

**Case No. A-5749
APPEAL OF BARBARA SIEGEL**

**Case No. A-5761
APPEAL OF CAROL LYNN GREEN**

ERRATA STATEMENT

The Opinion for the above-captioned cases, dated May 28, 2003, contained an inadvertent error that needs to be corrected. This errata statement is incorporated into the Opinion and reflects the following correction and clarification:

On page 2 of the Opinion, in paragraph 1 under Findings of Fact, the second sentence should be: "The property at **7105** Exfair Road (the Exfair property) is located at Lot 5, Block 4, the Bradley Village Subdivision in Bethesda, Maryland", correcting the address of the Exfair Property.

Donald H. Spence, Jr.
Chairman, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 12th day of June, 2003.

Katherine Freeman
Executive Secretary to the Board

BOARD OF APPEALS
for
MONTGOMERY COUNTY
Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
(240) 777-6600

www.montgomerycountymd.gov/mc/council/board.html

Case No. A-5749
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OPINION OF THE BOARD

(Hearings held July 31, 2002, September 25, 2002, November 13, 2002,
January 10, 2003, and January 23, 2003)
(Effective Date of Opinion: May 28, 2003)

Case No. A-5761 is an administrative appeal in which the appellant Carol Lynn Green charges administrative error on the part of the County's Department of Permitting Services (DPS) in its April 9, 2002 issuance of a building permit to construct a single-family residence at 7104 Exeter Road, Bethesda, Maryland.

Case No. A-5749 is an administrative appeal in which the appellant Barbara Siegel charges administrative error on the part of the County's Department of Permitting Services (DPS) in its February 21, 2002 issuance of a building permit to construct a single-family residence at 7105 Exfair Road, Bethesda, Maryland.

Because the cases presented common issues of law and fact, the appeals were consolidated. The Board held public hearings on the appeals, pursuant to Section 59-A-4.3 of the Zoning Ordinance, on May 1, 2002, June 19, 2002, June 26, 2002, July 31, 2002, September 25, 2002, November 13, 2002 and January 10, 2003. Appellants Carol Lynn Green and Barbara Siegel represented themselves, and Assistant County Attorney, Malcolm Spicer, represented Montgomery County, Maryland. Josh Pollack, the property owner at 7104 Exeter Road, intervened in Case A-5761, and Crescendo Homes, LLC, the property owner at 7105 Exfair Road, intervened in Case A-5749. Intervenor Josh Pollack was represented by Susan Carter, Esq., of Miller, Miller & Canby, and Intervenor Crescendo Homes was represented by Erica Leatham, Esq., of Holland & Knight.

Decision of the Board:

Administrative appeals **denied**.

FINDINGS OF FACT

The Board finds by a preponderance of the evidence that:

1. The property at 7104 Exeter Road (the Exeter property) is located at Lot 10, Block 4 in the Bradley Village Subdivision in Bethesda, Maryland. The property at 7107 Exfair Road (the Exfair property) is located at Lot 5, Block 4, the Bradley Village Subdivision in Bethesda, Maryland.

2. Both properties are located in the R-60 zone and are subject to the height limitations contained in the Montgomery County Zoning Ordinance. Specifically, Section 59-C-1.327(a) of the Ordinance limits buildings in the R-60 zone to “2 ½ stories” and “35 feet” in height.

3. Both property owners (the Intervenors) applied to DPS for a building permit to construct a single-family residence at the respective locations. DPS issued building permit 277698 to Intervenor Josh Pollack on April 9, 2002. DPS issued building permit 262232 to Intervenor Crescendo Homes on February 21, 2002.

4. Appellant Carol Lynn Green, a neighboring property owner at 7108 Exeter Road, filed an appeal with this Board challenging DPS’s issuance of the Exeter property permit. Appellant Barbara Siegel, a neighboring property owner at 7107 Exfair Road, filed a similar appeal to the Exfair property permit. The crux of each appeal is that DPS erred in calculating the height of the buildings. Appellants claim that each residence contains more than 2 ½ stories and is over 35 feet tall.

