BOARD OF APPEALS
for
MONTGOMERY COUNTY

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Case No. A-6199

APPEAL OF RUDOLPH GEIST

OPINION OF THE BOARD

(Hearing held May 16, 2007; Worksession held June 28, 2007)
(Effective Date of Opinion: August 23, 2007)

Case No. A-6199 is an administrative appeal filed by Rudolph Geist (the Appellant). The Appellant charges error on the part of the County's Department of Permitting Services (DPS) in issuing Building Permit No. 438435, dated November 14, 2006, for the construction of a detached garage at 7810 Exeter Road, Bethesda, Maryland 20814 (the Property).

Pursuant to Section 59-A-4.4 of the Montgomery County Zoning Ordinance, codified as Chapter 59 of the Montgomery County Code (the Zoning Ordinance), the Board held public hearings on the appeal on May 16, 2007, and June 28, 2007. David B. Lamb, Esquire, represented the Appellant. Assistant County Attorney Malcolm Spicer represented DPS. Property owner Stephen Collins, and his wife, intervened, and were not represented by counsel.

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

FINDINGS OF FACT

The Board finds by a preponderance of the evidence that:

1. The Property, known as 7810 Exeter Road in Bethesda, is zoned R-60. It is identified as Lot 2, Block A, in the Battery Park Subdivision, and is owned by Mr. and Mrs. Stephen Collins. The Appellant is the owner of adjoining property located at 7907 Glenbrook Road, in Bethesda, Maryland.

2. Building Permit No. 438435 was issued on November 14, 2006, for construction of an 810 square foot detached garage at the subject Property. No appeal was filed to the issuance of the building permit. A revision to the roof design for the garage was submitted on January 8, 2007, necessitating a recalculation of the building height. DPS approved a revision to the building permit on January 9, 2007, which reflected changes to the roof framing. Appellant appealed the

revised building permit on grounds that the height of the new roof was incorrectly determined for purposes of the application of the additional setbacks required by Section 59-C-1.326(a)(3) of the Zoning Ordinance.

3. Using the plans submitted for the revision and the definition of "height of building" set forth in Section 59-A-2.1 of the Zoning Ordinance,[1] Robin Ferro of DPS determined that the height of the detached garage was 14.5 feet, which is the mean height between the eaves and the ridge of the garage roof. The peak of the roof is 19.9 feet in height. The garage is set back more than 35 feet from the street line, and is set back 5.2 feet from the side lot line and 5.1 feet from the rear lot line.

4. Mr. Rudolph Geist testified that he lived at 7907 Glenbrook Road in Bethesda, Maryland. He testified that his property abuts the subject Property along his rear property line. He presented testimony about photographs he had taken of the Collins' garage three days earlier. See Exhibit 11. He testified that the garage is being constructed along the entire length of his rear yard fence, and that it blocks his sunlight and the view from his back yard. He testified that the garage was significantly impacting his enjoyment of his property, and his property value. He testified that it is a large, two story garage, that there are outside stairs to second story living space, and that the garage has a deck. He also presented pictures of houses in the immediate area and their garages, and a community map taken from the Battery Park Community Handbook. See Exhibits 11 and 12.

5. Mrs. Collins, Intervenor, testified that the area above the garage is intended as a place where her oldest daughter, who is seventeen and has Downs Syndrome, can go to have some independence while still living with the family. She testified that the area will be a place for her daughter to read and watch television. She testified that it is not intended to be a party house, and that she never thought it would be an issue.

6. Mr. George Meyers, the architect of the garage, testified that he has been working in Montgomery County for nearly 20 years, and that he has done 20 similar garages in R-60 zones throughout Bethesda and Chevy Chase. He stated that this type of garage is characteristic of the development character of these neighborhoods. He stated that the garage is 20 feet by 20 feet, which he testified is typical for a two-car garage.

   He testified that this garage is not a two-story structure, but rather is styled, with its dormers, as a one and one-half story structure. He testified that the pitch of the garage roof is typical (8/12), and matches the pitch of the roof on the house.

