BOARD OF APPEALS
for
MONTGOMERY COUNTY

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Case No. - A-6115

APPEAL OF SALLY RAND AND RICHARD HALL

OPINION OF THE BOARD

(Hearing held February 15, 2006)
(Effective Date of Opinion: October 18, 2006)

Case No. A-6115 is an administrative appeal filed by Sally Rand and Richard Hall (the "Appellants"). The Appellants charge error on the part of the County's Department of Permitting Services ("DPS") in issuing Building Permit No. 396835, dated November 7, 2005, for the construction of a single-family dwelling on the property located at 6311 Wiscasset Road (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 February 15, 2006. Richard O'Connor, Esquire, represented the Appellants Sally Rand and Richard Hall, both of whom appeared at the hearing. Craig Maloney also testified on behalf of the Appellants. Assistant County Attorney Malcolm Spicer represented DPS. Permitting Services Specialist Robin Ferro testified for DPS. Rebecca D. Willens, Esquire, represented Jennifer and Laurence Bou, who own the subject Property and who intervened in this case ("Interveners"). Paul Davey and Carter Willson testified on behalf of the Interveners.

Decision of the Board: Administrative appeal **granted in part** and **denied in part**.

FINDINGS OF FACT

The Board finds by a preponderance of the evidence that:

1. The Property, known as 6311 Wiscasset Road in Bethesda, is an R-90 zoned parcel identified as Lot 5, Block 9B of the Glen Echo Heights subdivision. It is located at the corner of Mohican Place and Wiscasset Road. On November

7, 2005, DPS issued Building Permit No. 396835 to Carter, Inc., to permit the construction of a single family dwelling on the Property.

2. Robin Ferro, Permitting Services Specialist for DPS, testified that she reviewed the plans for the proposed dwelling. She testified that the Property is currently located in the R-90 zone, and that the lot was recorded in 1940. She testified that the Property, at 8,841 square feet, was substandard for the R-90 zone. She testified that this lot was reviewed under section 59-B-5.1 of the Zoning Ordinance, pursuant to which the side and rear setbacks set forth in the 1930 Zoning Ordinance apply (20 foot rear setback, seven foot side setback). She testified that the plans show that the proposed construction is set back 21.5 feet from the rear lot line and 7.1 feet from the side lot line, which meets the required setbacks.

Ms. Ferro testified that the Property is subject, under the Zoning Ordinance, to the current height limitations and front line/established building line setbacks. Because this is a corner lot, it is subject to a front line/established building line ("EBL") setback along both Mohican Place and Wiscasset Road. See section 59-C-1.323 of the Zoning Ordinance. She agreed on cross examination that it was fair to say that the EBL was intended to maintain the character and compatibility of the neighborhood.

She further testified that the standard development method of development was applicable to this lot, and that thus under section 59-C-1.322(a), the minimum lot size for the R-90 zone was 9,000 square feet. She testified that the record plat at Exhibit 16(e) does not indicate that this is a density controlled subdivision, that the zone is "R-90," not "R-90 density controlled" (under section 59-C-1.43, for density controlled developments (which permit averaging of lot sizes), the minimum lot size would be 8,000 square feet).

Established Building Line Calculation

Ms. Ferro testified that to calculate an established building line, you look at the setbacks of houses on neighboring lots that are located on the same side of the street as the subject property and located within 300 feet of the side property lines of the subject Property. You then exclude from the calculation the setbacks of homes which are set closer to the street than the minimum permissible front line setback (they are nonconforming), as well as the setbacks of homes on corner and flag-shaped lots. You then take an average of the setbacks of all of the [eligible] houses that are within 300 feet to find the established building line. Thus along the Mohican Place side of the Property, Ms. Ferro testified that there was no established building line since all of the lots on that side of the street were excluded from the EBL calculation (lots 3 and 4 have less than the minimum required setback, lot 1 is a flag-shaped lot, and the next lot is a corner lot), and that the default front line setback of 30 feet therefore applied along Mohican Place.

