BOARD OF APPEALS
for
MONTGOMERY COUNTY

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

Case No. A-6072

APPEAL OF DAVID EFRON AND CHANPEN PUCKAHTIKOM

OPINION OF THE BOARD

(Hearing held July 6, 2005)
(Effective Date of Opinion: September 21, 2005)

Case No. A-6072 is an administrative appeal filed by David Efron and Chanpen Puckahtikom (the "Appellants"). The Appellants charge administrative error on the part of the County's Department of Permitting Services ("DPS") in issuing a letter, dated March 28, 2005, for the operation of a bed and breakfast facility with two guest rooms at the property located at 5402 Tuscarawas Road, 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 a public hearing on the appeal on July 6, 2005. Mr. Efron and Ms. Puckahtikom appeared pro se. Assistant County Attorney Malcolm Spicer represented DPS.

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

FINDINGS OF FACT

The Board finds by a preponderance of the evidence that:

1. The Property, known as 5402 Tuscarawas Road in Bethesda, Maryland, is zoned R-90 and is identified as Lot 13, Block 15 in the Glen Echo Heights subdivision.

2. In 1990, the zoning classification of the Property was changed from R-60 to R-90 by Map Amendment G-666.

3. The owners of the Property are Jayson H. Schwam and Leslie K. Miles (the "Owners"). They were permitted to intervene in the case.

4. The operation of bed and breakfast lodging with one or 2 guest rooms is a permitted use in the R-90 zone, provided that the use is registered with DPS and the property is not a mobile home. The owners are required to maintain a record of transient visitors.

5. The operation of bed and breakfast lodging with one or 2 guest rooms in the R-60 zone is only permitted by special exception.

6. The Owners sent a letter to the Department of Permitting Services, dated March 2, 2005 and received by DPS on March 7, 2005, requesting a Bed and Breakfast Lodging Certificate for the Property, and providing the information requested on the DPS website.

7. DPS sent a letter, dated March 28, 2005, to the Owners "confirming that the above-referenced property is registered with the Department of Permitting Services as a Bed and Breakfast Facility with 2 guest room(s)."

8. The Zoning Ordinance does not convey any decision-making authority on DPS with respect to the ability of an owner of property in the R-90 zone to register his property as a bed and breakfast facility with one or 2 guest rooms. If the property is zoned R-90 and is not a mobile home, the owner can, as a matter of right, register the property with DPS as a bed and breakfast facility with one or 2 guest rooms. Indeed, it is action by the owner, not action by DPS, which is necessary to bring about the registration and operation of property as a bed and breakfast in the R-90 zone.

9. DPS' issuance of letters confirming the registration of properties as bed and breakfasts is not required by the Zoning Ordinance.

10. Mr. Efron and Ms. Puckahtikom filed this appeal to the Board on April 19, 2005.

CONCLUSIONS OF LAW

1. Section 59-A-4.3(a) of the Zoning Ordinance provides that appeals to the Board may be made by any person, Board, association, corporation or official allegedly aggrieved by the grant or refusal of a building or use and occupancy permit or by any other administrative decision based or claimed to be based, in whole or in part, upon this chapter, including the zoning map. Section 59-A-4.3(e) of the Zoning Ordinance provides that except as otherwise specifically provided by statute, any administrative appeals to the Board from any action, inaction, decision or order of a Department of the county government must be

considered *de novo*. The burden in this case is therefore upon the County to show that the action taken by DPS was proper.

2. As a preliminary matter, counsel for DPS moved to dismiss the appeal on grounds that a letter confirming receipt of registration does not constitute a decision or order of the Department as contemplated by Section 59-A-4.3 of the Zoning Ordinance. For the reasons stated below, we find that the DPS letter was not an appealable administrative decision by that Department, and that Appellants' appeal must therefore be dismissed.

3. Section 59-C-1.31 of the Zoning Ordinance ("Land Uses"), as enacted by the County Council (sitting as the District Council), contains a chart listing the various uses which are permitted or available by special exception in the established one-family residential zones. Uses designated by a "P" are "Permitted Uses," and pursuant to section 59-C-1.31, are "permitted on any lot in the zones indicated, subject to all applicable regulations." Uses designated by an "SE" are "Special Exception Uses," and may be authorized as special exceptions in the designated zones, in accordance with the provisions of Article 59-G.

