

BOARD OF APPEALS
For
MONTGOMERY COUNTY

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

Case No. A-6147
APPEAL OF JOANNE G. SMALE

OPINION OF THE BOARD

(Hearing held on December 13, 2006)
(Effective Date of Opinion: March 22, 2007)

Case No. A-6147 is an administrative appeal filed by Joanne G. Smale (“Appellant”). The Appellant charges error on the part of the County’s Department of Permitting Services (“DPS”) in issuing Building Permit No. 415318, dated April 21, 2006, for the construction of an addition on a single family dwelling on the property located at 1717 Priscilla Drive (the “Property”).

Pursuant to Section 59-A-4.4 of the Montgomery County Zoning Ordinance, codified Chapter 59 of the Montgomery County Code (the “Zoning Ordinance”), and Section 2-112 of the Montgomery County Code, the Board scheduled and held a public hearing on the appeal on December 13, 2006. Edward Amourgis, Esquire represented the Appellant Joanne Smale, who appeared at the hearing. Assistant County Attorney Malcolm Spicer represented DPS. Rebecca D. Willens, Esquire, represented Phyllis and David Newman, who own the subject Property and who intervened in this case (“Intervenors”).

Following the prehearing conference, DPS and the Intervenors filed a preliminary Joint Motion for Summary Disposition. The Board heard oral argument on this preliminary Joint Motion for Summary Disposition at the public hearing on December 13, 2006.

Decision of the Board: Joint Motion for Summary Disposition **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 1717 Priscilla Drive, Silver Spring, Maryland 20904-1610 (Parcel 859, in the Rolling Acres subdivision) and is located in the R-200 Zone.
2. Intervenors desire to construct a 2,596 gross square foot addition to the existing house. The Intervenors were issued a building permit (No. 415318) by Department of Permitting Services on April 21, 2006.
3. Joanne Smale, the Appellant, is a contiguous landowner of the subject property. Appellant, by and through counsel, filed the appeal on May 19, 2006, appealing the issuance of the building permit based on claims that 1) the permit allows for a two family dwelling and the subject property is not zoned for a two family dwelling; 2) alternatively, if the subject property is zoned for a two family dwelling then the addition is an accessory apartment without a special exception; 3) the living unit is without the required registration; and 4) the Intervenors' use constitutes a commercial use which is an improper use in the R200 zone.
4. Intervenors and Montgomery County filed a Joint Motion for Summary Disposition on June 20, 2006 on the basis that the stated cause of action fails to assert a genuine issue of material fact.
5. On July 12, 2006, the Board of Appeals held a pre-hearing conference.
6. On December 13, 2006, the Board of Appeals heard oral argument on the preliminary Joint Motion for Summary Disposition at the public hearing.

SUMMARY OF ARGUMENTS

7. Counsel for the Intervenors argued that there is a Registered Living Unit in the single family dwelling that has been registered and properly inspected and certified by the Department of Permitting Services since June of 2004. Also, Intervenors argue that according to Section 59(a) 2.1 a Registered Living Unit is not considered to be any sort of accessory apartment or two family dwelling.

Counsel for the Intervenors argued in the alternative that since the unit is a Registered Living Unit and not an accessory apartment it does not need a Special Exception.

Counsel for the Intervenor argued that the living unit has been inspected by the Department, it has been registered and is licensed and thus meets the requirement of the code.¹

Further, Counsel argued that the Registered Living Unit is a residential unit and is not being used for a commercial use. Therefore, the argument that there was a commercial use was not applicable. However, because the Intervenor is a real estate agent and does conduct some business from her home, the Intervenor received a Home Occupation Certificate from the Department of Permitting Services.²

8. Counsel for DPS argued that the building permit was issued for additions to the existing single family dwelling which contained a previously approved Registered Living Unit and the appeal does not apply to the approval of the Registered Living Unit.

Counsel further argued that the Intervenor as owners of the subject property are qualified applicants for the building permit under County Code Section 8.24(a) and that whether or not the Intervenor needed approval by neighboring owners because of restrictive covenants is not an issue that the county looks at or even has authority to enforce.