Along the Wiscasset Road side of the Property, Ms. Ferro testified that lot 6 is vacant and therefore excluded, that the house on lot 26 is set back 43.6 feet from the front lot line and therefore could be included in an EBL calculation, and that the home on lot 10 is closer to the street than the minimum 30 foot setback (28 feet), and was therefore excluded. She then testified that DPS has concluded that you cannot take an average of one house to calculate an established building line (in this case, lot 26), and said that DPS has applied this policy consistently since the EBL was enacted. Thus she said that the minimum frontline setback of 30 feet applied along the Wiscasset Road side of the Property. She testified that the use of the plural "buildings" in the language of section 59-A-5.33(b) of the Zoning Ordinance ("The buildings considered in determining the established building line must….") was used to determine that more than one building must be included to calculate an EBL.[1] She acknowledged on cross examination that this interpretation is not written down anywhere.

Ms. Ferro also testified that DPS did not issue a "waiver" from the EBL requirements for this property, and that such a waiver would in fact have been a variance. She further testified that under the foregoing interpretation of the EBL requirements, no variance was required for this property.

Height Calculation

With respect to height, Ms. Ferro testified that the building fronts on and is addressed on Wiscasset Road, and that she had calculated its height on that side as 29.41 feet. She testified that this was higher than the 29.16 feet that the architect had calculated, but still well below the 35 foot maximum. She further testified that there was no need for a height calculation along the Mohican Place side of the building because that was the side and not the "front" of the building.

Sloping Lot Calculation

Ms. Ferro testified that DPS had also reviewed these plans for number of stories. She testified that this was a three and one half story house, but that because of the sloping lot condition, it appears to be a two or two and one half story house from the front. She testified that although homes are usually limited to two and one half stories, there is an exemption at section 59-A-5.41 of the Zoning Ordinance, which allows additional stories on sloping lots. She stated that DPS had approved this lot as a sloping lot. She testified that DPS is generally looking for approximately 10 percent change in elevation between the front property line and the rear of the house, that she has reviewed approximately 25 sloping lot applications in the past two years, and that the smallest change in grade for which a sloping lot exemption had been granted was 8.9 percent. She testified (on cross examination) that she had denied

[1] Subsequent to the hearing, the language of section 59-A-5.33(b) was amended to clarify that at least two buildings must be used to calculate an EBL, thus confirming that DPS' longstanding interpretation of this section was consistent with the County Council's intent.

applications for lots with slopes of 7.7%, 7.9% and 8.7%, but that she had not denied any sloping lot applications with a slope between 8.7% and 10%. She further stated that DPS had approved three lots in the 9% range as sloping lots.

She testified that per the contour lines on the site plan submitted in connection with the request that DPS evaluation this Property for a sloping lot condition, the elevation of the front property line along Wiscasset Road was 292 feet, that the spot elevation at the rear of the house was 282.2 feet, and that the distance between the two points of measurement was 86 feet. Based on these figures, she calculated that the slope of the subject Property was 11.3 percent. She testified that all permitting specialists apply the same method to determine whether or not a lot is sloping, that their determinations are reviewed, and that they enforce the policy on sloping lots uniformly despite the lack of a written code interpretation policy. She also testified that DPS does not have a published code interpretation policy for each section of the Zoning Ordinance.

Pursuant to questions on cross examination, she testified that the slope is measured from the center of the property along the front property line, and that it is measured to the back of the house instead of the back of the lot to avoid a situation where a homeowner could be accorded credit for a sloped lot without having to site his home on the slope (e.g. lot flat in front and significantly sloped in the rear). She testified that even looking at the elevations on the revised site plan (Exhibit 21) and using existing grades over the depth of the entire lot, the lot would be considered a sloped lot (9.3%).

