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

APPEAL OF DAVID REMES

Case No. A-5852

OPINION OF THE BOARD
(Hearings held February 26, 2003 and March 5, 2003)
Effective date of Opinion: May 29, 2003

Case No. A-5852 is an administrative appeal in which the appellant David Remes charges administrative error on the part of the County's Department of Permitting Services (DPS) in its December 10, 2003 issuance of a building permit to construct a single-family residence at 1102 Noyes Drive, Silver Spring, Maryland.

Design-Tech Builders, Inc., the property owner at 1102 Noyes Drive, intervened in the case and was represented by Erica Leatham, Esq., Holland & Knight, LLP. Appellant David Remes was represented by David Brown, Esq., Knopf and Brown, and Assistant County Attorney, Malcolm Spicer, represented Montgomery County, Maryland.

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

FINDINGS OF FACT

The Board finds by a preponderance of the evidence that:

1. The property at 1102 Noyes Drive is located at Lot 11, Block A-2 in the Woodside Park Subdivision in Silver Spring, Maryland.

2. Design-Tech (the Intervenor) applied to DPS for a building permit to construct a single-family residence at the property and DPS issued building permit 291437 on December 10, 2002 to allow this construction.

3. Appellant David Remes, a neighboring property owner at 1106 Noyes Drive, filed an appeal with this Board challenging DPS's issuance of the building

permit. The appeal is based on two[1] claims: (a) Lot 11 (the subject property) "merged" with the adjacent property, Lot 12, into a single lot. As a result, the issuance of a building permit for a residence on Lot 11 is unlawful under Section 59-A-5.2 of the Zoning Ordinance, which prohibits more than one single-family dwelling on a single lot;[2] and (b) DPS erred in calculating the number of stories at the building.

The Merger Issue

4. The subject property is located on Lot 11, which was recorded on subdivision plat #1614 in 1945 in the plat records of Montgomery County, Maryland (Exhibit 12e). It is adjacent to Lot 12, which was also recorded in the subdivision plat (Exhibit 12e).

5. Lot 12 was acquired by Ralph and Violette Duffie in March 1951 (Exhibit 13b) The lot was improved with a residence. The Duffies acquired Lot 11 in January 1954 (Exhibit 13c).

6. Sometime during the 1950s the Duffies constructed a swimming pool on Lot 11. Intervenors plan to demolish the pool to construct the proposed residence.

7. Sometime during the 1960s the Duffies constructed an addition to the residence on Lot 12 which is set back approximately 40 feet from the rear yard setback adjacent to Lot 11. Appellant contends that the development standards at the time required a 60 feet setback. But since the Board does not have conclusive evidence as to when the addition was constructed, it cannot determine whether the addition violated the development standards at the time.

8. The Duffies' son, Jonathan Duffie, acquired Lots 11 and 12 in August, 2001, after his parents died. He sold Lot 11 to Design-Tech on January 15, 2003.

9. Appellant contends that Lots 11 and 12 merged into one lot during the 1960s based upon the intent of the Duffies to form one tract, and actions by the County and State. For instance:

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[1]Initially, appellant stated a third claim: that the building height exceeded the 35 feet allowed under the Zoning Ordinance. However, this claim was withdrawn by appellant's counsel during his opening statement.

[2]Based upon this "merger" theory, appellant also filed suit in the Circuit Court of Montgomery County to enjoin or rescind the sale of the property to Design-Tech.

a. Neighboring property owner Gordon Muir testified to his conversations with Ralph Duffie suggesting that Mr. Duffie intended to merge the two lots by crossing the lot line from Lot 12 to Lot 11 to build the addition.

b. Lots 11 and 12 both appear on the same County DPS "permit card".

c. For a period of time, State tax bills for Lots 11 and 12 were consolidated (Exhibit 13h).

10. Prior to 1985 when the County Council passed legislation which prohibited the crossing of lot lines, the County may have allowed property owners to cross lot lines where the adjacent lots were under common ownership. However, appellant did not establish that the County had a formal policy to this effect.

Number of Stories

11. The property is located in the R-60 zone and is 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.

12. DPS and the Intervenor claim that the lower level of the proposed residence is a "cellar" under the Zoning Ordinance, while Appellant claims 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, the proposed residence would consist of 2 ½ stories and fall within the height restrictions of the Zoning Ordinance. In contrast, if the lower level were found to be a basement, the proposed residence would consist of 3 ½ stories and not meet the height restrictions of the Ordinance.

13. The parties do not dispute that specific provisions in the Montgomery County Zoning Ordinance apply to this case. Specifically:

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.

14. Delvin Daniels, a DPS permitting specialist reviewed the permit application with Design-Tech's proposed site plan (Exhibit 12f) and elevations (Exhibit 12i). He also reviewed calculations submitted by Design-Tech (Exhibit 12d), finding that the proposed lower level is a cellar since "one-half of the cellar ceiling height is below the mean level of the adjacent ground". Based upon

measurements and calculations submitted by Design-Tech with its permit application, DPS determined that the ceiling height at the lower level of the proposed residence was more than 50% below the mean level of the adjacent ground. Accordingly, DPS found that the lower level of the proposed residence was a cellar under the Zoning Ordinance.

