

**BOARD OF APPEALS  
for  
MONTGOMERY COUNTY**

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**Case No. A-6226**

**APPEAL OF MICHAEL CAREY**

OPINION OF THE BOARD

(Hearings held October 31, 2007 and February 27, 2008.  
Matter re-opened on Motion of the Board at Worksession on April 16, 2008.  
Effective Date of Opinion: July 1, 2008.)

Case No. A-6226 is an administrative appeal filed June 26, 2007, by Michael Carey (the "Appellant"). The Appellant charges error on the part of Montgomery County's Department of Permitting Services ("DPS") in the June 6, 2007, issuance of Building Permit No. 446728 for the construction of a two-story addition to the existing detached home on the property located at 1016 Nora Drive, Silver Spring, Maryland 20904 (the "Property"), in the R-90 zone. Specifically, the Appellant asserts that DPS incorrectly issued the subject building permit, and that it should have been denied.

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 October 31, 2007. The hearing was continued on February 27, 2008. The matter was re-opened on Motion of the Board at a Worksession on April 16, 2008, to clarify the grounds for the Board's decision.

The Appellant was represented by Keith J. Rosa, Esquire, of Abrams & West. Yu Cheung, the owner of the subject Property and the holder of the Building Permit at issue in this case, intervened in this case (the "Intervenor"), and was represented by Michael F. Wasserman, Esquire, of Rowan & Associates. Assistant County Attorney Malcolm Spicer represented DPS.

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 1016 Nora Drive in Silver Spring, is an R-90 zoned parcel identified as Lot 9, Block 3 in the Springbrook Knolls subdivision. The size of the Property is approximately 9,411 square feet.
2. On March 6, 2007, Intervenor Yu Cheung applied to DPS for a building permit to construct a two-story addition at the subject Property. Building Permit No. 446728 was issued on June 6, 2007, for the requested addition.
3. On June 26, 2007, Appellant timely filed this appeal, charging error by DPS in its decision to issue Building Permit 446728.
4. Ms. Susan Scala-Demby, Zoning Manager for the Department of Permitting Services, testified on behalf of DPS. Ms. Scala-Demby testified that Building Permit No. 446728 was issued on June 6, 2007, for a two-story addition at the subject Property. Ms. Scala-Demby testified that house plans submitted with this building permit application show that the addition is connected to the second floor of the existing house. See Exhibit 13(c), page 9 (house plans, sheet A-1). She testified that the width of the connection is 4 feet, 11 inches (exterior dimension). She testified that the addition is attached to the existing house, and that the addition and existing house share a common wall but not a common roof.<sup>1</sup> She testified that the County would not consider the addition to be an accessory building because it is attached to the main house. She read the following excerpt from the definition of accessory building, set forth in section 59-A-2.1 of the Zoning Ordinance, into the record:

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. See Exhibit 16.

In light of this definition, she testified that the addition could not qualify as an accessory building.<sup>2</sup>

Ms. Scala-Demby also testified that the addition would not qualify as a second dwelling unit. She testified that at a minimum, a separate dwelling unit would require facilities for cooking, sanitation, and sleeping. She testified that the plans submitted for this addition show a kitchen, a family room, a closet and an office. She stated that the kitchen in the existing house was going to be removed, so that there would be only one kitchen in the house. She testified that there was no bathroom in the addition (i.e. no "sanitation

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<sup>1</sup> Ms. Scala-Demby clarified on cross-examination that the common wall is between the new utility room and the existing house.

<sup>2</sup> On cross-examination, Ms. Scala-Demby stated that if the existing house and addition were not connected, the addition would be an accessory structure.

facilities”). She testified that the second floor of the addition was basically open space, with no walls, and she characterized it as a recreation room.

Ms. Scala-Demby testified that the Property is located in the R-90 zone, and that it is approximately 9,411 square feet. She testified that the building coverage allowed in the R-90 zone is 30 percent. She testified that the addition complied with the requirements of the zone in terms of location on the lot and setbacks from the side and rear property lines.

