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Case No. A-6361

APPEAL OF PAMELA CURRAN, DAVID AND JONI MCGUINNESS, AND ANDREW ZETTLER

OPINION OF THE BOARD

(Hearing held April 18, 2012)
(Effective Date of Opinion: May 22, 2012)

Case No. A-6361 is an administrative appeal filed December 23, 2011, by Pamela Curran, David and Joni McGuinness, and Andrew Zettler (the "Appellants"). The Appellants charge error on the part of the County's Department of Permitting Services ("DPS") in the issuance of Building Permit No. 534188, issued November 25, 2011, for the construction of a single family dwelling on the property located at 6429 83rd Place, Cabin John, Maryland 20818 (the "Property"), in the R-90 zone. Specifically, the Appellants assert in the written materials supporting their appeal that this Building Permit should have been denied because (1) the basis for DPS' decision that there was previously a dwelling on this Property is not in the record; (2) DPS improperly applied Section 59-B-5.3 of the Montgomery County Zoning Ordinance (the "Zoning Ordinance"); and (3) the Property does not comply with the applicable zoning standards.

Pursuant to Section 59-A-4.4 of the Zoning Ordinance, codified as Chapter 59 of the County Code, the Board held a public hearing on the appeal on April 18, 2012. The Appellants were represented by Ronald M. Bolt, Esquire. Matthew J. Waksmunski, the owner of the subject Property, intervened in this case (the "Intervenor") and was represented by Soo Lee-Cho, Esquire. Associate County Attorney Malcolm Spicer represented DPS.

Decision of the Board: Administrative appeal **GRANTED**.

FINDINGS OF FACT

The Board finds by a preponderance of the evidence that:

1. The Property, known as 6429 83rd Place in Cabin John, is an R-90 zoned parcel identified as Lot 38, Seven Locks Settlement Subdivision. The lot was recorded in 1922. See Exhibit 11-A3 (certified copy of record plat No. 228).

2. On March 30, 2010, the Intervenor applied to DPS for a building permit to construct a single family dwelling (and an accessory building/shed) at the subject Property. Building Permit No. 534188 was issued on November 25, 2011, for the requested construction. See Exhibit 11, attachment A1.

3. On December 23, 2011, the Appellants filed this appeal, asserting that the permit application should have been denied for the reasons including (1) that the basis for DPS' decision that there was previously a dwelling on this Property is not in the record; (2) that DPS improperly applied Section 59-B-5.3 of the Montgomery County Zoning Ordinance (the "Zoning Ordinance"); and (3) that the Property does not comply with the applicable zoning standards. See Exhibits 1(a)-(c) and 1(e).

4. Mr. Delvin Daniels testified on behalf of the County. He testified that he has worked for DPS for 22 years, reviewing building permit applications (house plans) for compliance with the Zoning Ordinance. Mr. Daniels testified that in August 2010, he reviewed plans for a proposed dwelling on the subject Property. On his initial review, Mr. Daniels testified that he concluded that a building permit could not be approved because the lot was less than 5,000 square feet, and because there was no evidence that there had previously been a dwelling on the Property.[1] He sent a letter regarding the lot size problem and other possible deficiencies in the application (established building line, setback and height of shed, whether top floor meets definition of half-story) to the Intervenor on

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[1] Mr. Daniels is referring here to Sections 59-B-5.1 and 59-B-5.3 of the Zoning Ordinance, which control the development or redevelopment of certain older lots, and read (in part) as follows:

Sec. 59-B-5.1. Buildable lot under previous ordinance.
Any lot that was recorded by subdivision plat prior to June 1, 1958, or any lot recorded by deed prior to June 1, 1958 that does not include parts of previously platted properties, and that was a buildable lot under the law in effect immediately before June 1, 1958, is a buildable lot for building a one-family dwelling only, even though the lot may have less than the minimum area for any residential zone. Any such lot may be developed under the zoning development standards in effect when the lot was recorded except that:

(a) a lot recorded before March 16, 1928, in the original Maryland-Washington Metropolitan District must meet the development standards in the 1928 Zoning Ordinance;

* * * * *

Sec. 59-B-5.3. One-family dwelling.
Any one-family dwelling in a residential zone or agricultural zone that was built on a lot legally recorded by deed or subdivision plat before June 1, 1958, is not a nonconforming building. The dwelling may be altered, renovated, or enlarged, or replaced by a new dwelling, under the zoning development standards in effect when the lot was recorded, except that:

(a) a lot recorded before March 16, 1928, in the original Maryland-Washington Metropolitan District, must meet the development standards in the 1928 Zoning Ordinance;

* * * * *

Section III(C)(1) of the 1928 Zoning Ordinance provides, under the heading "Lot area per family," that "Each dwelling hereafter erected or altered in this zone shall occupy a lot with a minimum area of five thousand (5,000) square feet…."

August 11, 2010. See Exhibit 11-A4, page 1. He stated he was viewing this as a new home.

Mr. Daniels testified that the Mr. Waksmunski, the Intervenor and owner of the subject Property, provided him with a certified copy of a Park and Planning document which indicates that there was previously a home on the subject Property. See Exhibit 11-A3 (copy of record plat No. 228 and subdivision map showing the outline of a house on Lot 38 (the subject Property)). He testified that the house outline was drawn in by hand, and that it contained setbacks and a date of June 18, 1947. Mr. Daniels did not know when this annotation was made or who made it. He testified that he had concluded based on conversations with Mr. Waksmunski and Mr. Spicer that the annotation was supposed to represent a house. On the basis of this document, Mr. Daniels testified that he approved the proposed construction as a replacement dwelling.

With respect to the established building line ("EBL"), Mr. Daniels testified that the subject Property is a corner lot, with frontage on both 83rd Place and 83rd Street. He testified that pursuant to his letter of August 11, 2010, he received documentation from the surveying company Site Solutions, Inc., showing the setbacks along 83rd Place and 83rd Street. See Exhibit 15. He testified that he reviewed this document in connection with his review of the building permit application, and was satisfied that the proposed house satisfied the EBL on both streets (28.1 feet along 83rd Place and 36.0 feet along 83rd Street).

Mr. Daniels testified that the permit application included a detached shed (accessory building), and that he was concerned about the setback of the shed from the rear line, testifying that the shed had to be 10 feet from the rear line and no more than 15 feet in height. He testified that he received revised shed plans from the Intervenor indicating that the height of the shed would be 15 feet or less. He testified that he understood the height limit to mean that the peak or ridge of the roof had to be no more than 15 feet from grade. He testified that the full-size version of the revised shed plans were scaleable, and complied with this limit. See Exhibit 11-A5, page 6. Mr. Daniels further testified that the revised site plan shows that the shed meets the 10 foot setback from the rear lot line. See Exhibit 11-A2.