Building Height

5. The parties do not dispute that building height is measured in accordance with §59-A-2.1 of the Zoning Ordinance as the “vertical distance measured from the level of approved street grade opposite the middle of the front of the building. . . to the mean height level between eaves and ridge of a . . . roof; **except that if a building is located on a terrace, the height above the street grade may be increased by the height of the terrace. . .**”. (emphasis supplied). Nor do the parties dispute that this section provides for what is known as a “terrace credit”: i.e. if a property is located on a terrace, the height of the terrace is not considered a part of the total building height.

6. The parties also agree that if the properties were to receive an appropriate terrace credit, the 35 foot height limitation could be met at both properties. What the parties dispute is whether a terrace existed at either property which would trigger use of the “terrace credit”.

7. DPS determined that both properties had terraces, that the Exeter property was entitled to a 3.3 foot terrace credit, and that the Exfair property was entitled to a 7 feet terrace credit. Appellants maintain that neither property had a terrace; therefore, the “terrace credit” should not have been considered when DPS calculated the building height at the properties. Appellants further maintain that without the benefit of the “terrace credit”, the height of both buildings exceeded the 35 foot limitation.

8. DPS and the Intervenors maintain that the current definition of “height” has appeared in the Zoning Ordinance since 1953. According to a DPS official, the term “height” has consistently been interpreted and applied at DPS and its predecessor agency since the 1980s.

9. The parties agree that the term “terrace” is not defined in the Zoning Ordinance. However, DPS maintains that the term is explained by DPS in a written memorandum, dated December 6, 1997, containing guidelines for the terrace credit application. (Exhibit 52 in Case A-5749, Exhibit 47 in Case A-5761). In substance, the guidelines state the following:

- a. The terrace must be a flat surface.
- b. The slope of the terrace must not exceed 1 to 12.
- c. The terrace must be a natural element compared with adjacent lots.
- d. The terrace must be no smaller than “x” feet wide.¹

DPS representatives admitted that, in these cases, the “natural element” guideline was not applied.

10. The “terrace credit” guidelines have been applied by DPS since they were issued. Although the County Council revisited the definition of “height” when it revised the Zoning Ordinance in 1997, the guidelines were not incorporated into the Ordinance. DPS has not used any formal procedure to adopt the guidelines, including issuance in accordance with the Montgomery County Administrative Procedures Act (APA).

11. Macris, Hendricks & Glascock, James Glascock’s firm, handled the civil engineering work for the construction at both properties, and Mr. Glascock was qualified by the Board as an expert in civil engineering. Regarding the Exeter property, Mr. Glascock testified that a terrace existed and met the DPS criteria; namely: the surface was relatively flat, the slope was less than 1 to 12, the terrace was a natural element in comparison to the two adjacent properties in

¹This portion of the guidelines has been interpreted to mean that the size of the terrace should be measured as the width from one side of the property line to the other, and should be a minimum of 6 feet. The Board did not adopt the 6 foot minimum.

that there was a consistent change in elevation going to the rear lot line in each of the adjacent properties, and the terrace width was larger than 6 feet. Regarding the Exfair property, Mr. Glascock testified that a terrace also existed and met the DPS criteria; namely: the terrace surface behind an existing tree was relatively flat, it had a relatively flat slope, it was a natural element in comparison with adjacent lots in that lots to both the east and west presented significant changes in elevations, and, the terrace area was approximately 10 feet wide.

12. Mr. Glascock calculated the building height at both locations. Using a 3 foot terrace credit at the Exeter property, he calculated that the building height was 33.78 feet.² Using a terrace credit of 5.69 feet at the Exfair property, Mr. Glascock calculated that the building height was 33 feet.