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1 Section 59-A-2.1 of the Zoning Ordinance defines "Height of building" as follows: "The vertical distance measured from the level of approved street grade opposite the middle of the front of a building to the highest point of roof surface of a flat roof or to the mean height level between eaves and ridge of a gable, hip, mansard, or gambrel roof. However, if a building is located on a terrace, the height above the street grade may be increased by the height of the terrace. In the case of a building set back from the street line 35 feet or more, the building height is measured from the average elevation of finished ground surface along the front of the building. On a corner lot exceeding 20,000 square feet in area, the height of the building may be measured from either adjoining curb grade. For a lot extending through from street to street, the height may be measured from either curb grade."

He stated that even without the usable second floor, there would have been attic space above the garage, and that the height of the garage would have been the same because he tries to match the pitch of the roof on a detached garage to the pitch of the roof on the house. He testified that there is no deck on the garage. He testified that the garage was carefully designed to meet the County Code. He testified that when he started designing these garages, the required setback was only two feet, but has since been moved back. He testified that the height of detached garages has always been measured to the mid-point of the gable. He stated that the fact that Mr. Geist looks out and sees this garage is in part a function of the configuration of the block and of Mr. Geist's lot.

7. The Appellant's appeal was filed on January18, 2007.

SUMMARY OF ARGUMENTS

1. Mr. Malcolm Spicer, Esquire, counsel for DPS, argued that for the purposes of the additional setback required by Section 59-C-1.326(a)(3),[2] the height of this accessory building should be calculated using the formula found in the general definition of "height of building" in Section 59-A-2.1. See Exhibits 8 and 9. Because DPS had used the formula set forth in that definition[3] in reaching their conclusion that the garage was 14.5 feet tall and thus did not require an additional setback, Mr. Spicer asserted that the building permit had been correctly issued.

   To further support this conclusion, Mr. Spicer cited Ordinance 15-82 (Zoning Text Amendment 06-08), which states on its face that it was an amendment for the purpose of reducing the allowable maximum height of an accessory building in certain zones, and increasing the minimum setback requirements for an accessory building under certain circumstances (among other things). See Exhibit 10. He argued that this Ordinance amended Section 59-C-1.326(a)(3) by increasing the ratio for the additional setback from one foot to two feet of additional setback for each foot of height in excess of 15 feet, but that it did not amend the reference to "height in excess of 15 feet" to suggest that "height" under this provision should be determined differently from the definition appearing in Section 59-A-2.1 of the Zoning Ordinance. He argued that this Ordinance also amended Section 59-C-3.127 (Maximum Building Height) by lowering the maximum building height from 25 feet to 20 feet, and by adding language to indicate that height for the purposes of the *maximum* building height was to be measured "to the highest point of the roof surface." Mr. Spicer emphasized the fact that similar language specifying that height was to be measured to the highest point of the roof surface was not added to Section 59-C-1.326(a)(3), despite the fact that Council was also amending that Section. He argued that this was not an oversight, but rather that it reflects the intent of the Council that the change to the way in which height was to be calculated was solely for the purpose of Section 59-C-1.327, and thus only for the purpose of

2 Section 59-C-1.326(a)(3) requires an additional two feet of setback from the side and rear property lines for every foot in height over 15 feet.

3 Again, DPS calculated the height by determining the mean height level between the eaves and ridge.

determining the maximum building height. Mr. Spicer stated that at 19.9 feet, the garage in question does not exceed the maximum building height for accessory structures. He further stated that when calculated according to the definition of height of building in Section 59-A-2.1, the height of the garage does not exceed the 15 foot limit set forth in Section 59-C-1.326(a)(3), above which additional setbacks would be required.

2. Mr. David Lamb, Esquire, counsel for Appellant, stated in his Memorandum in Support of Appeal that the cardinal rule in statutory interpretation is to ascertain and effectuate the intent of the legislature. He stated that this involves first looking at the language of the statute to see if it is plain and clear on its face; if so, the inquiry ends there. Where the language of the statute is ambiguous and subject to interpretation, Mr. Lamb asserted that the statute should be construed reasonably with reference to the purpose, aim or policy of the enacting body, particularly when the language is ambiguous and the legislative history is not helpful.