Ms. Scala-Demby testified that DPS viewed this addition as a two-story addition, with a slab at grade and a second story. She testified that she was confident that DPS reviewers were comfortable with the fact that the drawings submitted showed the lower level of the addition at a different level than the corresponding level of the existing house.<sup>3</sup> She testified that while height was measured from the front of the building, stories were not necessarily measured from the front. She read the definition of “height of residential building in the R-60 and R-90 zones” into the record:

For any one-family detached residential building in the R-60 or R-90 zone, building height is the vertical distance measured from the average elevation of the finished grades along the front of the building to either: (1) the highest point of roof surface regardless of roof type, or (2) the mean height level between the eaves and ridge of a gable, hip, mansard, or gambrel roof. However, for the purposes of determining building height and story, at no point must the finished grade be higher than the pre-development grade. In all cases where this Chapter provides for height limitations by reference to a specified height and a specified number of stories, building height is limited to the specified maximum footage and the number of stories within the specified maximum footage. See Section 59-A-2.1.

She clarified that “footage” refers to vertical distance. She testified that the height restriction in the R-90 zone is 30 feet to the mean, or 35 feet to the ridge of the roof.<sup>4</sup> She testified that even if a house in the R-90 zone otherwise meets the height restriction, it can only be two and one-half stories tall unless it meets the sloping lot exemption set forth in Section 59-A-5.41 of the Zoning Ordinance. Ms. Scala-Demby read the sloping lot exemption into the record:

On any sloping lot, stories in addition to the number permitted in the zone in which such lot is situated shall be permitted on the downhill side of any building erected on such lot, but the building height limit shall not otherwise be increased above that specified for the zone.

See Exhibit 17. Ms. Scala-Demby indicated that the sloping lot exemption could be applied regardless of whether a lot sloped away from or towards the street. She testified

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<sup>3</sup> On cross-examination, Ms. Scala-Demby indicated that the elevation of the first floor of the addition is shown as 106 feet, while the elevation of the second floor of the existing house is 109 feet.

<sup>4</sup> In response to a Board question, Ms. Scala-Demby indicated that height would be calculated from the average elevation in front to the mean or peak of the highest roof.

that this lot slopes from the rear of the Property down towards the street, and that from the back of the addition to the street was approximately a 13 percent slope. Ms. Scala-Demby reiterated on cross-examination her position that this was a two-story structure, and as such, this addition could be approved without the need to apply the sloping lot exemption.

5. Mr. George Muste, Manager for the Residential Program with DPS, testified for the County. He stated that he has worked in that position since 2001, and that he held a similar position with Alexandria County prior. He stated that he is familiar with the building codes that have been in existence through the years.

Mr. Muste testified that there is no required fire separation distance between the existing house, as improved with the addition, and the garage. He stated that "fire separation distance" is defined by the International Residential Code, 2003, ("IRC 2003")<sup>5</sup> as "the distance measured between two buildings on the property." He stated that the IRC defines a single "building" to include accessory structures, as follows: "any one or two-family dwelling or portion thereof, including townhouses, that is used or designed or intended to be used for human habitation for living, sleeping, cooking, or eating purposes, or any combination thereof, and shall include accessory structures thereto." See Exhibit 18(a) and (b) (IRC 2003 definitions of building and fire separation distance). Mr. Muste testified that because the definition of "building" includes the single family dwelling and its accessory structures, it does not require any fire separation distance. He testified that this is the position he has taken consistently since he's been with Montgomery County, namely that the main house and any accessory buildings on the property are considered a single "building" which does not require any fire separation distance from itself. He stated that he had called the staff at the International Residential Code Council, and that they had confirmed this interpretation.<sup>6</sup> He stated that if the garage were attached to the house, which this one is not, it would require some fire protection on the garage side, either half-inch drywall or five-eighths type gypsum.

On cross-examination, Mr. Muste testified that while the plans show the house and garage as separate structures, in actuality, the fascia of the garage roof touches the back wall of the second story of the house. He estimated that the total common area is about one foot by four inches. He stated that the distance shown on Exhibit 13(g) (large plan) between the house and garage was five feet, three inches. He testified that the minimum fire separation distance between buildings before one-hour fire resistant construction is necessitated is three feet from the fire separation line to the building.

6. Mr. Walter P. Merski testified as an expert for the Appellant. He testified that he has a bachelor of science in civil engineering from the University of Maryland, that he worked for the U.S. Army Corps of Engineers for 35 years, that he had been in the construction industry for the past 41 years, and that he has been a

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<sup>5</sup> This code was adopted by Montgomery County in April of 2005.

