BOARD OF APPEALS
for
MONTGOMERY COUNTY

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

Case No. A-5876
APPEAL OF HYON HO KIM, DAVID BASSETT, AND MITCHELL HERMAN

OPINION OF THE BOARD

(Hearings held June 4, 2003, October 29, 2003, and March 30, 2004)
(Effective Date of Opinion: November 8, 2004)

Case No. A-5876 is an administrative appeal filed by Hyon Ho Kim, David Bassett, and Mitchell Herman in his capacity as President of the Woodside Forest Civic Association (the "Appellants"). The Appellants charge error on the part of the County's Department of Permitting Services ("DPS") in issuing Use and Occupancy Certificate No. 219083 dated February 21, 2003 for the operation of a dry cleaning and laundry establishment for the property located at 9315 Georgia Avenue, Silver Spring, Maryland (the "Property").

Pursuant to Section 59-A-4.4 of the Montgomery County Zoning Ordinance, codified as Chapter 59 of the Montgomery County Code (the "Zoning Ordinance"), the Board held public hearings on the appeal on June 4, 2003, October 29, 2003, and March 30, 2004. Norman G. Knopf, Esquire, represented the Appellants as well as Douglas Curran and Manuel B. Ceneta, who intervened in the proceeding. Assistant County Attorney Malcolm F. Spicer, Jr., represented DPS. Stephen P. Elmendorf, Esquire, represented Milan Development, LLC, the lessee of the Property, which intervened in the proceeding.

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

FINDING OF FACT

The Board finds by a preponderance of the evidence that:

1. The Property, known as 9315 Georgia Avenue, is a C-2 zoned parcel located at the southeast corner of Georgia Avenue and Corwin Drive in Silver Spring. The Property is rectangular in shape and consists of about 15,000

square feet of land. The Property is improved with a one-story, 70' wide by 100' deep building located in the southeast corner of the lot. In the northern portion of the Property is a paved parking area.

2. On October 10, 2002, DPS received an application from Dry Clean Direct ("Direct") for a use and occupancy certificate for the operation of a "retail dry cleaner" at the Property (Ex. 6(b)). The application stated that the establishment will employ 10 employees and occupy all of the building's 6,576 square feet of space. DPS approved the application and issued Use and Occupancy Certificate No. 219083 on February 21, 2003 (Ex. 6(c)).

3. Susan Scala-Demby, permitting manager for DPS, testified that her office reviewed the plans submitted with the application (Ex. 15(a-d)) and determined that a dry cleaning and laundry establishment is a permitted use in the C-2 zone. She stated that DPS has interpreted the Zoning Ordinance as distinguishing among a dry cleaning and laundry "establishment," a dry cleaning "plant," and a dry cleaning and laundry "pick-up." She stated that a dry cleaning "plant" may receive dry cleaning and laundry from other establishments, while a dry cleaning "establishment" may not. A dry cleaning and laundry "pick-up" does not perform dry cleaning or laundry services on site, but delivers it to a plant. She testified that Direct's application did not indicate that clothing would be accepted from other dry cleaning and laundry establishments. She stated that DPS does not consider the size of the structure, the number of proposed employees, or the number of dry cleaning machines to be used when classifying a given use. DPS does not consider the type or amount of chemicals used at an establishment in reviewing a use and occupancy permit; that review is conducted by the Fire Marshall's office.

Ms. Scala-Demby testified that in this case the use is changing from a business "B" class use to an "F-1" class use. She stated that any use and occupancy permit application is reviewed by DPS for zoning issues, by the building division for building code issues, by the electric inspector for electric code issues, and by the Fire Marshall for fire and safety code issues. DPS accepts the approval of the other agencies before it issues a permit.

