

OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
FOR MONTGOMERY COUNTY, MARYLAND

Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
(240) 777-6660

www.montgomerycountymd.gov/content/council/zah/index.asp

IN THE MATTER OF THE OBJECTION TO DENIAL *
ACCESSORY APARTMENT LICENSE NO. *

Bertrand Tzeng
Gena Lai

OZAH Case No. ADO 23-01
Application No. 8091

License Applicant *

* * * * *

Clifton Bouma, *Program Specialist II* *
Dave Johnson, *Inspector* *

DHCA, Licensing and Registration Unit. *

* * * * *

Before: Kathleen Byrne, Hearing Examiner

HEARING EXAMINER'S REPORT AND DECISION

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I. CASE SUMMARY

On January 26, 2022, the Department of Housing and Community Affairs (DHCA) accepted Bertrand Tzeng and Gena Lai's (Applicants) Application for a "Class 3 Accessory Dwelling Unit" (ADU) their home at **6528 Lone Oak Drive, Bethesda MD 20817** (Property). In response to this application the DHCA assigned the pending application the number 8091. DHCA's Inspector Dave Johnson conducted a preliminary inspection on March 16, 2022. T.

14. Inspector Johnson’s report identified the square footage for the ADU as being over the 1,200 square foot threshold. *Id.* Upon review of Inspector Johnson’s Preliminary Inspection Report, Mr. Clifton Bouma issued a letter on June 16, 2022 to the Applicant’s denying their ADU application citing “Chapter 59, 2.c.iii” which identifies the maximum gross floor area for an ADU must either be less than 50% of the total floor area in the principal dwelling or 1,200 square feet, whichever is less.¹ Exhibit 3. On November 15, 2022, approximately 5 months after the issuance of the denial letter, the Applicants filed an Objection to DHCA’s decision regarding their application arguing that the additional 100 square feet over the allotted square footage area permitted by Code “poses no safety or health risks”. Exhibits 1 & 4.

OZAH scheduled a public hearing for Monday, December 12, 2022. On December 6, 2022, the Hearing Examiner emailed Ms. Lai and requested she be prepared to discuss if the objection was timely filed pursuant to Section 29-26 of the County Code. Exhibit 6. The public hearing proceeded as scheduled. The Hearing Examiner heard testimony from both Applicants, Ms. Gena Lai and Mr. Bertrand Tzeng, regarding the timing of the filing of the Objection. In addition, the Applicants testified in support of their application. Mr. Dave Johnson, Housing Code Inspector, testified to the Preliminary Inspection Report, site visit and his findings. Mr. Clifton Bouma, Program Specialist II, testified to how DHCA processes ADU applications. At the conclusion of the hearing, the Hearing Examiner held open the record of 30 days to allow the Applicants time to either withdraw their objection to OZAH and/or file for a variance to square footage to the Board of Appeals (Board). The Hearing Examiner stated that if the Applicants failed to either withdraw or file for a variance with the Board by January 12, 2023, she would then write a decision. T.34 The Hearing Examiner further stated if the Applicants submitted a

¹ Note the correct Zoning Ordinance cite for proper square footage is 59.3.3.3.B.2.b.

variance to the Board she would then extend the time to issue a decision until after the Board rendered its decision. T. 34. On Friday, January 6, 2023, the Applicants submitted an application to the Board of Appeals requesting a variance to the Zoning Code requirement that an ADU be 1,200 square feet. On Wednesday, April 26, 2023, the Board heard the Applicants variance request. On Tuesday, May 3, 2023, the Board of Appeals granted the Applicants variance request.

II. GOVERNING LAW

Section 29-26(b)(1) of the County Code states the Applicant for a new license for an ADU may object to an “adverse finding of fact by the Director” by filing a waiver or an objection and request for a hearing with OZAH. Section 29-26(3) states that an objection must be submitted to OZAH “within 30 days after the date of the Director’s report”. (Emphasis added). Chapter 3, Section 1-103(c) of the County Code identifies how to compute deadlines when the Code requires “a person to perform an act within a specific time period measured in days” by beginning the count on the day after the event, counting all the remaining number of days in that period and not counting a Saturday, Sunday or holiday as the last day to perform the act.²

Chapter 29, Section 19 of the Montgomery County Code details the licensing procedures for accessory dwelling units. The use standards for ADUs are found in Section 59.3.3.3 of the Zoning Ordinance. The maximum gross floor area for an attached accessory dwelling unit is 1,200 square feet. *Montgomery County Zoning Ordinance*, §59.3.3.3.B(2)(b). “The Hearing Examiner may only decide the issue raised by the waiver or objection.” *Montgomery County Code* §29-26(b)(5). “The Board of Appeals may grant a variance from any requirement of this Chapter [Chapter 59 - Zoning Ordinance].” *Montgomery County Code* §59.7.3.2.A.