   Mr. Lamb argued that the purpose of Section 59-C-1.326(a)(3) was to prevent the location of large accessory structures too close to the property line. He argued that massive accessory structures could be located within 5 feet of the property line simply by having peaked roofs if height were calculated as the mean between the eaves and the ridge (i.e. per the definition of "height of building" in Section 59-A-2.1). He argued that when Section 59-C-1.326(a)(3) is read in connection with Section 59-C-1.327, which established a maximum height of 20 feet and specified that such height should be measured "to the highest point of the roof surface," it was clear that "height" as used in Section 59-C-1.326(a)(3) should also be interpreted to refer to a measurement to the highest point of the roof surface, and thus to establish 15 feet as the maximum allowable "height" for an accessory structure before additional setbacks are required. He argued that if Section 59-C-1.326(a)(3) were not interpreted this way, it would be effectively moot, since the additional setbacks contemplated by that Section would almost never be invoked in light of the 20 foot maximum height imposed by Section 59-C-1.327. He reasoned that a peaked roof that at its highest point was no more than 20 feet could always be styled so that the mean height between the eaves and ridge was no more than 15 feet, and thus so that no additional setback would be necessary. Because such a structure could always be legally sited with a 5 foot rear and side setback (in the R-40, R-60, and R-90 zones), he argued that such an interpretation was counter to the intent of Section 59-C-1.326(a)(3), namely that these accessory structures not be located too close to neighboring property lines. He stated that the additional 10 feet of setback that would be required for the accessory garage at issue in this case if height were measured to the highest point of the roof instead of to the mean between the ridge and the eaves would make a substantial difference.

   Mr. Lamb further argued that the general definitions in Section 59-A-2.1 are to be applied where there is no other reference given. Mr. Lamb argued that it was clearly the intent of Council that the height measurement in Section 59-C-1.327 trump the general definition of height of building found in Section 59-A-2.1, and

that the Section 59-C-1.327 method of height calculation be used for the purposes of the additional setback requirements of Section 59-C-1.326(a)(3).

CONCLUSIONS OF LAW

1. Section 8-23 of the Montgomery County Code authorizes any person aggrieved by the issuance, denial, renewal, or revocation of a permit or any other decision or order of DPS to appeal to the County Board of Appeals within 30 days after the permit is issued, denied, renewed, or revoked, or the order or decision is issued. Section 59-A-43(e) of the Zoning Ordinance provides that any appeal to the Board from an action taken by a department of the County government is to be considered *de novo*. The burden in this case is therefore upon the County to show that the building permit revision was properly issued.

2. Section 59-A-2.1 states that "[i]n this Chapter, the following words and phrases have the meanings indicated," and goes on to define "Building," "Building, accessory," and "Height of building" as follows:

   Building: A structure having one or more stories and a roof, designed primarily for the shelter, support or enclosure of persons, animals or property of any kind.

   Building, accessory: A building subordinate, and located on the same lot with, a main building, the use of which is clearly incidental to that of the main building or to the use of the land, and which is not attached by any part of a common wall or common roof to the main building. In addition to any other meaning the word "subordinate" may have in this definition, on a lot where the main building is a one-family detached residential dwelling, except for an accessory agricultural building, subordinate means that the footprint of the accessory building is smaller than the footprint of the main building.

   Height of building: The vertical distance measured from the level of approved street grade opposite the middle of the front of a building to the highest point of roof surface of a flat roof or to the mean height level between eaves and ridge of a gable, hip, mansard, or gambrel roof. However, if a building is located on a terrace, the height above the street grade may be increased by the height of the terrace. In the case of a building set back from the street line 35 feet or more, the building height is measured from the average elevation of finished ground surface along the front of the building. On a corner lot exceeding 20,000 square feet in area, the height of the building may be measured from either adjoining curb grade. For a lot extending through from street to street, the height may be measured from either curb grade.