9. Counsel for the Appellants proffered three arguments. First, Appellants argued that, since Intervenor's property is subject to a restrictive covenant that requires proposed building plans to be approved by neighboring property owners prior to being submitted to the County for a building permit, Intervenor could not claim that their status as "owner" of the Property was sufficiently unencumbered to permit them satisfy the County Code requirement that a building permit applicant be the "owner" of property for which the permit is sought. The restrictive covenant imposes a requirement that property owners subject to the covenant must obtain approval from an architect selected by at least two contiguous land owners prior to submission for any permit. In the Appellant's supplemental brief, Counsel argued that the covenant runs with the land and binds all successors in interest to the owner of the Property at the time the covenant was imposed; therefore, Intervenor, as successors in interest to the original owner are in privity of estate with the original owner and are therefore bound by the covenant. The Intervenor did not obtain approval from an architect selected by the two contiguous land owners. Appellant's counsel argues that (1) the encumbrance created by the restrictive covenant and (2) the allegation that Intervenor have failed to observe a condition of that

¹ Intervenor referenced the Registered Living Unit certificate Registration No.: 047859 which is Exhibit 6A. The Affidavit of Compliance for the Registered Living Unit issued by the Department of Housing and Community Affairs is Exhibit 6(c-1).

² Two copies of the Home Occupation Certificate No: 246539 are marked Exhibit H pages 26 and 27 in the record.

covenant impair Intervenor's right to claim status outright as "owners" of the Property and that therefore the building permit was improperly granted.

Second, Counsel argued that the Intervenor, even though they are owners of the property are not qualified applicants to file a building permit under Section 8.24(a) because the restrictive covenant requires approval of an architect.

Third, Counsel also argued that a Storm Water Management Plan must be approved prior to the issuance of the Building Permit. Counsel in the Appellant's brief argued that the Intervenor were attempting to circumvent the storm water management plan by splitting their redevelopment into two separate parts. Counsel argued that the Intervenor obtained the present Building Permit to increase the footprint of their existing home and that the Intervenor filed a subdivision application to subdivide the same property from one lot into three lots.

CONCLUSIONS OF LAW

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 the Joint Motion for Summary Disposition would eliminate the need for further proceedings, the Board heard oral arguments on the motion and voted.
4. Section 59-C-1.31 of the Zoning Ordinance provides that a Registered Living Unit is a permitted use in the R-200 zone. Section 59-A-2 defines a Registered Living Unit as "a second dwelling unit, that is part of an owner-occupied one-family detached dwelling and is (a) suitable for use as a complete living facility with

provision within the facility for cooking, eating sanitation and sleep; (b) occupied by: (1) No more than 2 persons related to each other by blood, marriage or adoption, at least one of whom must be a household employee of the owner-occupant of the main dwelling; or (2) No more than 3 persons related by blood, marriage or adopted to the owner-occupant of the main dwelling; except that one may instead be an unrelated care-giver needed to assist a senior adult, ill or disabled relative of the owner-occupant; and (c) Subordinate to the main dwelling.”

Section 59-A-6.10 sets forth the requirements for a registered living unit. It provides that the registered living unit must:

- (a) be registered with and inspected by the Director, in which process:
 - (1) The owner must affirm, in an affidavit of compliance provided by the Director, that the registered living unit will be maintained, occupied and removed or converted to accessory apartment use, as provided by the requirements of this section.
 - (2) The Director may designate another County agency or department to administer and enforce the registration and inspection requirements.
 - (3) The Director is authorized to adopt Executive Regulations by Method 2 which may:
 - (i) provide for periodic inspections, including access by inspectors at reasonable times, and compliance with applicable codes;
 - (ii) establish procedures for initial and continuing registration of a registered living unit including provision for removal when it is not longer being used for purposes set forth in the definition;
 - (iii) include such other regulations as may be necessary to carry out the intent of this Section; and
 - (iv) establish fees as necessary to cover the cost of administration.
- (b) comply with the Housing and Building Maintenance Standards of Chapter 26 of this Code as amended;
- (c) have at least one party wall in common with the main dwelling;
- (d) be subordinate to the main dwelling;
- (e) use the same street address as the main dwelling;
- (f) have any separate entrance located so that the appearance of a one-family dwelling is preserved;
- (g) not be rented for financial remuneration, except that the services of household employees or expenses shared by family members are not deemed to be rent;
- (h) not be operated on the same lot or parcel as another registered living unit, an accessory apartment, a family of unrelated persons, or any other residential use for which rent is charged, except an accessory dwelling in an agricultural zone.

In the instant matter, the owner affirmed by affidavit of compliance provided by the Director that the registered living unit will be maintained, occupied and removed or converted to accessory apartment use. The dwelling is not operated

on the same lot or parcel as another registered living unit or an accessory apartment. DHCA issued a registered living unit registration, finding that the unit comprised a complete dwelling unit, and has subsequently inspected the unit in 2006 for continued compliance.³

The occupant of the dwelling is the Intervenor's daughter, who does not pay rent.⁴ Therefore, the dwelling is not rented for financial remuneration.

Further, the total square footage of the registered living unit is 2,153. The total square footage of the one-family dwelling is 6,712. The unit comprises about one third of the square footage of the one-family dwelling, and therefore satisfies the requirement that the area of the registered living unit be less than 50% of that of the main dwelling unit. Also, because the registered living unit is located in the basement, it uses the same street address as the main dwelling. The dwelling has a separate entrance located at the rear of the house which preserves the appearance of the one-family dwelling.⁵ Because the registered living unit is smaller in proportion to the main dwelling than the maximum permitted ratio and because presence of the registered living unit does not compromise the single-family appearance of the house, the registered living unit is therefore subordinate to the main dwelling unit.

Therefore, the Board finds that the second dwelling unit meets the requirements of Section 59-A-2 in that it was found to be suitable as a complete living facility by DHCA, unit is occupied by a family member of the owners of the main dwelling, and the registered living unit is subordinate to the main dwelling.

5. The County and the Intervenor urged the Board to decide that DPS did not permit a two-family dwelling by the issuance of the Building Permit for the proposed addition.

The Zoning Ordinance at Section 59-A-2.1 defines a one-family dwelling as "a dwelling containing not more than one dwelling unit. An accessory apartment, if approved by special exception, or a registered living unit may also be part of a one-family dwelling. A one-family dwelling with either of these subordinate uses is not a two-family dwelling, as defined in this section." The floor plans indicate that the subject property is improved with a one-family dwelling.⁶ The existing house did not become a two-family dwelling by the issuance of the Building Permit for an addition or because it contains a registered living unit. Therefore, as expressly provided in the Zoning Ordinance, the one-family dwelling remains a one-family dwelling even with the existence of a registered living unit.

³ See Exhibits 6(e-1) and 6(e-2) which are letters from DHCA from Wright Jolly, Jr. Housing Code Inspector dated January 13, 2006 and January 31, 2006 respectively, regarding inspections.

⁴ See Exhibit 6(f) which is the Affidavit of Heather Newman.

⁵ See Exhibit 7(k) which is a photograph of the back of the residence that shows the separate entrance.

⁶ See Exhibits 14(c) and 14(d) that depict the residence as a single family dwelling.

6. The building permit issued by DPS for the addition to the one-family dwelling did not grant a commercial use for the property. The purpose of the registered living unit is for residential use. The use of the property for commercial purposes is a separate issue and whether the homeowner is a real estate agent and does conduct some business from her home is not relevant to the issuance of the addition to the one-family dwelling unit. However, home occupations are permitted in the R-200 zone. Further, the Intervenor sought and received a Home Occupation Certificate from the Department of Permitting Services to remedy any problems with her conducting business from her home.

