she intended to deploy again after this position ends in October, 2014, she stated that she had "no plans to deploy again at this time." T. 90.

When asked the same question by Mrs. Scott, she replied, "I can't speculate on that at this time, whether I would refuse or where there may be conditions set after this hearing, so I can't comment on that." T. 100.

In response to the Objector's claims that she had not spent a night in the house since the winter of 2013, Ms. Hartman testified that she typically stays with her son, Aron Hubbard, in order to visit with family while she is on leave from her position. She testified that all of her personal belongings remain at 16820 Westbourne Terrace, including clothes, personal records, and jewelry, which are still in the upstairs of the home. T. 85. She further testified that her son, Alexander Hubbard, totaled her car and therefore, she must use rental cars that have license plates from other jurisdictions while on leave. T. 91.

D. Rental and Occupancy

Contradiction swirls about the rental and occupancy history of the property. According to Ms. Hartman, she installed separate cooking facilities in the basement prior to 2007 so that her son Zachary and his wife and child could live there. She initially testified that she had had the kitchen facilities removed in 2007 before she rented rooms at the property, although later she indicated that the facilities were removed due to complaints filed with the Department of Housing and Community Affairs (DHCA). T. 58, 60-61. After the two individuals renting the rooms in approximately 2007-2008 moved out, Ms. Hartman testified that she rented rooms to other individuals until 2013, when she re-installed the accessory apartment. After removing the kitchen facilities, she rented rooms in the home, sharing the upstairs kitchen facilities. She testified that the last tenants of the basement apartment moved out in January, 2014, and, according to her, no

one has lived in the basement since installation of the accessory apartment. Prior to installing the accessory apartment in 2014, she rented the rooms to individuals occupying the entire house with shared kitchen facilities. T. 58-64. Later, Ms. Hartman testified that she rented rooms in the home in 2008-2010, 2010-2012, and in 2013. Ms. Hartman admitted that she had rented rooms there when she did not own the property. T. 96.

Neighbors contend that the property has a history of rental violations. Contrary to Ms. Hartman's testimony that the property had not been rented since January, 2014, Mrs. Scott testified that occupants of the dwelling moved out in February, 2014, but new occupants moved into the basement in March, 2014. When they were moving in, the new occupants parked a U-Haul on the street near the pathway leading to the apartment, completely blocking her driveway. She could not even drive on the grass to by-pass the U-Haul to park on her driveway. T. 16. They moved out later because, according to Mrs. Scott, someone reported them to the County and this permitting process began. The only person she knows that remained in the house was Ms. Hartman's son, Alexander Hubbard. At one point, a woman with a baby lived there, but no one had a car—they would leave stolen shopping carts in the driveway after getting groceries. T. 16-17.

Ms. Hartman attributed the Objectors' complaints that the County considered past rental violations "resolved" to the neighbors "ignorance" as to what occurred on the inside of the home. T. 81-82. According to her, every rental complaint was addressed. T. 84. Mrs. Scott responded to Ms. Hartman's charge by testifying that Ms. Hartman did not leave the neighbors any contact information, and thus, they did not know how to

reach her to resolve the issues and had no information on what was happening with the property. T. 128.

Mr. Goff, the Housing Inspector, described the history of complaints to DHCA about the property that reveals a second violation in 2011. According to Mr. Goff, DHCA received a complaint on July 1, 2009. The Housing Inspector visited the property, but no one was home so he left his card in the door. He visited again on July 14th and July 21st, but still no one was home so he left his card. Ms. Hartman did contact DHCA in August, but the stove was still in the basement at the time. An inspector re-inspected on September 17, 2009, and the stove had been removed. T. 108-109.

Mr. Goff testified that DHCA received another complaint in 2011. A Housing Inspector visited the property on March 2, 2011, and found a microwave, sink and refrigerator in the basement. These were removed and the complaint was resolved. T. 108.

