BOARD OF APPEALS
for
MONTGOMERY COUNTY

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

Case No. A-6133
APPEAL OF SLIGO BRANVIEW COMMUNITY ASSOCIATION
BY MARY COGAN, ET AL.

OPINION OF THE BOARD

(Oral argument on Motions to Dismiss held May 17, 2006)
(Effective Date of Opinion: September 18, 2006)

Case No. A-6133 is an administrative appeal filed by William J. Chen, Jr., Esquire, on behalf of the Sligo-Branview Community Association and other individual appellants ("Appellants") who live near the proposed building located at 8809 Flower Avenue, East Silver Spring, Maryland 20901 ("the Property"). Appellants charge administrative error on the part of the County's Department of Permitting Services ('DPS'), and appeal from a letter issued by DPS and dated February 15, 2006, which they assert is an administrative decision establishing the number of parking spaces required for Intervener's proposed use.

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"), and Section 2-112 of the Montgomery County Code, the Board scheduled a public hearing on this appeal for May 24, 2006. Following the prehearing conference and after receiving preliminary Motions to Dismiss this appeal from Counsel for Adventist HealthCare, Inc. ("Adventist") and Flower Avenue Shopping Center, LP ("FASC") (both of whom had been permitted to intervene and who are collectively referred to herein as the "Intervenors") and Counsel for DPS, on May 17, 2006, pursuant to its authority in Section 2A-8 of the Montgomery County Code, the Board heard oral argument on these preliminary Motions to Dismiss. William J. Chen, Jr., Esquire, represented the Appellants. Stacy P. Silber, Esquire, and Robert R. Harris, Esquire, represented the Intervenors. Assistant County Attorney Malcolm Spicer represented DPS.

Decision of the Board: Motion to Dismiss **granted**; administrative appeal **dismissed**.

RECITATION OF FACTS

The Board finds, based on undisputed evidence in the record, that:

1. The subject Property is known as 8809 Flower Avenue, East Silver Spring, Maryland 20901 (Part of Lot 20, Block 1, Cissell's Addition to Silver Spring Subdivision), and is located in the C-1 zone.

2. Intervenors desire to construct of a 55,800 square foot building on the subject Property. On August 18, 2005, Intervenors filed applications for approval of a Preliminary Plan of Subdivision (No. 120060240) and Site Plan (No. 820060080) with the Maryland-National Capital Park and Planning Commission ("MNCPPC").

3. As part of the Planning Board process, Intervenors sought advice from Mr. David Niblock, Permitting Services Specialist with DPS, regarding the parking required for the proposed building. Mr. Niblock sent letters to Counsel for the Intervenors regarding this matter on July 28, 2005, and on February 15, 2006. See Exhibits 8(d) and (e). Intervenors provided the Niblock letters to MNCPPC staff for their reference in reviewing the Intervenors' proposed Site Plan.[1]

4. On February 21, 2006, the MNCPPC staff released its staff report on Site Plan No. 820060080.

5. Appellants filed this administrative appeal on March 6, 2006, asserting that in determining the number of required parking spaces, the February 15, 2006 Niblock letter erroneously classified the proposed building as an "office building" instead of a "medical clinic."

6. On March 9, 2006, the Montgomery County Planning Board held a public hearing on Preliminary Plan No. 120060240 and Site Plan No. 820060080. At that time, the Planning Board approved Site Plan 820060080.

7. The approved Site Plan will enable Intervenors to apply to DPS for a building permit.

SUMMARY OF ARGUMENTS

8. Counsel for the Intervenors stated that the Zoning Ordinance gives the Planning Board express decision making authority with respect to site plans,[2] and that any appeal of a decision of the Planning Board lies with the Circuit Court, not with the Board of Appeals. Counsel then argued that to allow the Board to review individual staff recommendations used by the Planning Board in approving a preliminary plan or site plan would effectively allow Appellants to preempt the established process for appealing

[1] Intervenors state that neither the Planning Board nor its staff required or requested these letters, but that they had provided these letters to Planning Board staff for their reference. Intervenors state that the staff report contained letters from many different agencies on a number of topics.

[2] See Section 59-D-3.4(a): "A public hearing must be held by the Planning Board on each site plan application. The Planning Board must approve, approve subject to modifications, or disapprove the site plan not later than 45 days after receipt of the site plan, but such action and notification is not required before the approval of a preliminary plan of subdivision involving the same property. The Planning Board then must notify the applicant in writing of its action. In reaching its decision the Planning Board must determine whether …(2) the site plan meets all of the requirements of the zone in which it is located…."