3. With respect to accessory buildings or structures in the R-60 zone that have a height greater than 15 feet, Section 59-C-1.326(a)(3) requires that the minimum side and rear yard setbacks[4] be increased at a ratio of 2 feet of additional setback for each foot of height in excess of 15 feet.

4 Per Section 59-C-1.326(a)(2), an accessory building or structure in the R-60 zone must be set back a minimum of 5 feet from both the side and rear lot lines.

4. Section 59-C-1.327 requires that in the R-60 zone, an accessory building must not exceed 2 stories, and the height from existing grade to the highest point of roof surface must not exceed 20 feet.

5. Counsel for DPS and counsel for the Appellant agreed at the outset of the proceedings to stipulate to the facts, and asked the Board to address the following single question in considering this appeal: how do you measure the height of an accessory building for the purposes of the additional setback required by Section 59-C-1.326(a)(3) of the Zoning Ordinance? The Intervenors presented no argument or evidence which would change the focus of these proceedings.

6. The Board notes that the Maryland Court of Special Appeals recently summarized the principles of statutory construction that serve as a starting point for the analysis of zoning regulations in *James Cremins, et al. v. County Commissioners of Washington County, Maryland, et al.*, 164 Md. App. 426, 448, 883 A.2d 966 (2005):

> When we review the interpretation of a local zoning regulation, we do so "under the same canons of construction that apply to the interpretation of statutes." *O'Connor v. Baltimore County*, 382 Md. 102, 113, 854 A.2d 1191 (2004). "'The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature.'" *Motor Vehicle Admin. v. Jones*, 380 Md. 164, 175, 844 A.2d 388 (2004) (quoting *Holbrook v. State*, 364 Md. 354, 364, 772 A.2d 1240 (2001)). We assign words in a statute or, as here, an ordinance, their ordinary and natural meaning. *O'Connor*, 382 Md. at 113. When the plain language of the provision "is clear and unambiguous, our inquiry ordinarily ends[.]" *Christopher v. Montgomery County Dep't of Health & Human Servs.*, 381 Md. 188, 209, 849 A.2d 46 (2004) (quotation marks and citation omitted). Only when the language is ambiguous do we look beyond the provision's plain language to discern the legislative intent. *Jones*, 380 Md. at 176.
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> The Board further finds that general principles of statutory construction also require that all pertinent parts, provisions and sections of a statute be viewed in context and so as to assure a construction consistent with the entire legislative scheme. *Ford Motor Land Development v. Comptroller*, 68 Md. App. 342, 346, 511 A.2d 578, 580, *cert. denied*, 307 Md. 596, 516 A.2d 567 (1986). To this end, no part of a statute may be "rendered surplusage, superfluous, meaningless, or nugatory." *Rossville Vending Machine Corporation v. Comptroller*, 97 Md. App. 305, 315, 629 A.2d 1283, 1288, *cert. denied*, 333 Md. 201, 634 A.2d 62 (1993). Just as the Board may not render statutory language surplusage, it may neither add nor delete language so as to reflect an intent not evidenced in the plain and unambiguous language of the statute. *Price v. State*, 378 Md. 378, 387, 835 A.2d 1221, 1226 (2003). Finally, the interpretation given must use common sense to avoid illogical or unreasonable conclusions. *Frost v. State*, 336 Md. 125, 137, 647 A.2d 106, 112 (1994). Indeed, this Board should "shun a construction . . .

which will lead to absurd consequences." (Citations omitted.) *Erwin and Shafer, Inc. v. Pabst Brewing Co., Inc.*, 304 Md. 302, 311, 498 A.2d 1188, 1192 (1985).

7. Based on a plain reading of the language and analysis of the relevant legislative history, set forth infra, the Board finds that the calculation set forth in the definition of "height of building" in Section 59-A-2.1 of the Zoning Ordinance should be applied for the purposes of determining whether or not the height of an accessory building or structure necessitates an additional setback pursuant to Section 59-C-1.326(a)(3).

