BOARD OF APPEALS
for
MONTGOMERY COUNTY

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
240-777-6600

(www.montgomerycountymd.gov/content/council/boa.asp)

Case No. A-5777
APPEAL OF DAVID M. AND PATRICIA L. SIMS

OPINION OF THE BOARD

(Hearings held September 11, 2002, April 16, 2003, and September 17, 2003)
(Effective Date of Opinion: February 2, 2004)

Case No. A-5977 is an administrative appeal filed by David M. and Patricia L. Sims (the Appellants). The Appellants charge error on the part of the County's Department of Permitting Services (DPS) in issuing Building Permit No. 269479, dated March 13, 2002, for the construction of an addition to a single family dwelling located at 6705 Persimmon Tree Road, West Bethesda, Maryland 20817 (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 September 11, 2002, April 16, 2003, and September 17, 2003. The Appellants were not represented by counsel. Assistant County Attorney Malcolm Spicer represented DPS. Martin J. Hutt, Esquire, represented Richard and Julie Smith, the Property owners, who intervened.

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 6705 Persimmon Tree Road in West Bethesda, is zoned R-90. It is identified as Lot 87, Block F, in the Cabin John Park Subdivision and contains about 23,945 square feet. It is improved with a two-story single family dwelling. Richard and Julie Smith are the owners of the Property. The Appellants are neighboring property owners.

2. On or about February 14, 2002, the Property owners applied to DPS for a building permit to construct a two-story addition with a garage and a porch onto the front of their house (Exhibit 6b). The plans for the addition (Exhibits 29 and 32) indicated that it would include two bedrooms, a bathroom, a living area, and a storage area on the second floor, with a garage and laundry room on the first floor. The plans show a space for a freezer within the laundry room. A doorway would provide access from the laundry room into the principal building. The plans show that the addition would be located 9 feet 11 inches from the lot adjoining the east side of the Property, which is Lot 88 - on which lot the Appellants reside.

3. On March 13, 2002, DPS issued Building Permit No. 269479 to permit the construction of the addition and porch at the Property. The permit incorrectly identified the Property as being located in the R-200 zone. The permit was posted at the Property on March 15, 2002.

4. On March 29, 2002, Susan Scala-Demby, the Permitting Services Manager for DPS, met with the Appellants and explained to them that the portion of the permit identifying the Property as being located in the R-200 zone was in error. She corrected the permit by hand, writing in AR90", and initialed and dated her correction. Some time later, DPS issued a printed revised building permit.

5. At the meeting with the Appellants on March 29, 2002, Ms. Scala-Demby stated that she had previously advised the Property owners that a permit would not be approved if the addition included cooking facilities as well as sleeping and sanitation facilities. She further advised the owners that if they submitted plans without cooking facilities, and later desired to add cooking facilities for a household employee, the owners would be required to apply to the Department of Housing and Community Affairs to register as a Aregistered living unit.@

6. Ms. Scala-Demby testified that the plans for the addition to the Property comply with the requirements of the Zoning Ordinance. She stated that the Property was originally platted in 1923 (Exhibit 28), so that it is subject to the setback requirements of the 1928 zoning ordinance. She stated that the 1928 zoning ordinance requires a seven foot side setback.

Ms. Scala-Demby further testified that DPS typically tells applicants that they must remove cooking facilities from addition plans in order to qualify for a building permit. She stated that while DPS has regarded the presence of a microwave oven as enough to qualify a unit as including a cooking facility, the mere presence of a freezer does not. She testified that, if DPS is presented with proposed plans for an addition to a single family dwelling that shows all three elements of a dwelling unit - cooking, sleeping and sanitation - it has been DPS's practice to question the applicant about who will be living in the unit. If the applicant intends that the unit will be occupied by a relative or household

employee, the applicant is advised to apply as a registered living unit; if otherwise, the applicant is told to seek a special exception as an accessory apartment. In either instance, DPS will not issue the building permit for the addition until the proper approvals are obtained.

7. Mrs. Sims testified that several years ago the Property owners told her that they intended to build an apartment for their nanny and her husband. She stated that the addition is less than 30 feet from her home and overlooks her living room, family room and study. She stated that the addition was built with five windows instead of two as shown on the plans.