<sup>6</sup> On cross-examination, Mr. Muste testified that the Council has staff that you can call for a code opinion. He testified that he had called them and had specifically described the situation pertaining to this lot, in response to a letter he received from Mr. Carey. He testified that he wanted to confirm that what he had been doing all these years was correct.

registered professional engineer in the State of Maryland since 1974. He testified that he built several family housing projects for the military. He testified that after he retired from the Army Corps of Engineers, he went to work for Harkins Builders, where he was the project manager for the design and construction of a family housing project at Camp LeJeune, which was designed around the International Residential Code, 2003. The project included 160 duplex units and one single family house. In response to voir dire, Mr. Merski stated that he has not received any special training in the use of the IRC 2003, but that his opinion was based solely on his reading of the Code. He also stated that the Camp LeJeune project was the only occasion on which he used the IRC 2003, but that he had applied previous Codes.

Mr. Merski read the IRC 2003 definition of “fire separation distance” into the record, stated that he had read the definition of “building” in the IRC 2003, and then testified that it was his interpretation that the subject Property contains two buildings,<sup>7</sup> and that there should either be a fire separation distance or a one-hour rated wall between buildings less than six feet apart. He testified that gypsum wall board can provide a one-hour rated wall, but that the wall assembly has to be Underwriters’ Laboratories listed and approved. He testified that a one-hour rated wall would theoretically allow a person one-hour to exit a burning building before it is completely engulfed in flames. In response to a Board question asking him if the wall section shown on Exhibit 13(f) would provide a one-hour fire separation, Mr. Merski testified that the drawing calls out one-half inch drywall which, if it were fire-rated, would be sufficient to provide a one-hour fire separation from the interior side. In response to questions posed on cross-examination as to what the fire protection value of a brick face, stone veneer, or concrete board would be, Mr. Merski said he would have to look at UL-tested assemblies.

Mr. Merski testified in response to a Board question that he would not consider a garage and house with soffits that touched to be a continuous assembly, but rather he would consider it a construction error.

7. Ms. Robin Ferro, a plan reviewer and permitting services specialist with DPS for 24 years, testified on behalf of the County that she had reviewed the plans for the addition at the subject Property. She testified that she had reviewed the height of the home, to the surface of the highest roof (i.e. the roof of the addition), and that she had determined that the mean height between the eaves and ridge of the roof was 27 feet, and that the peak height of that same roof was 28.83 feet. She testified that both of these measurements were within that allowed by the Zoning Ordinance, which establishes 30 feet as the maximum height from the mean between the eaves and ridge, and 35 feet as the maximum peak height. She stated that the starting point for this measurement

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<sup>7</sup> Mr. Merski testified on cross-examination that he believes the accessory structure (garage) is a separate building under the definition of building in the IRC 2003. He testified that he believed that “and shall include accessory structures thereto” meant that the structure or the accessory structure could be a building. He testified that “thereto” could be on the lot adjacent to the building.

was the average elevation along the front of the building (101 feet), as per the definition of height of building in the R-60 and R-90 zones. See Exhibit 20.

Ms. Ferro testified that she also reviewed the plans for lot coverage. She testified that the maximum lot coverage in the R-90 zone is 30 percent, that the subject Property is 9,411 square feet, and that 30 percent of that number is 2,823.3 square feet. She then testified using the September 12, 2007 plans as to the square footage of the various components of the house which factor into lot coverage, as follows:

Existing house:	1,044.92 square feet
Porch:	259.50 square feet
Addition:	715.85 square feet
Cantilever:	97.66 square feet
Connection:	99.58 square feet
<u>Accessory building (garage):</u>	<u>454.94 square feet</u>
TOTAL	2,672.45 square feet, or 28.4 percent lot coverage

[See Exhibit No. 13(g)].

Ms. Ferro testified that this lot coverage is less than the 30 percent maximum.

Ms. Ferro also testified that with the construction of the addition, the accessory structure (garage) occupies 18.8 percent of the rear yard, which is less than the maximum (20 percent) rear yard coverage for accessory structures. On cross-examination, there was a question raised with respect to whether the measurement shown on Exhibit No. 13(g) for the depth of the rear yard (29 feet, 6 inches) included the two foot cantilever or not. Ms. Ferro did a re-calculation of the size of the rear yard, using a depth of 27 feet, 6 inches, and came up with a rear yard of 2,447.5 square feet. She testified that twenty percent of that rear yard would be 489.5 square feet, and that at 454.94 square feet, the garage would still cover less than 20 percent of the rear yard.