Mr. Daniels testified that he was also concerned about whether the shed exceeded the rear yard lot coverage limit of 20%. He stated that he had noted this is an October 20, 2011, letter to Mr. Waksmunski.[2] See Exhibit 11-A4, page 2. He testified he received a document from Site Solutions addressing this issue, and was satisfied that the 20% lot coverage restriction was met. See Exhibit 15.

Mr. Daniels testified that he had requested additional information necessary to confirm that the top level of this house was a half-story, and that he received revised drawings confirming that the area of the half story with headroom of 5 feet or more did not

[2] Mr. Daniels later explained that he had laid out all of the issues he initially spotted with this application in the August 11, 2010, letter, and that the October 20, 2011 letter laid out two remaining issues, all others having been resolved at that point.

exceed 60% of the area of the second floor, and so he was satisfied that this was a half-story. See Exhibit 11-A5, page 3.

Finally, Mr. Daniels testified that he had determined that the lowest level of the proposed home was a cellar and not a basement because 56.8% of the foundation was below grade. See Exhibit 17. He testified in detail as to the methodology and numbers he employed to reach this conclusion. He noted that this is standard methodology, and is done for every house in this zone which has a lower level, explaining that while "basements" count as stories, "cellars" do not. On cross examination, Mr. Daniels testified that he obtained his elevations from the site plan, which was signed by an engineer. See Exhibit 11-A2.

On cross examination, Mr. Daniels testified that he initially thought that a minimum lot size of 5,000 square feet was required because he had no evidence that this was a replacement house, and that as he understood the DPS policy at the time, if this were a new house, the 5,000 square foot minimum would apply. He later clarified this statement, saying that at the time of his review, he read Section 59-B-5.3 of the Zoning Ordinance as allowing replacement houses. At the request of Mr. Bolt, Mr. Daniels read a portion of DPS Code Interpretation Policy ZP0404-1, regarding Sections 59-B-5.1 and 59-B-5.3 of the Zoning Ordinance, into the record, as follows: "Therefore, standards including minimum lot area and setbacks must comply with the provisions of the 1928 Code." See Exhibit 18. When asked if this Code Interpretation Policy was still in force, Mr. Daniels replied that it was. He testified that he changed his initial position that the 5,000 minimum square foot lot area applied when he received evidence that the requested building permit was for a replacement house, stating that the DPS policy had been that if there wasn't a previously existing house, you could not approve the permit. He testified that based on this permit approval and previous permit approvals, the sentence he had read from the Code Interpretation Policy did not apply to replacement houses. He stated that this revised interpretation had not been put in writing but rather was based on guidance from DPS counsel (Mr. Spicer).

Mr. Daniels testified on cross-examination that he had not looked to see whether a building permit had ever been issued for the subject Property, noting that the DPS records do not go back that far, and that the earliest he had seen them go back was the 1950's. He testified that he had no evidence of a prior permit for this Property, but later explained that just because DPS has no record of a permit does not mean there was no permit. When he was asked whether the documentation submitted by Site Solutions regarding the EBL calculation was a survey, he responded that it was done by a survey company, that it shows the setbacks of the surrounding houses from the streets, and that it was sufficient. When asked how he knew the document was accurate without a surveyor's stamp, Mr. Daniels testified that if a registered professional gives DPS a submission on their professional letterhead, DPS accepts it.

Mr. Daniels testified in response to questioning by Counsel for the Intervenor that the "development standard" language in Section 59-B-5.3 is the same as the language in Section 59-B-5.1. He explained that pursuant to Section 59-B-5.3, a dwelling that is not a

non-conforming building can be replaced, and that the applicable development standards are the setbacks standards, not the lot area standards. He testified that Section 59-B-5.1 was even more explicit than Section 59-B-5.3, and limited construction to single family dwellings. He testified that undersized lots meeting the requirements in Section 59-B-5.1 can be developed per the development standards, noting that the language was the same as the language in Section 59-B-5.3. Mr. Daniels testified that DPS' policy with respect to allowing construction on lots recorded before 1928 that have less than 5,000 square feet has been inconsistent. He then testified that DPS has allowed new construction on lots with less than 5,000 square feet, including lots in this subdivision. He testified that he now views the subject Property as a buildable lot for a single family dwelling based on Section 59-B-5.1. He summarized his understanding of DPS' position by stating that in 2011, the policy was that if there was never a house on a property, you could not issue a permit for a substandard lot. There has been a change to this policy, and now it is DPS' position that Section 59-B-5.1 would allow new construction on a lot even if it were substandard. This revised position was based on advice of counsel. DPS no longer issues written Code Interpretations without going through the County Council.

5. Mr. Jeffrey Lewis, a professional engineer with Site Solutions, Inc., testified on behalf of the Intervenor as an expert in civil engineering. Mr. Lewis testified that he is the Director of Engineering and was assigned to this project. He testified that the project had been started by another firm, Fowler Associates, which had done boundary and topographic surveys. He testified that Site Solutions took the project over about two years ago, and that they had their surveyors verify the boundary and topographic information put together by Fowler.[3] Mr. Lewis testified that Site Solutions prepared their drawings based on field surveys. He stated that if a survey is not required to be a boundary survey they don't put a stamp on it. Mr. Lewis testified that the EBL was based on a field survey, in which his surveyors had determined the front corners of the houses on adjacent lots. He stated that to do a full boundary survey, you have to survey the entire block. He testified that based on the record plat and the boundary survey done by Fowler Associates, Site Solutions computed their measurements. He reiterated that they had verified Fowler's measurements, which they were required to do professionally.

Mr. Lewis explained how the lot coverage calculations in Exhibit 15 were done. He testified that using CAD, the total area of the rear yard was found to be 553 square feet and the accessory building was found to be 110.6 square feet, for a rear lot coverage of 20%, which meets the Zoning Ordinance. See Exhibit 15. He further testified that the shed met the 30 foot setback requirement from the side street.

Mr. Lewis testified that he had done a basement versus cellar calculation for this Property in January 2012 as a result of concerns raised by the Appellants. He testified that while his numbers deviate slightly from DPS' numbers, both reach the same conclusion, namely that the lowest level of the proposed dwelling is a cellar. He noted that his calculation was more accurate because of their use of CAD.

[3] On cross examination, Mr. Lewis explained that this verification had been done by sending surveyors to the site to locate the corners for boundaries and to spot check the elevations. He testified that he did not recall the margin of error and that they had relied on the boundary survey in doing their calculations.

Finally, Mr. Lewis testified that in his opinion as a professional engineer, this Property meets all the required setbacks, EBL, and other zoning requirements.

6. Ms. Susan Scala-Demby, Zoning Manager, testified on behalf of DPS. She stated that she was familiar with Sections 59-B-5.1 and 59-B-5.3 of the Zoning Ordinance. She testified that it has been DPS' consistent position that Section 59-B-5.3 allows construction of replacement dwellings on lots that are less than 5,000 square feet in area. She explained that this interpretation is consistent with the language of the statute, where it says that "[t]he **dwelling** may be replaced … under the zoning development standards in effect when the lot was recorded" (emphasis added). She then testified that the term "development standards" as used in this section referred to the setbacks, building height, lot coverage, and other standards related to the design and construction of the building itself and therefore controlled by the builder, not to the minimum lot size.

