OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
FOR MONTGOMERY COUNTY, MARYLAND
Council Office Building
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IN THE MATTER OF AN OBJECTION TO ACCESSORY DWELLING UNIT LICENSE NO. 116646, 612 Potomac Avenue, Silver Spring, MD 20878	*	
Dr. William Chernicoff Mrs. Bruna Chernicoff Ozan Koknar Serpil Koknar Objectors	*	
David Brown, Esquire Attorney for Objectors	*	OZAH Case No. ADO 21-01
* *		
Pavitra Bacon Richard Bacon	*	
License Applicants Opposing the Objection	*	
* *		
Ivan Eloisa, DHCA Clifton Bouman, DHCA	*	
Neither Opposing nor Supporting the Objection	*	
* *		

Before: Lynn Robeson Hannan, Hearing Examiner

HEARING EXAMINER'S OPINION AND DECISION

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I. STATEMENT OF THE CASE

Dr. and Mrs. William Chernicoff and Mr. and Mrs. Ozan Koknar (Objectors) filed an objection with the Office of Zoning and Administrative Hearings (OZAH) to the Department of Housing and Community Affairs' (DHCA) finding that an accessory dwelling unit (ADU) rental license (Application No. 116646) complies with the Zoning Ordinance.[1], [2]. The rental license application was filed by Pavitra and Richard Bacon (Applicants or Bacons). Exhibit 1. The Bacons seek the rental license to establish a detached ADU in an existing garage at their residence at 612 Potomac Avenue, Silver Spring, MD 20910. *Id.*

As required by the County Code, OZAH tentatively set a hearing date for December 9, 2020.[3]. Both Objectors and the Bacons requested a postponement of that date. Exhibits 8, 9. Both agreed to a new hearing date of December 18, 2020 and OZAH issued an Order granting the postponement request and noticing the rescheduled hearing date. Exhibit 14. Because the Board of Appeals had granted variances permitting the ADU to deviate from the Zoning Ordinance standards, the Hearing Examiner asked the parties to submit memoranda by December 15, 2020 on whether OZAH had jurisdiction over the objection. Exhibit 12. Both parties timely submitted these. Exhibits 16, 18. On December 15th and 17th, 2020, the Hearing Examiner advised the parties that she would take official notice of legislative and ordinances forming the basis of the law establishing the ADU objection procedure. Exhibits 15, 19.

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[1] Until 2019, the Zoning Ordinance and Code referred to accessory dwelling units "accessory apartments". The Council changed the terminology to "accessory dwelling unit" with the adoption of ZTA 19-01. Exhibit 15(b).
[2] Unless otherwise specifically noted, all references to the Zoning Ordinance are to the *2014 Montgomery County Zoning Ordinance.*
[3] The County Code governing objections to accessory dwelling unit licenses requires OZAH to set a hearing date within 30 days of the date of the objection. *Montgomery County Code,* §29-26(b)(4).

The public hearing proceeded on December 18, 2020 as scheduled.[4] One objector, Mr. Ozan Koknar, testified in support of the objection[5] and the Bacons testified in opposition. Representatives from the Department of Housing and Community Affairs (DHCA) testified regarding procedures for licensing of ADUs. The Hearing Examiner left the record open to December 28, 2020, to receive the transcript. The record closed on December 28, 2020.