Ms. Ferro testified on direct examination that this is a two-story house with a two-story addition, slab on grade. She testified that the addition does not share a common foundation with the existing house, and that the different floors are at different levels.<sup>8</sup> She testified that there was no building under the addition which would cause the addition portion of this building to be considered a three-story building. She testified that story is defined by the Zoning Ordinance as that portion of a building included between the surface of any floor and the surface of the floor next above it. See Exhibit 21. She stated that in her opinion, this is a two-story house, consistent with that definition. On cross-examination, Ms. Ferro testified that stories are measured from the average elevation around the perimeter of the building. She testified that this starting point was arrived at using the definition of height of building for the R-60 and R-90 zone in combination with the method used to determine whether the lowest level of a house is a

<sup>8</sup> Ms. Ferro testified that the site plan showed the first floor elevation of the existing house at 100 feet, the first floor of the addition at 106 feet, the second floor of the original house at 109.5 feet, and the second floor of the addition at 115.5 feet. See Exhibits 13(g) and 19.

basement or cellar.<sup>9</sup> She testified that as would be the case with a split level house, different parts of the house are evaluated separately with respect to stories, but height encompasses the house as a whole.

Ms. Ferro testified on cross-examination that when she reviewed the plans, DPS did not take the sloping lot exemption into account, but rather considered this a two-story building.

8. Ms. Ferro also testified as a witness for the Intervenor. She testified that DPS had done an analysis of this Property after the permits had been approved to see, if the building were considered a three-story building, if the lot would meet the sloping lot exemption.<sup>10</sup> She stated that this Property has a slope of 10.97 percent,<sup>11</sup> and that DPS generally approves sloping lot exemptions for lots with a slope of 10 percent or greater. She concluded that the subject Property has a sloping lot condition. She explained that the sloping lot exemption in the Zoning Ordinance allows stories, in addition to the number of stories permitted in the zone, on the downhill side of a building erected on a sloping lot, but that the building height cannot exceed that allowed in the zone. She stated that the direction of the slope (front to back, back to front, side to side, corner to corner) does not matter.

Ms. Ferro stated on cross-examination that she has reviewed sloping lot exemptions for other lots that slope towards the street, although she acknowledged that they are not as common as exemptions for lots that slope away from the street. When asked if the addition had to be built on the downhill side, Ms. Ferro stated that per the language in the Zoning Ordinance, when applying the exemption, DPS looks at the building in its entirety, not at the placement of any addition. She reiterated that for purposes of this exemption, the slope of the lot is calculated using existing grades.

9. Mr. Michael Carey, Appellant, testified that he lives directly across the street from the subject Property. He testified that he first received notification of the Intervenor's proposed addition on March 9, 2007, via email from DPS or his civic association. He testified that he went on the DPS website, pulled the permit, and contacted Mr. George Muste at DPS. He testified that he asked Mr. Muste to review the plans relative to this building permit, and that Mr. Muste did so, and stated that the permit had been denied.

Mr. Carey testified that in early June, he saw a notice of permit posted on the subject Property, and that he went to DPS a couple of days later to review the plans himself. He stated that he filed a formal complaint about the permit on June 11. He testified that he

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<sup>9</sup> Per the basement and cellar definitions, cellars are not counted as stories, but basements are.

<sup>10</sup> The sloping lot exemption is set forth in Section 59-A-5.41 of the Zoning Ordinance, and provides as follows:

"On any sloping lot, stories in addition to the number permitted in the zone in which such lot is situated shall be permitted on the downhill side of any building erected on such lot, but the building height limit shall not otherwise be increased above that specified for the zone." See Exhibit 17.