She testified by way of history that in the early 1960s, there was an exemption for "steeply" sloping lots with a minimum 14 percent change in grade, and that in 1964, the current language was adopted which eliminated the reference to "steeply," as well as the requirement for a 1 foot vertical change for every 7 feet of horizontal change (effectively 14 percent). She said that these changes indicate that a steepness requirement of 1 in 7 was no longer desired. She testified that these changes have provided DPS with greater flexibility in reviewing sloping lot exemptions, and that DPS' consistent policy in reviewing and approving sloping lots implements the broadening of this policy by the District Council.

3. A definition of "average" from Black's Law Dictionary (Abridged Seventh Edition) was introduced by counsel for the Interveners to support DPS' interpretation that is calculating an EBL, you cannot take an average of one. The first definition of average reads as follows: "[a] single value that represents a broad sample of subjects; esp., in mathematics, the mean, median, or mode of a series." A definition of "mean" from the same source was also introduced, with emphasis put on language referring to "an intermediate point between two points." Again, this was to support the conclusion that average (and mean) should be read to refer to multiple properties ("mean, adj. 1. Of or relating to an intermediate point between two points or extremes <a mean position>. 2. Medium in size <a mean height>. 3. (Of a value, etc.) average <a mean score>."). Exhibit 26.

4. Paul Davey from Studio Z Design Concepts, LLC, was accepted as an expert in architecture. He testified that he began working with the Bou family in the fall of 2004.

Mr. Davey testified that he considered the applicable setbacks in designing the Bous' home. He testified that he realized only one neighboring lot was eligible for inclusion in the EBL calculation, and that he agreed with the DPS position that one lot could not be used to determine an EBL. He stated that he had previously encountered this situation, and that a similar result obtained.

He testified that the house conforms to the 30 foot required minimum setback on both streets. He testified that as shown on Exhibit 22 (front elevation), the house is two and one half stories from its architectural front, and that it is three and one half stories from the rear. He testified that the height is less than 30 feet, and that it is below the 35 foot limit imposed by the Zoning Ordinance at the time of permit review. He theorized that the difference between his height calculation and that of DPS was probably due to the six inch height of the gutter line, and that one had likely measured to the top of that line, one to the bottom.

He testified that the rear setback is 20 feet. He testified that the stairs to the deck on the right rear side of the home (northeast corner) would not be built as shown on the revised site plan (Exhibit 21) because as shown, they project more than the permitted 9 feet into the rear setback. He testified that they would be built to comply with the required setback after coordination with the civil engineer, and that this was a typical field revision. He testified that revised plans had been prepared which showed the stairs "sliding back and falling within the nine foot dimension." He testified that apart from the stairs to the rear deck, the house conforms to the requirements of the Zoning Ordinance. He testified that in his experience, the building permit application would not have been rejected because of the need for a field revision to the rear stairs, but rather that the permit would have been issued with a notation placed on the approved drawings that the holder needs to make sure that the rear stairs were located within the permissible area. He stated that these drawings do not contain that annotation.

He testified on cross examination that the house covers approximately 28% of the lot, and that the maximum coverage allowed is 30%. He testified that the Zoning Ordinance says a half story can't exceed 60% of a full story, and that the attic in this house was not close to that percentage.

5. Carter Willson, of Carter, Incorporated, testified that his company was the builder for the Bous' home, and that someone from his company had applied for the building permit at issue in this case. He testified that he has 25 years' experience working in Montgomery County. He testified that any reference to a variance granted for lot 6 was erroneous and an oversight. He testified that in his experience, an oversight such as the incorrect placement of the rear deck stairs on the Bous' site plan would not be grounds for rejecting a building permit

application, that the revised plans conform to the Zoning Ordinance, and that these types of minor revisions are done frequently. He stated that they had a revised plan prepared which conformed to the setbacks, and which they were prepared to submit to DPS if necessary.

