BOARD OF APPEALS
for
MONTGOMERY COUNTY

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

Case No. A-5926

APPEAL OF JAMES J. LEVIN

OPINION OF THE BOARD

(Hearings held November 12, 2003 and January 14, 2004)
(Effective Date of Opinion: June 11, 2004)

Case No. A-5926 is an administrative appeal filed by James J. Levin (the "Appellant"). The Appellant charges error on the part of the County's Department of Permitting Services ("DPS") in issuing Building Permit No. 313014, dated July 25, 2003, for the construction of a single-family dwelling on the property located at 8037 Park Lane, Bethesda, 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 November 12, 2003 and January 14, 2004. David W. Brown, Esquire, represented the Appellant. Assistant County Attorney Malcolm Spicer represented DPS. Kinley R. Dumas, Esquire, represented Habib Ahmadizadeh and Tahereh Safari, the Property owners, who intervened.

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

FINDINGS OF FACT

The Board finds by a preponderance of the evidence that:

1. The Property, known as 8037 Park Lane in Bethesda, is an R-60 zoned parcel identified as Lot 10, Block G of the Battery Park subdivision. On July 25, 2003, DPS issued Building Permit No. 313014 to Mr. Ahmadizadeh to permit the construction of a single family dwelling on the Property.

2. Delvin Daniels, Permitting Services Specialist for DPS, testified that he reviewed the plans[1] for the proposed dwelling, which show a structure with two stories above grade and a lower level partially below grade. Mr. Daniels stated that he reviewed the plans to determine, among other things, whether the lower level of the structure qualified as a "basement" or as a "cellar" under the Zoning Ordinance. He stated that, based upon the measurements given in the plans, the average elevation of one-half the clear ceiling height of the proposed lower level is 374.28 feet. This figure was based, in part, upon a calculation of a 9.8-foot clear ceiling height for a portion of the lower level in which the owner proposes to install a 12" drop ceiling. Mr. Daniels stated that he subtracted the thickness of the drop ceiling when he calculated the clear ceiling height for that portion of the proposed lower level.[2]

Mr. Daniels stated that the plans showed a mean elevation of the ground adjacent to the proposed structure of 374.45 feet. He stated that this calculation was based upon the proposed finished grade of the adjacent ground and not the pre-construction existing grade. He testified that the difference between the existing and the proposed finished mean grades is about 7 inches.

Based upon these figures, Mr. Daniels found that the average elevation of one-half the clear ceiling height of the proposed lower level would be approximately 2 inches below the mean elevation of the adjacent ground. He concluded that the lower level therefore constituted a cellar and not a basement.

Mr. Daniels further testified that the Building Code requires at least a 6" fall in grade over a distance of 10 feet from the foundation of a house. This requirement is to provide positive drainage away from the house.

3. Barry D. Yatt, who qualified as an expert in architecture, site development, and building codes, testified that he went to the site of the dwelling and took measurements. He found that the building elevations and wall length calculations contained in the building permit plans were very close to the as-built conditions so that, using the same factors and method of calculation used by Mr. Daniels, the average elevation of one-half the clear ceiling height is actually 2.55 inches below the proposed finish grade of the adjacent ground (Exhibit 14).

Mr. Yatt then testified that if either of two factors – (1) the use of finished grade elevations, or (2) the inclusion of a 12" drop ceiling - is removed from

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[1] After mathematical discrepancies in the original building plans were discovered at the November 12, 2003 hearing, the Intervenors submitted to DPS revised building plans. Without objection, it is the revised plans that are the subject of this appeal.

[2] Specifically, Mr. Daniels subtracted the lower level floor elevation (368.90'), the drop ceiling thickness (1.0'), and the first floor thickness (1.31') from the first floor elevation (381') to arrive at the clear ceiling height of 9.8 feet.

DPS's calculation, the proposed lower level would then be considered a basement.

