OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660

IN THE MATTER OF:	*	
SALVATORE PEPE	*	
Applicants	*	
Salvatore Pepe	*	
For the Application	*	
* *		
Cece Kinna	*	OZAH Case No. CU 17-01
Housing Code Inspector III	*	
For the Department of Housing	*	
And Community Affairs	*	
* *		
Eileen Finnegan	*	
Opposing the Application	*	
	*	
* *		

Before: Lynn A. Robeson, Hearing Examiner

HEARING EXAMINER'S REPORT AND DECISION

TABLE OF CONTENTS

I. STATEMENT OF THE CASE

On July 6, 2016, the Applicant, Salvatore Pepe, filed an application seeking approval of a conditional use to allow an Attached Accessory Apartment in the basement of a single-family detached home at 1011 Schindler Drive, Silver Spring, Maryland, 20903. The subject property is identified as Lot 4, Block L, in the Burnt Mills Knolls Subdivision. It is zoned R-90 (Residential Detached). Records from the Maryland State Department of Assessment and Taxation (SDAT) reflect that the Applicant owns the subject property (Exhibit 8).

Most accessory apartments may be licensed without a conditional use approval provided they meet certain standards in the Montgomery County Code. *Montgomery County Code*, §29-19(b). The licensing requirements in the Code require compliance with standards in the Montgomery County Zoning Ordinance. *Id.; Montgomery County Zoning Ordinance*, §§59-3.3.3.A and B. Two of these Zoning Ordinance criterion require that (1) the property have a minimum number of on-site parking spaces and (2) the apartment be separated by a minimum distance from another accessory apartment. *Zoning Ordinance*, §§59-3.3.3.A.2.a.iii.(b); 59-3.3.3.B.2.d. When the application does not meet these standards, the Applicant must apply for a conditional use to be decided by the Hearing Examiner following the procedures of Section 59.7.3.1 of the Zoning Ordinance.[1] *Id.*, §59-3.3.3.A.2.c. These procedures require a review and recommendation on the application from Staff of the Montgomery County Planning Department (Technical Staff or Staff) and a public hearing before the Hearing Examiner.

The Applicant filed a license application for a Class 3 Accessory Apartment with the Montgomery County Department of Housing and Community Affairs (DHCA). On June 3, 2016,

[1] All citations in this Decision are to the 2014 Zoning Ordinance for Montgomery County, adopted September 30, 2014 (Ordinance No. 17-52), as amended effective December 25, 2015, in ZTA 15-09 (Ordinance No. 18-08, adopted December 1, 2015).

DHCA declined to accept the application and referred it to the Office of Zoning and Administrative Hearings (OZAH) for a conditional use approval. DHCA made the referral because another accessory apartment is located less than the minimum distance from another accessory apartment and because the property did not meet the on-site parking requirements. Exhibits 1, 2, 26.

By notice issued on September 21, 2016, the public hearing before the Hearing Examiner was scheduled for October 21, 2016. Exhibit 24. Technical Staff issued its report recommending approval of the application on September 30, 2016, subject to two conditions limiting occupancy to two adults and prohibiting other residential rental uses on the property.

The hearing went forward as scheduled on October 21, 2016, and the Applicant appeared *pro se*. The Applicant adopted the findings and conclusions in the Technical Staff report (Exhibit 26) and the information in his "case statement" (Exhibit 4) as his own evidence of record without further additions. T. 4, 5. He also agreed to comply with Staff's proposed conditions of approval. T.5. Ms. Eileen Finnegan testified in opposition to the application because the property, according to her, has been advertised online for short-term rentals. Ms. Cece Kinna, Housing Code Inspector III, presented the results of her inspection of the apartment and analysis on whether the apartment complied with the Housing Code (Chapter 26 of the Code). Their testimony is summarized in detail below, where relevant.

Based on questions raised during the public hearing, the Hearing Examiner referred the question of whether accessory apartments may be rented for less than 6 months to the Montgomery County Department of Health and Human Services (HHS), DHCA, and the Montgomery County Planning Department. Exhibit 31. The Hearing Examiner kept the record open until November 18, 2016, to receive the agencies' responses and comments from the parties. All three agencies responded prior to that date (Exhibits 32-34), however, the Hearing Examiner had additional

questions of Planning Staff. Exhibit 36. She extended the close of the record to November 29, 2016, to receive Staff's response and to give the parties an opportunity to respond. Exhibit 40. The Planning Department submitted its response on November 23, 2016. Exhibit 42. The Applicant submitted additional comments on November 14, 2016. Exhibit 35. Ms. Finnegan submitted her comments, with documents attached, on November 29, 2016. Exhibit 44. The next day, she advised that one of the documents she had attached was not the document referenced in her comments. The Hearing Examiner re-opened the record to receive the document referenced because (1) Ms. Finnegan correctly identified the document in her written comments, and (2) the document was available on the County's website. Exhibit 45.

The Hearing Examiner finds sufficient evidence that there is adequate on-street parking available to grant Applicants' request to deviate from the on-site parking requirements under Section 59-3.3.3.A.2.c of the Zoning Ordinance. She also finds that deviation from the minimum distance requirement does not result in an overconcentration of accessory apartments in the surrounding neighborhood. However, she holds that accessory apartments may not have rental occupancies for less than six months. For this reason, the Hearing Examiner approves the conditional use, but imposes a condition of approval requiring rental occupancies of greater than six months.

II. FACTUAL BACKGROUND

A. The Subject Property

The property consists of 9,093 square feet located on the south side of Schindler Drive, one house from its intersection with Gatewood Avenue. Exhibit 26, p. 3. The general location of the property is shown on a vicinity map in the Staff Report (Exhibit 26, p. 1, on the following page).

Vicinity Map
Exhibit 26, p. 1

The property is improved with a one-story, single-family detached home which, according to SDAT records, was built in 1956. Exhibit 8. An aerial photograph of the property, and photographs of the front and rear of the single-family home, are shown below and on the following page (Exhibit 26, pp. 4-5.)