4. Steven King, Senior Permitting Specialist for DPS, testified that he reviewed the permit plans for the Property (Ex. 15(a-d)). The plans classify the establishment under the "F-1" use group for the purposes for the County's building code. "F-1" uses include dry cleaning and dyeing. Mr. King testified that the chemical perchloroethylene ("perc"), a solvent used in dry cleaning, is not "toxic" as defined in the building code and therefore does not pose a health hazard requiring classification under the "H" group. In response to cross-examination, Mr. King pointed to page 7 of the Dow Material Safety Data Sheet #000190 dated October 6, 1997 (a document introduced by the Appellants as Exhibit 19) indicating that the median lethal dose (LD50) for "perc" for skin absorption in rabbits is over 10 g/kg and the oral LD50 for rats is greater than

5000 mg/kg. He stated that the median lethal concentration (LC50) for "perc" is over 8,000 parts per million. He testified that while "perc" can cause health problems, it is a low hazard. "Perc" is not flammable or reactive. He stated that he did not review air quality regulations or other State or federal regulations in reviewing the use and occupancy application.

5. Michael Crumloff of the Division of Emergency Management of the Department of Fire and Rescue Services testified that Direct applied for and received approval for a hazardous materials use certificate in May 2003 (Ex. 22). The application lists a maximum storage of 350 gallons of "perc" and smaller amounts of other chemicals typically found in dry cleaning establishments. The application requested a classification as a "high use facility." Mr. Crumloff testified that none of the substances declared by Direct constitute "extremely hazardous" materials. He stated that the application therefore complied with the County's regulations on Facilities Using, Processing, Transferring, Storing or Manufacturing Hazardous Substances (Ex. 21). He provided a list of about 140 other dry cleaning establishments in Montgomery County certified to use and store hazardous materials, including six classified as high use facilities (Ex. 24).

6. Melvin Stambro of the Department of Fire and Rescue Services testified that the Department reviewed the application for fire code compliance. NFPA 32 provides fire safety standards for dry cleaning plants and their operations (Ex. 25). The plans submitted with the application classified the solvents to be used in Direct's operation as "Class IV," or nonflammable, under NFPA 32 Section 1.6.16.5. Because "perc" is nonflammable, this classification was correct. He stated that the plans show the rear wall of the building as being blank with a 2-hour fire resistance rating. He stated that the fire code does not limit the number of dry cleaning machines or the amount of Class IV solvents that may be stored on site.

7. Wayne Hummer of the Department of Fire and Rescue Services testified that he inspected the Property on February 11, 2003 and determined that it complied with the fire code provided that the owner obtained a hazardous materials use certificate (Ex. 12).

8. The Appellants introduced a Chemical Fact Sheet on "perc" produced by the Office of Pollution Prevention and Toxics of the United States Environmental Protection Agency dated August 1994 (Ex. 30). The Fact Sheet indicates that exposure to "perc" can occur in the workplace or in the environment following releases to air, water, land, or groundwater. Exposure can occur when people live adjacent to a dry cleaning facility. Effects of "perc" depend on the amount of "perc" present and the length and frequency of exposure. Long exposure to high amounts of "perc" can cause dizziness, skin irritation, liver and kidney damage, and possibly cancer. These effects are not likely to occur at levels of "perc" that are normally found in the environment.

Similarly, “perc” is not likely to cause environmental harm at levels normally found in the environment.

The Appellants also presented an excerpt from the 10th Report on Carcinogens produced by the U.S. Department of Health and Human Services dated December 2002. The Report indicates that “perc” is reasonably anticipated to be a human carcinogen, but that the evidence is limited. The Report states that higher levels of concentration have been found in laundromats, in the homes of dry cleaning workers, and in homes with freshly dry-cleaned clothes stored in closets.

9. Doug Curran testified that he lives immediately behind the Property and is concerned about the business being so close to his residence. He introduced photographs of the Property showing vapor or fumes emanating from the top of the building (Exs. 34(c) and (d)). He stated that the exhaust fan on the building runs constantly and emits an irritating sound.

10. David Bassett, Damaris Hagge, and Laurel McFarland testified that they each live near the Property. The expressed their concerns about the potential hazards to the neighborhood from the storage of dangerous chemicals on the site. They also stated that they have observed a high volume of business at the Property including vehicles from out of state. They felt that the proposed business is not appropriately located near a residential neighborhood.