6. Craig Maloney, an architect with CEM Designs who has 26 years experience, was also accepted by the Board as an expert in architecture. He testified on behalf of the Appellants that he had reviewed the plans submitted in connection with the building permit at question. He testified that he had calculated the elevations and slope based on the submitted site plan (Exhibit 21), and had arrived at a slope of 9.75%. He testified that there were other ways to measure slope. For example, he testified that if you measured all the way back to the center of the rear property line, you would come up with a slope that was less than 9.7%. He calculated the slopes along both the western and eastern property lines as being 10.4%. He testified that the slope of the lot from east to west (side to side) was less than 6%. Pursuant to a question from the Chair, he calculated the slope from the northwest corner of the lot to the southeast corner of the lot to be 13.3%.

Mr. Maloney further testified that he was familiar with the exemption in the Zoning Ordinance for sloping lots, and it was his understanding that the slope had to be ten percent or greater. Indeed, he testified that in preparing to come before the Board, he had telephoned DPS and had asked to speak with the zoning review officer at the zoning desk. He testified that he then spoke with Delvin Daniels, who told him that a sloped lot generally has a slope in excess of ten percent. Mr. Maloney further testified that in his experience, he couldn't say that a slope of 9.3% had ever been considered, although he later testified that he had never sought a sloping lot exemption for a lot with less than 10% slope. He said that he has designed homes for 8 or 10 sloping lots over the past 15 years.

Mr. Maloney testified that the plans show a three and one half story house, and that because more than 50% of the clear ceiling height of the lowest level is above grade, he concurred that the lowest level was a basement. He testified that he had calculated the height of the house on the Wiscasset Road side as being 29 feet, nine inches. He also testified that he had calculated the height of the house along the Mohican Place side, but was not allowed to testify to that after the Chair ruled that there was no ambiguity in the Zoning Ordinance as to what constituted the "front" of the house for the purpose of measuring the height of the house.

Mr. Maloney agreed with Mr. Davey's statement that the site plan submitted violated the rear setback. He disagreed, however, with Mr. Davey's assertion that this site plan should have been the basis for the issuance of a building permit, stating that a site plan that shows a nonconforming condition should not be the basis for the issuance of a building permit.

7. Appellant Sally Rand stated that she lives adjacent to the subject Property on the Mohican Place side. She testified that she had called DPS two

times to inquire about the sloping lot exemption. She said that in December, she had spoken with Clark Campbell, who said that a sloped lot was greater than 10 percent slope, and that slope was measured from the front lot line to the rear lot line. She testified that she had called again last week, and had been told the same thing.

8. Appellant Richard Hall stated that he lives with his wife, Ms. Rand, at 5705 Mohican Place, adjacent to the Property. He stated that the Bous had told them that they were rebuilding, and had shown them the initial plans. He further testified that he and Ms. Rand had invited the builder over to show them the plans for both the subject Property and for lot 6 (on the opposite side of the subject Property, along Wiscasset Road). He testified that they became concerned when they saw a reference on the site plan for the subject Property to a variance that had been granted for lot 6, and that his wife (Ms. Rand) came to review the file. He testified that at that time, she noticed that the EBL survey was dated the day after the permit.

Mr. Hall testified that the Bous' home is 17 feet higher than their house. He testified that numerous math programs for the computer and math textbooks used in Montgomery County allow you to take an average of one number. He said that he and Ms. Rand were not bringing this action because "the average of one is one" but because their property was being directly affected by this construction, and because their efforts to compromise with the Bous had not been successful.

CONCLUSIONS OF LAW

1. Section 8-23(a) 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. As a preliminary matter, the County and the Interveners filed a Joint Motion for Summary Disposition pursuant to Board Rule 3.2.2, asserting that each of Appellants' three stated causes of action failed to assert a genuine issue of material fact to be resolved and that the Board should therefore dismiss these actions as a matter of law. The Board considered the Joint Motion, as well as Appellants' Opposition to the Joint Motion, and concluded that there was enough of a question as to the application of the law to the facts to permit the matter to proceed. Thus the Board voted 5-0 to deny the Joint Motion for Summary Disposition.