Schindler Drive Frontage
Exhibit 26, p. 4

Entrance of Apartment in Rear

Aerial Photograph of Subject Property
Exhibit 26, p. 4

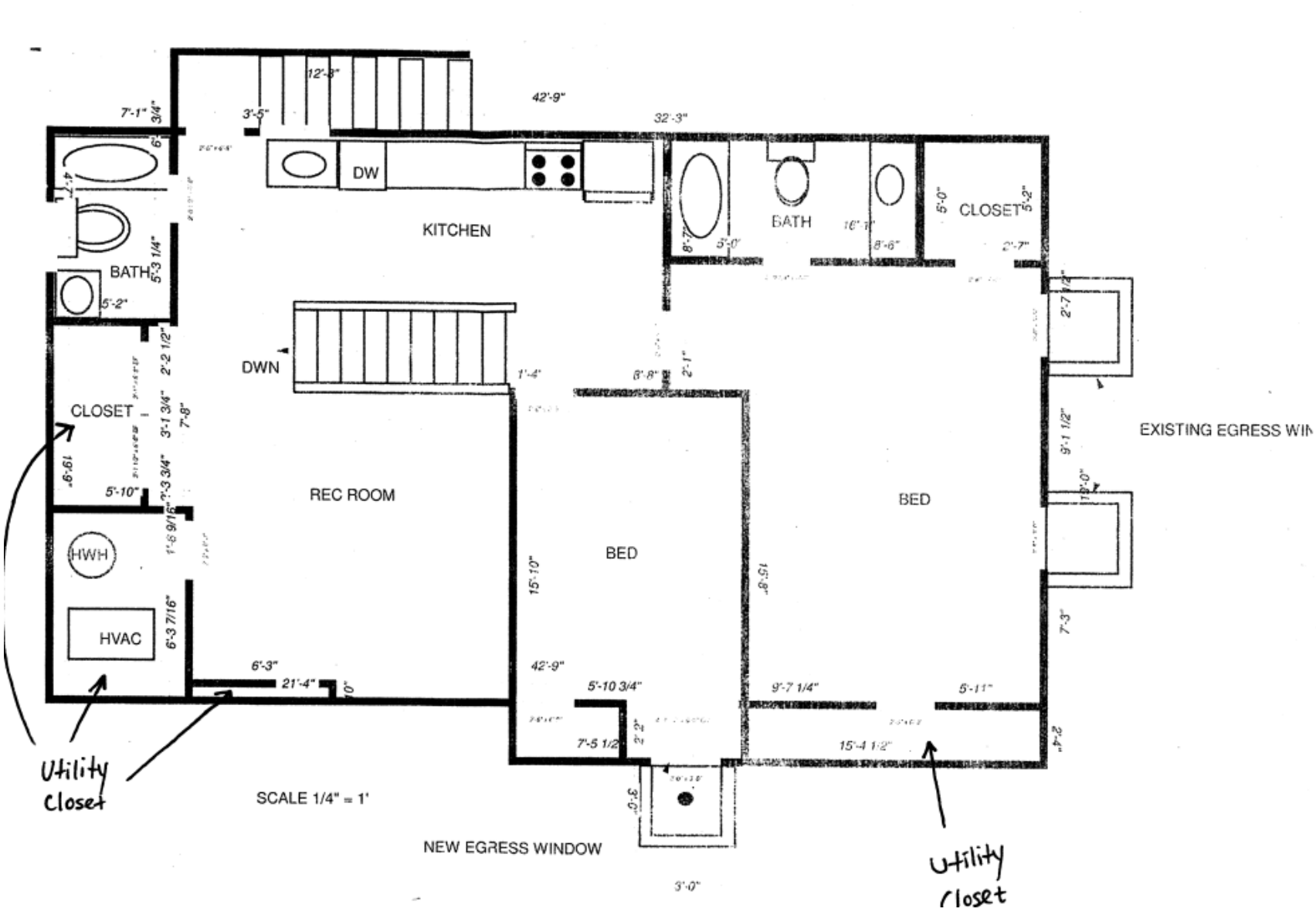
The Applicant proposes an attached accessory apartment in the basement of the existing, single-family detached home. While the length of occupancy is not mentioned in the Staff Report, it is mentioned in the Applicant's "Statement of the Case." He states (Exhibit 4, p. 11):

> The Applicant intends for the tenant pool for the proposed use be mainly comprised of professional interns, fellows, post-doctoral degree candidates, or full-time employees working at the FDA White Oak Campus. The subject site's proximity to the FDA White Oak Campus also means that many tenants – who are likely attending a college or university – either do not own a personally operated vehicle, or will not elect to bring one during their time with the Agency. Therefore, the anticipated impact on off-site parking due to the proposed use will likely be less than the 1 car proposed above, and therefore, oftentimes nonexistent.

Mr. Pepe testified that rental terms are generally for at least 6 weeks. T. 15. Ms. Finnegan testified that the property is advertised online for shorter term rentals. Her testimony is included in Part II.C. of this Report. T. 16. Ms. Kinna testified that she did not believe that accessory apartments could be used for short-term rentals. T. 19.

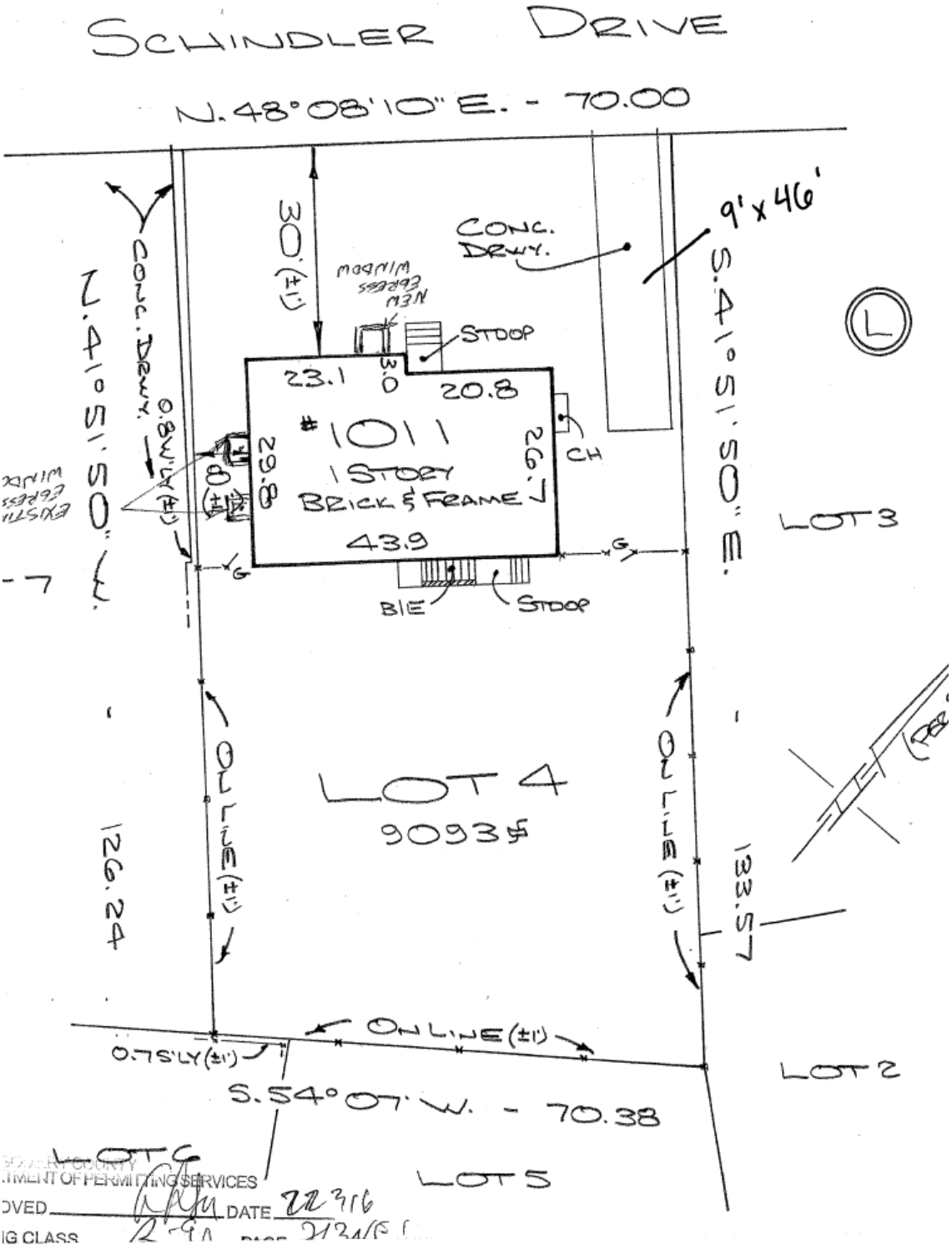
DHCA advises that the apartment consists of 1,177 gross square feet. Exhibit 28. Ms. Kinna estimated that the total floor area of the property is about 2,420 square feet because SDAT records list the area above grade at 1,210 square feet. T. 11. Planning Staff advised that the apartment consists of 1,093 square feet based on the floor plans, shown on the following page. Exhibit 26, p. 8. Staff estimated the total size of the dwelling at 2,303 square feet, adding the amount shown on the floor plan to the above-grade enclosed area listed on SDAT records (i.e., 1,903 + 1,210 = 2,303). *Id.* at 8.