11. Steven Langulli, an expert in the operation of the dry cleaning machine used at the Property as well as the NFPA 32 standards for dry cleaning plants, testified that the machine is a state-of-the-art dry cleaning system that is “closed loop” – that is, it circulates the “perc” and re-uses it so that there are no emissions of liquid or vapors. The machine has a solvent capacity of 335 gallons. The system has no vents because the “perc” is never in contact with the outside air. He stated that “perc” does not have a flash point and is not flammable. He referred to the Dow Material Safety Data Sheet No. 000190 dated April 12, 2002 (Exhibit 38), an updated version of Exhibit 19, which states, among other things, that small amounts of “perc” swallowed incidental to normal handling operations are not likely to cause injury. In confined or poorly ventilated areas vapors can readily accumulate and can cause unconsciousness or death. It further states that “perc” is not believed to pose a measurable carcinogenic risk to humans when handled as recommended. Mr. Langulli presented a ECETOC (an association of chemical companies) study showing that the toxicity levels for “perc” are below those established in the building code. He also estimated that 85% of all dry cleaning establishments now use “perc.”

12. Dr. Randall Yaznary testified that he is the owner of the dry cleaning establishment at the Property. He stated that the business does not take dry cleaning from other establishments and has only retail customers.

13. Jeff Ahn, who operates a dry cleaning business, testified that he has a dry cleaning machine similar to the one used by Direct that holds 180 gallons of solvent. He stated that all "perc" is not recaptured because its residue will remain on the dry cleaned clothing. He also stated that "perc" can escape when the sludge tank is cleaned out. He stated that the average cleaner replaces about 100 gallons of "perc" annually. On cross-examination, Mr. Ahn stated that he has not observed the operation of the tandem machine used by Direct.

CONCLUSIONS OF LAW

1. Section 8-23 of the Montgomery County Code authorizes 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-43(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 use and occupancy permit was properly issued.

2. At first blush, it appears from the Appellants' petition that their primary claim of error is that the proposed use was improperly classified as a "dry cleaning and laundry establishment" rather than a "dry cleaning plant" under the Zoning Ordinance. As the hearings progressed, however, the Appellants' position soon became a "moving target" as it became evident that the Appellants desired to challenge the issuance of the use and occupancy certificate on additional grounds not mentioned in the petition. From the testimony of the Appellants' witnesses and argument of Appellants' counsel, we glean the following additional three claims: (a) that DPS incorrectly categorized the proposed use as an "F-1" use under the County's building code, rather than the "H" group of high hazard uses; (b) that DPS failed to determine whether the proposed use will "result in any greater hazard to public safety or welfare" under Section 8-6(b) of the County Code; and (c) that the proposed use constitutes a "public nuisance" under Section 59-C-4.355 of the Zoning Ordinance.

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3. Before determining whether DPS erred in issuing the use and occupancy permit, we must define DPS' duty with respect to use and occupancy permits. Section 59-A-3.21 of the Zoning Ordinance provides that "a use-and-occupancy permit certifying compliance with this Chapter [59] must be issued by the Director before any building, structure, or land can be used or can be converted, wholly or in part, from one use to another." In addition, Section 8-6(b) of the County Code provides that "It shall be unlawful to make any change in the use or occupancy of any structure which would subject it to any special provision of this chapter [8] without approval of the director [of DPS] and his certification that such structure meets the intent of the provisions of law governing building

construction for the proposed new use and occupancy and that such change does not result in any greater hazard to public safety or welfare."