3. The Board finds that pursuant to section 59-B-5.1 of the Zoning Ordinance, because this lot was recorded by subdivision plat in 1940 and does not conform to the area standard for the R-90 zone (which requires a 9,000 square feet minimum),[2] the 1930 Zoning Ordinance applies to this Property, except with respect to height and application of the EBL. In addition, the Board finds that pursuant to section 59-G-4.27 of the Zoning Ordinance, because this Property was previously classified in the R-60 zone and was reclassified through the 1990 Bethesda Master Plan to the R-90 zone by a sectional map amendment, it is developable under the R-60 zone standards applicable when the Property was platted. In light of the foregoing, the Board finds that DPS was correct in determining that the applicable rear yard setback is 20 feet. Pursuant to 59-B-5.1(c), the Property is subject to the current height limitations (35 feet in the R-90 Zone at the time of permit application, per section 59-C-1.327), and pursuant to section 59-B-5.1(d), it is subject to an established building line setback. Because this is a corner lot, the Board finds that pursuant to section 59-C-1.323, the Property has two front yards and is subject to a front yard setback from each street. See DPS Code Interpretation Policies ZP 0404-2 (Established Building Line) and ZP 0403-3 (Corner Lots).

Height

4. With respect to height, Appellants contend that because this is a corner lot and is thus considered to have two "front" yards for the purposes of determining the applicable setbacks, the height of the structure should be measured along both street sides. While the Board agrees that the Property has two front yards, the Board finds that the building on the Property has only one "front" for the purpose of determining height, and thus rejects Appellants' contention that height should be measured along both Mohican Place and Wiscasset Road.

Section 59-A-2.1 defines "height of building" as "[t]he vertical distance measured from the level of approved street grade opposite the middle of the front of a building to …". The Board finds that this reference to the "front of a building" is unambiguous, and that the fact that a lot may be considered for zoning purposes to have two "front yards" does not mean that a building on that lot has two architectural "fronts." The Board rejects Appellants' assertion that language in the definition of "height of building" in section 59-A-2.1 of the Zoning Ordinance, which permits a measurement of height from either adjoining curb grade on corner lots exceeding 20,000 square feet, should be read to say that every house on a corner lot has two "fronts," both of which must be measured and must comply with the applicable height restrictions. A plain reading of this language indicates that it is intended to allow a choice regarding the curb grade

[2] The Board finds as a matter of fact, based on evidence of record (plat and zoning vicinity map) and testimony from Robin Ferro, that this Property was subject to the standard development standards under section 59-C-1.322 (establishing a 9,000 square foot minimum for the R-90 zone), and not to the density control development standards regarding lot area (set forth in section 59-C-1.431 and establishing an 8,000 square foot minimum for lots in the R-90 density control development zone), as Appellants had posited. As noted previously, this Property is 8,841 square feet, substandard for the R-90 zone.

from which to measure height if the house sits on a large corner lot. Similar language is included for through lots. The Board finds that it is reaching to say that the implications of this language are that all corner houses have two "fronts," both of which must meet height restrictions. Furthermore, the Board finds that the provision regarding corner lots exceeding 20,000 square feet is not applicable to the facts of this case, in which the lot in question is only 8,841 square feet.

Based on the foregoing analysis, and in light of testimony and evidence that the architectural front of the building faces Wiscasset Road, the Board has determined that the height of this structure should be measured from the Wiscasset Road side, and that side alone. Although all three witnesses offering testimony on height came up with slightly different calculations of the height of the building on the Wiscasset Road side, all of the measurements were less than 30 feet, which is well under the 35 foot maximum allowed under the Zoning Ordinance at the time this permit application was reviewed. Thus the Board finds, based on a preponderance of the evidence, that the home does not violate the height restriction set forth in section 59-C-1.327.

Number of Stories and the Sloping Lot Exemption

5. In addition, and also going towards height, the Board finds that DPS correctly determined that the subject Property has a basement (as corroborated by Mr. Maloney's testimony that more than half of the clear ceiling height was above grade), and that it is thus a three and one-half story house.