The floor plans, (Exhibit 14, shown on the following page,) show two bedrooms, a "rec room," a kitchen and two baths. The site plan (Exhibit 11, shown on page .) reveals that the entrance to the apartment is at the rear of the existing home. Access is from a concrete driveway that leads to stone path walkway, which leads to a patio in the rear yard of the home.



Floor Plan
Exhibit 14

The site plan, shown below, shows the entrance to the apartment in the rear of the home (Exhibit 11):



Ms. Kinna described the results of her inspection of the apartment. This revealed that there is adequate on-site parking for 2 vehicles. Because there is a gas furnace and water heater in the living room area, no one may be permitted to sleep there. She also testified that she could find no permits on file for the construction of the accessory apartment. Before DHCA will issue a license, Mr. Pepe must obtain permits from the WSSC and the Department of Permitting Services for the work that has been done. T. 9-11. Ms. Kinna's report listed the following Housing Code violations that must be corrected prior to obtaining a license (Exhibit 28):

1. Applicant must obtain and provide copies of approved DPS and WSSC building, electrical and plumbing permits for the basement unit construction.

2. The retaining wall alongside of the driveway has deteriorated wood ties and needs to be repaired or replaced.

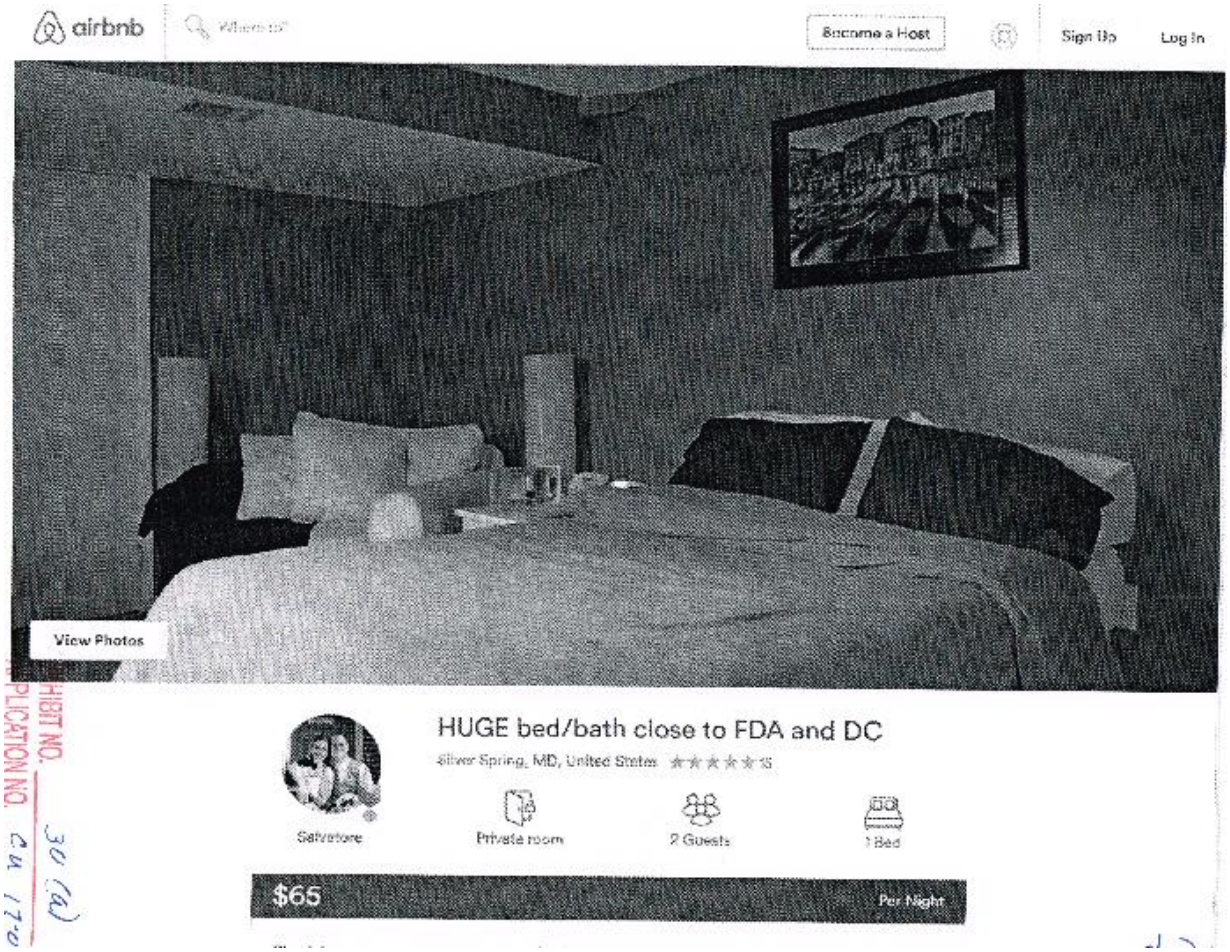
Ms. Kinna testified that she did not think that accessory apartments could be rented for shorter terms, but referred the Hearing Examiner to the Director of DHCA. T. 23.