As characterized by Ms. Hartman's attorney, the "elephant in the room" underlying this case is Alexander Hubbard's recent residence in the upper portion of the home (Alexander Hubbard is Ms. Hartman's son). T. 73. Ms. Hartman testified that Alexander lived in the upstairs of the home at least in 2014, although she gave no specific dates. T. 55. The evidence concerning Alex Hubbard's occupation of the property is conflicting, although all parties agree that the activity that occurred adversely impacted the neighborhood.[8] According to Ms. Hartman, there was a time period in 2014 when her son experienced "multiple stressors," causing him to abuse drugs. She was unaware that people other than her son were occupying the house during at least May and June, 2014.

[8] Ms. Hartman apologized to the neighborhood for her son's activity in her house. T. 85.

She spoke with her adjoining neighbors, the Sittinger's, on the opposite side of her property from Mrs. Scott. According to Ms. Hartman, these neighbors informed her that the situation in her home had deteriorated "in a matter of days." Ultimately, she herself called the police about her son's drug activity in the home. T. 77. According to Mrs. Scott and Mrs. Hayduk, the police arrested individuals in the home on June 3, June 5, and June 29, 2014. Ms. Hartman attributed the Objectors' complaints about inadequate parking to "one large party" that had occurred at some point while he occupied the house. T. 85. When asked by Mrs. Scott about large parties every night at the property, she stated, "[W]ell there was a period of time where Alex was having, having a disruption to the neighborhood." T. 97. In response to a question from the Hearing Examiner, she admitted that there may have been other parties or activity at the home during her absence of which she was not aware. T. 97.

Ms. Hartman believes that that there are rumors circulating in the neighborhood incorrectly attributing illegal behavior to her property. According to her, the police had been sent there five times and each time found nothing wrong. T. 79.

She also reported that she has been told that neighbors have been going door-to-door to try to stop her from getting the accessory apartment license. In her opinion, she has been careful to obtain good renters by doing credit and background checks. She has "no plans at this time" for her son Alex to return home. T. 80.

D. Availability of Parking

Mrs. Scott testified that occupants of the subject property park on both sides of the street in front of her house and near her driveway. They also park at the path leading from Westbourne Terrace into the accessory apartment on the subject property. The path

is very close to Mrs. Scott's driveway and parked cars belonging to the occupants have partially blocked her driveway. She testified that getting in and out of her driveway "can be very tricky." T. 9. At one point, she altered the time she went to work to avoid the parking issues. *Id.* Mrs. Scott further testified that parking has been a problem when there are two occupants of the apartment because they always park on the street rather than in the driveway. According to her, she has "rarely" seen occupants use Ms. Hartman's driveway. T. 131. She has had to ask the occupants to move their cars because they have blocked her driveway or parked in front of her mailbox. She stated that the U.S. Postal Service will not deliver mail if the mailbox is blocked. She has also experienced parking issues in the mornings and evenings before and after work. In one instance, she and her husband did not think that they would be able to leave their driveway because a car was parked on the street almost next to the bumper of her husband's car. T. 128-131.

The Hearing Examiner questioned Mrs. Scott as to whether the parking problems on the street near her home were caused by the large parties that occurred while Alex Hubbard resided there, or whether occupants of the apartment created the on-street parking problems in front of her property. The Hearing Examiner suggested that she assume there would be four cars at the subject property. Mrs. Scott responded that, assuming each adult occupant had a car and only one parked in the driveway, there will not be room for three cars safely in front of Ms. Hartman's house. She explained that Westbourne terminates in a cul-de-sac, and one of the cars will have to either park across the street where there is a fire hydrant or in front of her driveway or her property. If Mrs. Scott backs out of her driveway, there could be somebody right behind their cars.

She believes that there is realistically room for only two cars in front of Ms. Hartman's house, and possibly three cars in front of her house. T. 154.

Mrs. Scott described the layout of the driveways in the neighborhood. The homes are ramblers that were built in the 1960's. The original driveways that were built are approximately 16 feet wide and 27 feet long. They can accommodate two cars if the cars are parked in tandem (i.e., one behind the other.) T. 19.

Mrs. Scott testified that she would not mind if parking was congested occasionally, such as when someone would have dinner parties. T. 134-135.