II. FACTUAL BACKGROUND

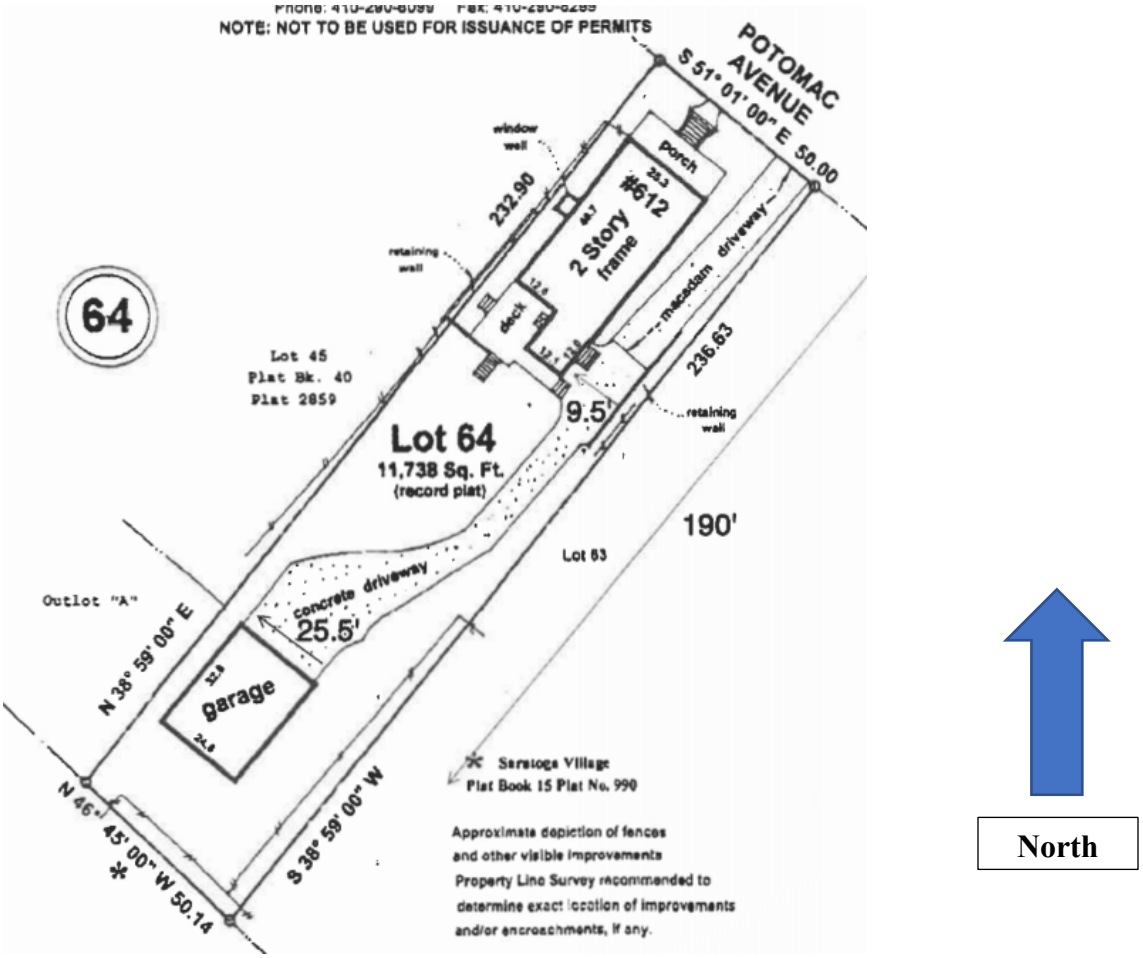
A. License Application

The Bacons testified that they wish to convert an existing one-story detached garage on their property to an ADU to house Mrs. Bacon's parents. T. 54. The property is zoned R-60 (Residential Detached) and consists of a long, narrow lot. Exhibit 16(b) and 13(c) The garage is located 5 feet from the northeastern property line. Exhibits 16(a) and (d). The Bacons propose to construct the ADU in the first floor the garage and increase the height to permit HVAC and storage. T. 53-54. A location survey submitted to DHCA (Exhibit 13(c), on the next page) shows the existing improvements.

Two of the Objectors, Mr. and Mrs. Chernicoff, live adjacent to the southeastern side of the property. Mr. and Mrs. Koknar, the other Objectors, live adjacent to the southwest (rear) property line. T. 12-13.

Mrs. Bacon testified she and her husband participated in the legislative process resulting in Zoning Text Amendment (ZTA) 19-01,[6] which first permitted detached ADUs as a "limited

[4] Due to the COVID-19 pandemic and the County Executive's Order limiting indoor meetings to 10 people, the hearing was held virtually via Microsoft Teams. All exhibits and a link and phone number to join the meeting were posted on OZAH's website and available to the public without the need to subscribe to Microsoft Teams.
[5] As the parties agreed on most of the facts, much of the Objectors' case consisted of legal argument by their counsel.
[6] Ms. Bacon testified that ZTA 19-01 was "passed in January 2020); ZTA 19-01 was adopted by the Council on July 23, 2019 and became effective on December 31, 2019. T. 53; Exhibit 15(b).



use" in the R-60 Zone. T. 53. Mrs. Bacon testified that she knew the apartment did not meet some of the limited use standards of the Zoning Ordinance and would still require variances from the Board of Appeals.[7]

Mrs. Bacon first applied for a building permit from the County's Department of Permitting Services (DPS). She testified she applied for the building permit first because a denial of a building permit is a prerequisite to the Board's consideration of a variance application. T. 55. As expected, DPS denied the permit on May 15, 2020, finding that the garage did not meet the required 17-foot

[7] A "limited use" is one that is permitted by right in the zone *if* the proposed development meets "limited use standards" established by the Zoning Ordinance. *Zoning Ordinance,* §59.3.1.1.B.

setback called for by the R-60 Zone and that it exceeded the maximum floor area permitted under the limited use standards for detached accessory apartments. Exhibit 16(a). The Board of Appeals opinion approving the variance refers to a statement, apparently submitted by the Bacons, attributing the excess floor area solely to the "proposed taller roof." Exhibit 16(d), p. 3. Mrs. Bacon testified that she would not have needed to obtain the variances if the height wasn't being increased because the Zoning Ordinance permits the non-conformities unless there is an increase in height.[8] T. 56.

After DPS' anticipated denial of the building permit, the Bacons applied to the Board of Appeals for three variances: (1) a 12-foot variance from the required 17-foot setback in the R-60 Zone, (2) construction of a second floor window on the side of the garage requiring the variance, and (3) a variance to exceed the maximum size permitted for a detached accessory structure. Exhibit 16(d). On July 29, 2020, the Board granted the variances from the setback and size requirements and denied the variance to permit a second floor window.[9] Exhibit 16(d). Objectors in this case appeared at the Board of Appeals hearing in opposition to the variance requests and have appealed the Board's decision to the Circuit Court because they believe the Board erred in granting the variances. T. 56-57.