   The Board finds that the language at the beginning of Section 59-A-2.1 is clear on its face, stating unambiguously that "In this Chapter, the following words and phrases have the meanings indicated." This Section goes on to define many terms used in the Chapter, including "building," "building, accessory," and "height of building." There is no dispute that the building permit at issue in this case was issued for a detached garage, or that the garage constituted a "building, accessory" and thus also a "building" under the definitions set forth in the Zoning Ordinance. Indeed, it is clear from the question presented for resolution to this Board that the parties acknowledge that this detached garage is an accessory building, since the Zoning Ordinance provision at issue applies specifically to accessory buildings or structures.[5] Given that the garage in question meets the Zoning Ordinance definitions of "building" and "accessory building," the Board finds that when it is necessary to calculate the "height" of this building, absent specific statutory language to the contrary, the calculation set forth in the Zoning Ordinance definition of "height of building" should be applied. The Board concludes that there is nothing in the plain language of Section 59-C-1.326(a)(3), which plainly references "height" in excess of 15 feet, which would suggest that the "height" of an accessory building or structure for purposes of that Section should be accorded a meaning different from that set forth in Section 59-A-2.1, which by its own terms applies to all of Chapter 59, and thus to Section 59-C-1.326(a)(3).

   The Board finds that this conclusion is supported by the legislative history of recently (and simultaneously) enacted amendments to both Section 59-C-1.326(a)(3) and Section 59-C-1.327 which were made by Ordinance No. 15-82 (Zoning Text Amendment 06-08). This Ordinance added the words "to the highest point of roof surface" to Section 59-C-1.327 in order to clarify that the calculation of "height" for the purposes of compliance with the *maximum* height limitation in that Section was not the same as "height of building" as defined in Section 59-A-2.1; the Board finds that it is significant that this Ordinance did not make a corresponding change to clarify the term "height" as used in Section 59-C-1.326(a)(3). The Board notes that this Ordinance did amend Section 59-C-1.326(a)(3), to increase the additional setback required by that Section from one

5 "Structure" is defined by Section 59-A-2.1 of the Zoning Ordinance to include buildings, as follows: "An assembly of materials forming a construction for occupancy or use including, among others, buildings, stadiums, gospel and circus tents, reviewing stands, platforms, stagings, observation towers, radio and television broadcasting towers, telecommunications facilities, water tanks, trestles, piers, wharves, open sheds, coal bins, shelters, fences, walls, signs, power line towers, pipelines, railroad tracks and poles."

foot for each foot over 15 feet in height to two feet for every foot over 15 feet in height. The Board finds that had the Council intended that height, as used in Section 59-C-1.326(a)(3), be interpreted as required by the amendment to Section 59-C-1.327, then when modifying 59-C-1.326(a)(3) to increase the required additional setbacks, Council would have added language to that Section which was similar to the language added by this same Zoning Text Amendment to Section 59-C-1.327. The language of Section 59-C-1.327 unambiguously requires that height be measured to the highest point of the roof surface; the language of Section 59-C-1.326(a)(3) simply references "height" which, pursuant to the instructions set forth at the beginning of Section 59-A-2.1 and absent evidence of a contrary meaning, has the meaning accorded that term by Section 59-A-2.1.

8. The Board finds by a preponderance of the evidence that DPS properly calculated the height of the garage at the subject Property for purposes of the application of the additional setbacks required by Section 59-C-1.326(a)(3) of the Zoning Ordinance, and the revision to Building Permit No. 438435 was therefore properly issued.

9. The appeal in Case A-6199 is **DENIED**.

On a motion by Vice-Chair Donna L. Barron, seconded by Member Wendell M. Holloway, with Chair Allison I. Fultz in agreement, and Members Caryn L. Hines and Cathie G. Titus necessarily absent, the Board voted 3 to 0 to deny the appeal and adopt the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above be adopted as the Resolution required by law as its decision on the above entitled petition.

Allison I. Fultz
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 23rd day of August, 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 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.