C. Community Response

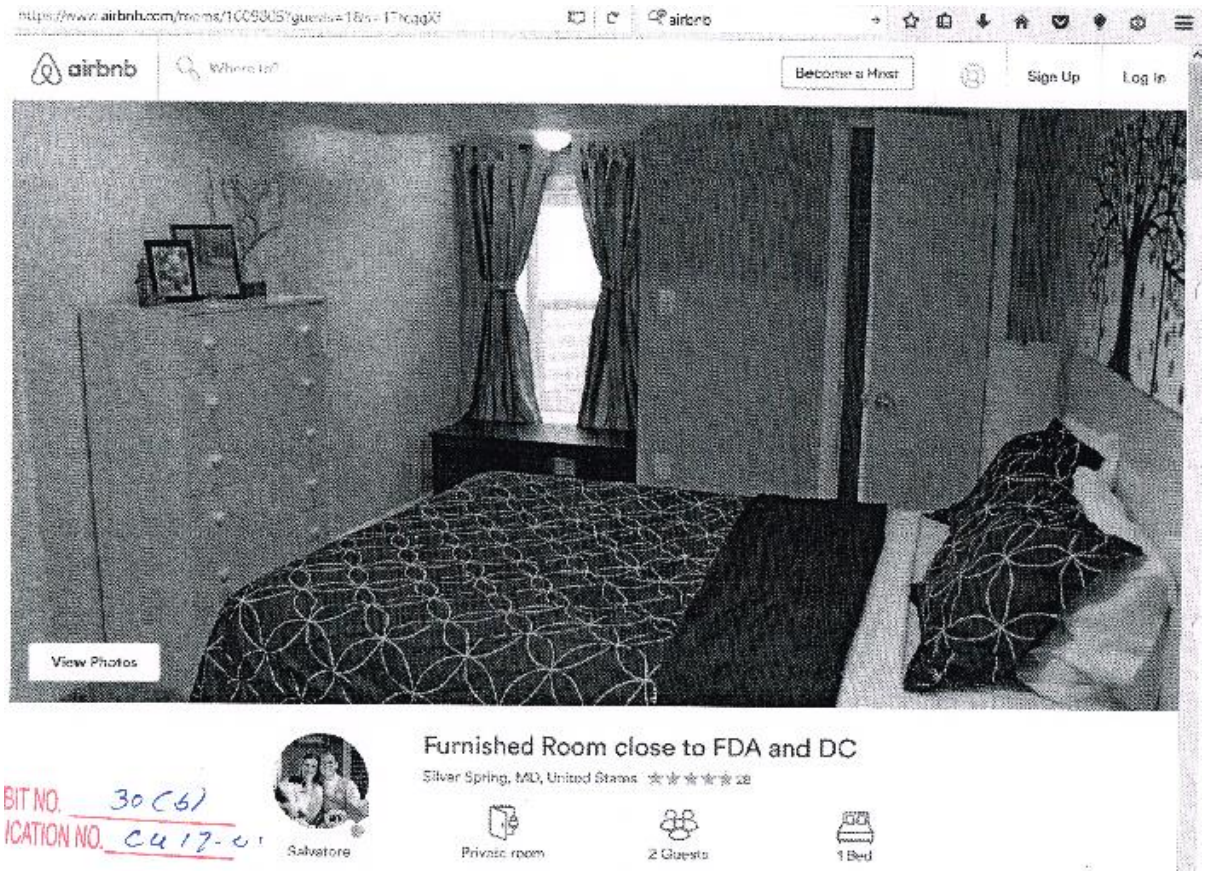
Planning Staff did not receive any opposition to the proposed apartment. Ms. Finnegan testified in opposition at OZAH's public hearing. She has been working with her citizen's association on the issue of short-term rentals. T. 19. She stated that Mr. Pepe has been advertising the apartment on Airbnb. According to her, both rooms of the apartment are advertised independently for rent for periods less than 30 days. She believes that overnight rentals of less than 30 days are not permitted in the R-90 Zone. She submitted printouts of the Airbnb advertisement, which are shown on the following pages (Exhibit 30.) T. 12.

Ms. Finnegan stated that there are additional requirements, including licenses, for overnight accommodations for up to six months. She believes this is because such rentals are more in the nature of a hotel or motel. T. 16, 17. She suggested contacting a representative from Health

and Human Services (HHS) to clarify its position. According to Ms. Finnegan, there is draft legislation governing short-term rentals that will prohibit them in accessory apartments. T. 18. Ms. Finnegan felt that approval of this application will set a precedent that is detrimental to communities. T. 28. Copies of the Airbnb advertisements (Exhibits 30(a) and (b) are below and on the following page.)



Copy of Airbnb Advertisement (One Room) Exhibit 30(a)



Copy of Airbnb Advertisement for Second Bedroom
Exhibit 30(b)

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A conditional use is a zoning device that authorizes certain uses provided that pre-set legislative standards are met. Ordinarily, an applicant may establish an accessory apartment without the need for conditional use approval. This is accomplished by approval of a Class III Accessory Apartment license from DHCA under Section 29-19(b) of the Montgomery County Code. The Code requires compliance with "limited use" standards in the Zoning Ordinance as well as other licensing standards. *Zoning Ordinance,* §59-3.3.3.A.2; 59-3.3.3.B.2. Two of the Zoning Ordinance standards require that the proposed apartment (1) be more than 300 feet from

another accessory apartment and (2) meet minimum on-site parking requirements. *Id.*, §§59-3.3.3.A.2.a.iii.(b), 59-3.3.3.B.2.d. If a proposed apartment does not meet these two standards, it may still be approved by filing an application for a conditional use. *Id.*, §59-3.3.3.A.2.c. For approval of the conditional use, an application that doesn't meet the minimum separation requirement must demonstrate (*Id.*, §59-3.3.3.A.c.ii):

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

An application that does not have sufficient parking must demonstrate that there is adequate on-street parking to support the use (§59-3.3.3.B.2.d):

> i. Fewer off-street spaces are allowed if there is adequate on-street parking. On-street parking is inadequate if:
> (a) the available on-street parking for residents within 300 feet of the proposed Accessory Apartment would not permit a resident to park on-street near his or her residence on a regular basis; and
> (b) the proposed Accessory Apartment is likely to reduce the available on-street parking within 300 feet of the proposed Accessory Apartment.

An analysis of the applicable limited standards, and whether the proposed use may deviate from the on-site parking and minimum separation requirements, is set forth below.

A. Limited Use Standards for Accessory Apartments, in General (Section 59.3.3.3.A.)

This section contains standards for all accessory apartments, whether they are attached to or detached from a single-family home:

Section 59.3.3.3.A. – Accessory Apartments, In General

1. Defined, In General

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

Conclusion: The Zoning Ordinance defines a "dwelling unit" as "a building or portion of a building providing complete living facilities for not more than one household, including, at a minimum, facilities for cooking, sanitation, and sleeping." *Id.*, §59-1.4.2. The proposed apartment has a full kitchen for cooking, two bathrooms, and two bedrooms. It meets this definition.

2. Use Standards for all Accessory Apartments

a. Where an Accessory Apartment is allowed as a limited use, it must satisfy the following standards:

i. Only one Accessory Apartment is permitted for each lot.
ii. The Accessory Apartment was approved as a conditional use before May 20, 2013 and satisfies the conditions of the conditional use approval; or
iii. The Accessory Apartment is licensed by the Department of Housing and Community Affairs under Chapter 29 (Section 29-19); and

Conclusion: The Applicants are requesting approval for only one accessory apartment on the subject site, therefore, the standard in §59-3.3.3.A.2.a.i has been met.

Because §59-3.3.3.A.2.iii a license from DHCA, the Hearing Examiner referred Ms. Finnegan's question (i.e., whether rentals for less than 6 months are permitted in accessory apartments) to DHCA, HHS (which regulates short-term rentals), and the Planning Department. The agencies differ in their opinions as to whether rentals of accessory apartments may be for less than 6 months. They agree, however, that owners may not rent accessory apartments for less than 30 days. All agencies refrained from interpreting any regulations other than the ones they administer. Exhibits 32--34.

DHCA states that rentals of accessory apartments for less than six months are not permitted. They explain that Chapter 29 of the Code (governing licensing of rental housing) prohibits the DHCA from licensing "transient housing." *Code,* §29-1. The definition of rental housing, which DHCA is responsible for licensing, states (*Code,* §29-1, emphasis supplied):

> Rental housing: Any structure, or combination of related structures and appurtenances, including a personal living quarters building and a mobile home park as defined in Section 29-66(1), in which a landlord provides to a tenant for consideration one or more dwelling units. Rental housing does *not include*:
>
> (a) *any transient housing*, such as a guest room in an apartment hotel, boarding house, tourist home, inn, motel, hotel, school dormitory, hospital, or medical facility; or…
>
> (b) any housing operated for religious or eleemosynary purposes.

