BOARD OF APPEALS
for
MONTGOMERY COUNTY

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
240-777-6600
www.montgomerycountymd.gov/content/council/boa/index.asp

Case No. A-6263

APPEAL OF STEVEN WICHTENDAHL AND ANGELA DICKSON

OPINION OF THE BOARD

(Hearing held March 25, 2009)
(Effective Date of Opinion: June 19, 2009)

Case No. A-6263 is an administrative appeal filed July 3, 2008, by Steven Wichtendahl and Angela Dickson (the "Appellants"). The Appellants charges error on the part of the County's Department of Permitting Services ("DPS") in the issuance of Building Permit No. 450831, issued June 6, 2008, for the construction of a single family dwelling on the property located at 12307 Luxmanor Road, Rockville, Maryland 20852 (the "Property"), in the R-200 zone. Specifically, the Appellants assert that this lot is not buildable because it is substandard for the zone, and that neither Section 59-B-5.3 of the Montgomery County Zoning Ordinance (the "Zoning Ordinance") nor Section 50-20(b)(5) of the Montgomery County Code (the "County Code") render it buildable.

Pursuant to Section 59-A-4.4 of the Zoning Ordinance, codified as Chapter 59 of the County Code, the Board held a public hearing on the appeal on March 25, 2009. The Appellants appeared pro se. Chardell Partners LLC, the owner of the subject Property, intervened in this case (the "Intervenor") and was represented by Michele Rosenfeld, Esquire. Assistant County Attorney Malcolm Spicer represented DPS.

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

FINDINGS OF FACT

The Board finds by a preponderance of the evidence that:

1. The Property, known as 11307 Luxmanor Road in Rockville, is an R-200 zoned parcel identified as Part of Lot 11, Block C, in the Luxmanor subdivision. The size of the Property is approximately 17,209 square feet.

2. On April 18, 2007, Mr. Philip Cantor, on behalf of Chardell Partners, applied to DPS for a building permit to construct a single family dwelling at the subject

Property**.** Building Permit No. 450831 was issued on June 6, 2008, for the requested construction. See Exhibits 3(a) and (b).

3. On July 3, 2008, the Appellants filed this appeal, asserting that the permit should not have been issued because the lot is only a partial lot, does not meet the minimum for the zone, and was not grandfathered by Section 59-B-5.3 of the Zoning Ordinance or rendered buildable by reason of mold under Section 50-20(b)(5) of the County Code. See Exhibit 1(b).

4. Ms. Susan Scala-Demby, Zoning Manager, testified on behalf of DPS. She stated that she was familiar with the Property. Ms. Scala-Demby testified that DPS issued Building Permit No. 450831 on June 6, 2008. See Exhibit 3(a). She stated that the current zoning of the Property is R-200, which has a minimum lot size of 20,000 square feet. She testified that the site plan on file shows that this Property is about 17,209 square feet. See Exhibit 8(b).

Ms. Scala-Demby testified that according to the State Department of Assessment and Taxation data, there was previously a home on this Property, which had been constructed in 1968. She testified that DPS issued Building Permit No. 450831 under Section 59-B-5.3 of the Zoning Ordinance, which allows the replacement of homes on lots that were created by deed. She testified that the lots for which the permit was issued were created by deed when the minimum lot size was 5,000 square feet.

Ms Scala-Demby testified that the subject Property was lot 11, recorded by plat in 1946. See Exhibit 8(c). She testified that when the plat was recorded, the 1941 Zoning Ordinance was in effect, and that under the 1941 Zoning Ordinance, this was an "A" residence zone. She testified that the minimum lot size in the "A" residence zone was 5,000 square feet, and read the relevant portion of the 1941 Zoning Ordinance into the record. See Exhibit 12, 1941 Zoning Ordinance, at Section 3.C.1. Ms. Scala-Demby testified that as originally platted, lot 11 had 23,598 square feet, approximately 6,389 square feet more than are there today. She testified that she had reviewed the deeds that had resulted in the current configuration of this lot.

Ms. Scala-Demby testified that by deed dated September 25, 1952, and recorded in the land records at liber 1712, folio 10, 6,689 square feet of lot 11 had been conveyed to the owners of lot 9, located at 6007 Poindexter Lane. See Exhibit 8(f). She testified that the part conveyed to the then-owners of lot 9 was the triangular portion labeled I on Exhibit 11(f). Ms. Scala-Demby then testified that by deed dated September 25, 1952, 8,436 square feet of lot 11 had been conveyed to the owner of lot 10. See Exhibit 8(g). She explained that this portion was the area marked II on Exhibit 11(f). Finally, Ms. Scala-Demby testified that by a third deed dated September 25, 1952, 8,773 square feet of lot 11 had been conveyed to the owner of lot 1, located at 6016 Roseland Drive. See Exhibit 8(h). She explained that this was the portion of lot 11 marked III on Exhibit 11(f), and referenced the tax map at Exhibit 13 as showing the location of lot 1. Ms. Scala-Demby testified that all of these deeds were recorded in the Montgomery County land records.