Ms. Scala-Demby testified that in the past, DPS has not had a consistent position with respect to its interpretation of Section 59-B-5.1 of the Zoning Ordinance, sometimes granting building permits for construction on undersized lots, and other times denying those permits. She noted that the house next door to the subject Property on Lot 39 at 6420 83rd Street (owned by Appellant Curran) is an example of an instance in which DPS granted a permit for construction on an undersized lot. See Exhibit 20 (2/21/07 building permit).[4] Ms. Scala-Demby testified that DPS' current position is that a building permit could be issued under Section 59-B-5.1 for an undersized/substandard lot recorded before June 1, 1958. With respect to why the subject Property would be buildable under this Section, Ms. Scala-Demby agreed with Counsel that the subject Property was recorded in 1922 by subdivision plat. She then testified, tracking the language of Section 59-B-5.1, that the subject Property "was a buildable lot under the law in effect immediately before June 1, 1958," explaining that the law in effect immediately before 1958 was the 1954 Zoning Ordinance. Ms. Scala-Demby then stated that numerous things could have been built on the subject Property under the 1954 Zoning Ordinance, including an accessory building, a church or convent, a library, a museum or a farm building. See Exhibit 22. She testified that while there was a 9,000 square foot minimum lot size for single family dwellings under the 1954 Zoning Ordinance, there was no minimum lot size for the afore-mentioned uses. She concluded that the subject Property was buildable under the 1954 Zoning Ordinance, but not for a single family dwelling. She agreed in response to Board questioning that under Section 59-B-5.1, the lot is now a buildable lot for a one-family dwelling only.

When asked how she reconciles DPS Code Interpretation Policy ZP0404-1, which states, in interpreting Sections 59-B-5.1 and 59-B-5.3 of the Zoning Ordinance, that "standards including minimum lot area and setbacks must comply with the provisions of the 1928 Code," with DPS' current interpretations of those provisions, Ms. Scala-Demby testified that there is a mistake in the Code Interpretation Policy, and that DPS has not been

[4] Note that the street number (6416) on this building permit is incorrect. Park and Planning's address verification document confirms that the correct street number is 6420. See Exhibit 21.

applying the sentence referenced above. She stated that DPS will be withdrawing this Code Interpretation Policy, but has not done so yet.

In response to an observation by the Board that the subject Property could be developed under the 1928 Zoning Ordinance and in response to questions from the Board asking whether the term "development standards" was defined in the current Zoning Ordinance or in the 1928 Zoning Ordinance, Ms. Scala-Demby testified that the term was not defined. She testified that "development standards" do not include minimum lot size because lot size is excluded by the introduction to Section 59-B-5.1, which speaks of lots being buildable "even though the lot may have less than the minimum area for any residential zone." She agreed in response to further Board questioning that the Section III(C) of the 1928 Zoning Ordinance, entitled "Area Requirements," includes a minimum area of five thousand (5,000) square feet and a minimum width of fifty (50) feet at the front building line. She acknowledged that the subject Property does not conform to these requirements. On cross-examination, Ms. Scala-Demby testified that the title of Section 59-C-1.32 of the Zoning Ordinance is "Development Standards," and that it includes minimum lot area.

Ms. Scala-Demby testified in response to questioning by counsel for the Intervenor that when Section 59-B-5.1 says a lot "is a buildable lot for building a one-family dwelling only, even though the lot may have less than the minimum area for any residential zone,' it does not specify that this is a reference to the minimum area requirements of the current Zoning Ordinance. She testified that Section 59-B-5.1 restricts the use of certain R-90 lots to single family dwellings only, even though there are other uses to which lots in the R-90 zone could otherwise be put to. She concluded that Section 59-B-5.1 allows for the development of lots with less than the minimum area, and that it would not make sense to read minimum area into the term "development standards" in this case.

Ms. Scala-Demby further testified in response to questioning by counsel for the Intervenor that under the reading of Section 59-B-5.3 advanced by the Appellants, pursuant to which a replacement dwelling could not be constructed on the subject Property because the Property has less than the 5,000 square foot minimum lot under the 1928 Zoning Ordinance, that even if the original house on the Property was existing a month ago and had burnt down, it could not be replaced. She testified that such a reading frustrates the purpose of the Section. She agreed with counsel that Appellants Curran and Zettler both have houses built on lots with less than 5,000 square feet, and testified that if their homes were more than 50% destroyed by fire, they could not rebuild their homes under their interpretation of Section 59-B-5.3.

7. Mr. Richard Weaver, Acting Supervisor for Area III, Montgomery County Planning Department, testified at the request of the Appellants. Mr. Weaver testified that he was present when Exhibit 11-A3, the copy of record plat No. 228 and the subdivision map showing the outline of a house on the subject Property, was discussed. He testified that it is a copy of two separate documents. He testified that the Exhibit contains a stamp across the staples and his signature, attesting to its veracity.

Mr. Weaver testified that he did not know who made the handwritten notations on Exhibit 11-A3. He testified that at some point in time, Park and Planning was in charge of issuing building permits, and that in his professional judgment, the notations on Exhibit 11-A3 were likely a tracking mechanism for building permits. He testified that they were likely drawn on the map by a staff member in the 1940s in connection with the issuance of a building permit.[5] He testified that he did not know if a house was actually built on the subject Property.

Mr. Weaver testified that the record plat book is available on demand. He testified that he was asked at the front counter for a copy of this record plat, and that Exhibit 11-A3 is a copy of the official record plat in the official plat books kept at Park and Planning. He stated that the notations were not part of the original plat, and that he has seen notations on the plats from as early as the 1930s and as late as the 1970s. He testified that it was fairly common to see a plat with hand-drawn squares and crossed-out street names, and that while he lacks personal knowledge of the notations, based on his institutional knowledge he believes these annotations were a method to track building permits. Mr. Weaver testified that the smaller, 8.5x11 inch document that is stapled to the larger copy of the record plat was a copy that he had made of from the linen plat book. He testified that he copied the page for Mr. Waksmunski, and that he stapled it to the larger plat and signed it, to show that it was a true copy. He testified that he made no representations to Mr. Waksmunski except that what he had given him was a true copy of the record plat.

On cross-examination, Mr. Weaver testified that Park and Planning would not initiate a review of the subject Property for fire service because it was in an existing subdivision which had presumably been checked for the adequacy of fire and other services when it was recorded.

8. Mr. Andrew Zettler testified that he lives at 6427 83rd Place, which adjoins the subject Property. He showed an aerial photograph of his neighborhood, and noted that his house had the brown roof. He said his house shares a lot line with an empty patch of green with cars on it.