DHCA goes on to say that it uses the definition of "transient visitor" in the Zoning Ordinance to define the term "transient" in the rental licensing code. The Zoning Ordinance defines "transient visitor" as, "[a] person residing in the County for any one period of time not exceeding 6 months, except that, in a Bed and Breakfast, a transient visitor is a person who resides in the lodging for no longer than 14 days in any one visit." *Zoning Ordinance,* §1.4.2. DHCA concludes, "[b]ecause… "transient visitor" under the zoning ordinance is someone residing in the County for a period not exceeding six months … *the lease term of accessory apartments must be for a period of more than six months*." Exhibit 33 (emphasis supplied).

HHS advised that it is responsible for issuing licenses for buildings that serve transient visitors under Chapter 54 of the Code. The definition of "transient visitor" in Chapter 54 is almost identical to the definition in the Zoning Ordinance. Chapter 54 defines "transient visitor" as, "[a] person who obtains lodging or lodging and meals upon payment or promise of payment therefor at the same premises for a continuous period of not more than 6 months." HHS, however, treats rentals for periods under 30 days and rentals between 30 days and six months differently (Exhibit 32):

> If the individual goes through the process and obtains licensure as a long term rental (over 30 days), although HHS does have the right to license up to 6 months under Chapter 54, HHS previous practice has not been to enforce Chapter 54. Only if the individual does not obtain a license through the local housing regulating entity has HHS performed the enforcement of Chapter 54.

> If there is a condition in order to meet the conditional approval that a minimum lease term of 6 months is required, licensure would not be a requirement under Chapter 54.
>
> The individual would additionally need to change their AirBnB, or any other form of media advertisement, status from nightly rentals to a minimum of 30 day stays and obtain a housing rental license in order for HHS not to require licensure under Chapter 54.

The Planning Department interprets the Zoning Ordinance to *permit* rentals of accessory apartments for terms between 30 days and 6 months in accessory apartments. Exhibit 42. Staff relies on the definition of "household living" in Section 59-3.3.1:

> A. Defined, In General
>
> Household Living means the residential occupancy of a dwelling unit by a household on a monthly or longer basis.

Staff also provided the Hearing Examiner with a link to work being done on legislation to permit short term rentals in the County. Exhibit 33. Staff further explained (Exhibit 42):

> The Planning Department's position is the zoning code draws the line between a residential use and temporary lodging at a minimum monthly stay. Less than a month is temporary lodging. More than a month is residential.
>
> Staff recognizes that the definition of "transient visitor" creates some ambiguity, but for several reasons we view that definition as having limited significance. Only one use in the code relates with the six-month duration of a transient visit and allows for a "transient visitor," and that's "household living," which allows stays of monthly or more days.
>
> Staff also recognize that accessory apartments are not listed under household living. Nevertheless, we view household living as the closest analog in the code to an accessory apartment, in part because an accessory apartment clearly meets the definition of a dwelling unit. In contrast to a bed and breakfast or hotel room, it must have a full kitchen, which is a significant distinction.
>
> Also, because Section 59-3.3.3.2.c excludes the usual conditional use findings our view is that DHCA regulations and any other non-zoning-code-based issues are beyond the scope of requirements for an accessory apartment conditional use review. Such regulations may prevent the applicant from using their accessory apartment for short-term rentals, but do not preclude approval of a conditional use.

> Finally, based on the applicant's conditional use request and the information presented in the application, staff understood the request to be an accessory apartment that advertises on an online platform. Staff's position is that Section 3.3.1 of the zoning code allows residential occupancy of a dwelling unit by a household on a monthly or longer basis. Therefore, the proposed use is recommended for approval if the accessory apartment is rented for periods of a month or longer.

The Applicant commented on the agency responses: "[I] believe that Agency responses reflect the level of ambiguity that exists in the County Code as it pertains to defining transient housing and visitors, in which uses transient visitors are permitted, and how the County Agencies license these uses and enforce their respective Chapters of the County Code." Exhibit 35. Mr. Pepe advised that he could find no regulatory restriction prohibiting stays of between 30 days and 6 months. This is because, according to him, Chapter 29 does not define "transient housing." For this reason, he believes that DHCA's interpretation is arbitrary because it limits stays for all rental housing in the County for a period of six months. *Id.* He also stated that his personal experience with short-term rentals has not born out the "negative experiences" described at public hearings. He believes that rentals to professionals visiting the County for shorter term professional purposes is a valuable service to the County, an in particular, to the White Oak area the recent master plan encourages employment in health care and life sciences. *Id.*

Ms. Finnegan points out that permitting short-term rentals (i.e., under 6 months) undermines the Council's goal in adopting recent changes to the laws regulating accessory apartments. Exhibit 44. She states:

> Accessory apartments in Montgomery County have been promoted as a means to increase affordable housing stock in the County. The legislative history of the most recent Zoning Text Amendment on making accessory apartments more easily achieved, ZTA 12-11, provides some indication that Council did not see accessory apartments being used as short-term rentals, but as long-term rental housing stock for county residents. Furthermore, as shown on "circle 34" in the February 5, 2013 "action packet", authority over accessory apartment licensing and more importantly, tenant issues are described as being overseen by DHCA's Office of Landlord Tenant Affairs

> The Office of Landlord Tenant Affairs takes this one step further, and offers a standard lease for owners of accessory apartments. The Landlord Tenant Handbook (available on the web site) also explicitly excludes coverage of transient rentals.

After careful consideration of the responses and comments of both the County agencies and the parties, the Hearing Examiner concludes that owners of single-family dwellings may *not* rent accessory apartments for terms less than 6 months under the relevant Code and Zoning Ordinance provisions.

The Hearing Examiner is required to construe laws and regulations using rules established by the Maryland courts. The primary rule of construction is to effectuate the Council's intent by giving the language its "plain" meaning and to consider all of the relevant laws to ensure they are "construed together and harmonized." *Smith v. Delaware N. Companies*, 449 Md. 371, 398 (2016); *Jamison v. State,* 6 SEPT.TERM 2016, 2016 WL 6755922, at *4 (Md. Nov. 15, 2016). The interpretation of a statute by the agency charged with administering the statute is entitled to great weight. *Comm'r of Financial Regulation v. Brown, Brown & Brown, P.C.,* 449 Md. 345, 360 (2016), *reconsideration denied* (September 28, 2016), *quoting, Adventist Health Care Inc. v. Maryland Health Care Comm'n*, 392 Md. 103, 119 (2006). Where a law is ambiguous, courts may refer to the legislative history of the law to ascertain the legislature's intent. However, even when the language where the plain meaning of the statute is clear, the resort to legislative history is a confirmatory process. *Smith, supra.*