Planning Board decisions. Counsel argued that if side appeals could exist, a chaotic result would ensue, asserting that even if the Board had jurisdiction to review these individual staff determinations, the exercise of such jurisdiction would wreak havoc on the Planning Board process, since the resolution of those appeals might conflict with Planning Board approval. Counsel further argued that the use of the appeal process to circumvent the authority of the Planning Board was certainly not the intent of the Zoning Ordinance, and, per generally accepted principles of statutory construction, the Board should seek a harmonious construction of the various statutory provisions in order to avoid what Counsel characterized as an absurd result.

Counsel stated that the Planning Board does not seek interpretations from DPS regarding parking, and is not bound by such interpretations if and when they are received, but rather can accept or reject them. Counsel stated that the Planning Board in this case considered all the recommendations from all the varied agencies, including recommendations regarding the parking requirements,[3] in voting to approve this Site Plan.

Counsel argued that the Niblock letters are not "decisions," stating that they do not decide or permit anything, but rather provide information as to what Mr. Niblock believes is the proper parking classification. Counsel asserted that it is a well-settled principle of law that administrative orders are not reviewable until and unless they impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process. Counsel argued that the Niblock letters do none of these things, stating that "the Niblock letters are not a decision because they do not change any legal rights or duties. The applicant can build no building, can obtain no building permit with this letter…." See Tr. at page 8. Counsel argued that because the Niblock letters do not constitute a final agency decision, they are not ripe for appeal. Counsel reiterated that it is the approval of Site Plan that is the appealable event, and suggested that Appellants could also properly appeal any building permit issued pursuant to the approved Site Plan.

9. Counsel for DPS argued that the letters do not constitute "administrative decisions" such as are contemplated by Section 59-A-4.3(a) of the Zoning Ordinance. Counsel stated that in the instant case, the Niblock letter is not making any decision, but rather was submitted to Planning Board staff, which in turn made a recommendation to the Planning Board, which ultimately made the final decision regarding this Site Plan. Indeed, Counsel asserts that the Appellants acknowledge that any decision, if there is a decision to be made, will be made by the Planning Commission. Counsel contends that the Niblock letters are not agency action, and are certainly not "final" action necessary for appeal.

Counsel stated in his Motion to Dismiss that to allow appeals of letters, especially letters which are not decisions and which are just confirmatory of earlier correspondence, would create a chaotic condition. To illustrate, during the hearing Counsel stated that if every individual determination that is being made in the course of the issuance of a building permit and that happens to find its way into a piece of

[3] Intervenors' Reply Brief in Support of their Motion to Dismiss states that the Planning Board had recommendations regarding parking from its staff and from Mr. Niblock. See Exhibit 14 at page 3.

correspondence were subject to appeal, DPS would have 10 appeals before they could issue a permit for anything. Counsel argued that the Court's decision in *United Parcel Service v. People's Counsel for Baltimore County* (336 Md.569, 650 A.2d 226 (1994)) is directly on point and supports his Motion to Dismiss, despite being in a different jurisdiction with somewhat different statutory language. Counsel noted that the *UPS* case relies extensively on the *National Institutes of Health Federal Credit Union v. Hawk* case (47 Md.App. 189, 422 A.2d 55(1980)), which is a Montgomery County case dealing specifically with Section 59-A-4.3 of the Zoning Ordinance.[4]

10. Counsel for the Appellants argued that the specific language in Section 59-A-4.3(a) of the Zoning Ordinance, entitled "Filing of Appeals," is clear on its face, plain and unambiguous:

> **(a) 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. (emphasis added to reflect argument made by Counsel).

Counsel asserted that this language allows an appeal of the Niblock letter. Counsel stated that "this chapter" refers to Chapter 59, the Zoning Ordinance, and that the Niblock letter refers to specific sections of Article 59-E, the County's off-street parking and loading requirements, and other sections of the Zoning Ordinance. Counsel noted that "administrative decision" is not defined in the Zoning Ordinance. Counsel argued that section 59-A-4.3(a) does not require a "final" agency decision or that the agency decision grant or determine any permission or license, and stated that the County Council could have added language imposing such conditions if that is what was intended. Counsel cited case law to support his argument that under generally accepted principles of statutory construction, where the language is clear on its face, the Board cannot read into it qualifications and/or limitations that do not exist. Counsel argued that the clear language of this provision, authorizing the appeal of administrative decisions based on Chapter 59, supercedes any claim by opposing counsel that this matter is somehow not "ripe" for appeal.