Mrs. Hayduk testified that parking has been a problem in the neighborhood due to the occupants of the subject property. These problems stem from the fact that the occupants park on the street. She observed two cars parked on the street in December, 2013 that left in January, 2014.

Mr. and Mrs. Hayduk and Mrs. Scott testified that on-street parking near Ms. Hartman's house is very congested. Mrs. Hayduk testified that on-street parking near the stop sign on Fernshire Road**,** which leads into the neighborhood, is so congested that it is difficult to make a left turn into the neighborhood or a right turn out of the neighborhood. Cars have been parked on both sides of the street in front of Ms. Hartman's property. When she or her husband try to exit the neighborhood, it is often difficult to make the right turn onto Fernshire because cars are parked so close to the intersection. She has not observed cars parked within the Hartman's driveway, although admittedly she does not drive by the property every day. She does not believe that fire trucks could make the turn into the neighborhood due to the amount of on-street parking, which is of concern to her because many of the neighbors are elderly. T. 35-36.

Mrs. Hayduk does not agree with DHCA's finding that there is room for three cars in the existing driveway. She believes there is room only for two cars to park one behind the other. Two cars cannot park side-by-side. T. 36-37.

Mr. Hayduk testified that he has observed the same parking conditions as his wife—the intersection at Westbourne Terrace and Fernshire Road had so many cars parked near it that he felt it would be difficult for emergency vehicles to make the left turn onto Westbourne Terrace. He testified that other homes on the street have no more than two vehicles each, and their carports are adequate to handle the parking. T. 51.

Mr. Hayduk testified that he did not believe that people used the driveway because tandem parking is inconvenient. He also stated that it would be nearly impossible to widen the driveway because a PEPCO power box is near the side of the driveway on the property line. He also pointed out that there is no walkway from the driveway to the entrance of the accessory apartment. Mr. Hayduk believes that occupants of the subject property will not park in the driveway because it's more convenient to park on the street near the pathway leading to the accessory apartment. There is no pathway leading from the driveway to the entrance of the accessory apartment. T. 136-141.

According to Ms. Hartman, her hand-drawn sketch of the neighborhood shows that there is a gap on each side of her house where cars could park (i.e., the horizontal lines on each side of Ms. Hartman's house, shown in Exhibit 44, on page 11.) She testified that every house in the neighborhood has space along the road for 2-3 cars to park. In her opinion, there is "quite a bit" of on-street parking there. T. 70-71.

Ms. Hartman testified that parking is available in front of her home and other homes near the intersection. According to her, most of the homes there park a couple of

cars in their driveways and a couple on the street and "almost everyone has two to three cars parked on the street in front of their house plus some cars in the driveway." T. 146. According to her, there is plenty of room to park in front of her property and in front of the Sittinger's property, her neighbor to the north. According to her, Mr. Sittinger has a long lot and has sufficient parking for 4-5 cars in front of his house. She frequently parks in front of the Sittinger's house when she visits the property. The house across the street has three cars in the driveway and four or five cars on the street opposite of her house. She testified that she and her children would never park in front of Mrs. Scott's house because they always park in front of the Sittinger's property because there is always plenty of room in front of that house. T. 146-147.

Ms. Hartman described the driveway on her property. The driveway is made of asphalt and the apron is cement. The asphalt drive leads to an area of brick pavers, which she and her family have used for a long time to park their vehicles. That area exceeds the basic requirement to have 480 square feet of parking. According to Ms. Hartman, she parks three cars there all of the time. At one point, she had an Accord, one son had a Civic, and another son had a Blazer. All three could fit within the driveway if they parked behind one another. The rear of the car parked closest to the street does not extend into the street. T. 71-73.