Before applying these rules, it is helpful to review Code and Zoning Ordinance provisions governing accessory apartments. Chapter 29 of the County Code requires accessory apartments to be licensed by DHCA. *Montgomery County Code*, §29-19(b). As noted, DHCA's authority to license rental housing excludes transient rentals. *Montgomery County Code,* §29-1. DHCA may

issue an accessory apartment license if an application meets criteria listed in Section 29-19(b) of the Code. One of the criteria in Section 29-19(b) requires compliance with the Zoning Ordinance provisions governing accessory apartments. *Id.,* §29-19(b)(1)(C).[2]

The Zoning Ordinance permit accessory apartments as a "limited use" if it meets the "limited use standards" in the Ordinance. These include following:[3]

> *iii. The Accessory Apartment is licensed by the Department of Housing and Community Affairs under Chapter 29 (Section 29-19); and*
>
> (a) the apartment has the same street address as the principal dwelling;
> (b) one on-site parking space is provided in addition to any required on-site parking space for the principal dwelling; however, if a new driveway must be constructed for the Accessory Apartment, then 2 on-site parking spaces must be provided;
> (c) the maximum gross floor area for an Accessory Apartment, including any floor area used for an Accessory Apartment in a cellar, must be less than 50% of the total floor area in the principal dwelling, including any floor area used for an Accessory Apartment in the cellar of the principal dwelling, or 1,200 square feet, whichever is less;
> (d) the maximum floor area used for an Accessory Apartment in a proposed addition to the principal dwelling must not be more than 800 square feet if the proposed addition increases the footprint of the principal dwelling; and
> (e) the maximum number of occupants is limited by Chapter 26 (Section 26-5); however, the total number of occupants residing in the Accessory Apartment who are 18 years or older is limited to 2.

Zoning Ordinance, §3.3.3.A.2.iii (emphasis supplied.)

Thus, accessory apartments are not permitted by the Zoning Ordinance unless they can be licensed by DHCA. As part of its license process, DHCA determines whether the Zoning

[2] The County Code states that the accessory apartments must meet the requirements of "Section 59-A-6.20" of the Zoning Ordinance. This refers to the section of the Zoning Code governing accessory apartments that was in effect prior to October 29, 2014, when the new Zoning Ordinance was adopted. The Code was not updated to reflect the current sections of the Zoning Ordinance governing accessory apartments. The current requirements are in Section 3.3.3.A and B of the 2014 Zoning Ordinance, which are included in this Report.

[3] A "limited use" is one that is permitted by right (i.e., without further zoning approvals) provided that the "limited use standards" in the Zoning Ordinance are met. *Zoning Ordinance,* §59-3.1.1.B. Other approvals, such as the requirement for a license, are still applicable.

Ordinance requirements are met. It is only when an application cannot meet the minimum requirements for on-site parking or is within the minimum distance required between accessory apartments that a conditional use is required. Where a conditional use is needed, the Hearing Examiner determines whether the limited use standards of the Zoning Ordinance have been met. Section 59-3.3.3.A.2.c states (emphasis supplied):

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

The Hearing Examiner concludes that the plain language of the County Code and the Zoning Ordinance prohibit issuance of a rental license for terms of under six months because that is "transient housing," which DHCA cannot license. Without a license from DHCA, the accessory apartment does not meet the limited use standards of the Zoning Ordinance.

The definition of a "transient" is the same in the Zoning Ordinance and Chapter 54 (regulating transient lodging). The Zoning Ordinance and the Code consistently define a "transient" as a person residing at a property for less than 6 months. *Compare, Zoning Ordinance,* §1.4.2; *Montgomery County Code,* §54-1. There is no other definition of "transient" in the Zoning Ordinance or the County Code and there is no basis to "read in" any other meaning beyond the plain language. This is particularly true because the definition is consistent with both HHS' interpretation of its jurisdiction and DHCA's interpretation of its licensing authority: HHS regulates facilities where persons stay under six months and DHCA regulates rental occupancies of six months or more. While it is HHS' *policy* not to enforce under Chapter 54 if transient lodging

has been licensed by another agency, HHS recognizes that its jurisdiction extends to rental facilities with terms of less than 6 months. Because DHCA may not issue licenses for less than 6-month stays, an accessory apartment may not be rented for less than 6 months and still meet the limited use standards in the Zoning Ordinance, which require a license.

This conclusion is further consistent with the principle of statutory construction that deference should be given to the interpretation of the agency that administers the law. Ms. Finnegan correctly points out that DHCA is the agency charged with administering accessory apartment licenses. This power is vested by Section 29-19(b) of the Code, which mandates that accessory apartments obtain a rental license issued by DHCA. Under this section, it is the Director of DHCA that determines whether the requirements of the Zoning Ordinance have been met (unless a conditional use is required). Violations of accessory apartment licenses are decided by the Commission of Landlord Tenant Affairs rather than any of the County's zoning agencies (i.e., the Planning Board, OZAH, or the Board of Appeals). *See, Analyst Packet, Agenda Item #6B, Action before County Council,* February 5, 2013. Therefore, DHCA's interpretation of its own licensing statute is entitled to great weight. It applies the definition of "transient" contained in the Zoning Ordinance (although that would not change if applied the definition of transient contained in Chapter 54 of the Code). DHCA's interpretation of its own licensing authority precludes licensing of stays under 6 months.

DHCA's interpretation (which relies on the Zoning Ordinance definition of "transient" stays) is also consistent with the legislative history of the laws governing accessory apartments. In 2012 and 2013, the Council amended both the Zoning Ordinance and Chapter 29 of the County Code to regulate accessory apartments comprehensively. *See,* ZTA 12-11, Ordinance No. 17-28 (adopted February 5, 2013); Council Bill 31-12, Ch. 2 *Laws of Montgomery County* 2013 (adopted

February 5, 2013). During the revision, requirements that had previously been in the Zoning Ordinance, such as the requirement that the property owner reside on the property, were moved to Chapter 29 of the Code and the requirement to obtain a rental license under Chapter 29 was inserted into the Zoning Ordinance. *Compare, 2004 Montgomery County Zoning Ordinance,* §59-G-2.00; *2014 Montgomery County Zoning Ordinance,* §59-3.3.3.A.2.iii (above.) For this reason as well, the licensing requirements should not be read in isolation from the Zoning Ordinance or *vice versa*. This further supports DHCA's interpretation that incorporates the definition of "transient" in the Zoning Ordinance to determine its own licensing jurisdiction.

The Planning Department asserts that the definition of "household living" should be applied to accessory apartments. Looking at the Zoning Ordinance in isolation from the licensing law, they believe that the definition of "transient" has little significance because it relates only to one use in the Zoning Ordinance. This ignores both the conjoined legislative history of the Zoning Ordinance and licensing laws applicable to accessory apartments and the fact that a license issued by DHCA is a requirement of the Zoning Ordinance. It also ignores the plain language of Zoning Ordinance. The uses listed under "household living" do *not* include accessory apartments. The uses listed as "household living" include only single-family living, two-unit living, townhouse living, and multi-unit living. *Zoning Ordinance*, §59-3.3.1. Accessory apartments are separately defined under §59-3.3.3.A.1: "Accessory Apartment means a second dwelling unit that is subordinate to the principal dwelling. An Accessory Apartment includes an Attached Accessory Apartment and a Detached Accessory Apartment."[4]

[4] Practically, the distinction between household living and an accessory apartment is that the latter permits two complete dwelling units in one single-family structure. "Household living" would permit a group of individuals to occupy a single home with one kitchen. An "accessory apartment" permits two separate households, with separate kitchen, bathing and sleeping facilities, in one single-family structure.