Counsel noted that Section 59-D-3.23(e) of the Zoning Ordinance requires that the Site Plan include a calculation of the required number of parking spaces, and that it is the applicant's responsibility to provide that information. Counsel stated that it was the applicants' choice to ask staff at DPS (Mr. Niblock) for the off-street parking calculation, and noted that they could have gone to a private traffic engineer or land planner for this calculation instead. Counsel argued that it was this choice to seek the parking calculation from a County agency which opened them up to this administrative appeal.

---

[4] Counsel states that in *Hawk*, the Court concluded that a letter written [by the Director of the Department of Environmental Protection] in response to a citizen's request to revoke a Use and Occupancy permit was not an appealable decision under Section 59-A-4.3.

Counsel stated that the Niblock letter contains a calculation of the off-street parking requirements that is based on the information he received from the applicant in the Planning Board proceedings. Counsel provided an affidavit from one of his clients which indicated that she was told by MNCPPC technical staff that the Niblock letter was the basis for the staff determination as to off-street parking requirements. See Exhibit 10(e). Counsel argued that because the Niblock letter was used for the Site Plan parking calculation, and in light of the language in Section 59-A-4.3(a), the letter is clearly an administrative decision.[5]

Counsel stated that appealing the approved Site Plan in the Circuit Court would be a much more costly proposition than was this targeted administrative appeal, and noted that if the Board were to grant the Motions to Dismiss, the correctness of the off-street parking requirements for this building would undoubtedly be back before the Board in a year or two in the context of an administrative appeal to the building permit.

11. On rebuttal, Co-counsel for the Intervenors noted that the Zoning Ordinance specifically charges the Planning Board with making decisions about parking in Site Plan cases. Counsel cited to Section 59-E-2.1 of the Zoning Ordinance, which states that "Designs and plans for areas to be used for automobile off-street parking shall be subject to approval by either the planning board or the director in accordance with the parking facilities plan procedures of section 59-E-4.1", and to Section 59-E-4.1, which says that:

> "[f]or any use that requires 25 or more parking spaces, a parking facilities plan must be submitted:
>
> (a) For development that requires site plan approval as contained in Division 59-D-3, a required parking facilities plan must be submitted to the Planning Board for review and approval as part of the site plan review process. …"

Co-counsel then reiterated that it was the Planning Board that made the decision with respect to parking in this case, and that the Niblock letter was one of many things considered by the Planning Board in making that decision.

Finally, Co-counsel argued that if the Board were to accept the Appellants' contention that the Niblock letter was an appealable decision, that it would be the July 2005 Niblock letter, and not the February 15, 2006 reaffirmation of the July letter, which should have been appealed, and that any appeal of July letter would not be timely.

CONCLUSIONS OF LAW

[5] In response to suggestions from opposing Counsel that the February 15, 2006 Niblock letter was merely confirmatory of the July, 2005, Niblock correspondence, Counsel for the Appellants argued that the February 15 letter was a self-contained, free-standing decision, independent of the earlier July letter, and stated that his clients did not even know about the July letter.

1. Section 2-112(c) of the Montgomery County Code provides the Board of Appeals with appellate jurisdiction over appeals taken under specified sections and chapters of the Montgomery County Code, including sections 2B-4, 4-13, 8-23, 15-18, 17-28, 18-7, 22-21, 23A-11, 24A-7, 25-23, 29-77, 39-4, 41-16, 44-25, 46-6, 47-7, 48-28, 49-16, 49-39A, 51-13, 51A-10, 54-27, and 58-6, and chapters 27A and 59.

2. Section 2A-2(d) of the Montgomery County Code provides that the provisions in Chapter 2A govern appeals and petitions charging error in the grant or denial of any permit or license or from any order of any department or agency of the County government exclusive of variances and special exceptions, appealable to the County Board of Appeals, as set forth in Section 2-112, Article V, Chapter 2, as amended, or the Montgomery County Zoning Ordinance or any other law, ordinance or regulation providing for an appeal to said board from an adverse governmental action.

3. Under Section 2A-8 of the Montgomery County Code, the Board has the authority to rule upon motions and to regulate the course of the hearing. Pursuant to that section, it is customary for the Board to dispose of outstanding preliminary motions at the outset of the hearing. In the instant matter, because granting of the Motions to Dismiss would eliminate the need for further proceedings (and the attendant preparation for those proceedings), the Board took the unusual step of bifurcating this hearing such that the Board would hear oral argument on and would vote on the Motions to Dismiss one day and then, if the Motions were not granted, would take up the balance of the case during a second day of hearings.