She disagrees that the property has inadequate parking because she has been able to park three cars in her driveway. T. 81-82. Ms. Hartman testified that she has had renters with two cars, while others have had only one car. She is willing to make it a condition of her lease that all renters park in the driveway. She was unaware of this as a possible issue. T. 143-146. She also testified that neighbors may not have seen

individuals parking in her driveway because there has never been a need for more than two cars to park at the property. When she and her roommate lived there, he would park his truck in the driveway and she would park on the street. It has not been necessary to have three cars park in the driveway. T. 147. Nor does she think it's unusual for renters to walk on ground to get to their apartment. T. 138. She acknowledged, however, that one of her renters parked on the opposite side of the street, across from Mrs. Scott's house, because a tree fell on his car when he parked on the side of the street nearest the subject property. T. 66.

Mr. Goff, the Housing Inspector, explained why the requirement to expand the asphalt driveway had been removed from his initial report. The DHCA is completely different from the Department of Permitting Services (DPS) that is responsible for building construction. The driveway into the property is asphalt, and there is an 18-inch gap between the driveway and the brick pavers, which appeared to be a patio. He consulted with his managers, all of whom agreed that it was a patio rather than a driveway. Ms. Hartman had DPS visit the property, and DPS staff initially agreed that there was a patio and driveway. When Ms. Hartman asked to be shown where the code explicitly stated that a patio couldn't be used for parking, DPS could not find an explicit prohibition. As a result, they stated that the patio could be used for a parking area. T. 112.

Mr. Goff testified that there are steps from the patio that lead to the main house, but there is no walkway from the driveway and patio directly to the accessory apartment entrance. The only walkway into the apartment is the walkway from the street (near Mrs.

Scott's house) to the entrance. T. 138-140. He also testified that he visited the property during the daytime hours, and did not have difficulty parking. T. 110.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A summary of the law applicable to this case is included in Section II of this Opinion and Decision. There are two objections raised in this case that OZAH has jurisdiction to decide: (1) whether the property is the owner's "primary residence," and (2) whether the on-street parking is available to neighbors within 300 feet of Ms. Hartman's property.

A. Primary Residence

Those objecting to the license application assert that neither Applicant occupies the property; therefore, it is not their primary residence. Admittedly, Mr. Aron Hubbard does not occupy the property, and in fact, permanently lives at another residence he owns in Columbia, Maryland. The Hearing Examiner finds that the subject property is not Mr. Hubbard's primary residence.

Based on the evidence presented, the Hearing Examiner finds that the subject property does qualify as Ms. Hartman's primary residence, even though she finds credible Mrs. Scott and Mrs. Hayduk's testimony that Ms. Hartman has not occupied, or possibly even spent the night at the property, since the winter of 2013. Mrs. Scott and Mrs. Hayduk's testimony that Ms. Hartman has not occupied the property for some time is consistent with Ms. Hartman's testimony that she stays with her son, Aron Hubbard, when she is on leave from her civilian deployment. The Hearing Examiner does not find credible Ms. Hartman's testimony that all of her personal belongings are located at the

property because of the length of time she has been absent. The Hearing Examiner also believes, from Ms. Hartman's non-committal responses, that she will deploy again.

Nevertheless, the Hearing Examiner concludes that occupancy is not the criteria for approval of this accessory apartment. The former special exception standards required the owner to actually occupy the property for at least 6 months per year. That requirement stemmed from the belief that both ownership *and* occupancy ensured fulfillment of and involvement in complying with conditions of special exception approvals. *PHED Committee Worksession Packet, p. 7 (October 18, 2012, Agenda Item # 1, October 22, 2012).* When considering changes to the laws governing accessory apartments, however, the PHED Committee recommended changing the occupancy requirement to a requirement that the home be the owner's "primary residence." *Council Introduction Packet (November 9, 2012, Agenda Item #7, November 13, 2012).* When the Council adopted Council Bill 31-12, it endorsed this concept because it wanted "easy methods of proof and wanted to allow absences by the owner without monitoring the timing of those absences." *County Council Worksession Packet (January 11, 2013, Agenda Item #7, January 15, 2014)).*

Given this legislative history, the Hearing Examiner may only conclude that occupancy for a specific period of time is not mandatory as long as the owner has no other residence, or has documentation that the property is the owner's primary residence. Ms. Hartman has provided the proof required by law that she intends this to be her primary residence in the form of a driver's license and ownership of the subject property. She testified that she files a Maryland income tax return, although this is not in the record. Nor is there any other evidence in this record that she has another residence, and

she affirmatively testified that she has no other home "in the world." T. 55. Her permanent duty station in Washington, D.C., also corroborates her testimony that she intends this property to be her primary residence. For these reasons, the Hearing Examiner denies this objection to issuance of a rental license for the property.