Section 8-28 of the County Code further provides in pertinent part:

> "…
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> (b) Buildings hereafter altered. It shall be unlawful for any person to use or occupy a building hereafter enlarged, extended or altered to change from one use group to another, in whole or in part until a certificate of use and occupancy shall have been issued by the director certifying that the work has been completed in accordance with the provisions of the approved permit; except, that any use or occupancy, which was not discontinued during the work of alteration, shall be discontinued within thirty (30) days after the completion of the alteration unless the required certificate is secured from the director.
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> (c) Existing buildings. Upon written request from the owner of an existing building, the director shall issue a certificate of use and occupancy; provided, that there are no violations of law or orders of the director pending and it is established after inspection and investigation that the alleged use of the building has heretofore existed. Nothing in this chapter shall require the removal, alteration or abandonment of or prevent the continuance of the use and occupancy of a lawfully existing building, unless such use is deemed to endanger public safety and welfare.
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> …
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> (f) Contents of certificate. When a building or structure is entitled thereto, the director shall issue a certificate of use and occupancy within ten (10) days after written applications. The certificate shall certify compliance with the provisions of this chapter and the purpose for which the building or structure may be used in its several parts. The certificate of use and occupancy shall specify the use group, the fire grading, the maximum live load on all floors, the occupancy load in the building and all parts thereof and any special stipulations and conditions of the building permit.

Maryland's courts have ruled that these provisions require that DPS review an application for a use and occupancy permit for more than mere compliance with the originally approved building permit; rather, DPS must review the application for compliance with all zoning, building, fire safety, and other applicable County laws. *National Institutes of Health Federal Credit Union v. Hawk*, 47 Md. App. 189, 199, 422 A.2d 55, 61 (1980).

4. The Appellants first argue that DPS erred in classifying the proposed use as a dry cleaning and laundry establishment rather than a dry cleaning plant under the Zoning Ordinance. They claim that the proposed use is in fact a dry cleaning plant and therefore is not a permitted use in the C-2 zone.[1]

Direct applied for a use and occupancy permit for a "retail dry cleaner" use, which DPS interpreted, and we think reasonably so, to mean a dry cleaning and laundry establishment. We find that there is insufficient evidence of record to show that the proposed use of the Property is in reality a dry cleaning plant. First, we agree with DPS that the only distinction made by the Zoning Ordinance between an "establishment" and a "plant" is whether the business receives dry cleaning and laundry from other establishments. Section 59-C-4.2(e) fn.28. Thus, the Appellants' evidence regarding the size of the use, the number of employees, the number and size of dry cleaning machines, and the amount for chemicals stored at the Property is irrelevant to this issue. Second, there is no reliable evidence in the record that shows that Direct intended to use the Property to receive dry cleaning and laundry from other establishments. To the contrary, Mr. Yaznary, the owner, testified that he has only retail customers. Consequently, DPS correctly determined that the proposed use is a dry cleaning and laundry establishment, which is a permitted use in the C-2 zone.

5. The Appellants next contend that the proposed use was not correctly categorized as an "F-1" use under the County's building code. They claim that the use should have been classified under the "H" group of high hazard uses.

The County's building code[2] at Section 306.1 defines "Factory Industrial Group F" as the use of a building for assembling, disassembling, fabricating, finishing, manufacturing, packaging, repair or processing operations that are not classified as a Group H hazardous occupancy. Section 306.2 expressly includes "dry cleaning and dyeing" within the category "F-1 Moderate-Hazard Occupancy."

Although Direct's use is clearly that of a dry cleaning establishment, the inquiry into its proper classification does not end at Section 306.2. Because the IBC defines Group "F" uses to include those uses not classified as Group "H," it is necessary to look at the Group "H" requirements to determine if the particular use falls within that category. Section 307.1 provides that "Hazardous Group H"

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[1] At the time the appeal was filed, Section 59-C-4.2(e) permitted dry cleaning and laundry establishments in the C-2 zone as long as they did not perform work for other similar establishments. This provision was amended during the pendency of the appeal to limit the area of such establishments to 3,000 square feet; however, this amendment does not govern establishments like the one at the subject Property that existed prior to June 23, 2003.