After the Board of Appeals approved the variances, the Bacons returned to DPS for approval of the building permit. After their meeting with DPS, the Bacons applied to DHCA for an accessory dwelling unit license sometime in October 2020. T. 59. DHCA inspected the property and determined that the ADU met the Zoning Ordinance standards. Mr. Ivan Eloisa,

[8] Section 3.3.3.C.2.b of the Zoning Ordinance provides: "Any structure constructed legally before May 31, 2012 that is not increased in size or building height and does not have new windows on a wall nearest an abutting property may be used for a Detached Accessory Dwelling Unit without regard to setbacks or floor area."
[9] Mrs. Bacon testified that the Bacons are not pursuing the Board's denial of the variance for the second floor window. T. 56.

program manager for DHCA's Code Enforcement Section, testified that DHCA verified the size of the ADU by reviewing floor plans submitted by the Bacons. T. 51. These floorplans do not show the second story of the ADU. Exhibit 13(b). Mr. Eloisa testified that he was aware of the limit on the size of ADUs because the preliminary inspection (that requires DHCA to notify an applicant of all items needed for the license) states (Exhibit 4):

> 4. Detached ADU – the maximum gross floor area must be the least of 50% of the footprint of the principal dwelling; 10% of the lot area; or 1,200 square feet of gross floor area.
>
> (Exception for structures constructed legally before May 31, 2012 that is not increased in size or building height and does not have new windows on a wall nearest to abutting property that may be used for a detached ADU without regard to setbacks or floor area per ZTA 19-01).

Mr. Eloisa also testified that he did not know of the second story window.[10] T. 51. DHCA issued a "Final Director's Report of findings on Accessory Apartment Class 3 license application" on November 30, 2020, which stated "Zoning review passed". Exhibit 13(a), on the next page). Mr. Eloisa testified that license will not be issued until construction is completed. The final inspection is currently scheduled for May 4, 2021. T. 51-52.

B. DHCA Licensing Procedures

Mr. Eloisa and Mr. Clifton Bouma, of the registration unit of DHCA, described DHCA's licensing procedure at the public hearing. Mr. Bouma works with license applicants to make sure the application is complete and all required paperwork has been submitted. He also verifies that the zoning of the property permits an ADU. T. 43. Mr. Eloisa's program conducts all inspection to ensures compliance with the limited use standards of the Zoning Ordinance and with the County's Housing Code. T. 42-45.

[10] The Hearing Examiner assumes that the Bacon's had already decided not to pursue their request for a second story window when they applied for the ADU.

Primary residence	☑	**Apartment square footage**	768
Document used to validate primary residency	Real Estate Bill	**House square footage**	3079
Age of house passed	☐	**Apartment entrance passed**	☑
Year built	1923	**Entrance location**	Left
Minimum distance to nearby ACC	☐	**Existed prior to 5/20/2013**	
Distance (if less than minimum required)		**Apartment address passed**	☑
Parking passed	☑	**Address same as house**	☑
Driveway square footage (160 sq ft / car)	1586	**Detached apartment requirement passed**	
Parking spaces required by Zone, age of house, and accessory apartment law	0	**Other residential uses passed**	☐
Size of apartment passed	☐	**Other residential uses**	☐
Application sent to OZAH		**Housing Code Enforcement case number**	164262
Zoning review passed	☑	**Application Sent to Code**	10/22/2020 12:00:00 AM
		Code Initial Inspection	11/3/2020 12:00:00 AM
		Code Final Inspection	11/3/2020 12:00:00 AM

Individuals who disagree with the findings in the Director's Report or who believe that on-street parking is inadequate to accommodate the accessory apartment may object to the granting of the license and request a hearing with the Office of Zoning and Administrative Hearings (OZAH).

Mr. Eloisa testified that, once Mr. Bouma determines that the applicants have submitted all required documents and that the Zone permits ADUs, Mr. Bouma refers the application to the Code Enforcement Section, who conducts a physical inspection of the property. For example, the inspection verifies whether the property has the on-site parking required by the Zoning Ordinance and that the ceiling height meets Housing Code requirements. For existing construction, the inspector ensures that the applicant obtained the required permits for all improvements. If they did not, DHCA refers the applicant to DPS to obtain the necessary permits. T. 42-45. After they complete their inspection, he meets with the inspector and ultimately forwards a list to the applicant of everything they must do to receive the ADU license. T. 45.

If the ADU requires construction or additional permits, DHCA schedules a re-inspection typically 6 months from the first inspection. If the applicant needs more time, they can request an extension of the deadline, but they typically start with a 6-month deadline. T. 46. The license will

not issue until a final inspection has been constructed and DHCA confirms that improvements comply with the Zoning Ordinance and Housing Code.

Mr. Eloisa testified that homeowners who wish to build an ADU may either go first to the Department of Permitting Services for a building permit (if one is needed) or to DHCA and begin the license application process. If they go to DPS first, DPS will refuse to process the permit until the owner applies for a rental license and DHCA begins the licensing process. If the owner comes to DHCA first, DHCA starts the process described earlier and refers the license applicant for the permits they need from the Department of Permitting Services. T. 77-78. This way, the County ensures that both agencies are aware of the ADU and the ADU receives both the rental license and necessary building permits. T. 78.