<sup>11</sup> Ms. Ferro explained that the slope of the lot is calculated by determining the difference in elevation between the elevation at the front property line and the elevation at the rear of the house or addition, and dividing that number by the distance between the front property line to the rear of the house.

also emailed Mr. Muste at DPS that day to notify him about discrepancies that he had noticed between what was represented on plan sheet CS2 as existing on the lot, and what he knew existed on the lot. He specifically testified that the size of the driveway was not accurately portrayed. See Exhibit 15 at pages 19-30 (complaint and emails). He testified that on June 12, he sent an email questioning how this could be considered an addition under DPS' Code Interpretation Policy concerning alterations, additions, and new construction to George Muste, Susan Scala-Demby, Carla Joyner, Cliff Royalty, Marilyn Praisner, Reggie Jeter, Claire Iseli, and other people in his civic association. See Exhibit 15 at pages 7 and 24 (DPS Code Interpretation Policy ZP-0204). He testified that the plans portrayed a separate building on a separate foundation, connected to the existing house by a hallway and laundry room that was accessible from the hall. Mr. Carey testified that he continued emailing DPS throughout June, and that he met with DPS personnel on June 20 and requested a stop work order, which was not granted.

Mr. Carey stated that based on sheet CS2 (Exhibit 13(b), page 8), he saw three major issues with this permit. First, he did not agree that the proposed construction was an addition. Second, he asserted that the contours shown for the existing grades were inaccurate because they did not reflect the amount of fill that had already been placed prior to the generation of these plans, and that the existing grading was higher. He stated that his third issue was that the work required for the dry well was going to occur through the existing driveway.<sup>12</sup>

Regarding the house plans, Mr. Carey testified that Sheet A-3 does not show a complete cross-section of the house as it relates to the height of stories. He testified that there was no vertical elevation or cut section through the building to depict all of the floors relative to one another, which was the crux of his argument that this was a three-story building. See Exhibit 13(c), at page 11. He testified that the plan was incomplete, and questioned how it could have been accepted. The Board Chair then questioned whether such drawings were necessary if that information was available elsewhere in the plans, and stated that the relevant information as to floor levels was in the record from the beginning.

Mr. Carey testified that the upper floor of the addition juts out two feet farther to the north than the lower floor. See Exhibit 13(c), page 11 (Sheet A-3). He testified that he did not believe that this was reflected on the site plan, and that he had therefore consulted the architectural plans to determine the depth of the addition. He testified that Sheet A-1 showed a north-south outside dimension of 14 feet, 8 inches (see Exhibit 13(c), page 9—enlarged version submitted as Exhibit 22(c)), which correlated with the 14 feet, 8 inch outside dimension shown on the site plan (Sheet C-2, Exhibit 13(b), page 8—enlarged version submitted as Exhibit 22(b)). Thus he concluded that the site plan did not reflect the 16 foot, 8 inch dimension of the upper floor of the addition.<sup>13</sup> Mr.

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<sup>12</sup> The Board Chair at this point noted that the dry well was not noted on the notice of appeal, and was not an issue before the Board.

<sup>13</sup> At this point, it may be appropriate to recount a discussion between counsel for the Appellant, Mr. Rosa, and the Board Chair, during which Mr. Rosa stated that the original site plan (2/12/07, Exhibit 15(b), page 7) and the revised site plan (5/30/07, Exhibit 15(b), page 8), showed different dimensions in the rear yard, with the first showing a depth of 29 feet, six inches, and the latter showing 27 feet, six



Carey then testified, with respect to the dimensions that presumably had been used to calculate the depth of the rear yard for purposes of determining lot coverage, that Sheet CS-2 (Exhibit 22(b)) shows the depth of the rear yard as 27 feet, 6 inches, measured from the corner of the addition to the rear lot line. He testified that he did not believe this dimension included the two foot overhang of the upper floor,<sup>14</sup> and that if that had been included, the rear yard would be 25 feet, 6 inches deep. He testified that by scaling the plans, he calculated that with the addition, the rear yard coverage was within 30 feet of exceeding the 20 percent rear yard lot coverage limit.

Mr. Carey testified that the rear yard area depicted on page 8 of Exhibit 13(b) did not show a metal shed which existed in the northeast corner of the Property when the permit was issued. He testified that in late June or early July, he had taken a picture from his neighbor's roof which shows the shed to the right of a blue tarp. See Exhibit 15, page 69. Mr. Carey further testified that he had hired a subcontractor to take an aerial photograph of the subject Property, and that that picture, taken July 23, shows the new shed (which was permitted later) in the location of the old shed. See Exhibit 15, page 65. He testified that this issue was discussed during the June 20 meeting with DPS.