The distinction between rentals of "household living units" and accessory apartments is further reinforced by the limited use standards applicable to accessory apartments. "Household living" may be licensed as rental housing under Chapter 29 of the Code. The limited use standards applicable to accessory apartments, however, prevent accessory apartments from being located on lots where "other allowed rental Residential use exists." Section 59-3.3.3.A.2.a.iv. Thus, the Zoning Ordinance distinguishes between rentals accessory apartments and rentals of other residential units that may occur under "household living."

Planning Staff asserts that accessory apartments may be used for shorter-term rentals because "household living" is "closer analog" to the accessory apartment. Exhibit 42. Staff argues that an accessory apartment is a "dwelling unit" as defined in the Zoning Ordinance (because it has eating, sleeping, and sanitary facilities), rather than more temporary occupancies such as a hotel room, which may not include a kitchen. Exhibit 42. While the Hearing Examiner understands this distinction, she does not have enough evidence in this record to make that distinction. There are a number of extended-stay hotels that offer private kitchens, sanitary, and sleeping within a single unit. The record does not reveal whether these are regulated by HHS or DHCA. Certainly, the plain language of definition of "transient" in Chapter 54 and the Zoning Ordinance does not distinguish between transient and longer term occupancies based on the facilities included in the rental unit. Instead, it distinguishes transient from other residential occupancies by length of stay.

There are practical differences between rentals of accessory apartments and "household living" that could have influenced the Council when regulating them differently. A property owner may rent a single family home with common eating, sleeping, and sanitary facilities for all of the residents. An accessory apartment, however, permits two separate residences to occupy the same

single-family structure, each with its own, separate, kitchen, sleeping, and bathroom, arguably a more intense use than rental of "household living" units. Without more in the record, there is no basis to say that the Council intended to treat both uses the same, contrary to the plain language of the Code and the Zoning Ordinance.

Finally, Planning Staff argues that the Hearing Examiner has no authority decide whether accessory apartments may have lease terms shorter than 6 months because: "Section 59-3.3.3.2.c excludes the usual conditional use findings our view is that DHCA regulations and any other non-zoning-code-based issues are beyond the scope of requirements for an accessory apartment conditional use review." Apparently, Staff refers to the fact that the Hearing Examiner does not review accessory apartments for compliance with general standards (in Section 59-7.3.1.E.1 of the Zoning Ordinance) required for approval of most conditional. As indicated earlier, the Hearing Examiner agrees that these general standards do not apply to accessory apartments. What Staff's argument ignores is that the requirement for a license from DHCA is contained in the limited use standards, which the Hearing Examiner is explicitly required to apply. Section 59-3.3.2.A.2.c states: "The limited use standards of Section 3.3.3.A.2.a and Section 3.3.3.A.2.c apply to all accessory apartment conditional use applications."

The Applicant argues that DHCA's interpretation of the Code is arbitrary because it would otherwise prohibit all rentals in the County for periods under six months. DHCA's interpretation of the Code does not do this. Rentals for under 6-month periods are permitted, but are required to be licensed by HHS.

Ms. Finnegan argues that permitting short term rentals could undermine the Council's legislative goal to use accessory apartments to provide a long-term affordable housing stock. While the Hearing Examiner notes that the per-day rate advertised (i.e., $65 per day) does appear

to be much higher than what would be deemed "affordable" under the County's laws governing moderately priced dwelling units (in Chapter 25A of the Code), she has no definitive evidence in the record with which to make this determination and does not do so.

While the Hearing Examiner understands the Applicant's view that the rentals here are benign and serve a benefit to the community, countervailing concerns and views exist, as evidenced on the Planning Department's website describing proposed legislation to regulate short-term rentals. Relief for this use must be sought in the on-going efforts to revise the rental laws to permit short-term rentals. As DHCA has already stated that it will not issue a license for less than 6-month terms, the Applicant has failed to prove that it may meet this limited use standard.

Because the proposed application meets all remaining requirements for an attached accessory apartment except for one operational aspect (the length of the rentals), the Hearing Examiner does not find that complete denial of the application is warranted. The application may be approved with conditions designed to comply with the Zoning Ordinance requirements. These conditions include (1) a requirement that rentals be for terms of 6 months or more; (2) restrictions on advertising designed to ensure compliance with this condition.

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

Conclusion: The accessory apartment will be located in the basement and have the same address as the principal dwelling. This standard has been met.

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

Conclusion: Planning Staff states that there is one on-site vehicle parking space; the Housing Inspector's report states that the Code requires 415 square feet of parking and only 320 feet is

provided on the subject property. Exhibit 28. It appears from the photographs and the site plan that there is room for two tandem parking spaces. The Zoning Ordinance requires two spaces for the dwelling and one for the accessory apartment. *Id.*, §6.2.4.B.

The Hearing Examiner may allow an applicant to deviate from this requirement if the application meets certain standards in the conditional use process. These are set out in detail in pp. 28-31 of this Report.

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

Conclusion: The Housing Code Inspector and Staff came up with slightly different measurements for the size of the apartment and the size of the principal dwelling. Ms. Kinna estimated the total floor area of the dwelling to be 2,420 by doubling the amount of the enclosed above-grade area listed on the tax records. T. 11. SDAT records state that the above-grade enclosed area consists of 1,210 square feet. Exhibit 8. She measured the apartment as having 1,177 square feet of gross floor area. Planning Staff estimated that the principal dwelling contained 2,303 square feet, based on the above-grade square footage shown on the tax record and the size of the apartment shown on the floor plans. Staff calculated from the floor plans that the apartment was 1,093 square feet. Exhibit 26, p. 8.

Because of the difference in measurements, it is possible that the floor area of the apartment exceeded 50% of the floor area of the dwelling. If Staff were correct that the total dwelling consists of 2,303 square feet and Ms. Kinna were correct that the apartment is 1,177 square feet, then the application would *not* meet the requirement that it be 50% less that the total floor area used for the

accessory apartment (i.e., 1,177 ÷ 2,303 = 51%). The Hearing Examiner asked for further clarification of these measurements, and Ms. Kinna explained:

> Our guidelines for measuring the Class 3 accessory apartments, per the directive of the Montgomery County Council, is to include exterior walls to obtain the gross square footage. This includes exterior walls. Total floor area is a measurement that does not include exterior walls.
>
> The basement apartment, from an interior view, is a rectangle. It measured 44' wide and 26' 9" on the left side, or 1,177 gross square feet.
>
> The main level of the home has a "bump out" of approx. 2' on the front side and to the right of the front door. I estimate that that 2' bump out is approx. 1/2 the width of the house, or 22'. Tax records shows above grade enclosed area as 1,210. The definition of above grade enclosed area does not state if the enclosed area includes exterior walls. However, I spoke with Andy Jakab, with DPS, who checked with construction codes - the "above grade enclosed area" is determined from the floor plans provided by the builder and does NOT include exterior walls.
>
> So, in summary, the gross square footage of the basement apartment at 1,177 gross square feet is still less than the stated above grade enclosed area of 1,210 square feet which does not include exterior walls. The apartment would be less than 50% of the total gross square footage of the entire residence.