II. GOVERNING LAW

A. Statutory Scheme

Chapter 29, Article 3 of the Montgomery County Code governs the rental licensing procedures for ADUs. *See, Montgomery County Code,* §29-19, *et. seq.* Before issuing a rental license for an ADU, these require the DHCA Director to "find[s]" that the application meets certain licensing requirements (such as proof that the property is the Applicant's primary residence), and that it conforms to the limited use standards of the Zoning Ordinance. Section 29-19(1)(D)(1)(i) of the Code states that DHCA must find that:

> (i) the accessory dwelling unit satisfies the standards for an accessory dwelling unit in Section 59.3.3.3 and if needed, a Hearing Examiner granted a waiver under Section 29-26; or

Section 59.3.3.3 referred to above is a cross-reference to the Zoning Ordinance, which permits ADUs in certain zones (including the R-60 Zone) as a "limited use." *Zoning Ordinance,* §59.3.1.6. A "limited use" may be permitted by right (*i.e.,* without conditional use approval) *if* it

meets restrictions on the use imposed by the Zoning Ordinance. These restrictions are referred to as the "limited use standards." *Id.,* §59.3.3.1.B. Section 59.3.3.3 of the Zoning Ordinance contains the limited use standards for *all* ADUs and separate standards applicable only to ADUs in a detached structure. *Id.,* 59.3.3.3.A and C. The limited use standards relevant to this case are those for ADUs in a detached structure:

> a. Where a Detached Accessory Dwelling Unit is allowed as a limited use, it must satisfy the use standards for all Accessory Dwelling Units under Section 3.3.3.A.2.
>
> b. Any structure constructed legally before May 31, 2012 that is not increased in size or building height and does not have new windows on a wall nearest an abutting property may be used for a Detached Accessory Dwelling Unit without regard to setbacks or floor area.
>
> c. A Detached Accessory Dwelling Unit built after May 30, 2012 must have the same minimum side setback as the principal dwelling and a minimum rear setback of 12 feet.
>
> d. For any Detached Accessory Dwelling Unit with a length along a rear or side lot line that is longer than 24 feet, the minimum side or rear setback must be increased at a ratio of 1 foot for every 1 foot that the dimension exceeds 24 linear feet. The additional rear setback is from a 12-foot setback as its starting point.
>
> e. The maximum gross floor area for a Detached Accessory Dwelling Unit must be the least of:
>
> i. 50% of the footprint of the principal dwelling;
> ii. 10% of the lot area; or
> iii. 1,200 square feet of gross floor area.

Id., §59.3.3.3.C.

DHCA is charged with making an initial investigation into whether these standards are met. *Montgomery County Code,* §29-19(b)(2)(B). After investigation and inspection, it must (1) complete a report on any repairs or improvements needed to approve the application, and (2) issue a report on "all required findings" within 30 days after the date the application was accepted. *Montgomery County Code,* §29-19(b)(2)(C) and (D). DHCA must issue the rental license within

30 days of issuing its report unless (1) an objection is filed under Section 29-26 of the Code, or (2) improvements to the property are required for the license to be approved. *Id.,* §29-19(b)(2)(F).

The framework for filing objections to the above findings of DHCA permits the license applicant to "object" to any "adverse finding of fact" made by the Director of DHCA. *Id.,* §29-26(b)(2).[11] "Aggrieved parties" may also object to a "finding of fact" made by DHCA. A public hearing must be scheduled within 30 days of the date the objection is filed and the Hearing Examiner is limited to considering only those issues raised in the objection. *Id.,* §29-26(b)(5). The Hearing Examiner has 30 days after the hearing record closes to write her decision and DHCA must issue the license in accordance with that decision without further exploration of the facts. *Id.,* §29-26(b)(10). The Hearing Examiner's decision is then appealable directly to the Circuit Court, without an appeal to the Board of Appeals. *Id.* §29-26(b)(12).

B. Principles of Statutory Construction

Maryland courts have many times articulated the principles governing construction of a statute or ordinance:

> In matters involving statutory construction, the canons applied by this Court are well-settled and have been oft repeated. The predominant goal of statutory construction is to "ascertain and effectuate the intention of the legislature." *Md.-Nat'l Capital Park & Planning Comm'n v. Anderson, 395 Md. 172, 182, 909 A.2d 694 (2006)* (citations and quotations omitted). As we have explained, "to determine that purpose or policy, we look first to the language of the statute, giving it its natural and ordinary meaning." Id. (citations and quotations omitted); see also *Chow v. State*, 393 Md. 431, 443, 903 A.2d 388 (2006) (stating that "[s]tatutory construction begins with the plain language of the statute, and the ordinary, popular understanding of the English language dictates the interpretation of its terminology") (citations omitted). "We so on the tacit theory that the General Assembly is presumed to have meant what it said and said what it meant." Lillian *C. Blentlinger, LLC v. Cleanwater Linganore, Inc*., 456 Md. 272, 294, 173 A.3d 549 (2017) ("Blentlinger") (citations omitted). "When the statutory language is clear, we need not look beyond the statutory language to determine the Legislature's intent." *Walzer v. Osborne*, 395 Md. 563, 572, 911 A.2d 427 (2006) (citations and

[11] Licensing procedures for DHCA are contained in §29-19 of the Code; the framework for objections is in §29-26(b) of the Code.