Mr. Carey testified regarding the number of stories that he had been copied on a September 27 email from Carla Joyner to some of his neighbors, in which Ms. Joyner indicated that the height of the addition was not a concern because of the sloping lot exemption. The email stated that the slope of this lot was 13 percent. See Exhibit 15, page 15. Mr. Carey then testified as to his opinion that this was a three-story house, stating that because the second floor of the original house was connected to the lower floor of the addition, the two should be treated as one contiguous floor (even if you have to step down a few steps into the addition), rendering the upper floor of the addition a third story. Mr. Carey stated that there was nothing in the Code which allowed multiple first floors. He argued that the benchmark for what constitutes a first floor was established by the height calculation, which looks at the average elevation of the finished grade along the front of the house. See 59-A-2.1. When asked by the Board whether a split level house would be viewed as having multiple first floors, or how such a house would fit within the story limit, Mr. Carey was unable to offer a specific reply, but indicated that he did not feel that the house in question should be viewed as a split level.

In response to a Board question regarding the height of the floors of the addition relative to the height of the floors of the existing house, Mr. Carey testified that Exhibit 22(c) shows a half step down into the hallway that connects the existing house with the addition, and then an additional two or three steps down into the kitchen/family room area of the addition. He went on to say that Exhibit 22(d), sheet CS-2, shows the elevation of the second floor of the existing house as 109.5 feet, and the elevation of the lower level of the addition as 106 feet. He again reiterated his opinion that they should be viewed as a contiguous (second) floor.

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inches. Mr. Rosa further indicated that the 9/30/07 site plan also shows a rear dimension of 29 feet, six inches. See Exhibit 13(g).

<sup>14</sup> The dimension of the overhang is evident from Exhibits 22(c) and (e), which show a 16 foot, 8 inch dimension on the upper floor.

### 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*.
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. The Appellant in this case challenged the issuance of building permit 446728 on the following grounds: (1) that the addition is not in fact an addition, but rather is a separate dwelling unit or an accessory building; (2) that the addition does not maintain the fire separation distance required by the IRC 2003 between the addition and the existing garage; (3) that the addition has decreased the square footage of the rear yard such that the accessory structures located in that yard occupy more than the permitted 20 percent; (4) that the total lot coverage exceeds that permitted 30 percent; and (5) that the addition has increased the height of the house beyond the permitted two-and-one-half stories, and that the sloping lot exemption does not apply.
4. With respect to the first allegation, the Board finds that there was no credible evidence to indicate that the construction undertaken pursuant to building permit 446728 constituted anything other than an addition to the existing house. The testimony of Ms. Scala-Demby and of the Appellant indicates that the new construction is connected to the second floor of the existing house by a hallway and utility room. Ms. Scala-Demby's testimony further indicates that the existing house and new construction share a common wall. Ms. Scala-Demby testified that the new construction would therefore not be considered an accessory building, which is defined in section 59-A-2.1 of the Zoning Ordinance to exclude attached structures, as follows:

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. (emphasis added)

The Board finds that the plans in the record confirm Ms. Scala-Demby's testimony that the new construction and existing house are connected by a conditioned hallway and share a common wall, and that the new construction therefore does not meet the definition of "building, accessory." See Exhibit 13(c). Although Appellant testified that he did not feel the construction comported with the spirit of the Zoning Ordinance, the Board cannot base a decision on the Appellant's perception of the underlying intent of the Ordinance, but rather must look at the Ordinance itself, unless the Ordinance is so unclear as to necessitate the use of secondary sources (and even then the Board would not rely on perceived intent). The definition of accessory building clearly excludes attached structures.

With respect to the allegation that the construction undertaken pursuant to permit 446728 should be viewed as a second dwelling unit, Ms. Scala-Demby testified that at a minimum, a separate dwelling unit would require facilities for cooking, sanitation, and sleeping.<sup>15</sup> Ms. Scala-Demby testified that while the proposed construction did include a kitchen, per the plans it did not include a bathroom (sanitation facilities) or sleeping quarters. She also testified that the kitchen in the existing house was going to be removed. The Board finds, based on this evidence, that the proposed construction does not meet the definition of "dwelling unit."