15. Norman Haines testified as an expert in architecture for the appellant. He reviewed the calculations submitted by Design-Tech and noted some discrepancies between calculations in the site plan and calculations in the elevations. He re-calculated the relevant measurements and found that the lower level was more than 50% above grade, either 51.6% or 56.9%, depending upon whether he relied on Design-Tech's site plan or elevations (See Exhibit 22). According to
Mr. Haines, the lower level qualified as a basement, not a cellar.

16. James Glascock, of the civil engineering firm of Macris, Hendricks & Glascock, also reviewed the calculations and prepared a revised analysis (See Exhibit "C" appended to Intervenor's Pre-Hearing Submission, Exhibit 14-A). The revised analysis takes into account the discrepancies between the site plan and the architectural elevations noted by appellants, in particular, the more conservative elevation measurements at the front facade of the proposed residence. Even using more conservative measurements, Mr. Glascock calculated that at least 51.9%[3] of the proposed lower level was below grade.

17. While the Board finds Mr. Haines' testimony helpful, it is persuaded more by Mr. Glascock's testimony. Based upon Mr. Glascock's calculations (either those submitted in writing or the final lower figure offered in testimony), the Board finds that the lower level of the property is more than 50% below the mean level of the adjacent ground.

CONCLUSIONS OF LAW

1. Section 59-A-4.3(e) of the Zoning Ordinance provides that any appeal to the Board from any action taken by a department of the county government, is to be considered *de novo*. Therefore, the issuance of the building permit is appealable, *de novo*, to the Board.

2. Because the issuance of the permit was heard *de novo,* the Board hearing was an entirely new hearing on the propriety of the permit 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]Mr. Glascock's written submission calculated that 52.3% of the lower level was below grade. However, during cross-examination by appellant, he conceded that if he were to use Mr. Haines' approach he would need to revise his calculations, and lower the percentage to 51.9.

3. The County and Intervenors had the burden of demonstrating that the permit was 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 permit was properly issued, specifically:

a. Lot 11 is a properly recorded lot, which is independent of Lot 12.

Appellant argues that Lots 11 and 12 merged into one lot, while DPS and Design-Tech argue that Lots 11 and 12 were complimentary but independent lots. The Board agrees with DPS and Design-Tech. Although appellant did establish that the Duffies may have intended to treat Lots 11 and 12 as one single lot, the Board does not agree that their intentions are determinative of this issue.

As Design-Tech correctly notes in its Memorandum of Law:

> "Montgomery County has codified the procedures for the formal combination, assembly or other 'merger' of already recorded lots (or unrecorded parcels) in Chapter 50 of the Montgomery County Code. The procedure culminates with the recordation of a new plat describing the newly created, 'merged' lots to effectuate any assembly. Lot 11, as shown on the permit plans, is a recorded lot pursuant to a plat recorded in 1945 in Plat Book 26 at Plat Number 1614. Since that time, no additional subdivision or resubdivision procedures were initiated and no new plat was recorded; therefore, Lot 11 remains a valid subdivided, individual lot with the ability to support a building permit and related residential structure."

The Board also believes that appellant's reliance on *Friends of the Ridge v. Balt. Gas & Elec. Company*, 352 Md. 645 (1999) is misplaced. In *Ridge*, the Court of Appeals held that **for zoning purposes,** adjacent lots held by the same owner could merge by operation of law as a result of the intentions and actions of the owner. But Judge Catthel stated unequivocally in *Ridge* that subdivision is not zoning, that zoning ordinances do not create lots, and that the construction of structures over more than one parcel would not affect lot lines. He stated first: "We have often held that subdivision is not zoning." *Ridge*, at 648, n.4.

He later states: "Zoning ordinances. . . **do not create lots** (emphasis in original)." *Ridge*, at 651. He finally states: ". . . the construction of structures extending over more than one parcel or lot would not, in our view, affect the boundary lines (or lot lines) of the two parcels. They remain in place until a deed of conveyance or a new subdivision. . . is created." *Ridge*, at 661.

Unlike *Ridge*, this is not a zoning variance case, it is a building permit case. The only issue for permit purposes is whether the lot was a properly recorded lot which met the development standards of the zone. Lot 11 is a properly recorded lot, and no plat has ever identified the "merger" of Lots 11 and 12 into a third larger lot. Therefore, based upon the subdivision plat recorded in the land records of this County, we believe that Lot 11 is a properly recorded independent lot.

b. The lower level of the proposed residence was a cellar.

Because the lower level of the proposed residence was more than 50% below the mean level of the adjacent ground it qualified as a "cellar" rather than a "basement" and was not a "story" within the meaning of the Zoning Ordinance (Findings of Fact, paragraphs 14-17). As a result, the property was within the 2 ½ story height limitation contained in Section 59-C-1.327(a) of the Zoning Ordinance.

5. Therefore, based upon the foregoing, the Board **denies** the appeal in Case A-5852.

On a motion by Louise L. Mayer, seconded by Angelo M. Caputo, with Board members Allison Ishihara Fultz, Donna L. Barron and Chairman Donald H. Spence, Jr., in agreement, the Board adopted 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.

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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 29th 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.