> quotations omitted). "If the words of the statute, construed according to their common and everyday meaning, are clear and unambiguous and express a plain meaning, we will give effect [**560] to the statute as it is written." *Blentlinger*, 456 Md. at 294 (citations omitted). Additionally, we "neither add nor delete words to a clear and unambiguous statute to give it a meaning not reflected in the words the Legislature used or engage in forced or subtle interpretation in an attempt to extend or limit the statute's meaning." *Walzer*, 395 Md. at 572 (citations and quotations omitted). "If there is no ambiguity in the language, either inherently or by reference to other relevant laws or circumstances, the inquiry as to legislative intent ends." *Blentlinger*, 456 Md. at 294 (citation omitted); *Walzer*, 395 Md. at 572 (citations and quotations omitted).
>
> If the language of the statute is ambiguous, "then courts consider not only the literal or usual meaning of the words, but their meaning and effect in light of the setting, the objectives and the purpose of the enactment under consideration." Anderson, 395 Md. at 182 (citations and quotations omitted). "[A]mbiguity exists within a statute when there are two or more reasonable alternative interpretations of the statute." *Melton v. State*, 379 Md. 471, 477, 842 A.2d 743 (2004) (citations and quotations omitted). "When a statute can be interpreted in more than one way, the job of this Court is to resolve that ambiguity in light of the legislative intent, using all of the resources and tools of statutory construction at our disposal." *Blentlinge*r, 456 Md. at 295 (citations omitted).
>
> In construing a statute, "we avoid a construction of the statute that is unreasonable, illogical, or inconsistent with common sense." *Bellard v. State*, 452 Md. 467, 482, 157 A.3d 272 (2017) (citations omitted). Additionally, the "meaning of the plainest language is controlled by the context in which it appears." *Md. Dep't of the Env't v. Cty. Comm'rs of Carroll Cty*., 465 Md. 169, 203, 214 A.3d 61 (2019) (citations and quotations omitted). As this Court has stated,
>
> > … [b]ecause it is part of the context, related statutes or a statutory scheme that fairly bears on the fundamental issue of legislative purpose or goal must also be considered. Thus, not only are we required to interpret the statute as a whole, but, if appropriate, in the context of the entire statutory scheme of which it is a part.
>
> *Id*. (citations omitted).

75-80 Props., L.L.C. v. RALE, Inc., 470 Md. 598, 623-25 (2020). While some courts have indicated that resort to the legislative history is permissible only when a statute is ambiguous, courts have clarified that it is not limited to a finding that the statute is ambiguous.:

> Although these formulations may at first blush seem contradictory, we think they are reconcilable according to the following principles: (1) faced with a

> truly unambiguous statute, a court is neither required to consider, nor prohibited from considering, legislative history; and (2) whether to consider legislative history to confirm a court's interpretation of a truly unambiguous statute is left to the discretion of the court. Factors that may affect the court's decision to review legislative history may include the relative degree of clarity of the language; the relative degree of clarity of the legislative purpose; the degree to which the plain language interpretation promotes the apparent legislative purpose, as opposed to merely does not conflict with it; whether any of the parties have called the court's attention to allegedly contradictory legislative history; the novelty or importance of the question; and logic and common sense.

Daughtry v. Nadel, No. 1814, 2020 Md. App. LEXIS 1180, at *20-21 (Spec. App. Dec. 16, 2020).

C. Legislative History

To the Hearing Examiner's knowledge, this is the first case that has examined the interplay between the grant of a variance by the Board of Appeals and an objection under Section 29-26 of the County Code. The Objectors characterize the issue as whether a license should be granted when a wrongly decided appeal of variances is being litigated. The Objectors argue that the plain language of the Code permits them to object to a "finding of fact" that the ADU complies with the Zoning Ordinance. While the Hearing Examiner believes that the modifier "made by the Director" clarifies that it doesn't apply to mixed questions of law and fact decided by the Board of Appeals, she finds that a review of the legislative history of the zoning and licensing regulations governing ADUs is appropriate, given the novelty of the question to be resolved and the fact that the statutory scheme doesn't explicitly address the issue.

The Council has visited the approval process for ADUs several times within the last eight years. Prior to 2013, ADUs were special exceptions under the Zoning Ordinance, requiring full review by the Planning Department (taking up to 120 days) and a public hearing before the Hearing Examiner. ADUs were also subject to the general, more discretionary, standards governing conditional uses relating to the compatibility of the conditional use with the surrounding area. *See,* Exhibit 19(a); *2004 Zoning Ordinance,* §§59-G-1.21, 59-G-2.00.