13. Professor Barry Yatt testified as an expert in architecture for the appellants. He disagreed with 3 of the 4 DPS criteria for defining a terrace, specifically those listed in paragraph 9 a, b, and d above. Professor Yatt's written submission to the Board defined a terrace as "a continuous landscape feature spread across several adjacent properties." The Board finds this definition to be substantially similar to the DPS criteria requiring a terrace to be a natural element in comparison with adjacent lots (See paragraph 9c above). Regarding the Exeter property, Professor Yatt initially stated that there was probably a terrace at the property. However, he later changed his testimony, stating that the landscape feature which DPS and the Intervenors called a terrace was not high enough to be a terrace and represented only a minor 3 foot change in elevation from the rest of the property. Regarding the Exfair property, Professor Yatt testified that although a terrace had once existed at the property, it had been removed during excavation to construct a driveway and no longer existed. According to Professor Yatt, neither property qualified for the "terrace credit".

14. While the Board finds Professor Yatt's testimony helpful, it is persuaded by Mr. Glascock's testimony, and finds there was a continuous terrace at both properties. Regarding the Exeter property, the Board does not agree with Professor Yatt's conclusion that the 3 foot height of the landscape feature was not high enough to qualify as a terrace, and notes that there is no minimum height for a terrace in either the Zoning Ordinance or the DPS guidelines. Regarding the Exfair property, the Board does not agree with Professor Yatt's that partial excavation of the terrace disqualifies it for the "terrace credit". The terrace still exists at the property. Even if the terrace were initially larger, it still covers a substantial portion of the property along the building from side to side.

²When the Exeter plans were originally submitted to DPS the building height was 34.48 feet. But by the time of the public hearing, the property owner had lowered the building by one foot, and Mr. Glascock modified his calculations accordingly.

15. Based upon the Board's review of the site plan of the Exeter property (Exhibit 52(a)), the Board finds that a 2.9 foot (348'-345.1') terrace credit is appropriate. Based upon the Board's review of the site plan for the Exfair property (Exhibit 45(a)), the Board finds that a 5.3 foot (344.5'-339.2') terrace credit is appropriate.

Number of Stories

16. DPS and the Intervenors claim that the lower level of each building is a "cellar" under the Zoning Ordinance, while Appellants claim that the lower level is a "basement" under the Zoning Ordinance. The distinction is important because a basement is considered a "story" under the Ordinance and a cellar is not. Thus, if the lower level were found to be a cellar, each building would consist of 2 stories and fall within the height restrictions of the Zoning Ordinance. In contrast, if the lower level were found to be a basement, each building would consist of 3 stories and not meet the height restrictions of the Ordinance.

17. The parties agree that the following definitional sections of the Zoning Ordinance apply:

Section 59-A-2.1 Story: A basement is counted as a story.

Section 59-A-2.1 Basement: That portion of a building below the first floor joists at least half of whose clear ceiling height is above the mean level of the adjacent ground.

Section 59-A-2.1 Cellar: That portion of a building below the first floor joists at least half of whose clear cellar ceiling height is below the mean level of the adjacent ground.

18. The parties each used the same approach to calculate the "mean level of the adjacent ground". DPS and experts for both the Intervenors and Appellants agreed to take a series of grade elevations around the perimeter of the structure and to average them.

19. Based upon measurements and calculations submitted with its permit application, DPS determined that the ceiling heights at the lower levels of both buildings were more than 50% below the mean level of the adjacent ground. Accordingly, DPS found that the lower levels of both buildings were cellars under the Zoning Ordinance.

20. Professor Yatt agreed on the approach used by DPS and the Intervenors to calculate the number of stories, but concluded that neither DPS nor Mr. Glascock had sufficient information to determine the number of stories at either building. Appellants submitted no evidence of their own that the properties had more than 2 ½ stories.