[2] Sections 8-13 and 8-14 of the County Code provide that the building code for Montgomery County is the latest edition of the ICC International Building Code (the "IBC") as amended by DPS regulations. By Resolution No. 14-1139 (Ex. 20), the County Council adopted the 2000 edition of the IBC with certain amendments not pertinent here.

occupancy is the use of a building that involves the manufacturing, processing, generation or storage of materials that constitute a "physical or health hazard" in quantities in excess of those found in Tables 307.7(1) and 307.7(2).

Section 307.2 specifically defines both "physical" and "health" hazards. A "physical hazard" is a chemical for which there is evidence that it is a combustible liquid, compressed gas, cryogenic, explosive, flammable gas, flammable liquid, flammable solid, organic peroxide, oxidizer, pyrophoric or unstable (reactive) or water-reactive material. The uncontradicted evidence, from the testimony of Mr. King and Mr. Langulli, and Exhibits 19, 30, 31, 38 and 39, is that "perc" is not flammable, combustible or reactive. Consequently, we find that DPS properly found that the "perc" to be used by Direct does not pose a "physical hazard" for the purposes of the County building code.

A "health hazard" is defined as a classification of a chemical for which there is statistically significant evidence that acute or chronic health effects are capable of occurring in exposed persons. The term "health hazard" includes chemicals that are toxic or highly toxic, and corrosives. Section 307.2. A "toxic" chemical is one that falls within one of the following categories:

> 1. A chemical that has a median lethal dose (LD50) of more than 50 milligrams per kilogram, but not more than 500 milligrams per kilogram of body weight when administered orally to albino rats weighing between 200 and 300 grams each.
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> 2. A chemical that has a median lethal dose (LD50) of more than 200 milligrams per kilogram but not more than 1,00 milligrams per kilogram of body weight when administered by continuous contact for 24 hours (or less if death occurs within 24 hours) with the bare skin of albino rabbits weighing between 2 and 3 kilograms each.
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> 3. A chemical that has a medial lethal concentration (LC50) in air of more than 200 parts per million but not more than 2,000 parts per million by volume of gas or vapor, or more than 2 milligrams per liter but not more than 20 milligrams per liter of mist, fume or dust, when administered by continuous inhalation for 1 hour (or less if death occurs within 1 hour) to albino rats weighing between 200 and 300 grams each.

Again, the testimony of Mr. King and Mr. Langulli and Exhibits 19, 38 and 39 are uncontroverted that "perc" has an oral LD50 of over 5,000 mg/kg,[3] a skin absorption LD50 of over 10g/kg,[4] and an LC50 of over 8,000 parts per million.

[3] As Mr. King explained, the higher the LD50 and LC50 number, the better. For example, a "highly toxic" chemical has an oral LD50 of 50 mg/kg or less. Section 307.2.

[4] Ten grams is equivalent to 10,000 milligrams.

Consequently, DPS properly determined that "perc" is not a "toxic" chemical for the purposes of the building code.[5] Mr. King's and Mr. Langulli's testimony is further corroborated by Exhibits 19, 30, 31, 38 and 39 that "perc" is a relatively low hazard material that may cause skin irritation and is harmful if too much is swallowed or inhaled, but does not cause acute or chronic health effects at normal levels if properly handled. DPS therefore properly found that "perc" is not a "health hazard" for the purposes for the building code.

Because "perc" is neither a physical nor a health hazard, its use is not classified as a "Hazardous Group H" use under Section 307.1. Neither is its storage subject to the quantity limits found in Tables 307.7(1) and (2). Moreover, Section 307.9.1 of the IBC expressly excludes from Group H "cleaning establishments which utilize a liquid solvent having a flash point at or above 200°F(93°C)." As Mr. Langulli testified, because "perc" has no flash point, Direct's operation is expressly exempted from Group H. For all of these reasons, DPS therefore properly categorized and reviewed Direct's use and occupancy application under category "F-1."