In early 2013, the Council adopted Zoning Text Amendment (ZTA 12-11, Ordinance No. 17-28) and a companion Council bill (Council Bill 31-12), which were designed to lessen the regulatory burden of the ADU approval process. Exhibit 19(a). The Zoning Text Amendment (ZTA) amended the 2004 Zoning Ordinance to remove the requirement that every ADU be approved as a conditional use.[12] Instead, it made most ADUs "limited uses" in several residential zones. The Council found that "notice and an opportunity to challenge the facts related to the accessory apartment [now ADU] can be accomplished without a special exception and Planning Staff review." Exhibit 19(a), p. 2. By doing so, ZTA 12-11 removed the 120-day review by the Planning Department, the need for a public hearing before OZAH, and the need to meet the general standards of compatibility applicable to conditional uses contained in Section 59.7.3.1.E of the Zoning Ordinance for most ADUs. Exhibit 19(a). If an ADU did not meet two of the limited use standards, a requirement for two on-site parking spaces and a 300 feet separation between ADUs, it still had to go through the conditional use process. *Id.*

Along with the ZTA, the Council adopted new ADU licensing requirements in Council Bill 31-12, which established the "objection" process previously described.[13] Exhibit 19(a), p. 9. The PHED Committee recommended that the Hearing Examiner's decision should be directly appealable to the Circuit Court, rather than the Board of Appeals, because "[t]he Committee believes that accessory apartments that qualify for a license do not warrant multiple bites of the apple for objecting parties." *Id.,* p. 9.

[12] The Council adopted the current Zoning Ordinance on May 20, 2014, effective October 30, 2014. Conditional uses were referred to under the 2004 Ordinance as "special exceptions". *2004 Zoning Ordinance,* §59-A-2.1. The current Zoning Ordinance changed the term "special exception" to "conditional use". *2014 Zoning Ordinance,* §1.41.

[13] Section 29-26 of the Code, establishing the objection, has been amended since 2013; the amendments to not substantively impact this case.

In 2018, the Council further streamlined the ADU approval process when it adopted ZTA 18-07 (Ordinance No. 18-53). This legislation removed all ADUs from the conditional use process and made them limited uses under the Zoning Ordinance. Exhibit 15(a). The Council's Planning, Housing and Economic Development (PHED) Committee recommended approval of the ZTA to reduce "barriers to a low-cost means of adding to the housing supply". Exhibit 15(c), p. 1. The Council's Action Memorandum summarizes the PHED Committee's recommendation:

> …the license and appeal process for accessory apartment applications has successfully avoided problems, while giving neighbors the opportunity for a hearing of specific issues. To build on that success, the Committee recommended the introduction of ZTA 18-07 and companion Bill 26-18 to amend licensing requirements.
>
> The current conditional process allows for more resident input, but the burdens of that process outweigh its benefits. The more visible change to neighborhoods is the allowance for detached accessory apartments, but there has been little interest in pursuing that option by property owners.

Id. at 4. The Committee and the Council acted upon a recommendation of the Director of OZAH to the PHED Committee:

> The Hearing Examiner cited the unnecessary burdens of the current code and recommended a solution:
>
> > *…Zoning Ordinance §59.7.3.1.B.2, as currently written, requires each application for a conditional use to provide all of that information and documentation. That is why the back of OZAH's application form calls for it…We do not need all that information to make our decisions in these accessory apartment cases, so Zoning Ordinance §59.7.3.1.B.2. could be modified by ZTA to specify that Accessory Apartment CU Applications need less documentation…*
> >
> > *…However, an even better solution would be to eliminate the conditional use process for accessory apartments (which is very limited in scope now) and go entirely with an expansion of the DHCA Objection process, which would then be an Objection-Waiver process…*
> >
> > *The current accessory apartment conditional use process allows a conditional use only for three reasons—to deviate from the limited use standards for the number of on-site parking spaces; to deviate from the*

> *minimum distance from any other accessory apartment; or to allow a detached accessory apartment in the AR, R or RC Zones. Since we have not had even one detached accessory apartment CU application in the last four years, the only practical reason for the current accessory apartment conditional use system is to provide a waiver from statutory standards for on-site parking and minimum distance from other accessory apartments. It does not make sense to have the lengthy conditional use process (120 days of Planning Department review) just to make a waiver decision by the Hearing Examiner.*

Id., pp. 2-3 (emphasis in the original to mark portions quoted from the OZAH Director's memorandum to the PHED Committee dated September 22, 2017).

Revisiting ADU zoning regulations again in 2019, the Council expanded the available of ADUs and recognized the "importance of increasing the supply of ADUs in the County, while also working to minimize any negative impacts on the residential neighborhoods." Exhibit 15(b). Previously permitted only in the larger lot residential detached zones (the RE-1, RE-2, and RE-2C Zones), the Council adopted ZTA 19-01, which permits detached ADUs as a limited use in the R-200, R-90, and R-60 Zones.[14]

III. ARGUMENTS OF THE PARTIES

A. Objectors' Arguments

The Objectors agree that a license may not issue until all required improvements have been constructed and inspected for compliance with the building and housing codes, although they ask whether they need to renew their objection when the license is issued. T. 83. According to them, the ADU proposed here plainly does not comply with the Zoning Ordinance because it necessitated the grant of variances, which (in the Objectors' opinion) were improperly granted. They assert that the plain language of Section 29-26(b) of the Zoning Ordinance permits an objection when an

[14] The minimum lot size and density in the RE-2 and RE-2C Zones is 2 acres and one dwelling unit per 2 acres, respectively. *Zoning Ordinance,* §59.4.4.4.B.1; 59.4.4.5.B.1. The density in the RE-1 Zone is one unit per 1.09 acres. *Id.,* §59.4.4.6.B.1. The R-200, R-90, and R-60 Zones have minimum lot sizes of 20,000, 9,000, and 6,000 square feet, respectively. *Zoning Ordinance,* §§59.4.4.7.B.1, 59.4.4.8.B.1. and 59.4.4.9.B.1.

aggrieved party disagrees with "a finding of fact by the Director." Because DHCA has made a finding that the proposed ADU complies with the Zoning Ordinance, jurisdiction over this finding lies with OZAH. If there is to be a meaningful appeal to the Circuit Court, their arguments continue, OZAH must be able to sit in judgment of the correctness of DHCA's finding. T. 14-17.