4. In this appeal, Appellants urge the Board to view the February 15, 2006, letter from DPS Permitting Services Specialist Niblock to counsel for the Intervenors, which states that it "confirms" the parking category to be used to calculate the parking requirements for the Intervenors' proposed building, as an appealable "administrative decision." After reviewing the letter and considering the arguments of counsel, the Board finds that the February 15 letter confers no rights, but rather simply informs the Intervenors that DPS would view Intervenors' proposed building as an "office, general office, and professional building or similar use" as defined in Section 59-E-3.7 of the Zoning Ordinance for the purposes of calculating the required parking. The Board finds that the February 15, 2006, DPS letter does not make a decision with respect to any application for a permit, license, or approval – that decision was yet to be made by the Montgomery County Planning Board. Nor does this letter conclusively determine the number of parking spaces that would be required for the proposed use. Again, the Zoning Ordinance makes clear that in this context, the number of parking spaces is a decision that must be made by the Planning Board, which was free to accept, modify, or reject DPS' parking calculation in making their determination.[6] Indeed, before it could approve the Intervenors' Site Plan, the Planning Board was required by Section 59-D-3.4(a)(2) of the Zoning Ordinance to determine whether or not the Site Plan met all of the requirements of the zone.

Maryland courts have previously addressed the types of decisions that constitute events or decisions from which appeals can be taken. Counsel for DPS and the Intervenors cite *United Parcel Service, Inc. v. People's Counsel* (336 Md. 565, 650 A.2d

[6] See sections 59-E-2.1 and 59-E-4.1 of the Zoning Ordinance.

226 (1994)), as well as *National Institutes of Health Federal Credit Union v. Hawk* (47 Md. App. 189, 422 A.2d 55 (1980)), as authority for the Board to grant their Motions to Dismiss. The Board finds the reasoning in these cases persuasive.

In *United Parcel Service, Inc. v. People's Counsel for Baltimore County*, 336 Md. 569, 650 A.2d 226 (1994), the Maryland Court of Appeals explained what constituted an appealable decision for purposes of Article 25A, Section 5(U) of the Annotated Code of Maryland.[7] In the *United Parcel Service* case, neighboring landowners appealed from the zoning commissioner's letter responding to their objection to his previous approval of a building permit application. In his letter, the commissioner explained and defended his prior decision to approve the building permit. The Court reasoned that an appealable event must be a final administrative decision, order or determination. The Court held that the commissioner's response letter was not an "approval" or "permission," but merely the reaffirmation of his prior approval or decision.[8] The Court reasoned that the words of the State law "obviously refer to an operative event which determines whether the applicant will have a license or permit, and the conditions or scope of that license or permit …." The court found that the operative event occurred when the building permit was approved and issued, not when the commissioner sent his explanatory letter. "If this were not the case an inequitable, if not chaotic, condition would exist. All that an appellant would be required to do to preserve a continuing right of appeal would be to maintain a continuing stream of correspondence, dialogue, and requests … with appropriate departmental authorities even on the most minute issues of contention with the ability to pursue a myriad of appeals ad infinitum." 336 Md. at 584, *quoting National Institutes of Health Federal Credit Union v. Hawk*, 47 Md. App. 189, 422 A.2d 55, 58-59 (1980) *cert. denied* 289 Md. 738 (1981).

As stated above, the Board's authority is limited to the review of some "operative event" – that is, the affirmative approval or denial of some permit or other form of permission. This Board is convinced, given that the subdivision and site plan approval processes are regulated by the Montgomery County Planning Board and not by DPS, that the February 15 letter from DPS to counsel for the Intervenors, while it was undoubtedly considered by MNCPPC staff and the Planning Board in reviewing and ultimately approving the subject Site Plan, was not binding on those bodies in making their decisions, and did not, by itself, convey any rights or permission on the Intervenors. Thus the Board concludes that the February 15 letter was not a final, appealable administrative determination as is required for review.

---

[7] The Board finds that the Court's reasoning in this regard is applicable to the instant case even though as a technical matter, the Board's authority to hear appeals is derived from Article 28 of the Annotated Code, section 8-110(a)(4), which states that the "decisions of the administrative office or agency in Montgomery County shall be subject to an appeal to either the board of appeals or other administrative body as may be designated by the district council. In either county, the appeal shall follow that procedure which may from time to time be determined by the district council."

[8] The Board notes that the Court in the *UPS* case relied heavily on the *Hawk* decision, which was a Montgomery County case. In considering an appeal under Section 59-A-4.3 of the Montgomery County Zoning Ordinance, the Court in *Hawk* applied similar reasoning, and quoted with approval an underlying Hearing Examiner report, which had concluded that "The `decision' which is the subject of [the] Appeals . . . is not a final administrative decision, order or determination. It is at most a reiteration or reaffirmation of the final administrative decision or order of the department granting the original Use and Occupancy Certificate." *National Institutes of Health Federal Credit Union v. Hawk*, 47 Md. App. 189, 195, 422 A.2d 55, 58-59 (1980) *cert. denied* 289 Md. 738 (1981).