8. The Appellants appeal was filed on April 16, 2002.

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 building permit was properly revoked.

2. As a preliminary matter, the County moved to dismiss the case as untimely filed under Section 8-23. The Board finds that the permit, originally issued on March 13, 2002, was revised by Ms. Scala-Demby on March 29, 2002. At that time, the Appellants were made aware of the revision. DPS therefore effectively re-issued the permit on March 29, 2002 and it is from this action that the Appellants are deemed to appeal. As their appeal was filed on April 16, 2002, it is within the 30 days required for an appeal and is timely filed.

3. The Appellants raise four issues in their appeal:

(a) Whether the building permit indicates the incorrect zoning classification for the Property,

(b) Whether the incorrect side yard setback was applied,

(c) Whether DPS allowed the Property owner to "circumvent" the Zoning Ordinance by advising the Property owners to submit plans for an addition without cooking facilities, then apply to the Department of Housing and Community Affairs for a "registered housing unit," and

(d) Whether the addition built fails to comply with the approved building plans.

4. With regard to the Appellants' first issue, the area zoning map (Exhibit 27) and the uncontroverted testimony of Ms. Scala-Demby establish that the correct zoning classification of the Property is R-90. While the initial building permit erroneously indicated that the Property was zoned R-200, the error was corrected by Ms. Scala-Demby on March 29, 2002 and the Appellants were personally informed of the correction. Thus, the Appellants were on notice of the correct zoning classification and of the zoning standards that would apply to the proposed construction. To the extent there was error in the issuance of the initial permit, it was rendered harmless by the later revision. The Appellants' appeal on this issue is therefore moot.

5. With regard to the Appellants' second issue, the 1923 subdivision plat (Exhibit 28) and the uncontroverted testimony of Ms. Scala-Demby establish that the Property was originally platted in 1923. Section 59-B-53(a) provides, in pertinent part, that "a lot recorded before March 16, 1928, in the original Maryland-Washington Metropolitan District, must meet the development standards in the 1928 Zoning Ordinance." According to Ms. Scala-Demby, the 1928 zoning ordinance requires a seven foot side setback. Consequently, we find that a seven-foot side setback was properly applied and approved for the proposed addition to the Property.

6. The Appellants charge in their third issue that DPS acted improperly to "circumvent" the Zoning Ordinance by advising the Property owners to submit plans for an addition without cooking facilities, then apply to the Department of Housing and Community Affairs for a "registered housing unit." The Appellants contend that the addition is in fact an accessory apartment and that the Property owners should have been required to apply for a special exception. The Appellants complain that they were deprived of the opportunity for a public hearing before the Property owners converted their home to a "multi-family compound."

The Board finds that DPS's actions were entirely proper and in full compliance with the Zoning Ordinance. The Appellant's argument fails because the premise on which it is based - that if cooking facilities had been included in the plans for the addition to the Property, the unit would have necessarily been considered an accessory apartment - is incorrect. We explain.

Under the Zoning Ordinance, an accessory apartment may be established only if first approved by the Board, after a hearing, as a special exception use. Section 59-G-2.00. The Ordinance defines an accessory apartment as "a second dwelling unit that is part of an existing one-family detached dwelling, or is located in a separate existing accessory structure on the same lot as the main dwelling, with provision within the accessory apartment for cooking, eating,

sanitation and sleeping. Such a dwelling unit is subordinate to the main dwelling." Section 59-A-2.1. If read alone, one might conclude from this definition, as the Appellants apparently did, that *any* second dwelling unit on a single-family residential property is necessarily an accessory apartment. This is not the case.

In Ordinance No. 11-61, the County Council established another kind of use – a registered living unit – that is similar in many ways to an accessory apartment. A "registered living unit" is defined in Section 59-A-2.1 as:

> "A second dwelling unit that is part of an owner-occupied one-family detached dwelling and is:
>
> (a) Suitable for use as a complete living facility with provision within the facility for cooking, eating, sanitation and sleeping;
>
> (b) Occupied by:
>
> (1) No more than 2 persons related to each other by blood, marriage or adoption, at least one of whom must be a household employee of the owner-occupant of the main dwelling; or
>
> (2) No more than 3 persons related by blood, marriage or adopted to the owner- occupant of the main dwelling; except that one may instead be an unrelated care-giver needed to assist a senior adult, ill or disabled relative of the owner-occupant; and
>
> (c) Subordinate to the main dwelling."