Objectors also assert that the ADU is not yet in compliance with the Zoning Ordinance because the Board of Appeals' decision on the variances has not been finally adjudicated. Until then, the ADU license is "inchoate" because the license can't be issued until the ADU is constructed and inspected. T. 16. In their view, an orderly administration of the licensing process would be to await completion of the project and the "administratively final" decision is also "judicially final." T. 23-24. Without the ability to object, there is no place in the licensing process to argue that the Board of Appeals "made a mistake" in granting the variances. T. 25-26.

The Objectors disagree with the Bacon's argument that their objection is merely a means to seek a stay. This "license appeal" is not a substitute for seeking a stay. The objection is unaffected until the ADU is licensed and constructed. T. 18.

B. License Applicant's Arguments

The Bacons argue that granting the objection would "contravene both the plain language of the applicable statutes and regulations, and also the intent of the Montgomery County Council, which recognized the importance of increasing supplies of ADUs in the County, and in order to do so, the provide streamlined procedures to achieve that result." T. 62.

They believe that Objectors are using the objection process to stay the Board of Appeals' decision on the variances. According to them, the Objectors intend to "delay and burden the

licensing of their ADU."[15] They assert that this is exactly what the Council sought to avoid by ZTA 18-07, when it removed ADUs as conditional uses. In further support, they quote from the legislative history of the Zoning Ordinance and Code provisions (T. 62, *quoting* Exhibit 15(c), p. 4), "[T]he current conditional [sic] process allows for more resident input, but the burdens of that process outweigh its benefits." Also, "[T]he committee believes that accessory apartments that qualify for a license do not warrant multiple bites at the apple for objecting parties." T. 62-63, (*quoting* Exhibit 19(a), p. 9). A failure to approve that which ZTA 19-01 allowed them to build would, in the Bacon's opinion, "deprive aging homeowners of their only means of being able to afford to stay in their homes."

According to the Bacons, the ADU process is very intimidating. Not only are they responding to multiple challenges in different forums, but Objectors take pictures of their signs every time they blow down. She is glad that she is one of the first to test this process because she has the English proficiency, means, and motivation to withstand this intimidating process. T. 64.

Mrs. Bacon disagrees with the Objectors position that staying the ADU would further orderly administration of licenses. In her opinion, inviting multiple agencies to weigh in on the decisions of other agencies "invites chaos". T. 65. She believes that the Board issued a final decision on the variance requests and they are entitled to rely on that. T. 65.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant's argue jurisdiction in the objection process because they disagree with DHCA's finding of fact that the application complies with the Zoning Ordinance. The Hearing Examiner

[15] Several of the Bacons' arguments cast aspersions on the motivations of the Objectors and assert that the Objector's attorney acted unethically by not providing them notice of the objection. The motivations of the parties are irrelevant to the outcome of this case except to the extent they implicate the legislative history and the Hearing Examiner does not repeat or consider them in this opinion. Under the Code, the Objectors are not required to notify the license applicants of the objection. This is accomplished by OZAH when it schedules the public hearing. *Montgomery County Code,* §29-26(b)(4).

sees the issue somewhat differently: The question is whether DHCA may consider on the Board of Appeals approval of a variance when making its findings that the application complies with the Zoning Ordinance.

Applying the governing law in the context of its legislative history, the Hearing Examiner finds that a Board of Appeals decision to grant variances from the limited use standards for ADUs may not be the subject of an objection. Section 29-26(b)(1) permits an objection to an "adverse finding of fact" by DHCA. At present, the parties do not disagree on any factual matters relating to this case. The Bacons acknowledge that the ADU proposed does not meet all limited use standards in the Zoning Ordinance but obtained variances from the Board of Appeals to legalize the use anyway.

While it is not entirely clear from this record that DHCA knew of the second story when it issued its findings, this does not change the outcome of the objection.[16] DHCA's preliminary inspection report advises of the restriction on size and the non-conformities were fully disclosed to the Board of Appeals, which at the time of DHCA's inspection, had granted already variances from those requirements. The only "fact" with upon which the parties disagree now is not one made by DHCA, but whether the Board of Appeals should have granted the variances. At the time DHCA issued its "preliminary findings", the variance had been granted and the application met the standards of the Zoning Ordinance, even though the Objectors disagreed with the Board's decision.[17] Thus, the Objectors are not challenging an adverse finding of fact by DHCA that the application conforms to the Zoning Ordinance; they are challenging the grant of a variance by the

[16] Mr. Eloisa testified that he did not know of the second story window, although by the time of DHCA's inspection, the Bacons may have already decided not to pursue it. The floor plan submitted to DHCA shows only the first floor, not the higher roof that necessitated the variance.

[17] Had DHCA received the license application *before* the Board of Appeals granted the variance, its proper course of action would have been to issue findings that the ADU did *not* meet the limited use standards of the Zoning Ordinance (assuming that it would know about the second story). Applicants then could have pursued the variance with the Board of Appeals and reapplied for the license.