First, Mr. Yatt provided figures showing that the mean pre-construction elevation of the ground adjacent to the proposed home is 373.89 feet (Exhibit 15). Based upon these figures, and assuming the use of a 12" drop ceiling, Mr. Yatt found that the average elevation of one-half the clear ceiling height of the proposed lower level (374.30 feet) would be approximately 4.92 inches above the mean elevation of the adjacent ground.

Mr. Yatt further testified that if the plans for the main portion of the lower level provided for a 3/4" drywall ceiling, rather than a 12" drop ceiling, the clear ceiling height of that portion of the lower level would be 10.74 feet instead of 9.8 feet. As a result, the mean elevation of one-half the clear ceiling height would be 374.63 feet instead of 374.30 feet. Even using the post-construction grade elevation figures relied upon by DPS (374.45 feet), the lower level would qualify as a basement by more than 2 inches. If Mr. Yatt's pre-construction ground elevation figures are used, the lower level would qualify as a basement by 8.83 inches.

In response to examination, Mr. Yatt stated that, in his opinion, the word "ceiling" in the Zoning Ordinance refers to a finished ceiling. He stated that, in his opinion, a typical basement or cellar does not have a 12" drop ceiling, but he admitted that it is a reasonable use in a residential dwelling.

Mr. Yatt also noted that the proposed finished grade around most of the perimeter of the home will be raised between 0.9' to 1.2' above the pre-construction grade. About 16.80 feet of the southwest perimeter of the house will be reduced in grade about 4.7 feet in order to provide a driveway entrance into the garage.

4. Curt Schreffler, who qualified as an expert in civil engineering and site planning, testified on behalf of the Intervenors/Owners. He stated that he agreed with Mr. Yatt's computations. He stated that a 12" drop ceiling is not unreasonable and may be installed to allow room for ductwork, lighting, and electrical lines. He also testified that, when designing a home, it is sometimes necessary to exceed the 6" fall for grading required by the Building Code in order to, for example, provide a level yard. He stated that in this case, the lot gently slopes from left to right (west to east). He stated that the grade at the left front portion of the house is being raised more than 6" in order to provide drainage toward the street. Mr. Schreffler did not consider the proposed grading to be drastic.

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 issued.

2. There is little dispute as to the facts or applicable law of the case. All parties agree that the maximum allowable height of the proposed structure is governed by Section 59-C-1.327.a of the Zoning Ordinance, which states:

> "The height must not exceed 2½ stories or 35 feet if other lots on the same side of the street and in the same block are occupied by buildings with a building height the same or less that (sic) this requirement."

The parties also agree that, if the lower level of the proposed house qualifies as a "basement," it must be counted as a "story" for the purposes of the height restriction of Section 1.327.a. Section 59-A-2.1. The two sides also agree that a "basement" is defined in Section 59-A-2.1 as:

> "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."

The parties also agree with the figures offered by Mr. Yatt with regard to the measurement of the as-built wall lengths and the elevations of the lower level of the proposed house, as well as his pre-construction ground elevations. What's more, all agree that if the mean level of the adjacent ground is measured from the existing grade, rather than the finished grade, then the lower level of the proposed house will constitute a "basement" and therefore a story within the meaning of the Zoning Ordinance. Finally, all agree that if the clear ceiling height of the main portion of the lower level is measured from a ¾" ceiling thickness rather than a 12" drop ceiling, then the lower level of the proposed house will again constitute a "basement" and therefore a story within the meaning of the Zoning Ordinance.[3]

3. The parties diverge, however, on two points: (1) whether the mean level of the adjacent ground is to be measured from the existing or finished grade, and (2) whether the clear ceiling height of the main portion of the lower level may be calculated assuming the installation of a 12" drop ceiling. These

[3] Additionally, because it was not raised as an issue, we will presume, for the purposes of this Opinion, that all parties agree that the proposed dwelling will not exceed 35 feet in height.

questions require our interpretation of the Zoning Ordinance's definition of "basement."