4. The use at issue is classified as "Bed-and-breakfast lodging with one or 2 guest rooms." Per section 59-C-1.31, that use is a permitted use in the R-90 zone unless, as indicated by footnote, the home is a mobile home. The footnote further provides that the owner must maintain a record of transient visitors and register the lodging with DPS. Thus the County Council, sitting as the District Council, has, through legislation, given the owners of single family homes in the R-90 zone the right to use their homes as bed-and-breakfast lodging with one or 2 guest rooms.

5. Section 59-G-2.09.2 of the Zoning Ordinance ("Bed-and-breakfast lodging") sets forth requirements governing special exceptions for bed-and-breakfast lodging in those zones in which such use is permitted by special exception; section 59-G-2.09.2 does not apply to bed-and-breakfast lodging with one or 2 guest rooms in zones such as the R-90 zone in which such use is a permitted use.

6. This appeal is taken from the issuance by DPS of a letter confirming registration of the subject Property as bed and breakfast lodging with 2 guest rooms. The Board finds that this was not a decision or order of DPS. As indicated in testimony at the hearing, DPS has no authority under the Zoning Ordinance to deny the registration of a property located in the R-90 zone as bed and breakfast lodging with one or 2 guest rooms. That use is permitted as of right in the R-90 zone unless the property is a mobile home. DPS' issuance of a letter that is not required by the Zoning Ordinance and that, by its own language, "confirms" the registration of the subject property as a bed-and-breakfast is not a

grant of "approval" or "permission" to use the subject property as such, and does not constitute an appealable administrative decision by the Department.

7. Appellants contend that section 59-G-4.27 of the Zoning Ordinance, which permits development of lots in the R-90 zone which were recorded by deed or subdivision plat in the R-60 zone before June 26, 1990 with a one-family dwelling and accessory structures in accordance with the development standards of the R-60 zone that were in effect when the lot was recorded, should be read as limiting the owners of such R-90 property to those uses permitted in the R-60 zone. The Board does not find this argument persuasive. As stated on its face, section 59-G-4.27 was intended to address development standards, not uses. If this were not the case (and if 59-G-4.27 were read to be mandatory, as the appellants would urge, and not permissive, as the language dictates), the effect of section 59-G-4.27 would have been to make the zoning of the Property in question (and those like it) R-90 in name only, thereby negating all effects of the rezoning and essentially rendering it meaningless. The Board does not believe that the rezoning was undertaken simply for purposes of a name change. The Board's interpretation of section 59-G-4.27 as preserving the ability to apply R-60 development standards to these rezoned lots is supported by and consistent with the May 29, 1990 statements included in the Montgomery County Planning Board Recommendation on Zoning Text Amendment No. 90002 (which added the section in question). Those statements read, in relevant part: "… The additional subsection described in No. 3 (setting forth the text of what would become 59-G-4.27) would provide an additional exception to the nonconforming use restrictions for unimproved lots being downzoned by Sectional Map Amendment G-666. It has now been determined that a number of such lots that were legally recorded between 1958[1] and 1990 would become unbuildable under a strict interpretation of the provisions of Text Amendment No. 90002. These scattered lots are also too small for resubdivision under either R-60 or R-90 standards. As a matter of equity, it was never the intention of the Bethesda-Chevy Chase Master Plan to render any lots unbuildable. Therefore, the Board recommends that this provision be added."

8. As stated above, the Board's authority under section 59-A-4.3(a) of the Zoning Ordinance is limited to the review of an administrative decision based or claimed to be based, in whole or in part, upon the Zoning Ordinance. Having concluded that 59-G-4.27 does not impose the R-60 use limitations on properties such as the subject property that were rezoned from R-60 to R-90, and given that under 59-C-1.31, use of the subject Property as "bed and breakfast lodging with one or 2 guest rooms" is permitted as of right due to the location of the Property

[1] Section 59-B-5.1 of the Zoning Ordinance establishes the right to build on lots recorded by deed prior to June 1, 1958, in accordance with the zoning development standards in effect when the lot was recorded, with certain specified exceptions. [Please note that this footnote was added for clarity to better explain the Planning Board recommendation. It was not part of the excerpted text.]

in the R-90 zone, the Board finds that there was no "decision" for DPS to make, and hence no administrative decision from which to take this appeal.

9. For the foregoing reasons, we find that the appeal in Case A-6072 is moot and is therefore **DISMISSED**.

On a motion by Member Louise L. Mayer, seconded by Vice Chairman Donna L. Barron, and Chairman Allison Ishihara Fultz in agreement, with Member Angelo M. Caputo and Member Wendell M. Holloway necessarily absent, the Board voted 3 to 0 to dismiss 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
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 21st day of September, 2005.

_____
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.