Board of Appeals from those limited use standards. This is not the same as an "adverse finding of fact" made by independently by DHCA.

The Council established the objection procedure to allow both license applicants and neighbors an expedited means of challenged DHCA's finding of facts on whether the ADU meets the limited standards of the Zoning Ordinance. In this case, the Applicant has "passed by" this stage of the process, at least with respect to the limited use standards of the Zoning Ordinance, by obtaining variances from the Board of Appeals. Once granted, neither the licensing provisions of the Code or the Zoning Ordinance give DHCA the explicit authority to relitigate the variances, as the Zoning Ordinance gives sole jurisdiction for this to the Board of Appeals. There is nothing to indicate that the limited authority given to DHCA to investigate and confirm facts was intended to "second guess" the Board of Appeals' authority to grant variances.[18]

The Hearing Examiner holds that DHCA must conform to the Board of Appeals' decision granting the variances when issuing Class III Accessory Apartment licenses. She agrees with the Bacons that, to hold otherwise would contravene the intent of the Council that objectors have "multiple bites of the apple." Permitting the Hearing Examiner to overturn a decision of the Board of Appeals would place the applicant in a "Catch-22" and subject the applicants to litigation a forum that has no jurisdiction to decide variances. Further, it would undermine the clear authority given to the Board of Appeals to decide variances. Just as ADU objections may not be appealed to the Board of Appeals, parties may not have a second bite at the Board of Appeals' decision via ADU objections heard by the Hearing Examiner.

The objection process was designed to provide a forum to disagree with factual findings of DHCA. These have been overtaken by variances granted by the Board of Appeals.

[18] As the Hearing Examiner has no authority in an objection case to grant a variance, the Hearing Examiner takes no position on whether the variances were correctly decided.

This then leaves the argument, raised by the Objectors, that variance decision should not be considered because it is not final, and the ultimate outcome (after appeal to the Circuit Court) is unknown. The Hearing Examiner disagrees. Maryland courts have many times decided the finality of administrative decisions for the purpose of appeal. The Hearing Examiner is unaware of any legal principle, and the Objectors have not referred her to one, that distinguishes between "administratively final" and "judicially final" decisions. In fact, were the Board of Appeals decision not final, they would not be able to pursue their administrative appeal in the Circuit Court. This is underscored by the Court of Appeals' decision in *City of Bowie v. Prince George's County*., 384 Md. 413 (2004), where the Court made clear that a property owner may continue obtaining needed land use approvals even after a prior approval has been appealed. It warned, however, that:

> … the holder of a vulnerable preliminary approval who chooses to proceed to final approval, and then procure permits and builds in reliance thereon, has undertaken a, presumably, calculated risk, which he certainly may choose to do. As we stated in Powell, "persons proceeding under [Board approval] prior to finality are not 'vesting' rights; they are commencing at 'their own risk' so that they will be required to undo what they have done if they ultimately fail in the litigation process." *Id.* at 410, 795 A.2d at 101 (alteration added). Should a developer's underlying preliminary approval properly be determined invalid, he risks exposure to suits and the enforcement of regulations compelling him to return the property to the status quo or to make other amends or provide other remedy. This Court cannot presume to dictate [**986] the business risks in which a developer may choose to engage.

City of Bowie v. Prince George's Cty., 384 Md. 413, 429-30 (2004).

The Objectors argue that, without the ability to challenge the variances via the objection, there is no place in the licensing process to challenge the Board of Appeals' decision on the variances. They are correct. Objectors have already undertaken the statutory remedy to challenge the Board's decision by appealing it to Circuit Court. The license applicants proceed with the license application (and potentially construction) at their own risk.

To answer the Objectors final question, they need not renew their objection at the time of the license is issued (if the Bacons decide to proceed to construction). Objections are designed to challenge findings of fact by the Director early in the licensing process. Under the Code, DHCA must issue its findings within 30 days of the rental license application and objections must be filed within 10 days of the date that DHCA issues its findings. If the Bacons do not prevail in the appeal of the variance decision, both the building permit and the license would be revoked and the Bacons will be placed back at square one. If construction is commenced, they would be required to remove it. *See, City of Bowie, supra.*

V. ORDER

For the foregoing reasons, the Hearing Examiner hereby ***denies*** the objection to Class III Accessory Dwelling Unit Rental License Application No. 116646 for construction of an accessory dwelling unit at 612 Potomac Avenue, Silver Spring, MD.

Issued this 19th day of January 2021.

Lynn Robeson Hannan
Hearing Examiner

Notification Memos to:

David Brown, Esquire
Attorney for the Objectors
Pavrita and Richard Bacon, License Applicants
Vicki Gaul, Esquire
Assistant County Attorney
Ivan Eloisa, DHCA

NOTICE OF RIGHT TO APPEAL

Any party aggrieved by the Hearing Examiner's decision on an objection or a waiver may request the Circuit Court to review the Hearing Examiner's final decision under the Maryland Rules of Procedure. An appeal to the Circuit Court does not automatically stay the Director's authority to grant a license. *Montgomery County Code,* §29-26.

Contact information Office of the Clerk of the Circuit Court, Civil Department, is listed below:

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