Mr. Zettler testified that he moved into his house in the spring of 2000. He testified that at that time, there was not a house on the subject Property, but rather that there were substantial trees. Based on the diameters of those trees, Mr. Zettler concluded that they had been there for a long time. He testified that the County had taken some of them down because they were diseased.

Mr. Zettler showed a photograph of the cars parked on the subject Property, and testified that the photo accurately depicts current conditions. See Exhibit 1(e). He testified that he is concerned about the cars that park on that lot, which he testified the neighbors generally leave open for parking by tenants of the senior Waksmunskis, and that he wonders where those cars will go if a house is built on the subject Property. Mr. Zettler estimated that between six and seven cars park on the subject Property at night, and between three and four during the day.

[5] The Board noted that like Lot 38, Lots 57 and 60 also have squares drawn on them.

Mr. Zettler testified that he is also concerned about fire trucks, and the impact that more cars might have on the ability of those trucks to navigate the neighborhood's narrow streets. He testified that the "Santa" fire truck had stalled in front of his house because of parked cars. He concluded that the subject Property is a traffic bottleneck. Mr. Zettler testified that he had called the Volunteer Fire Chief and asked him to write a letter regarding the impact of the proposed house on the neighborhood. Mr. Zettler related that the Fire Chief said parking was a huge problem. He said that there is no place for the current cars to go, and that he doesn't want to add more: "…our position is quite simply that this specific area cannot handle the vehicles currently parking on the public streets and any additional vehicles would prove to be a recipe for disaster, should a fire incident occur." See Exhibit 1(e), pages 26-27.

Finally, Mr. Zettler testified that if a house is built on the subject Property, he will lose his light. He testified that a house would block his sunlight and create poor aesthetics.

On cross-examination, Mr. Zettler acknowledged that two of the three rental houses in the neighborhood that are owned by the senior Waksmunskis have driveways and garages, but testified that one tenant parks his truck on the subject Property, and one has adult girls at home, with additional cars that they park on the subject Property. When asked if people other than the Waksmunskis' tenants use the subject Property for parking, Mr. Zettler responded that other neighbors do not usually use the Property for parking except perhaps when they host parties.

On cross-examination, Mr. Zettler testified that per SDAT, his property is 3,710 square feet. When asked if he understood that according to the argument being put forth by his lawyer, he could not rebuild his house in the event of a fire, Mr. Zettler testified that he believed he could rebuild because there would have been a preexisting structure on the property. When told that would not be the case, Mr. Zettler stated that while there might be some risk there, he would have to rely on the leniency of the Board of Appeals to let him rebuild.

9. Mr. David McGuinness testified that he lives at 6422 83rd Place, and has for 11 years. He testified that he does not recall a house ever having been located on the subject Property. He testified that the Property was wooded, but had been cleared in the past three or four years. He testified about a photograph of a tree stump on the subject Property that he said was about 48 inches in diameter, indicating that it was an old tree. See Exhibit 1(e). He testified that given the location of this stump, when the tree was there, a house could not have been located on the subject Property because the tree would have been in the center.

Mr. McGuinness testified that he is concerned about putting a house on the subject Property because that lot is the entry point to the neighborhood, and creates the first impression. He testified the subject Property is the last preserve of green space, and that another rental property will diminish the character of the neighborhood. Mr. McGuinness testified that tenants of other rental properties currently used the subject Property for

parking, in addition to parking on their front yards. He believes that if those cars can no longer park on the subject Property, they will either park on the streets, creating a difficult situation for delivery vehicles, trash haulers, and emergency vehicles, or they will park on their front yards. He testified that cars parking on their front lawns is problematic. He testified that the neighborhood has been changing recently. He testified that the neighborhood is now attractive, and that smaller homes are becoming larger homes. Finally, Mr. McGuinness testified that he became involved with this issue after 12 families in his neighborhood were already involved. He testified that the neighborhood always believed this was an unbuildable lot.

On cross-examination, Mr. McGuinness testified that he lived in the neighborhood when Ms. Curran's house was built. He testified that there had previously been a long-standing residence that straddled two lots, including the Curran property, and that there are now two single family houses on those two lots.

10. Mr. Matthew Waksmunski, the Intervenor, testified that his father had purchased four lots in this neighborhood, two in 1965 and two in 1970. He testified that in 2003, his father passed the subject Property to him.

Mr. Waksmunski testified that he knew the Property was recorded in the 1920's, but that he went to Park and Planning to verify this. He testified that he worked with Mr. Weaver to get a copy from the large plat book, and that at that time, he noticed the outline of a house. He testified that Mr. Weaver attached a copy of this to the plat of the entire subdivision, and signed and stamped it. Mr. Waksmunski testified that he then brought the document to DPS. He testified that he always believed he could build on the subject Property, and now he wants to. He testified that his father had constructed Mr. Zettler's house in 1969. Mr. Waksmunski testified that 19 new houses have been constructed in this community since 1988, that more than half of the lots in the neighborhood are less than 5,000 square feet, and that a small percentage of the lots are less than 4,000 square feet. He testified that he obtained this information from public records.

Mr. Waksmunski testified that all but one of his father's tenants have driveways and garages. He testified that other people in the neighborhood park on the subject Property, and that some people simply park there to walk to the canal, as evidenced by their out-of-state license plates. Mr. Waksmunski testified that he allows his father's tenants to park on his Property as a courtesy to his father, but that there is nothing in their leases about their being allowed to do so.

Mr. Waksmunski testified that there is an unbuilt (paper) street shown on the plat for the neighborhood. He testified that this is a 20 foot right-of-way that runs between lots 62 and 64. He stated that this right-of-way is owned by the County. He testified that he had asked the County to build this street because it would eliminate access issues, but that the County has not done so.

CLOSING STATEMENTS

While they did address each of the alleged violations, counsel focused their closing statements on the proper interpretation of Sections 59-B-5.1 and 59-B-5.3 of the Zoning Ordinance, and why, under those Sections, Mr. Waksmunski should or should not be allowed to construct a house on the subject Property. A brief recitation of each party's argument concerning those Sections follows.

1. Mr. Spicer argued that there is no issue that this was a replacement house, stating that the only evidence provided was a copy of the plat book taken from Park and Planning records and certified by Mr. Weaver which showed the outline of the foundation of a house on the subject Property. Mr. Spicer argued that the language of Section 59-B-5.3 clearly permits the replacement of a dwelling ("The dwelling may be … replaced by a new dwelling."). He then argued that the reference to "development standards" in the introductory paragraph and in subsection (a) relates to the building and not to the lot size. He acknowledged that Section 59-B-5.3(a) is poorly worded, stating that if a lot recorded before March 16, 1928 were 4,000 square feet, it could never meet the "development standards" of the 1928 Zoning Ordinance if those standards were interpreted to include the 5,000 square foot minimum lot size. He concluded based on this example that it was clear that the intent of this Section was that the building on the lot had to meet the relevant development standards, not that the lot itself had to meet any standards. He argued that the 1928 Zoning Ordinance was used as a point of reference for those standards. He argued that Section 59-B-5.3(a) does not make sense if "development standards" is interpreted to include lot area. Mr. Spicer said that there are thousands of lots that would not meet this minimum area requirement, and questioned whether the County Council, in enacting Section 59-B-5.3, would have intended that the owners of those lots could not get permits. He urged the Board to apply common sense in their interpretation, and to conclude that the Council did not intend, in enacting Section 59-B-5.3, to render those lots recorded before March 16, 1928 that have less than 5,000 square feet, and the houses on those lots, unbuildable.