The Board further finds that under section 59-A-5.41 of the Zoning Ordinance, additional stories above the number permitted in the zone are allowed on the downhill side of any building erected on a sloping lot, provided the building does not exceed the height limitation for the zone. This is referred to as a "sloping lot" exemption. DPS' interpretation and application of this exemption was the subject of debate during this hearing. Ms. Ferro, a senior DPS specialist, testified that DPS looks for lots with approximately 10% slope from the front line to the rear of the house, but that DPS has granted sloping lot exemptions to lots with slopes as low as 8.9%. Appellant Rand and her expert architect (Mr. Maloney) both testified that in response to telephone inquiries, they were told by DPS that a sloping lot has a slope of at least 10 percent. DPS has not published any interpretative guidance on how it interprets the sloping lot exemption. Legislative history indicates that former references to "steeply" sloped lots and a 14% grade had been eliminated from the Zoning Ordinance. In light of the foregoing, the Board concludes that it has the discretion to look at the specifics of this Property to determine whether or not a sloping lot exemption should have been granted for this Property. Regarding this Property, Ms. Ferro testified that she had originally calculated the slope of this lot as 11.3%, and that even if she were to look at the elevations on the revised site plan (Exhibit 21) and use the existing grades, this lot would still be considered a sloped lot (9.3%). Mr. Maloney testified that using DPS' procedures, he had calculated the slope of this lot as 9.75%. He further testified that there are many ways to calculate slope and

in so demonstrating, he gave further evidence to support a conclusion that this is a sloping lot, as the Property has a significant measurable slope in many different directions.

In reviewing the site plan and testimony of record, the Board finds that there is an absolute change in elevation from the front of this Property to the rear of the house that is almost a full story, and that both Ms. Ferro's calculation and Mr. Maloney's calculation of slope approximate the 10% standard. The Board thus concludes that this lot is the type of lot to which the sloping lot exemption was intended to apply, that this is a sloping lot, that DPS properly accorded this lot a sloping lot exemption to allow an additional story, and thus that the proposed three and one-half story house (including the basement) is permissible. The Board therefore dismisses Appellants' argument that DPS erred in determining that this lot was a sloping lot within the meaning of the exemption.

Established Building Line

6. As a preliminary matter, that Board accepts testimony of Robin Ferro that DPS did not issue a "waiver" from the EBL requirements for this property based on the grant of a variance for the lot next door. Ms. Ferro testified conclusively that DPS did not consider the variance granted for the lot next door in calculating the applicable setbacks for this Property and issuing this building permit.

With respect to the actual calculation of the EBL, section 59-A-5.33 of the Zoning Ordinance was revised by the County Council subsequent to the hearing for the stated purpose of "clarifying that the established building line requirements apply only if there are at least two existing residential dwellings that are not nonconforming and within 300 feet of the side property line of the proposed construction site…."[3] At present, section 59-A-5.33 provides the following:

59-A-5.33. Established building line.

(a) The established building line, as defined in 59-A-2.1, applies only in the R-60, R-90, R-150 and R-200 zones.

(b) The two or more buildings considered in determining the established building line must:

(1) all be within 300 feet of the side property line of the proposed construction site (excluding corner lots);[4]

(2) all be along the same side of the street;

(3) all be between intersecting streets or to the point where public thoroughfare is denied;

[3] See Ordinance 15-78 (Zoning Text Amendment 06-13), effective August 7, 2006.

[4] The Board finds that the reference to 300 feet is clear, and that contrary to Appellants' urging, DPS has no leeway under the Zoning Ordinance to consider properties further than 300 feet away in the established building line calculation.

(4) all exist at the time when the building permit application is filed;

(5) not be nonconforming, unlawfully constructed, or constructed pursuant to a lawfully granted variance; and

(6) not be located on a pipestem or flag-shaped lot.

(c) The established building line is the minimum setback for the zone, unless there are at least two buildings as described in (b) and more than 50 percent of the buildings described in (b) are set back greater than the minimum, in which case the average setback of all the buildings described in (b) excluding those buildings in the R-200 zone that are served by well or septic, is the established building line. Any building excluded from the established building line restriction must comply with the minimum setback requirement of the zone.