7. Appellant urged the Board to consider the effect of a restrictive covenant requiring that the property owners obtain approval from an architect selected by at least two contiguous land owners prior to submission of any permit. 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.

Enforcement of a restrictive covenant is a private right of action beyond the jurisdiction of the Board of Appeals to hear and decide appeals to an alleged adverse governmental action. Therefore, the Board does not have jurisdiction to consider whether or not the Intervenor violated the restrictive covenant.

8. The Appellant argued that the Intervenor, even though they are owners of the property, are not qualified applicants to file a building permit under Section 8.24(a) of the Montgomery County Code because of the requirements imposed by the private restrictive covenant. Section 8.24(a) provides that qualified applicants to file a building permit are “the owner or lessee of the building or structure, or agent of either or by the licensed engineer or architect employed in connection with the proposed work.” The Intervenor are the owners of the property,⁷ even though their fee simple interest may be subject to the terms and conditions of the restrictive covenant. As owners of the property they are qualified applicants as defined by the Code. Any obligations Intervenor may be required to fulfill pursuant to the terms and conditions of the covenant extend only to the parties who are subject to the covenant, and any enforcement of the covenant must be pursued as a civil action in the courts. The existence of the restrictive covenant has no bearing on the County’s jurisdiction to issue a building permit upon the applicant’s establishing, in a manner required of all County residents, ownership or other authority to apply for the permit. Even though the restrictive covenant in the instant case and County Code requirements relating to buildings may address similar issues, private obligations under the covenant are independent of, and do

⁷ See Exhibit 4 which is the deed to the property dated May 21, 2004.

not overlap with, the requirements a building permit applicant must satisfy under County law. Only the parties to the covenant may enforce the terms and conditions of that covenant. Only the County may issue building permits. Accordingly, the Intervenor's have satisfied the requirement under Section 8.24(a) of the County Code that they are the owners of the Property.

9. The Appellant argued that a stormwater management plan must be approved prior to the issuance of the Building Permit. Counsel in the Appellant's brief argued that the Intervenor's were attempting to circumvent the stormwater management plan by splitting their redevelopment into two separate parts. The stormwater management plan that the Intervenor's provided was submitted in connection with their subdivision application after the issuance of the Building Permit. There is no requirement that an onsite stormwater management plan be submitted prior to the issuance of a Building Permit for an addition to a single-family residence. Therefore, the issuance of the Building Permit before the Intervenor's submitted a stormwater management plan does not mean that DPS acted improperly with respect to the Building Permit. Section 8-24 of the County Code contains no requirement that a stormwater management plan must be submitted with a building permit application.

Further, additions or modifications to an existing single family dwelling are exempted from the stormwater management requirements under Chapter 19. Chapter 19-31 exempts additions or modifications to an existing single family dwelling by providing under Chapter 19, Article II that (b): "any addition or modification to an existing single family detached residential structure if the addition or modification does not disturb more than 5,000 square feet of land area". Therefore, because the building permit was for an addition to a single family dwelling that does not disturb more than 5,000 square feet of land then the interveners did not need to submit a stormwater management plan prior to the issuance of the building permit.

10. In the instant case, in order to prevail the Appellant must prove that DPS erred in the issuance of the Building Permit by erroneously applying or interpreting the Zoning Ordinance and development standards. In this case, the Board finds that DPS properly applied the Zoning Ordinance and has found no error in DPS' review or issuance of the Building permit.

11. 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 Intervenor's' and DPS' Joint Motion for Summary Disposition to dismiss the instant matter.

12. The Joint Motion for Summary Disposition to dismiss Case A-6147 is granted, and Case A-6147 is consequently **DISMISSED**.

On a motion by Member Caryn L. Hines, seconded by Member Wendell M. Holloway, with Chair Allison I. Fultz, Vice Chair Donna L. Barron and Member Catherine Titus in agreement, the Board voted 5-0 to grant the Joint Motion for Summary Disposition 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 is 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 22nd day of March, 2007.

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 Board (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 proceedings 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).