When asked if he was disclaiming DPS' 2004 Code Interpretation Policy ZP0404-1, Mr. Spicer replied that he was, explaining that the Code Interpretation Policy should not have included minimum lot area. He joked that while he can sign off on anything, he does not have the authority to change the law. He noted that DPS did not follow this Code Interpretation Policy, stating that DPS has issued a lot of permits that are contrary to the Policy. He said that DPS wants to follow the law, and he urged the Board to interpret Section 59-B-5.3 in a reasonable manner.

Mr. Spicer's argument regarding the proper interpretation of subsection (a) in the context of Section 59-B-5.3 is applicable to subsection (a) of Section 59-B-5.1 as well. Mr. Spicer argued with respect to Section 59-B-5.1 that that Section is even more clear than Section 59-B-5.3 in that Section 59-B-5.1 specifically refers to a lot being a "buildable lot for **building** a one-family dwelling only, even though the lot may have less than the minimum area for any residential zone" (emphasis added). Mr. Spicer argued that this language clearly invokes the development standards applicable to the actual construction, not the underlying lot. He noted in response to an assertion that lot area is

included under Section 59-C-1.32 of the Zoning Ordinance, entitled "Development standards," that Section headings are not part of the law.

2. Mr. Bolt argued that ZTA 07-02 (Ordinance 16-04, enacted in 2007) clarified that the references to the 1928 Zoning Ordinance in Section 59-B-5.3 referred to the Zoning Ordinance as enacted in 1928, not to the 1928 Zoning Ordinance as re-enacted with amendments in 1930. See Exhibit 12B. He said this is important because in the earlier Waksmunski case (A-4851, decided in 1998), the Board had opined that the 5,000 square foot minimum lot size would apply if the 1928 Zoning Ordinance applied, but not if the 1930 amendments to that Ordinance were applied. See Exhibit 12F. Mr. Bolt stated that the County Council had spoken on this matter, and that the Board now knew with certainty that it was to apply the 1928 iteration, which it had previously determined required a lot size of at least 5,000 square feet. Mr. Bolt disagreed with Intervenor's counsel, who said that the legislative history of Ordinance 16-04 was dicta. He concluded that the question raised by the Board's 1998 Waksmunski decision had been answered by the Council, and thus that "development standards" under the 1928 Zoning Ordinance included minimum lot size. Mr. Bolt argued that Mr. Daniels had explained this best when he testified that when he first denied this building permit, he had said that the 5,000 square foot minimum was applicable, but then DPS had changed that policy. Mr. Bolt said that policy changes should not occur at the permitting stage, based on this one case.

Mr. Bolt argued that Section 59-B-5.1 does not apply because the subject Property does not meet the 9,000 square foot minimum lot size required for a single family home in the R-90 zone under the 1954 Zoning Ordinance. He then asserted that regardless of whether Section 59-B-5.1 or Section 59-B-5.3 applies, there is a 5,000 square foot minimum lot size required under subsection (a) of both of those Sections, since both require compliance with the development standards in the 1928 Zoning Ordinance. He questioned, when considering replacement dwellings under Section 59-B-5.3, how far back you had to look to find the dwelling that was being replaced.

Mr. Bolt stated that the variance provisions of the Zoning Ordinance provide an avenue of relief for property owners who otherwise cannot develop their properties due to their small size. He said that the decision of whether a substandard lot can be developed should be made in the variance context. Mr. Bolt argued that just because building permits have been issued for substandard lots in the past does not mean they should be issued now, adding that the Council intended that the laws it enacts be enforced.

Mr. Bolt questioned whether, given the discrepancy in the west lot line measurement between the subdivision plat and the boundary survey, and in light of the fact that the proposed construction is at the setback lines and lot coverage limits, the Board can be certain that the County has met its burden of showing that the proposed construction meets all of the development standards. He stated that these types of issues are resolved by a building survey. He testified that the site plan is not certified and that it does not contain a margin of error.

Mr. Bolt closed by stating that the Board is being asked to interpret the Zoning Ordinance, and that in doing so, the Board needs to follow the stated purpose of the Ordinance, set forth in Section 59-A-1.1, which is to protect and promote "the health, safety, morals, comfort and welfare of the present and future inhabitants of the district…."

3. Ms. Lee-Cho agreed that the 1928 Zoning Ordinance was determined to apply by ZTA 07-02, but questioned whether that Ordinance was being applied to Sections 59-B-5.1 and 59-B-5.3 in a manner that makes sense. She stated that ZTA 07-02 only included Section 59-B-5.3. She said that it was assumed that the staff recommendation to the Planning Board applied to both Sections, but Section 59-B-5.1 was not even discussed. See Exhibit 12C. Ms. Lee-Cho argued that this ZTA was about the Duffy case, not about the 1998 Waksmunski case. She acknowledged that the Waksmunski case was mentioned, but stressed that that was only in the context of a recitation of history. She argued that too much is being made of the Planning Board staff memo, and that this Board must look at the plain language of the Zoning Ordinance, and consult the legislative history only as a matter of last resort. She said that the Zoning Ordinance should be applied in an objective manner based on its text.

Ms. Lee-Cho argued that she has always interpreted Section 59-B-5.1 of the Zoning Ordinance as allowing construction on substandard lots. She argued that to understand her interpretation, one must read the introduction to that Section as a whole, stopping before the words "except that" in the last sentence. She said that such a reading evidences the true meaning of the words "except that" by demonstrating that without the addition of subsection (a), lots recorded before March 16, 1928, would not be buildable at all under Section 59-B-5.1. She explained that the "exception" set forth as subsection (a) was clearly an attempt to clarify that lots recorded before March 16, 1928, were buildable, and that just as lots recorded between March 16, 1928, and June 1, 1958, look to the development standards—with the exception of lot size—of the Zoning Ordinance in effect when they were recorded, so those lots recorded before March 16, 1928, should look to the development standards—except minimum lot size—of the first Zoning Ordinance, which was enacted in 1928. She argued that both the introduction to Section 59-B-5.1 and subsection (a) of that Section use the term "development standards," and questioned why the Board would interpret this term to include minimum lot size in one instance but not in the other. She asserted that her interpretation of "development standards" complies with the intent of Section 59-B-5.1 in its totality and that it is clear from the context in which it is used that "development standards" as used in Section 59-B-5.1 cannot reasonably be interpreted to include minimum lot area.