Section 59-A-2.1: Making the "Grade" (Redux)

4. The Appellant contends that the mean level of the ground adjacent the proposed dwelling should have been measured from the existing grade of the Property and not from the proposed finished grade. The Appellant relies on our Opinion in BA Case No. A-5873, *Appeal of Habib and Tahereh Safari Ahmadizadeh*, for support of this position. We find the Appellant's reliance on *Ahmadizadeh*, however, to be misplaced.

Our decision in *Ahmadizadeh* is clearly distinguishable from the case at hand. In that case, DPS had revoked the appellant's building permit for failure to meet the height requirements of the Zoning Ordinance. Upon reviewing that action, we agreed with DPS and found that the landowners improperly proposed to artificially raise the grade of the adjacent ground by 2½ feet for the sole purpose of avoiding the height requirement of Section 59-C-1.327.a. In that case, there was nothing in the record to suggest that the 2½- foot increase in grade was proposed for drainage, aesthetics or for any other reason. Rather, it appeared from the record that the sole reason for increasing the grade by 2½ feet was to avoid defining the lower level as a "basement" and therefore a "story" for the purpose of the height restriction. Because the appellants' actions were intended solely for the purpose of circumventing the Zoning Ordinance, we determined to uphold DPS's revocation of their building permit.

In this case, there is sufficient evidence in the record to show that the proposed post-construction finished grade is a reasonable measure of the adjacent ground level for the purposes of applying the height restriction of the Zoning Ordinance. Mr. Daniels testified that the average increase from the existing to the finished grade is only 7 inches. He stated that the Building Code requires a minimum 6" fall in grade over a distance of 10 feet away from the foundation of a house. While at some points along the perimeter of the home the finished grade will be as much as 1.2 feet higher than the existing grade, Mr. Schreffler, an expert in the field, offered a plausible reason for this difference – that it was necessary to provide positive drainage toward the street. We find nothing in the record to discount this testimony.

The difference in the grade change in the *Ahmadizadeh* case and this case is significant - 2.5 feet in the former, as opposed to an average of 7 inches, or 1.2 feet at its highest point, in the latter. What's more, in *Ahmadizadeh*, the appellants offered no reasonable explanation of the grade change other than to circumvent the height requirement. Here, the Owners have provided a reasonable engineering basis for the increase in grade, which explanation is uncontroverted.

We point out that, in footnote 5 of our Opinion in *Ahmadizadeh*, we cautioned DPS not to read our decision to mean that all residential building plans should be measured from the existing grade. We expressly limited our conclusion in that case to the facts, which showed that the appellants had artificially increased the grade for the sole purpose of circumventing the Ordinance. We stated our belief that DPS should continue to interpret and apply the regulation on a case-by-case basis according to the particular facts. We find that DPS has done so properly in this case.

We therefore conclude that DPS reasonably used the proposed post-construction finished grade to measure the adjacent ground level for the purpose of determining whether the lower level of the proposed dwelling is a "basement" or "cellar" within the meaning of Section 59-A-2.1.

Section 59-A-2.1: I Can "See(ling)" Clearly Now

5. The Appellant next argues that DPS improperly considered the proposed 12" drop ceiling in its calculation of the clear ceiling height of the main portion of the lower level. The Appellant contends that DPS should have instead allowed only for a ¾" thick drywall ceiling in determining the clear ceiling height.

The Appellant's argument requires us to interpret and apply the phrase "clear ceiling height" as used in the Zoning Ordinance's definition of "basement," which is "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."[4] As with any matter of statutory interpretation, our goal is to ascertain and carry out the real intention of the legislature. The primary source from which we glean this intention is the language of the statute itself. In construing a statute, we accord the words their ordinary and natural signification. If reasonably possible, a statute is to be read so that no word, phrase, clause, or sentence is rendered surplusage or meaningless. Similarly, wherever possible an interpretation should be given to statutory language which will not lead to absurd consequences. Moreover, if the statute is part of a general statutory scheme or system, the sections must be read together to ascertain the true intention of the legislature. The Mayor and Council of Rockville v. Rylyns Enterprises, Inc., 372 Md. 514 (2003).