B. Adequacy of Parking

The Hearing Examiner finds from the evidence and testimony that on-street parking is not available to neighbors within 300 feet of the subject property because of existing congestion at the intersection of Fernshire Drive and Westbourne Terrace, and because of the accessory apartment at the subject property. The Hearing Examiner agrees with Ms. Hartman that three cars may park in tandem on the driveway and the patio. That does not end the question, however, because the criteria is not whether three cars may physically be able to fit in the driveway/patio area; it is whether *on-street* parking is available to those within 300 feet of the subject property on a regular basis. The Hearing Examiner finds that on-street parking near Ms. Scott's house, which adjoins the subject property, is not adequate and that problems that occur in front of Ms. Scott's house are directly attributable to the accessory apartment as well as existing conditions near the intersection of Westbourne Terrace and Fernshire Road.

Both Mrs. Scott and Mrs. Hayduk testified that occupants of the apartment on the subject property regularly parked on the street rather than in the driveway, and not just during large parties that may have occurred when Alexander Hubbard lived at the property.[9] Mrs. Scott testified that at times, her driveway has been blocked, the mailbox located on her property was blocked, and she and her husband were barely able to exit

[9] Although understandably of concern to the neighbors, the Hearing Examiner does not give a tremendous amount of weight in this decision to parking generated by the large parties held during Ms. Hartman's absence, as Alexander Hubbard no longer occupies the property.

her driveway because tenants of Ms. Hartman's property parked so close to Mrs. Scott's driveway. She also testified that occupants of the apartment regularly parked on the street in front of her house. As she is an adjacent neighbor, Mrs. Scott's property is clearly within 300 feet of the subject property, and the pictures submitted by the Housing Inspector attest to the short distance between Mrs. Scott's house and the pathway on the subject property that leads into the accessory apartment. Mrs. Scott testified that problems with on-street parking occurred even when two residents had occupied the apartment (prior to the problems that occurred during Alexander Hubbard's residence).

Ms. Hartman has been at the property rarely since October, 2013, and admits that she may not be aware of all of the activity that occurs there. Her testimony supporting the fact that on-street parking is available is that she frequently parks in front of the Sittinger's property on the opposite side from Mrs. Scott. Thus, the availability of on-street parking in front of Mr. Sittinger's property does not address whether Mrs. Scott has adequate on-street parking in front of her property. Ms. Hartman admits that most of the houses near the intersection of Westbourne Terrace and Fernshire Road have multiple vehicles parked both in their driveways and on the street, suggesting that parking is, indeed, congested in that area. The Hearing Examiner finds credible Mrs. Scott's and Mr. and Mrs. Hayduk's testimony that on-street parking near the intersection is so congested that cars are extremely close to the stop sign, making it difficult to make a left turn onto Westbourne Terrace or a right turn onto Fernshire Road.

Further, the Hearing Examiner finds from the evidence that tenants of the apartment do not regularly use the driveway on the subject property. Mrs. Scott testified that she rarely saw occupants parked in the driveway; Ms. Hayduk stated that she had

never seen anyone parking in the driveway. Ms. Hartman counters this by asserting that there has been no need to use the driveway, but also admitted when she and a roommate occupied the house, they "juggled" the parking arrangements so that one vehicle parked in the driveway and one parked on the street. T. 147. Ms. Hartman testified that she and her sons have all parked in the driveway, but also testified that she frequently parks in front of the Sittinger's property on the other side of Mrs. Scott's property when she visits the property.