(d) Corner lots have two front yards and are subject to established building line standards on both streets.

DPS Code Interpretation Policy ZP0404-02 (May 7, 2004)[5] provides guidance as to the way in which DPS interprets and applies section 59-A-5.33. It requires identification of all main buildings that are within 300 feet of the side lot lines on the subject property, on the same side of the street, excluding buildings on corner lots, buildings subject to a front yard variance, buildings with a nonconforming front yard setback, buildings set back less than the required minimum front yard setback, illegal buildings, buildings on pipestem or flag-shaped lots, and buildings not meeting the minimum width at the minimum front setback. It then specifies how to measure the front yard setback of the remaining buildings, and says to "[a]dd all of the front yard setbacks together and divide by the number of houses included in your calculation. The result is the established building line." Exhibit 18(f-2). The Board notes that even prior to the changes clarifying this section of the Zoning Ordinance, Ms. Ferro of DPS had testified that DPS had consistently interpreted the previous iteration of section 59-A-5.33 to require the inclusion of at least two buildings in the established building line calculation. Thus the Board finds that despite predating the clarifying amendments, the method used by DPS to determine the established building line in this case was and is consistent with section 59-A-5.33, as revised.

The Board accepts testimony of record that no buildings within 300 feet of the subject Property along the Mohican Place side of the Property are eligible for inclusion in the established building line calculation. The Board thus finds that under 59-A-5.33, the required front line setback along Mohican Place is the minimum for the zone, in this case 30 feet.

The Board accepts testimony of record regarding the buildings within 300 feet of the subject Property along Wiscasset Road, finding that only one building fits the Zoning Ordinance criteria for inclusion in the established building line

[5] Although this Code Interpretation Policy predates the clarifying amendments to section 59-A-5.33, based on the testimony of Ms. Ferro, the Board finds that DPS' interpretation and implementation of the previous version of section 59-A-5.33 was consistent with the language of section 59-A-5.33, as amended.

calculation, and that that building is set back 43.6 feet from the front lot line. In light of revisions enacted to clarify that section 59-A-5.33 of the Zoning Ordinance requires that at least two buildings be used to calculate an established building line, the Board finds that as was the case on the Mohican Place side of this Property (and as was determined by DPS), the required setback along the Wiscasset Road side of the subject property is the minimum for the zone (30 feet).

The Board notes that while DPS relied on references in the previous iteration of section 59-A-5.33 to the plural "buildings" as support for their implementation of this section as precluding taking an average of one, section 59-A-2.2(a) of the Zoning Ordinance ("General Rules of Interpretation") states that as used in the Zoning Ordinance, the singular number includes the plural number and the plural the singular. The Board finds that in light of the clarifying references to "two or more buildings" in section 59-A-5.33, the argument that "buildings" could be read to refer to a single "building" in this context is no longer viable, and that under section 59-A-5.33 as currently in effect, the DPS interpretation was correct.

The Board therefore dismisses Appellants' argument that DPS failed to properly calculate the established building line along the Wiscasset Road side of the Property.

Rear Setback

7. As explained in number 3, above, the Board finds that the rear setback applicable to this Property is 20 feet, not 25 feet as Appellants had argued. Pursuant to section 59-B-3.1(a) of the Zoning Ordinance, open steps and stoops, exterior stairways, terraces, and porches can extend not more than 9 feet into any minimum rear yard. Evidence of record (revised site plan, Exhibit 21) and testimony from Paul Davey and Carter Willson all indicate that the open deck steps shown on the plans that were filed in connection with the application for this building permit extend more than 9 feet into the required rear setback. Although there was testimony indicating that this error had been addressed by revisions made to the plans which would be submitted to DPS, and that this type of correction was a permissible "field revision" and was not grounds for the rejection of the building permit, the Board finds that because the plans submitted in connection with building permit 396835 at the time it was originally approved depicted an exterior stairway that violated the rear setback requirements, DPS should not have issued this building permit until that error was corrected. The Board thus grants Appellants' appeal in this regard.