Ms. Scala-Demby testified that by deed dated April 18, 1968, the same 8,773 square feet that had been conveyed by the deed at Exhibit 8(h) was conveyed to the owners of the property conveyed by Exhibit 8(g) (the Eastwoods), such that they then owned two

parcels. She testified that that is basically what exists today, and that that was the Property for which the permit was issued.

Ms. Scala-Demby testified that DPS approved Building Permit No. 450831 under Section 59-B-5.3 of the Zoning Ordinance, which says that any lot recorded by deed prior to June 1, 1958, is a buildable lot under the law. She testified that DPS viewed these two deed lots as meeting this because they met the 1946 minimum of 5,000 square feet. She testified that this permit was sent to the Park and Planning Commission for review but not for approval, per Section 59-A-3.34. See Exhibit 14.

On cross-examination, Ms. Scala-Demby testified that she was somewhat familiar with Article 28, Section 8-119 of the Maryland Code Annotated. At the request of counsel, Ms. Scala-Demby read a portion of that Section into the record, as follows: "in Montgomery County, all building permit applications shall be referred to the [Park and Planning] Commission for review and recommendations as to zoning requirements." See Exhibit 15. She agreed with the statement of counsel that this State law reinforces the idea that building permits go to Park and Planning for review and recommendation only.

Still on cross-examination, Ms. Scala-Demby made clear that each of the two parcels shown on Exhibit 13 exceeded the 5,000 square foot minimum when they were deeded. She testified again that a home had been built in 1968 on the combined deeded parcels, and that a building permit had been issued for that combined part of lot 11 ("the square part") in 1968. She testified that the minimum lot size at that time would have been 20,000 square feet, and that the "square part" did not meet that in 1968. When asked how, under Section 50-20 of the County Code, a permit could have been granted in 1968 for the "square part," Ms. Scala Demby testified that because such a permit would have been applied for before 1985, it could be issued.[1]

When asked on cross-examination to review the uses to which this Property could be put per Section 59-C-1.31 of the Zoning Ordinance if it were not used as a single family dwelling, Ms. Scala-Demby testified that if the lot were 20,000 square feet, it could be used for a variety of residential uses, including a bed and breakfast or embassy. She stated that all of these uses would require a building permit. She testified that without having to get a building permit, the Property could be used for parking, Christmas tree sales, or agricultural uses such as farming or an animal farm (chickens, horses, pigs). She testified that this was the entirety of the uses to which this Property could be put other than a single family dwelling.

In response to further questioning, Ms. Scala Demby described the process followed for this permit. She testified that the permit application was sent to Park and Planning for review. She testified that because the lot was less than 20,000 square feet, DPS needed to see if the Property was grandfathered, which they did. She testified that DPS followed the usual procedures. She stated that they did meet with the Property owner, which she testified is normal if such a meeting is requested. She testified that they also met with the Appellant, which she said is also normal if requested. She testified in response to Board questioning that Park and Planning had recommended against issuance of this building permit because the Property did not meet the 20,000 square foot minimum. She testified

[1] See Section 50-20(b)(1) of the County Code.

that the Park and Planning recommendation was not in writing, but that there was a denial from Park and Planning reflected in the DPS database. Ms. Scala Demby testified that DPS met with Park and Planning to get feedback on this permit application. She testified that DPS disagreed with Park and Planning, and that based on Section 59-B-5.3 of the Zoning Ordinance, DPS issued the permit. Again in response to Board questioning, when asked if, for the purposes of the Zoning Ordinance or Chapter 50, the conveyance by deed of a portion of a platted lot established a lot line, Ms. Scala Demby testified that it did if it was conveyed before June 1, 1958. When asked by the Board if DPS considered Section 50-20(b)(5) of the County Code, Ms. Scala Demby testified that DPS did consider this Section, but felt that because this lot was a buildable lot under Section 59-B-5.3 of the Zoning Ordinance, that Section overrode Section 50-20(b)(5). See Exhibit 11(q). She testified that DPS also concluded that if they couldn't issue a building permit for this Property, it was worthless other than as an agricultural property, and so they thought the permit could be issued.

In response to questioning from the Appellants, Ms. Scala Demby testified that she has been in her current job since 2001, and that she could recall one other time when DPS had gone against the recommendation of Park and Planning. When asked if she got involved in every permit, she testified that she is responsible for all permits, and that she gets involved with specific permits if there is a problem with or after permit review. She testified that she became aware of this permit after Appellant Wichtendahl talked to her. Finally, she testified that the decision that this permit could be issued under Section 59-B-5.3 was made prior to the issuance of the permit.

5. Mr. Wichtendahl testified that he lives in a neighborhood of 20,000-plus square foot lots. See Exhibit 11(a). He testified that lot 11 was divided in 1952, and that parts were combined again in 1968. He testified that the combined Property was conveyed to Mr. Cantor and Chardell Partners in 2006.