The phrase "clear ceiling height" is not defined in the Zoning Ordinance. Giving it its ordinary and natural signification, however, it would refer to the distance between the top of the floor and the bottom of the ceiling of any room in a building. The word "ceiling" is commonly defined as "the upper interior surface of a room," *The American Heritage Dictionary of the English Language, Fourth Edition (2000)*; and "the inside lining of a room overhead; the underside of the

[4] Concurrently, we also interpret the phrase as used in the definition of "cellar," which is "that portion of a building below the first floor joists at least half of whose clear ceiling height is below the mean level of the adjacent ground." Section 59-A-2.1.

floor above; the upper surface opposite to the floor; the lining or finishing of any wall or other surface, with plaster, thin boards, etc.; also, the work when done," *Webster's Revised Unabridged Dictionary* (1996). Consequently, "clear ceiling height" would seem to refer to the distance between the lower and upper *finished* interior surfaces of a level of a building.

That the County Council intended to use the finished ceiling surface as a measure of the basement height is also clear from the plain language of the "basement" definition. If the legislature intended the height of the lower level to be measured to the bottom of the first floor joists, it would not have used the phrase "clear ceiling height" at all; the definition would have simply read, "that portion of a building below the first floor joists at least half of which is above the mean level of the adjacent ground." We must give meaning to the phrase "clear ceiling height" so that it is not rendered surplusage. The Council clearly intended that it mean something other than the distance to the first floor joists.

We find added support for our interpretation in the Montgomery County Building Code. While it is not ordinarily a resource for the interpretation of the Zoning Ordinance, in this instance, it is the only source of County law of which we are aware in which "ceiling height" is defined. Section R202 of the International Residential Code, which was adopted as the County's building code pursuant to Section 8-14 of the Montgomery County Code, defines "ceiling height" as "the clear vertical distance from the finished floor to the finished ceiling." We think the County Council had this definition in mind when it used the phrase "clear ceiling height" in the definition of basement.

We note that the Appellant's own expert, Mr. Yatt, opined that the word "ceiling" in the Zoning Ordinance refers to a finished ceiling. The Appellant suggests, however, that we should substitute in our calculation a ¾" drywall ceiling for the 12" drop ceiling proposed by the Owner. The Appellant argues that a ¾" ceiling thickness is more typical of residential construction and that the Owner's use of a 12" drop ceiling is merely a subterfuge to circumvent the Zoning Ordinance's 2½ story height requirement. After all, the Appellant posits, what is to stop any applicant from simply dropping the finished ceiling lower in order to avoid classification as a basement?

Once again, we will apply a reasonableness standard to the interpretation of the Zoning Ordinance. Mr. Schreffler explained that the installation of a 12" drop ceiling is not unusual in construction of this type, and is often used to allow room for ductwork, lighting, and electrical lines. This testimony was not only uncontroverted, but Mr. Yatt agreed that a 12" drop ceiling is a reasonable use in this size home. There is, therefore, a reasonable basis upon which to include the 12" drop ceiling in the calculation of clear ceiling height.

Unlike in *Ahmadizadeh*, we have no evidence before us that the Owner attempted to circumvent the Zoning Ordinance in this case. If, as the Appellant

suggests, an applicant were to propose, for example, a 2 or 3 foot drop ceiling without any plausible basis for doing so other than to qualify the lower level as a cellar, then we would expect DPS to apply the reasonableness standard and reject the application. This is a determination DPS must make on a case-by-case basis according to the particular facts. We find that DPS has done so properly in this case.

6. Consequently, we find that DPS properly calculated both the "clear ceiling height" and "mean level of the adjacent ground" when it determined that the lower level of the proposed dwelling on the Property is a cellar and not a basement. DPS therefore properly concluded that the proposed dwelling did not exceed 2½ stories in accordance with Section 1.327.a. Building Permit No. 313014 was therefore properly issued.

11. The appeal in Case A-5926 is **DENIED**.

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.

_____
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 11th day of June, 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.