With respect to Section 59-B-5.3, Ms. Lee-Cho explained that the introduction to that Section says that a one-family dwelling built on a lot that was legally recorded before June 1, 1958, is not nonconforming. She explained that this is saying that existing buildings are exempt from the lot area requirements. She argued that it would contradict the language of this Section to read minimum lot area as included under "development standards." She said that Sections 59-B-5.1 and 59-B-5.3 must be read together, and that with the exception of minimum lot size, the development standards of the 1928 Zoning Ordinance apply under either Section to lots recorded before March 16, 1928. She argued

that under her interpretation, it doesn't matter whether the subject Property was being developed as a replacement dwelling (i.e. under Section 59-B-5.3), or as a new single family home (under Section 59-B-5.1), the construction should be allowed.

Finally, Ms. Lee-Cho asserted that under the Appellants' theory, the County would be guilty of a taking of this Property unless a variance were granted. She argued that the interpretation of development standards as including minimum lot size that is being advanced by the Appellants under Sections 59-B-5.1 and 59-B-5.3 will impact every undersized property in the County that was recorded before March 16, 1928.

Ms. Lee-Cho explained that the policy change by DPS in interpreting Sections 59-B-5.1 and 59-B-5.3 of the Zoning Ordinance did not come about in connection with this case, but rather that DPS has acknowledged that their Code Interpretation Policy was wrong and has ignored it for a while. She stated that to say that if DPS denies a building permit, the property owner can come to the Board to get a variance understates the difficulty of getting variances. She then reiterated her position that if this building permit is denied, the Board has denied her client reasonable use of his Property, and has effected a regulatory taking. She urged the Board to look at the bigger picture.

CONCLUSIONS OF LAW

1. At the time this appeal was filed, Section 8-23 of the Montgomery County Code authorized any person aggrieved by the issuance, denial, renewal, or revocation of a permit or any other decision or order of DPS to appeal to the County Board of Appeals within 30 days after the permit is issued, denied, renewed, or revoked, or the order or decision is issued. Section 59-A-4.3(e) of the Zoning Ordinance provides that any appeal to the Board from an action taken by a department of the County government is to be considered *de novo*. The burden in this case is therefore upon the County to show that the building permit was properly issued.

2. Section 2A-2(d) of the Montgomery County Code provides that the provisions in Chapter 2A govern appeals and petitions charging error in the grant or denial of any permit or license or from any order of any department or agency of the County government exclusive of variances and special exceptions, appealable to the County Board of Appeals, as set forth in Section 2-112, Article V, Chapter 2, as amended, or the Montgomery County Zoning Ordinance or any other law, ordinance or regulation providing for an appeal to said board from an adverse governmental action.

3. Chapter 59 of the County Code contains the Zoning Ordinance. The following Sections in Article 59-B of the Zoning Ordinance were central to the Board's decision in this case:

Sec. 59-B-5.1. Buildable lot under previous ordinance.

Any lot that was recorded by subdivision plat prior to June 1, 1958, or any lot recorded by deed prior to June 1, 1958 that does not include parts of previously platted properties, and that was a buildable lot under the law in effect immediately before June 1, 1958, is a buildable lot for building a one-family dwelling only, even though the lot may have less than the minimum area for any residential zone. Any such lot may be developed under the zoning development standards in effect when the lot was recorded except that:

(a) a lot recorded before March 16, 1928, in the original Maryland-Washington Metropolitan District must meet the development standards in the 1928 Zoning Ordinance;

(b) any new one-family dwelling on a lot legally recorded by deed or subdivision plat before June 1, 1958, in the Upper Montgomery County Planning District must comply with the standards set forth in Section 59-B-5.3(b);

(c) the maximum building height and maximum building coverage for any building or structure must comply with the current standard of the zone in which the lot is now classified. In addition to compliance with the maximum building height and the maximum building coverage standards, any building or structure constructed pursuant to a building permit issued after August 24, 1998 that conforms to the lot area and width standards of the zone in which the lot is classified must comply with the current yard requirements of the zone in which the lot is classified; and

(d) an established building line setback must conform to the standards for determining the established building line in effect for the lot when construction occurs. Any building permit issued before November 23, 1997 must conform to the development standards in effect when the lot was recorded.

Sec. 59-B-5.3. One-family dwelling.

Any one-family dwelling in a residential zone or agricultural zone that was built on a lot legally recorded by deed or subdivision plat before June 1, 1958, is not a nonconforming building. The dwelling may be altered, renovated, or enlarged, or replaced by a new dwelling, under the zoning development standards in effect when the lot was recorded, except that:

(a) a lot recorded before March 16, 1928, in the original Maryland-Washington Metropolitan District, must meet the development standards in the 1928 Zoning Ordinance;

(b) one-family dwellings and accessory structures on a lot legally recorded by deed or subdivision plat before June 1, 1958, in the Upper Montgomery County Planning District must comply with the setback, yard, and area coverage standards applicable to the lot in the 1956 Zoning Ordinances for the Upper Montgomery Planning District;

(c) the maximum building height and maximum building coverage in effect when the building is altered, renovated, enlarged, or replaced by a new dwelling applies to the building; and

(d) an established building line setback must conform to the standards for determining the established building line in effect for the lot when

any alteration, renovation, enlargement, or replacement by a new dwelling occurs. Any building permit issued before November 23, 1997 must conform to the development standards in effect when the lot was recorded.

4. Both Sections 59-B-5.1 and 59-B-5.3 reference the development standards in the 1928 Zoning Ordinance for lots such as the subject Property, which were recorded before March 16, 1928. As mentioned earlier, the meaning of the term "development standards" as used in those Sections was central to this case. Section III(C) of the 1928 Zoning Ordinance reads as follows:

SECTION III - "A" RESIDENCE ZONE

* * * * *

(C) Area Regulations: In the "A" Residence Zone the minimum dimensions of yards and the minimum lot area per family, except as provided in Section VIII shall be as follows:-

1. Lot area per family: Each dwelling hereafter erected or altered in this zone shall occupy a lot with a minimum area of five thousand (5,000) square feet and a minimum width of fifty (50) feet at the front building line. No lot area shall be so reduced or diminished that the yards or open spaces shall be smaller than prescribed by this ordinance.

2. Building Line: There shall be a setback line of not less than twenty-five (25) feet, provided that, when the majority of buildings built on one side of a street between two intersecting streets at the time of the passage of this ordinance have been built with a minimum setback of more or less than twenty-five (25) feet from the street property line, no building hereafter erected or altered shall project beyond the minimum setback line so established; provided that no building shall be required by this Ordinance to set back more than forty (40) feet in any case, and provided further that this regulation shall not be interpreted as to reduce the buildable width of a corner lot, facing an intersecting street and which is separate and distinct from adjacent lots and is included in a plat of record at the time of passage of this ordinance, to less than twenty four (24) feet.