² The reference to Chapter 3, §1-103 here does not include specific text on how to calculate time when the period is less than 7 days (emphasis added).

III. OPINION AND ANALYSIS

Timeliness of Objection

As identified above, the County Code clearly requires objections to the DHCA’s findings to be filed with “within 30 days”. Ms. Lai stated she understood the “intent is that filings should be made within 30 days after the director’s report is issued.” T. 9. She went on to state that it was unclear to them that because the language provides that an objection delivered by mail requires the post mark must be no later than 30 days, but the Code does not talk about in person delivery. *Id.* She further stated, “but the language does not prohibit filings after 30 days if made by means other than mail” and concluded because the statute did not “talk about delivery in person” that in person delivery could be beyond 30 days. T. 10.

In addition to the Applicants belief that the law gave them more than 30 days to file their objection if it were filed in person, they were unsure that an appeal to OZAH was the correct path to take to see relief from DHCA’s decision. T. 11. Mr. Tzeng stated in the weeks after the denial they reached out to various attorneys and did additional research on their own to determine whether they should appeal to OZAH or the Board of Appeals. T. 11-13. Mr. Tzeng did admit the appeal did “fall off our radar” for a period of time. *Id.* Nothing in the letter from DHCA provides information to the Applicant on how to appeal the decision. Exhibit 3, T. 14-15. However, Mr. Bouma testified that he sent an email to the Applicants directing them on how to appeal to OZAH. T. 15. Mr. Tzeng stated the email directing the Applicants to OZAH’s website did not provide any additional clarity in determining how to proceed because none of the ADU decision issued by OZAH or the Board of Appeals discussed maximum square footage issues. T. 16.

Waiting more than 5 months to object to DHCA’s findings is well beyond the 30-day

timeframe. The Hearing Examiner finds the Applicants justification for believing that only objections sent my mail must be done within 30 days of DHCA's decision illogical. Chapter 3, Section 1-103(c) provides very specific instructions on how to calculate a deadline set forth in the County Code. Rules or informative text that provide additional instructions regarding how to calculate when sending document via mail are intended only further clarify how to calculate a time frame for mailing only, not to supplement the computation standard established by law. With that said, I understand that the due to COVID restrictions the Applicants may have been confused regarding how to perform a hand delivery or if hand delivery was an option. However, a quick phone call or email to OZAH could have resolved that confusion in one day.

The Hearing Examiner finds the Applicants confusion over which forum could grant their relief, OZAH or the Board of Appeals, to be a more credible reason for delay. Nothing in DHCA's letter of denial provides instructions to the Applicant on how to appeal a denial. Exhibit 3. While DHCA did send emails to the Applicants following up with instructions on how to appeal to OZAH, the final denial letter did not contain that information. T. 14-15, Exhibit 3. The Applicants indicated they conducted their own online research and reviewed OZAH and Board of Appeals decisions looking for similarities in those decisions to choose the correct path on where to file their "appeal". T. 16. The Hearing Examiner agrees that nothing in the online decision records of either agency presents a fact pattern like that presented by the Applicants. Again, a phone call or email to OZAH explaining the circumstances prior to filing could have resolved this confusion for the Applicants. Even with the uniqueness of the Applicants circumstances, waiting 152 days instead of 30 days to file seems too long a period to resolve this confusion. The Hearing Examiner finds that the Applicants did not timely file an objection with OZAH. However, because the Applicants are pro se and because this may be the

first time OZAH received an objection to a DHCA finding of an ADU that exceeds the square footage maximum, the Hearing Examiner will still address the merits of the objection as filed.