Having said that, the Board again acknowledges that in addition to earlier testimony that the site plan had been revised, just before the close of the proceedings, Ms. Ferro was recalled and testified that earlier that day, DPS had received and reviewed a revised site plan for this Property. Although the Board sustained an objection by Appellants' counsel regarding taking any evidence with regards to this new site plan, counsel for DPS proffered during his closing

argument that the revisions to the site plan eliminate any encroachment into the yard requirements, and suggested that if the rear setback violation posed by the deck stairs were to be the sole reason for the grant of this appeal, that the Board has the authority to remand the permit to DPS to allow a revision for the discrepancy regarding the stairs instead of outright denying the permit. Counsel for the Intervenors made a similar plea. Section 8-26(b) of the Montgomery County Code permits DPS to correct plans after the issuance of a permit, stating in relevant part that "[t]he issuance of a permit shall not prevent the department from thereafter requiring a correction of errors in plans or in construction or of violations of this chapter and all other applicable laws or ordinances specifically referring thereto…." Section 8-23(b) of the Montgomery County Code gives the Board the option to "affirm, modify, or reverse" an order or decision of DPS after notice and hearing (on an appeal of a building permit).

Thus the Board concludes that although DPS should not have issued this building permit based on the plans on file at the time of its issuance, by the conclusion of the hearing, a revised site plan had been received and reviewed by DPS which would presumably correct the encroachment of the deck stairs on the rear setback. Evidence and testimony of record shows that the proposed construction was otherwise in compliance with the Zoning Ordinance. Thus despite voting to grant Appellants' appeal after finding that, because the deck stairs encroached on the required rear setback, building permit 396835 was not properly issued, the Board has determined that rather than revoking permit 396835, the Board will instead invoke its power to modify DPS' decision, as follows:

Building permit 396835 is valid and remains in full force and effect, subject to the submission by the permit holders and approval by DPS of a revised site plan which demonstrates either that the deck stairs have been moved so as to conform to the applicable rear setback of 20 feet, or that the rear deck and attendant stairs have been eliminated so that the construction depicted on the plan now fully comports with the 20 foot rear setback.

8. The appeal in Case A-6115 is thus **GRANTED** in part and **DENIED** in part, as follows:

> For the reasons stated herein, Appellants were incorrect in their assertion that DPS incorrectly determined the Established Building Line applicable to the Property along the Wiscasset Road side. The Board does want to make clear that contrary to assertions by the Appellants, DPS has no discretion under section 59-A-5.33 of the Zoning Ordinance to include the setbacks of properties located more than 300 feet from the side line of the subject Property, nor do they have the duty or discretion to consider character and compatibility. Appellants' appeal of the Established Building Line calculation is DENIED.
>
> For the reasons stated herein, Appellants were incorrect in their assertion that DPS failed to correctly apply the slope exemption and determine the

height of the proposed building. Appellants' appeal of the slope and height calculations are therefore DENIED.

On a motion by Donna L. Barron, seconded by Caryn L. Hines, with Angelo M. Caputo, Wendell M. Holloway, and Allison Ishihara Fultz, Chair in agreement, the Board voted 5 to 0 to deny the appeal of the foregoing issues; furthermore:

For the reasons stated herein, Appellants were incorrect in their assertions that DPS had erroneously determined the rear setback to be 20 feet where it should have been 25 feet. The correct rear setback is 20 feet. Appellants were correct, however, in their assertion that a portion of the house (rear stairs to the deck) extends into the required setback. Appellants' appeal of rear setback violations is therefore GRANTED.

On a motion by Donna L. Barron, seconded by Caryn L. Hines, with Angelo M. Caputo, Wendell M. Holloway, and Chair Allison I. Fultz in agreement, the Board voted 5 to 0 to grant the appeal on the issue of the rear setback 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 18th day of October, 2006.

_____
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.