Based on Ms. Kinna's clarification of the measurements of the floor area, the Hearing Examiner finds that this standard has been met.

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

Conclusion: Not applicable. No addition is proposed in this case.

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

Conclusion: Ms. Finnegan noted that the Applicant's Airbnb advertisements list both rooms separately as a two-person occupancy. Mr. Pepe testified that, despite the listing, he does not rent both rooms at the same time. Conditions listed in Part IV of this Report and Decision specify that

total number of occupants residing in the accessory apartment who are 18 years or older is limited to 2, and will limit what can be advertised. The Hearing Examiner finds that the use, as conditioned, will meet this standard.

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

Conclusion: A condition of approval will prohibit any other rental residential uses on the property. The Hearing Examiner finds that the use, as conditioned, will meet this standard.

> *v. In the Agricultural and Rural Residential zones, an Accessory Apartment is excluded from any density calculations. If the property associated with an Accessory Apartment is subsequently subdivided, the Accessory Apartment is included in the density calculations.*

Conclusion: The property is zoned R-90, which is a Residential Detached Zone. Therefore, this standard is not applicable to this application.

> *vi. Screening under Division 6.5 is not required.*

Conclusion: No finding is required.

> *vii. In the AR zone, this use may be prohibited under Section 3.1.5, Transferable Development Rights.*

Conclusion: Not applicable. The property is located in the R-90 (Residential Detached) Zone.

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

> *i. The number of on-site parking spaces; or*
>
> *ii. The minimum distance from any other Attached or Detached Accessory Apartment*

Conclusion: The Application proposes to deviate from both of these requirements and has filed a conditional use application to do so. This is discussed in the next paragraph, below.

c. Where an Accessory Apartment conditional use application is filed under Section 3.3.3.A.2.b, the Hearing Examiner may approve a conditional use for the Accessory Apartment under Section 7.3.1, except that the findings under Section 7.3.1 E are not applicable to this type of conditional use. The limited use standards of Section 3.3.3.A.2.a and Section 3.3.3.A.2.c apply to all accessory apartment conditional use applications. In addition, the limited use standards of Section 3.3.3.B.2 apply to the Attached Accessory Apartment applications and the limited use standards of Section 3.3.C.2 apply to the Detached Accessory Apartment applications.

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

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

Conclusion: Staff concluded that there is adequate on-street parking to serve the use. Staff reports that the majority of the properties that front on Schindler Drive or on other streets within 300 feet of the subject property have driveways that accommodate at least one vehicle. Because most of the properties have driveways, Staff determined that the demand for on-street parking will be relatively low because all properties have enough lot width to accommodate two vehicles parking along the frontage. Exhibit 26, pp. 9-10. Mr. Pepe testified that there is sufficient parking. T.6. Based on this record, the Hearing Examiner finds that on-street parking is adequate for the use and properties within 300 feet of the proposed accessory apartment.

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

Conclusion: Staff reports that one other accessory apartment has been approved within a 300-foot radius from the subject property. It is located on Schindler Drive approximately two lots away from the subject property. An aerial photograph showing location of the existing accessory

apartments is shown on the following page (Exhibit 26, p. 11, shown below.) Staff advises that this will be the fourth accessory apartment in the defined neighborhood, which has approximately 300 single-family detached homes.

A review of the aerial photograph supports Staff's analysis. One apartment is located much further to the north and another is located approximately two – three blocks away. Because

accessory apartments, if properly conditioned, are compatible with single-family residential uses, the Hearing Examiner agrees with Staff that approval of this application will not result in an excessive concentration of accessory apartments within the neighborhood.

B. Use Standards for Attached Accessory Apartments (Section 59.3.3.3.B)

Section 59.3.3.3.B. – Attached Accessory Apartment

1. ***Defined***

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

Conclusion: As noted, the apartment proposed meets the definition of dwelling unit. It is less than 50% of the floor area of the principle dwelling, and is therefore subordinate to the single-family detached home. The apartment proposed here meets the definition of an "attached accessory apartment."

2. Use Standards

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

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

Conclusion: The accessory apartment proposed has an entrance in the rear of the dwelling. This standard has been met.

b. The detached house in which the Accessory Apartment is to be created or to which it is to be added must be at least 5 years old on the date of the

application for a license or a conditional use.

Conclusion: According to the property tax records, the detached dwelling was built in 1956. Exhibit 8. Therefore, the Hearing Examiner finds that the dwelling in which the accessory apartment will be located is more than 5 years old, meeting this standard.

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

Conclusion: The property is located in the R-90 (Residential Detached) Zone. Therefore, this standard is not applicable to this case.

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

Conclusion: This section is applicable. As discussed above, there is one other accessory apartment located within 300 feet; however the proposed use meets the requirements of Section 59.3.3.3.A.2.c. for granting the conditional use in spite of the proximity of another accessory apartment.

IV. CONCLUSION AND DECISION

Weighing all the testimony and evidence of record under the "preponderance of the evidence" standard specified in Zoning Ordinance §59.7.1.1, the Hearing Examiner concludes that the conditional use proposed in this application, *subject* to a condition requiring that rental terms be at least 6 months and the other conditions listed, would satisfy all of the requirements for the use.

Based on the foregoing findings and conclusions and a thorough review of the entire record, the application of Salvatore Pepe (CU 17-01), for a conditional use under Section 59.3.3.3.A. and

B. of the Zoning Ordinance, to operate an Attached Accessory Apartment at 1101 Schindler Drive, Silver Spring, Maryland, is hereby ***GRANTED,*** subject to the following conditions:

1. The Applicant shall be bound by all of his testimony and exhibits of record, subject to the conditions listed here;

2. The total number of occupants residing in the accessory apartment who are 18 years or older is limited to 2;

3. No other rental residential uses are allowed to be located on the subject site;

4. The area labelled as a "rec room" on the floor plans (Exhibit 14) may not be used for sleeping.

5. Rentals may not be for terms of less than 6 months;
.
6. All advertising for rental of the accessory apartment is subject to the following restrictions:

    - Advertised rental terms must be for 6 months or more;
    - The entire apartment must be advertised as one rental unit; advertisements for separate rooms are not permitted.

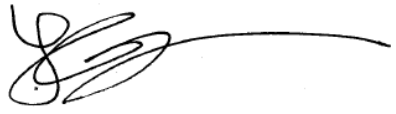
7. Applicant must obtain and provide copies of approved DPS and WSSC building, electrical and plumbing permits for the basement unit construction.

8. The retaining wall along the driveway must be repaired or replaced.

9. The Applicants must comply with any directions of the Housing Code Inspector to ensure safe and code-compliant occupancy; and

10. The Applicants must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the conditional use premises and operate the conditional use as granted herein. The Applicants shall at all times ensure that the conditional use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Issued this 23rd day of December, 2016.



Lynn A. Robeson
Hearing Examiner

NOTICE OF RIGHT TO REQUEST ORAL ARGUMENT

Any party of record or aggrieved party may file a written request to present oral argument before the Board of Appeals, in writing, within 10 days after the Office of Zoning and Administrative Hearings issues the Hearing Examiner's report and decision. Any party of record or aggrieved party may, no later than 5 days after a request for oral argument is filed, file a written opposition or request to participate in oral argument.

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

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