Thus, a registered living unit shares all of the attributes of an accessory apartment *except* that it is limited in one way - who may occupy it. A registered living unit is in essence an accessory apartment intended only for the property owner's relatives or household employees. The other distinction between an accessory apartment and a registered living unit is that a registered living unit is not a special exception use. Rather, it is a permitted use in the R-90 and other zones provided that it is properly registered in accordance with Section 59-A-6.10. Consequently, unlike an accessory apartment, a registered living unit enjoys an unrebuttable presumption of compatibility in the zone.

The Appellants suggest that DPS and the Property owners engaged in an act of subterfuge to avoid the accessory apartment requirements by conspiring to eliminate from the plans any indication of cooking facilities. To ascribe any malicious intent to this act, however, is simply not logical. By eliminating cooking facilities from the plans, the owners not only avoided qualifying the addition as an accessory apartment, they also prevented it from being considered what they

ultimately sought - a registered living unit. This is so because both an accessory apartment and a registered living unit is a "dwelling unit," which necessarily includes at least three elements – cooking, sleeping, and sanitation facilities. Section 59-A-2.1. If any one of these elements is lacking, the unit cannot qualify as either an accessory apartment or a registered living unit. Moreover, without independent cooking facilities in the addition, the entire structure would then be limited to occupancy by a single family – that of the Property owners. This result would defeat the purpose and intention of the Property owners to provide housing for their nanny and her husband.

We believe that the more logical conclusion is that, in eliminating cooking facilities from their plans, the Property owners simply determined to proceed with their building plans and perhaps wait until a later date to apply for registered living unit status. This is certainly their prerogative and is permitted under the law. In this case, the Property owners applied for a permit to build precisely what they had told Mrs. Sims they intended – living quarters for their nanny and her husband. Ms. Scala-Demby did no more (or less) than advise them of the requirements of the Zoning Ordinance and their options under it. We find no mischief in her intent - indeed, we commend her for properly executing her responsibility to inform the public of how to comply with the law.

Because the plans for the addition as finally submitted contain no provisions for cooking facilities, DPS was not obligated to inquire into its intended occupancy. If the Property owners later decide to install cooking facilities (be it a stove or microwave oven) for the use of their nanny and her husband, they will be required to register their living unit. If they permit occupancy by anyone other than a household employee or relative, they must apply for an accessory apartment special exception. If they fail to do so, or permit occupancy of their residence in violation of the Zoning Ordinance, they will be subject to enforcement action by DPS. In any of these events, the Zoning Ordinance provides the Appellants and any other interested citizens ample safeguards and opportunity to be heard. Until a case or controversy is presented, however, the Board may not speculate as to what uses may or may not be made of a particular property.

7. With regard to the Appellants' fourth issue, whether the improvements made on the Property comply with the approved plans is not before us. Rather, the issue on appeal is whether the building permit issued in March 2002 was properly approved as being in compliance with the Zoning Ordinance. Post-permit complaints regarding the construction of the addition must be directed first to DPS for investigation and necessary action. The Board's jurisdiction is limited to reviewing the actions taken by DPS. Section 8-23. The Board may not review issues that have not yet been addressed by the agency.

8. We find by a preponderance of the evidence that the plans for the addition to the Property comply with the requirements of the Zoning Ordinance. Building Permit No. 269479 was therefore properly issued.

9. The appeal in Case A-5777 is **DENIED**.

Vice-Chair Donna L. Barron was necessarily absent and did not participate in this Resolution. On a motion by Member Allison Ishihara Fultz, seconded by Member Angelo M. Caputo, and Chairman Donald H. Spence, Jr. and Member Louise L. Mayer in agreement, the Board voted 4 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.

_____
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 2nd day of February, 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.