6. The Appellants next argue that DPS failed to determine whether the proposed change in use will "result in any greater hazard to public safety or welfare" under Section 8-6(b) of the County Code. The Appellants first point to the evidence that "perc" is a potential carcinogen and, at high levels of exposure, can cause environmental and health hazards. They then assert that because Direct's proposed use is a "high volume, large scale" business (e.g., 10 employees, use of a 350-gallon dry cleaning machine), DPS should have held Direct to a higher standard than the typical dry cleaner. The Appellants contend that DPS, in order to ensure that the use will be "safe," should have considered the size and volume of the operation and, at a minimum, imposed conditions on the permit that would limit the amount of "perc" that could be stored or used on the site.

We disagree with the Appellants' premise, and so reject their conclusion. We do not believe that the language of Section 8-6(b) requiring DPS to determine whether a proposed change in use will "result in any greater hazard to public safety or welfare" establishes an independent standard by which DPS must assess use and occupancy applications. It is a basic tenet of due process of law that a statute may not be read to delegate basic policy matters for resolution by an administrative agency on an *ad hoc* and subjective basis. *Grayned v. City of Rockford*, 408 U.S. 104 (1972). We think the phrase "greater hazard to public safety or welfare" is too vague a standard to stand by itself. Without reference to some legally fixed standards and guidelines, it is so broad as to be susceptible to irrational, arbitrary, and discriminatory application. *Bowers v. State*, 283 Md. 115 (1978).

[5] By definition, it is not "highly toxic" either.

Instead, we think the better interpretation of Section 8-6(b), and the one that would pass constitutional muster, is that DPS must determine whether a proposed use not only meets the County's building code, but also all other applicable County safety-related codes. These codes, duly adopted by the legislature, provide explicit, objective standards for public safety and welfare that sufficiently inform the applicant of what is required and provide clear standards for those charged with their administration and enforcement. Consequently, if DPS determines that a proposed change in use meets all zoning, building, fire safety, and other applicable County laws, then it will have met the intent and purpose of Section 8-6(b).

In this case, the uncontroverted testimony of Mr. Hummer, Mr. Stambro, Mr. Crumloff, and Mr. Langulli clearly establishes that the application meets the requirements of the County's fire and safety codes.[6] There was no evidence offered to the contrary. Consequently, we find that DPS properly approved the application for compliance with the County's fire and safety codes. DPS was neither required nor authorized to order any additional conditions to the use and occupancy permit, beyond those already required by County law, to further restrict the use or storage of "perc" on the site.

7. Lastly, the Appellants contend that the proposed use poses the threat of a "public nuisance" to the neighborhood under Section 59-C-4.355. That section reads:

> 59-C-4.355. Nuisances.
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> Any use which is found by the board to be a public nuisance, by reason of the emission of dust, fumes, gas, smoke, odor, noise, vibration or other disturbance, is and shall be expressly prohibited in the C-2 zone. No such finding shall be made by the board except after a hearing upon reasonable notice, and any person, the commission or the district council may file a petition with the board for such a hearing.

This exact language is also contained in Section 59-A-5.7 of the Zoning Ordinance. The Court of Special Appeals held in *Thomas Miller v. Maloney Concrete Company*, 63 Md.App. 38, 491 A.2d 1218 (1985), that Section 59-A-5.7 is unconstitutionally vague. For the same reasons explained in that case, we find that Section 59-C-4.355 is invalid and, therefore, we may not apply it.

8. For all of the foregoing reasons, we find that DPS properly issued Use and Occupancy Certificate No. 219083. The appeal in Case A-5876 is **DENIED**.

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[6] Specifically, the application met NFPA 32, which is the fire safety code standard applicable to dry cleaners. See Section 22-14 of the County Code.

On a motion by Member Angelo M. Caputo, seconded by Member Louise L. Mayer, and Chairman Donald H. Spence, Jr., Vice-chairman Donna L. Barron, and Member Allison Ishihara Fultz in agreement, the Board voted 5 to 0 to deny 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.

Allison Ishihara Fultz
Chairman, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 8th day of November, 2004.

_____
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 on accordance with the Maryland Rules of Procedure.