The Hearing Examiner agrees with Mr. Hayduk that parking on the street near the pathway to the accessory apartment is more convenient for tenants of the apartment. Based on the evidence before her, she finds that the configuration of the off-street parking (i.e., tandem parking) and the fact that the pathway to the apartment is located near the Scott's property, causes tenants of the apartment to park on-street near Mrs. Scott's residence, and directly contributes to the lack of on-street parking near her house.

Given that she has found that on-street parking near Mrs. Scott's property is inadequate, the Hearing Examiner has two options under the licensing law—to uphold the objection that on-street parking is not regularly available near Ms. Scott's property (thereby requiring denial of the license) or to require additional parking spaces.[10] Rather than affirming the objection as to parking, the Hearing Examiner concludes that two additional parking spaces could resolve the on-street parking problems in front of Mrs. Scott's house without exacerbating on-street parking problems at the intersection of Westbourne Terrace and Fernshire Road, but only *if the parking spaces are configured*

[10] Section 29-26(b)(7) permits the Hearing Examiner to require more than the minimum number of spaces as a condition of approving the license.

properly.[11] The importance of the configuration of the spaces is illustrated by the fact that merely adding the square footage of the patio area to the asphalt driveway to provide three off-street spaces does not resolve the lack of on-street parking on Westbourne Terrace. The Hearing Examiner concludes that the additional two parking spaces should be added adjacent to the existing spaces on the asphalt driveway by widening the asphalt portion of the driveway, thus allowing cars better to maneuver around each other, and reducing the possibility that someone will be "blocked in" the driveway.[12] Access to the parking spaces configured in this manner should be direct and unobstructed via a pathway from the accessory apartment entrance to the patio. This configuration eliminates the need for a pathway access near Mrs. Scott's property, which contributes to the on-street parking problems there, and provides greater assurance that cars will actually park on the driveway, and not at the intersection of Westbourne Terrace and Fernshire Drive or in front of Mrs. Scott's house.

V. DECISION

It is this 28th day of August, 2014, ORDERED, that the objections of Anne M. Scott and Benjamin and Susan Overbey to the Director's conditional findings on Accessory Apartment License #83032, for property located at 16820 Westbourne Terrace, Gaithersburg, Maryland, are DENIED, and that DHCA should grant Accessory Apartment License #83032, *subject* to the following requirement:

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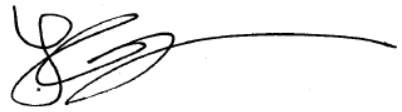
[11] The configuration of and access to the spaces are just as important as the number of spaces. The evidence indicates that the addition of the patio or brick pavers did little to resolve the on-street parking problem in front of Mrs. Scott's house because it doesn't permit cars to maneuver around each other. Imposing requirements on the configuration of the spaces are necessary to ensure that the intent of the statute is met, i.e., to permit accessory apartments without impacting on-street parking for neighbors within 300 feet.

[12] While Mr. Hayduk did not believe it possible to widen the driveway, he is not an expert in the laws and regulations governing driveway construction. The Hearing Examiner offers the opportunity to approve the accessory apartment without further impacting parking on the street; otherwise, she would have to affirm the objection, resulting in denial of the license.

Prior to issuance of a Class III Accessory Apartment License, the Applicants shall provide two additional parking spaces by widening the asphalt portion of the existing driveway and shall provide an unobstructed pathway between the entrance to the accessory apartment and the asphalt parking area.

Issued this 28th day of August, 2014.



Lynn A. Robeson
Hearing Examiner

MONTGOMERY COUNTY CODE, SECTION 29-26(B)(10) PERMITS ANY AGGRIEVED PARTY WHO FILED AN OBJECTION TO REQUEST THE CIRCUIT COURT TO REVIEW THE HEARING EXAMINER'S DECISION ACCORDING TO THE MARYLAND RULES OF CIVIL PROCEDURE.

The Civil Division of the Montgomery County Circuit Court may be contacted at:

Location:	Montgomery County Circuit Court North Tower 1st floor, Rm 1200
Phone:	(240) 777-9401

COPIES TO:

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