3. Side Yard: There shall be a side yard of not less than seven (7) feet in width on each side of a dwelling, except as provided in Section VIII.

4. Rear Yard: There shall be a rear yard, having a minimum depth of twenty (20) feet except as provided in Section VIII, 4.

5. Accessory Building: An Accessory building not exceeding fifteen (15) feet in height may occupy not more than thirty-five (35) per cent of the rear yard, except as provided in Section VIII, 2.

The exceptions set forth in Section VIII of the 1928 Zoning Ordinance (referenced in Section III, above) are reproduced below:

SECTION VIII - HEIGHT AND AREA EXCEPTIONS AND GENERAL REGULATIONS

Height and area requirements shall be subject to the following exceptions and regulations:

1. In any residential zone wherein are permitted public and semi-public buildings, hospitals, sanitariums or schools, such buildings may be erected to a height not exceeding seventy- two (72) feet, when set back from all lot lines not less than one foot for each foot such building exceeds the height restriction for the zone in which it is located, this increased set back to be in addition to the required side yard for such zone.

2. Chimneys, towers, tanks, penthouses or necessary mechanical appurtenances may be erected to their required height. An accessory building may be built to a height of two stories to provide quarters for servants employed on the premises.

3. In the case of a lot or parcel of land having a width of forty (40) feet or less, and which is included in a plat of record at the time of the passage of this ordinance, there shall be a side yard on each side of a dwelling of not less than five (5) feet in width.

4. Rear yard requirements are waived in respect to a building built on a lot running through from street to street.

5. Every part of a required yard or court shall be open and unobstructed from its lowest point to the sky, except that open porches, fire escapes, open stairways and chimneys may be permitted by the Building Inspector where same are so placed as not to obstruct light and ventilation.

6. Steps and uninclosed porches may encroach on the front building line not to exceed nine (9) feet and shall not exceed one story in height.

require that the new or replacement dwelling comply with current height and building coverage limitations, which, per Section 59-C-1.32 of the Zoning Ordinance, are as follows for the R-90 zone:

5. Both Section 59-B-5.1 and Section 59-B-5.3 require compliance with the current maximum building height and lot coverage provisions applicable to the R-90 zone:

Maximum percent lot coverage for all buildings: 30 percent (Section 59-C-1.328)

Maximum height: 2 ½ stories or 30 or 35 feet (Section 59-C-1.327)

These Sections also require compliance with the established building line setback. See Section 59-A-5.33 of the Zoning Ordinance for that calculation.

6. While the Appellants, in filing their appeal, raised numerous issues about the compliance of the proposed construction with various setbacks, coverage and other limitations, the County and the Intervenor provided evidence which this Board finds persuasive indicating that the challenged standards were met.

With respect to the established building line ("EBL"), Mr. Daniels testified, based on documentation from Site Solutions, that the proposed construction satisfied the EBL on both 83rd Place and 83rd Street, and the Board so finds. See Exhibit 15. This finding is

further corroborated by the expert testimony of Mr. Lewis pertaining to the preparation of Exhibit 15.

With respect to the proposed accessory structure, Mr. Daniels testified that the revised site plan shows that the structure meets the height and rear setback limits, and the Board so finds. See Exhibits 11-A2 and 11-A5, page 6. Mr. Lewis testified that the structure met the 30 foot setback required from the side street, and the Board so finds.[6]

With respect to the percentage of the rear yard covered by the proposed accessory structure, Mr. Daniels testified that based on Exhibit 15-1, prepared by Site Solutions, he was satisfied that the 20% lot coverage restriction was met, and the Board so finds. This finding is further supported by the testimony of Mr. Lewis, who explained in detail how the lot coverage calculations in Exhibit 15 were prepared.

With respect to whether the top story of the proposed dwelling constituted a half-story, Mr. Daniels testified that the drawings in the record at Exhibit 11-A5, page 3, confirm that the area of the half story with headroom of 5 feet or more does not exceed 60% of the area of the second floor, and thus that he was satisfied that this was a half-story, and the Board so finds.

With respect to whether the lowest level of the proposed dwelling is a cellar or a basement, the Board finds, based on the testimony and calculations of Mr. Daniels and Mr. Lewis, that the lowest level is indeed a cellar because more than half of the clear ceiling height is below grade. See Exhibit 17. The Board notes that although the calculations prepared by these two witnesses differed slightly due to the use of CAD by Mr. Lewis, both concluded that the lowest level was a cellar.[7]

7. There is no dispute as a factual matter that the subject Property was recorded before the 1928 date, nor is there dispute that it is less than 5,000 square feet. The real crux of this appeal came down to a single question, which can be stated thusly:

> Did DPS err in issuing Building Permit Number 534188 for the subject Property, which was recorded before March 16, 1928, because it is less than 5,000 square feet in area?

Underlying this question is the proper interpretation of Sections 59-B-5.1 and 59-B-5.3, and perhaps most importantly, a determination of the scope of the "development standards" in the 1928 Zoning Ordinance that apply to the proposed construction. While there is dispute as to whether this building permit should (or could) be issued under Section 59-B-5.3 as a replacement dwelling, or whether it had to be issued under Section

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[6] This setback can be found in Section 59-C-1.326(b)(2) of the Zoning Ordinance.

[7] Section 59-A-2.1 of the Zoning Ordinance defines "basement" and "cellar" as follows:

Basement: That portion of a building below the first floor joists of which at least half of its clear ceiling height is above the average elevation of the finished grades along the perimeter of the building.

* * * * *

Cellar: That portion of a building below the first floor joists of which at least half of its clear cellar ceiling height is below the average elevation of the finished grade along the perimeter of the building.

59-B-5.1 as a new one-family dwelling, the Board finds that the answer to that question does not matter, since both of the Sections state that the Property "must meet the development standards in the 1928 Zoning Ordinance." See Sections 59-B-5.1(a) and 59-B-5.3(a). Yet the question remains, what does that mean?

Counsel for the County and Counsel for the Intervenor presented arguments as to why they believed the reference to "development standards" in Sections 59-B-5.1(a) and 59-B-5.3(a) cannot be interpreted to include dimensional standards that pertain to the lot itself, as opposed to standards that apply to the construction being undertaken on the lot. Those arguments are laid out under the "Closing Statements" heading, above. Counsel for the Appellants presented an argument in which he asserted that ZTA 07-02 clarified the County Council's intent that the 1928 Zoning Ordinance be applied as it existed in 1928, not as it existed in 1930, and that as a result, under the Board's reasoning in the earlier Waksmunski case (A-4851), which he noted was discussed in the legislative history of that ZTA, the 5,000 square foot minimum lot size set forth in the 1928 Zoning Ordinance applies to the subject Property. That argument is also laid out under "Closing Statements."