Merits of the Objection

Mr. Bouma's letter dated June 16, 2022 denied the application for the ADU on the basis that the site exceeded the maximum square footage code requirements for size. Exhibit 3. Inspector Johnson testified that he was the second inspector to visit the site and found that the square footage for the unit to be 100 square feet over the 1,200 square foot minimum limit permitted by the Zoning Code. T. 22. Mr. Tzeng testified that he and Ms. Lai purchased the house from a prior owner who took possession of the house from his parents and then constructed the ADU attached to the house as a "registered living unit" (RLU) for his parents to move from the main house into the apartment. T. 17, 20. Mr. Tzeng theorized that the large size of the ADU was meant to specifically accommodate the prior owner's parents. T. 20. The County RLU process existed prior to the passage of the ADU legislation. T. 17. The Applicants stated that they believed the prior owner followed DHCA's steps and registered the addition as a "RLU" with DHCA, however the Applicants did not have access to those RLU records from the prior owner. *Id.* Mr. Tzeng further testified that he and Ms. Lai intend to use the apartment eventually for dwelling unit for either of their parents or as an ADU. T. 18. The Applicants did not modify the structure when they purchased the property and currently rent the ADU to a young doctor couple who work at Walter Reed. T. 18, 20.

"The Hearing Examiner may only decide the issues raised by the waiver or objection." *Montgomery County Code*, §29-26(b)(5). The Applicants do not dispute the facts as presented and agree with DHCA's finding that the ADU consists of 1,300 square feet, 100 feet over the Code requirement maximum of 1,200 square feet. Exhibit 4, T. 8. The Applicants do not object

to DHCA’s findings, but rather through their objection request that OZAH make a finding allowing that the additional 100 square feet may remain and argue that the extra 100 square feet poses no safety issues or health risks. *Id.* Because the Applicants do not object to any finding of fact by DHCA and OZAH is limited by law in its scope of review, the Hearing Examiner cannot grant the “equitable” relief requested by the Applicants. In addition, the Hearing Examiner finds DHCA committed no error in its denial because the Zoning Code very clearly states the maximum square footage for the ADU at the property is 1,200 square feet. What the Applicants need before DHCA can issue a rental license is a variance from the square footage provision in the Zoning Code and only the Board of Appeals can grant such a request. T. 27, *Montgomery County Code §59.7.3.2.A.*

IV. CONCLUSION AND ORDER

The standards for approval of an accessory dwelling unit are set out in the Montgomery County Code at §§29-19, 29-26 and the Montgomery County Zoning Ordinance at §59.3.3.3.A and B. An aggrieved person must timely file an objection and request for a hearing with OZAH by either objecting to any finding of fact by the Director or alleging that on-street parking is inadequate. *Montgomery County Code 29-26(2).* The Hearing Examiner has authority to “only decide the issues raised by the waiver or objection.” *Id.* at 29-26(5).

The Hearing Examiner finds Mr. Tzeng and Ms. Lai failed to timely file their objection with OZAH. *Id.* at 29-26(3). Even though the objection could have been dismissed without further action, the Hearing Examiner decided to reach a conclusion on the merits in order provide written clarity and avoid further confusion. The Hearing Examiner finds that Applicants failed to make an actual objection to DHCA’s finding of fact regarding square footage but rather sought a variance to the Zoning Code to maximum square footage requirement by filing an objection with OZAH. Because she does not have legal authority to grant a variance to the

Zoning Code, the objection as filed by the Applicants must be denied. The Hearing Examiner referred the Applicants to the Board of Appeals to obtain a variance. T. 27 and the Board of Appeals granted the Applicants variance request on May 3, 2023. Because DHCA denied the application that is the subject of this report and decision, the Applicants must reapply for the ADU license and provide DHCA with the Board's decision granting the variance to square footage. T. 32-33.

ORDER

For the foregoing reasons, the Hearing Examiner hereby orders, on this 4th day of May, 2023, that the **OBJECTION** to DHCA's denial of the accessory dwelling unit located at **6528 Lone Oak Drive, Bethesda MD 20817** (Application No. 8091) is **DENIED**.

Kathleen Byrne
Hearing Examiner

COPIES TO:

Bertrand Tzeng
Gena Lai
Dave Johnson, DHCA
Clifton Bouma, DHCA



NOTICE OF RIGHT TO APPEAL

Any party aggrieved by the Hearing Examiner's decision on a waiver may request the Circuit Court to review the Hearing Examiner's final decision under the Maryland Rules of Procedure. The Civil Division of the Montgomery County Circuit Court is located at: North Tower, 1st Floor, Rm 1200, 50 Maryland Avenue, Rockville, MD 20850. The phone number is (240) 777-9401. Anyone wishing to file an appeal should check with the Court on operations during the COVID-19 emergency at:

<https://www.montgomerycountymd.gov/cct/departments/civil-department.html>.