In addition, the Board notes that it has been asserted that if the DPS letters were found to be administrative decisions, then the February 15, 2006 letter simply "confirmed" the earlier July 28, 2005 correspondence with respect to parking, and as such, under the *UPS* and *Hawk* cases, should be dismissed. Because this Board had concluded for other reasons that the February 15th letter containing DPS' conclusions with respect to parking did not constitute an appealable event, the Board does not reach this issue.

5. The Board is not persuaded by Appellants' argument that Section 59-A-4.3(a) of the Zoning Ordinance should be read as on its face allowing this appeal of the February 15 letter. Section 59-A-4.3(a) of the Montgomery County 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. Appellants argue that this language simply says "administrative decision," and that if a "final" decision were intended, the Council could have so specified.

It is well established that the "decision" of an administrative agency that is subject to judicial review is the *final* decision or order of the case. *Dorsey v. Bethel A.M.E. Church*, 375 Md. 59, 75, 825 A.2d 388, 397 (2003); *State v. State Board of Contract Appeals*, 364 Md. 446, 457, 773 A.2d 504, 510 (2001); *Board of License Comm. v. Corridor*, 361 Md. 403, 418, 761 A.2d 916, 924 (2000); *Montgomery County v. Broadcast Equities*, 360 Md. 438, 452, 758 A.2d 995, 1002 (2000); *Holiday Spas v. Montgomery County*, 315 Md. 390, 395, 554 A.2d 1197, 1199 (1989).

The action of an administrative agency, like the order of a court, is "final" only if it determines or concludes the rights of the parties, or if it denies the parties means of further prosecuting or defending their rights and interests in the subject matter in proceedings before the agency, thus "leaving nothing further for the agency to do." *Kim v. Comptroller*, 350 Md. 527, 533-534, 714 A.2d 176, 179 (1998); *Driggs Corp. v. Md. Aviation*, 348 Md. 389, 407, 704 A.2d 433, 442 (1998); *Holiday Spas v. Montgomery County*, supra, 315 Md. at 395-396, 554 A.2d at 1199-1200; *Md. Comm'n on Human Relations v. B.G & E. Co.*, 296 Md. 46, 56, 459 A.2d 205, 211 (1983). The requirement for a "final" decision is not negated because the review sought is administrative rather than judicial. *Crofton Partners v. Anne Arundel County*, 99 Md. App. 233, 243, 636 A.2d 487 (1994).

As previously stated, the Board finds that DPS' February 15 letter did not, and indeed could not, determine or conclude the rights of the parties – that could only be done by the Planning Board. Appellants urge this Board to disregard the case law requiring a final decision in favor of a literalist reading of Section 59-A-4.3(a) which would, if embraced, allow an endless stream of appeals on minute issues of no consequence where there is any disagreement or contention. This is clearly what the Court in *Hawk*[9] and *UPS* was seeking to avoid, and this Board will not adopt that interpretation.

[9] The Court in *Hawk*, dealing with the appeal provisions in Section 59-A-4.3(a) of the Zoning Ordinance and

6. Pursuant to section 2A-8(i)(5) of the Montgomery County Code, the Board began the hearing by disposing of all outstanding preliminary motions and preliminary matters. Pursuant to this section and the Board's authority under section 2A-8(h) to rule upon motions, the Board granted Intervenors' and DPS' Motions to Dismiss the instant matter.

7. The Motions to Dismiss Case A-6133 are granted, and Case A-6133 is consequently **DISMISSED**.

On a motion by Member Wendell M. Holloway, seconded by Member Angelo M. Caputo, with Vice Chairman Donna L. Barron and Member Caryn L. Hines in agreement, and Chair Allison I. Fultz necessarily not participating, the Board voted 4 to 0 to grant the Motions to Dismiss and thus to dismiss the appeal, and 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.

Donna L. Barron
Vice-Chair, Montgomery County Board of Appeals

Section 2-112 of the Montgomery County Code, states that "The appeal provisions in the County Code and Zoning Ordinance dealing with administrative proceedings before various County departments and agencies clearly relate in their respective procedure to a point in time when the finality of the review process is conceded…." *National Institutes of Health Federal Credit Union v. Hawk* (47 Md. App. 189, 195-6, 422 A.2d 55, 59 (1980)).

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 18th day of September , 2006.

_____
Katherine Freeman
Executive Director

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 2A-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 (see Section 2-114 of the County Code).