5. With respect to the allegation that the addition does not maintain the fire separation distance required by IRC 2003,<sup>16</sup> the Board accepts the testimony of Mr. Muste that there is no required fire separation distance between the house and the garage because they are considered a single "building" under the IRC 2003. The Board notes that Mr. Muste called the International Code Council<sup>17</sup> to verify that DPS' interpretation of "fire separation distance," as defined by the IRC 2003, was correct. Mr. Muste testified that he was informed that for residential structures, accessory buildings are considered to be part of the (singular) "building" to be considered for fire separation distance. The Board thus finds that because fire separation distance is defined in the IRC 2003 as the distance measured between "buildings," there is no required fire separation distance between the house and garage.

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<sup>15</sup> Section 59-A-2.1 of the Zoning Ordinance defines "dwelling unit" as "[a] building or portion thereof providing complete living facilities for not more than one family, including, at a minimum, facilities for cooking, sanitation and sleeping."

<sup>16</sup> "Fire separation distance" is defined by the IRC 2003 as "the distance measured between two buildings on the property." See Exhibit 18(b).

<sup>17</sup> The International Code Council is a membership association dedicated to building safety and fire prevention. The Council develops model codes used to construct residential and commercial buildings, including homes and schools. Most U.S. cities, counties and states that adopt codes choose the International Codes developed by the International Code Council. See <http://www.iccsafe.org/news/about/>. The ICC has developed and made available numerous International Codes, including the 2003 International Building Code. See <http://www.iccsafe.org/news/about/#pubs>.

6. Per Section 59-C-1.326(a)(1) of the Zoning Ordinance, an accessory structure in the R-90 zone must not occupy more than 20 percent of the rear yard. Appellant in this case argued that the construction of the addition decreased the square footage of the rear yard such that the accessory structure (garage) now occupies more than the permitted 20 percent. Ms. Ferro testified that even if one were to use a depth of 27 feet, 6 inches for the rear yard, the garage would still cover less than the permitted 20 percent, with the garage occupying 454.94 square feet of a 2,447.5 square foot back yard. Appellant also testified as to the percentage of rear yard coverage, testifying to his belief that the rear yard was only 25 feet, 6 inches deep, but still concluding that the rear yard coverage did not exceed the 20 percent limit.<sup>18</sup> The Board finds, based on all testimony and evidence of record, that the building permit in question did not permit construction that would reduce the rear yard such that the garage occupied more than the permitted 20 percent.
7. Per Section 59-C-1.328 of the Zoning Ordinance, the maximum percentage of net lot area that may be covered by buildings, including accessory buildings, in the R-90 zone is 30 percent. Appellant initially alleged that the construction of this addition resulted in greater than 30 percent lot coverage, but did not argue that issue at the hearing. Ms. Ferro testified conclusively, with detailed calculations as recounted in this Opinion, that she had reviewed the submitted plans, and that the lot coverage did not exceed the permitted thirty percent. Thus the Board finds that the building permit in question did not sanction construction which would exceed the permitted lot coverage.
8. Finally, the Board finds, based on the testimony and evidence of record, that the building permit in question did not authorize construction that was in excess of the height or story limits in the R-90 zone. Section 59-C-1.327 of the Zoning Ordinance provides that for a main building in the R-90 zone, the height must not exceed: (1) 35 feet when measured to the highest point of roof surface regardless of roof type, or (2) 30 feet to the mean height level between the eaves and ridge of a gable, hip, mansard, or gambrel roof, subject to the following:

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<sup>18</sup> See February 27, 2008, Transcript, at page 137 (“THE WITNESS: From scaling the site plan ... I did a calculation and came up with that it was right at the cusp, like within 30 feet of exceeding the rear yard lot coverage. MS. FULTZ: But was it over or under? THE WITNESS: It was under. MS. FULTZ: Well, it’s a bright line.”) Contrary to the explicit testimony of his client, counsel for the Appellant argued, during his closing, that if one were to accept that the depth of the rear yard was 25 feet, 6 inches, then the garage occupied more than 20 percent of the rear yard. In following up on this, the Board notes that if one were to accept that the depth of the rear yard is 25 feet, 6 inches, and one were to assume a perfectly rectangular rear yard, then using a width of 89 feet (as shown on Exhibit 22(a)), the rear yard would have a calculated square footage of 2,269.5 square feet. That said, the Board notes that the rear yard, as shown on the plans, is not perfectly rectangular, but rather is slightly (1 foot, 3 inches) deeper when measured at the western edge of the house than it is from the eastern edge, where the 25 foot, 6 inch measurement was taken. The Board calculates the square footage of this additional triangular area to be approximately 55.63 square feet  $((1.25 \times 89)/2)$ . When this additional 55.63 square feet are added to the 2,269.9 square foot rectangle, the total area of the rear yard becomes approximately 2,325.53 square feet. Using this calculation, the garage would cover 19.56 percent of the rear yard, which is still below the allowed 20 percent.