21. Regarding the Exeter property, Mr. Glascock initially determined that 60.2% of the clear ceiling height below the first floor joists was below the mean elevation of the adjacent ground. He later revised that figure to 57.7%. (See Exhibits 59, 91, Case A-5761). However, the revisions had no material effect on the outcome of whether the lower level is a basement or cellar. Based upon Mr. Glascock's measurements and calculations, the Board finds that the lower level of the Exeter property is more than 50% below the mean level of the adjacent ground.

22. Regarding the Exfair property, Mr. Glascock determined that 59.3% of the clear ceiling height below the first floor joists was below the mean elevation of the adjacent ground. (See Exhibit 95, Case A-5749). Based upon these measurements and calculations, the Board finds that the lower level of the Exfair property is more than 50% below the mean level of the adjacent ground.

23. Appellants submitted alternative calculations using a methodology different from Mr. Glascock's. Their methodology purported to illustrate that the DPS methodology was inaccurate. The Board finds Mr. Glascock's methodology to be more persuasive and, therefore, adopts his findings with regard to the basement height.

CONCLUSIONS OF LAW

1. 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*. Therefore, the issuance of the building permits is appealable, *de novo*, to the Board.

2. Because the issuance of the permits was heard *de novo*, the Board hearing was an entirely new hearing on the propriety of the permits as if no determination had been made by DPS. *Boehm v. Anne Arundel County*, 54 Md. App. 497, 511, 459 A.2d 590, 599, cert. denied, 297 Md. 108 (1983)

3. The County and Intervenors had the burden of demonstrating that the permits were properly issued. Since the Board hearing proceeded as an original administrative determination, the burden of proof and burden of persuasion were allocated as with the original determinations by DPS. See, *Lohrman v. Arundel Corp.*, 65 Md. App. 309, 318, 500 A.2d 344, 349 (1985). The *de novo* hearing puts all parties back at square one to begin again just as if the DPS determinations appealed from had never occurred. See, *General Motors Corp. v. Bark*, 79 Md. App. 68, 79, 555 A.2d 542, 547 (1989).

4. The County and the Intervenors established that the permits were properly issued, specifically:

a. The Board concludes that the Exeter property qualified for a 2.9 foot terrace credit, and the Exfair property qualified for a 5.3 foot terrace credit (Findings of Fact, paragraph 15), both properties were within the 35 foot height limitation contained in Section 59-C-1.327(a) of the Zoning Ordinance.

b. The Board finds that the lower levels of both properties were more than 50% below the mean level of the adjacent ground, and that they qualified as “cellars” rather than “basements” and were not a “story” within the meaning of the Zoning Ordinance (Findings of Fact, paragraphs 21, 22). As a result, both properties were within the 2 ½ story height limitation contained in Section 59-C-1.327(a) of the Zoning Ordinance.

5. The Board finds that the purpose of the terrace credit is to allow a property owner to reasonably use her property when a terrace substantially affects the property. The Board agrees that the criteria in the DPS memorandum are appropriate. The Board disagrees that a terrace can be as small as 6 feet, and instead finds that a terrace must substantially occur throughout the buildable area of the property, a determination which can only be made on a case by case basis. Although the Exfair property was the closer call, the Board believes that the terrace area was substantial enough to qualify under the criteria contained in the DPS memorandum.

The Board is concerned about the lack of formality and limited public notice with regard to the DPS criteria. The Board strongly advises that the terrace credit be formally reviewed and adopted in accordance with applicable provisions of the Administrative Procedures Act, or through some other formal procedure, providing appropriate public notice.

6. The appeal in Case A-5761 is **DENIED**.

7. The appeal in Case A-5749 is **DENIED**.

On a motion by Angelo M. Caputo, seconded by Louise L. Mayer, with Board members Allison Ishihara Fultz, and Chairman Donald H. Spence, Jr., in agreement, and Vice-Chair Donna L. Barron dissenting, the Board voted 4 to1 to deny the appeals 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.

Donald H. Spence, Jr.

Chairman, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 28th day of May, 2003.

Katherine Freeman
Executive Secretary to the Board

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 2-A-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.