The Board finds that ZTA 07-02 may have clarified the Council's intent that the 1928 iteration of that Zoning Ordinance applies, but it does not help the Board interpret the 1928 Zoning Ordinance. The Board finds that the plain language of both Section 59-B-5.1 and Section 59-B-5.3 of the Zoning Ordinance requires that the subject Property meet the development standards of the 1928 Zoning Ordinance, and that the plain language of the 1928 Zoning Ordinance includes a minimum lot area.

The Court of Special Appeals summarized the Court's, and thus the Board's, task in construing zoning regulations as follows in *James Cremins, et al. v. County Commissioners of Washington County, Maryland, et al.*, 164 Md. App. 426, 448, 883 A.2d 966 (2005):

> When we review the interpretation of a local zoning regulation, we do so "under the same canons of construction that apply to the interpretation of statutes." *O'Connor v. Baltimore County*, 382 Md. 102, 113, 854 A.2d 1191 (2004). "'The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature.'" *Motor Vehicle Admin. v. Jones*, 380 Md. 164, 175, 844 A.2d 388 (2004) (quoting *Holbrook v. State*, 364 Md. 354, 364, 772 A.2d 1240 (2001)). We assign words in a statute or, as here, an ordinance, their ordinary and natural meaning. *O'Connor*, 382 Md. at 113. When the plain language of the provision "is clear and unambiguous, our inquiry ordinarily ends[.]" *Christopher v. Montgomery County Dep't of Health & Human Servs.*, 381 Md. 188, 209, 849 A.2d 46 (2004) (quotation marks and citation omitted). Only when the language is ambiguous do we look beyond the provision's plain language to discern the legislative intent. *Jones*, 380 Md. at 176.

The Board finds that the introductions to both Section 59-B-5.1 and 59-B-5.3 establish a general rule for the residential development of properties recorded before June 1, 1958. In the case of Section 59-B-5.1, the introduction sets forth a rule for the

construction of one-family dwellings on certain lots recorded prior to June 1, 1958; in the case of Section 59-B-5.3, the introduction contains a rule for the construction of replacement dwellings on similar older lots that previously contained a dwelling. The Board further finds that following the statement of the general rule in each of these Sections, each Section goes on to specifically carve out exceptions where the general rule does not apply, as evidenced by the use of the unambiguous language "except that."[8] The first such exception in both of these Sections is identical, and the Board finds that it clearly and unambiguously establishes a separate way of treating those lots recorded prior to March 16, 1928—they must meet the development standards of the 1928 Zoning Ordinance:

> "(a) a lot recorded before March 16, 1928, in the original Maryland-Washington Metropolitan District must meet the development standards in the 1928 Zoning Ordinance;".

A check of the "Area Regulations" set forth in Section III(C) of the 1928 Zoning Ordinance finds nothing to suggest that the standard for "Lot area per family" (minimum lot area) should be treated or viewed any differently than the standard for the "Building line" (front setback), "Side Yard" setback, ""Rear Yard" setback, or the height and coverage limitations on "Accessory Building[s]." Indeed, each of these standards is included as a separate paragraph under the "Area Regulations" heading, which by its own words contains the "the minimum dimensions of yards and the minimum lot area per family."

The Board notes that had the County Council intended to exclude minimum lot area from the "development standards" to which it was referring, it clearly knew how to do so, as is evident from the language included by the Council in the introduction to Section 59-B-5.1 ("Any lot that was recorded … is a buildable lot for building a one-family dwelling only, even though the lot may have less than the minimum area for any residential zone…."); similar language was not included in either Section 59-B-5.1(a) or Section 59-B-5.3(a). While in the course of this hearing, DPS distanced itself from its Code Interpretation Policy ZP0404-1, the Board finds that that Policy clearly indicates that, at least in 2004 (when the Policy was issued), DPS interpreted the reference in Sections 59-B-5.1 and 59-B-5.3 to the applicable development standards under the 1928 Zoning Ordinance to include the minimum lot area. Based on its analysis and the plain language of these statutes, the Board has reached the same conclusion. Finally, the Board finds that the heading "Area Requirements" in the 1928 Zoning Ordinance introduces the same types

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[8] The Board notes in this regard that when used as a preposition, the word "except" is defined to mean "With the exclusion of; other than; but: *All the eggs broke except one.*" When used as a conjunction, as it is in Sections 59-B-5.1 and 59-B-5.3, the word "except" is defined as follows: "1. If it were not for the fact that; only. Often used with *that: He would buy the suit, except that it costs too much.* 2. Otherwise than; with any purpose or manner other than. Usually used with an adverb, a clause, or a phrase: *He would not open his mouth except to yell*. 3. *Archaic*. Unless. See *The American Heritage Dictionary of the English Language*, William Morris, Editor, 1976. The Merriam Webster website definition for the conjunctive use of "except" is similar: "1**:** on any other condition than that **:** unless <*except* you repent> 2**:** with this exception, namely <was inaccessible *except* by boat> 3**:** only—often followed by *that* <I would go *except* that it's too far>." See http://www.merriam-webster.com/dictionary/except.

of elements that are contained under the heading "Development Standards" in Section 59-C-1.32 of the current Zoning Ordinance, including Lot Area and Width, which are set forth in Section 59-C-1.322 (of the current Zoning Ordinance). The Board finds that this further buttresses the Board's conclusion that the reference in Sections 59-B-5.1(a) and 59-B-5.3(a) to the "development standards" under the 1928 Zoning Ordinance was intended to include minimum lot area. Thus the Board concludes that the 5,000 square foot minimum lot area contained in Section III(C)(1) of the 1928 Zoning Ordinance is made applicable to the subject Property by the unambiguous language in either Section 59-B-5.1(a) or Section 59-B-5.3(a).

8. Based on the foregoing, the Board finds that Building Permit No. 534188 was not properly issued because the subject Property did not meet the 5,000 square foot minimum lot area required under the development standards of the 1928 Zoning Ordinance, irrespective of whether this permit was issued pursuant to Section 59-B-5.1 or Section 59-B-5.3 of the Zoning Ordinance, and should be revoked..

The appeal in Case A-6361 is **GRANTED**.

On a motion by Member Walter S. Booth, seconded by Vice Chair David K. Perdue, with Chair Catherine G. Titus and Members Stanley B. Boyd and Carolyn J. Shawaker in agreement, the Board voted 5 to 0 to grant the appeal and adopt the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above be adopted as the Resolution required by law as its decision on the above entitled petition.

_____
Catherine G. Titus
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 22nd day of May, 2012.

_____
Katherine Freeman
Executive Director

NOTE:

Any request for rehearing or reconsideration must be filed within ten (10) days after the date the Opinion is mailed and entered in the Opinion Book (see Section 2A-10(f) of the County Code).

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County in accordance with the Maryland Rules of Procedure (see Section 2-114 of the County Code).