- (a) The height must not exceed 2 ½ stories or 30 or 35 feet, depending on the method of measurement, if other lots on the same side of the street and in the same block are occupied by buildings with a building height the same or less than this requirement.

Ms. Ferro testified conclusively that she had reviewed the plans and had calculated the mean height of the subject house, as measured between the eaves and ridge of the roof, as 27 feet, and the peak height of that same roof as 28.83 feet. She testified and the Board finds that both of these measurements were less than the maximum height allowed by the Zoning Ordinance.

With respect to stories, the Board finds, pursuant to the testimony of both Ms. Scala-Demby and Ms. Ferro, that this is a two-story house. Ms. Scala-Demby testified that the construction allowed by the permit in question was a two-story addition built on a slab. Similarly, Ms. Ferro also testified that this was a two-story house with a two-story addition, slab on grade. She testified that there was no building under the addition which would cause it to be viewed as a three-story structure (i.e. no basement), and that the addition does not share a common foundation with the existing house. She testified that “story” is defined by the Zoning Ordinance as that portion of a building included between the surface of any floor and the surface of the floor next above it, and that her view of this house as a two-story house with a two-story addition is consistent with that definition. See Exhibit 21. The Board agrees and so finds.

Ms. Scala-Demby testified that the plans show that the upper and lower floors of the addition were at different levels than the floors of the original home. Ms. Ferro also testified that the floors of the addition are on different levels than the floors of the original house, at 100 feet (first floor of original house), 106 feet (first floor of addition), 109.5 feet (second floor of original house), and 115.5 feet (second floor of addition) of elevation. In addition, Ms. Ferro testified that as would be the case with a split level house, different parts of the house are evaluated separately with respect to stories, but height encompasses the house as a whole. The Appellant urged the Board to find that despite the change in level and the need to walk down several steps when entering the addition, that because the lower floor of the addition was connected by a hallway to the second story of the existing house, the two should be viewed as a contiguous floor, and thus that the upper floor of the addition should be viewed as a third story. The Board disagrees with this contention, giving credence to Ms. Ferro’s testimony, and finding that the different parts of this house should be evaluated separately with respect to stories. The point of connection therefore does not alter the Board’s finding that this is a two-story house with a two-story addition.

9. There was a lot of testimony during this hearing regarding the interpretation and applicability of the sloping lot exemption set forth in Section 59-A-5.41 of the Zoning Ordinance to this Property. Because the Board has concluded that this is a two-story house that meets the height requirements of section 59-C-1.327 of the Zoning Ordinance, it is not necessary for the Board to address the applicability of the sloping lot exemption to this Property.

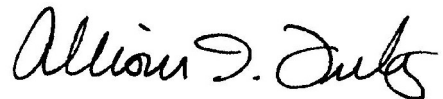
10. Based on the foregoing, the Board finds that DPS HAS met its burden of demonstrating by a preponderance of the evidence that Building Permit No. 446728 was properly issued.

The appeal in Case A-6226 is **DENIED**.

On a motion by Member David Perdue, seconded by Member Wendell M. Holloway, with Chair Allison I. Fultz and Members Catherine G. Titus and Caryn L. Hines in agreement, the Board voted 5 to 0 to deny the appeal and adopt the conclusions set forth in paragraphs 4, 5, 6, and 7 of the following Resolution:

On a motion by Member David Perdue, seconded by Member Caryn L. Hines, with Chair Allison I. Fultz and Members Wendell M. Holloway and Catherine G. Titus in agreement, the Board voted 5 to 0 to deny the appeal and adopt the conclusions set forth in paragraphs 8 and 9 of 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 1<sup>st</sup> day of July, 2008.

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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).