Mr. Wichtendahl testified that the demolition permit that was issued for the subject Property in February, 2007, did not give a reason for the demolition. See Exhibit 11(k). He stated that Mr. Cantor and Chardell demolished the existing house and then applied for a building permit in April, 2007. He testified that when the building permit was turned down, Mr. Cantor approached him to ask if he'd deed over the portion of lot 11 that he owned (and that adjoins the subject Property) to Mr. Cantor, who would then deed it back to him after he obtained the building permit. Mr. Wichtendahl testified that Mr. Cantor told him this is done frequently. He then testified that he talked with his lawyer, DPS, and Park and Planning, and that they all laughed. He testified that he told Mr. Cantor that he'd be willing to sell him a piece of his property, large enough to make the subject Property 20,000 square feet, but that Mr. Cantor said it would take too long to get the property resubdivided. Mr. Wichtendahl testified that Mr. Cantor continued to call him, but that he had to talk to his wife and was working through some personal issues, and so did not return the calls. He testified that he received a letter from Mr. Cantor in April, 2008, with a check for $5,000, requesting to include a part of his (Mr. Wichtendahl's) lot in his (Mr. Cantor's) permit application. See Exhibit 11(l). He testified that he felt this was unethical, and that he sent the letter and check back to Mr. Cantor. He testified that he then received a letter from Ms. Rosenfeld saying that this was legal.

Mr. Wichtendahl testified that on June 23, 2008, he saw a large truck pull up with a building structure and some framing. He testified that as it turned out, the truck had nothing to do with the subject Property, but that in the meantime, he had become concerned, and went to DPS. He testified that he found out that a building permit had been issued on June 6, 2008. He testified that he had no notification of the permit, and noted that permits are supposed to be posted within three days of issuance. See Exhibit 11(p). He testified that Exhibit 11(n) is a photograph that he took on June 24, 2008, of the truck at the subject Property. He contrasted that photo with Exhibit 11(o), which he took of the subject Property on July 2, 2008, noting that the latter shows the permit posted. He opined that the intent of the whole process was to deceive.[2]

Mr. Wichtendahl testified that he tried to see staff at DPS, but that no one would see him. He testified that he talked to a clerk at DPS who said that the permit still showed red in their system, and that he didn't know how it got issued. The clerk suggested that Mr. Wichtendahl talk with Park and Planning. Mr. Wichtendahl testified that he talked to Mr. Wayne Cornelius at Park and Planning who said it was impossible, that this permit could not have been issued. He testified that he then went back to DPS, where no one would see him. He testified that he went to the County Executive Office Building and saw Tom Street of the County Executive's Office, who called Carla Joyner (the head of DPS), and that he then met with Reginald Jetter at DPS. Mr. Wichtendahl testified that Mr. Jetter told him that he would look into the permit issuance and get back to him. Mr. Wichtendahl testified that he went back to DPS the next day, and that Mr. Jetter again saw him. He testified that Mr. Jetter presented him with the summary set forth in Exhibit 11(q), and that he then brought Mr. Spicer and Ms. Scala Demby in to explain how the permit was issued. He testified that Mr. Spicer said that permit was approved because of mold, and that when he asked what proof there was of mold, Mr. Spicer said it didn't matter because the permit could have been issued under Section 59-B-5.3 of the Zoning Ordinance. Mr. Wichtendahl testified that he later found out the permit had been issued after Ms. Rosenfeld talked with Mr. Spicer. He testified that Ms. Scala Demby was defensive, and that she said she could approve the permit without regard to what Park and Planning had said. Mr. Wichtendahl testified that he then went back to Park and Planning. He testified that Mr. Cornelius was beside himself, and said that his recommendations had never been overturned in the 35 years he'd been with Park and Planning.

Mr. Wichtendahl testified that he believed Section 59-B-5.3 of the Zoning Ordinance should be read to require that a dwelling be built on the lot prior to 1958, not just that the lot be recorded. He testified that he was unable to find any zoning for this Property before 1954, acknowledging that the minimum for the "A" zone in 1946 may have been 5,000 square feet. He testified that Exhibit 11(t) shows that in 1954, both the R-A and the R-R zones required a minimum lot size of 20,000 square feet. He testified that Exhibit 11(v) shows that in 1972, all remaining R-R zoned property became R-200.

Mr. Wichtendahl testified that he could not find a permit for the house built on the Property in 1968, or any indication as to how that had been approved.

[2] Counsel for DPS noted at this juncture that the 30 day period within which to appeal does not start until the permit is posted. Having said that, counsel noted that Appellants' appeal of this permit was timely filed.

On cross-examination, when asked if, when he and his wife met with DPS, they had said they were about to purchase the subject Property from Chardell, Mr. Wichtendahl stated that he had never considered doing that.

6. Ms. Rose Krasnow, Chief of Development Review for Maryland National Capital Park and Planning, testified for the Appellants. She stated that among other things, she oversees zoning matters, including the subdivision regulations in Chapter 50 of the County Code. She testified that she met with Ms. Rosenfeld, Mr. Cantor, and Kathy Conlon (also of Park and Planning) to see if a building permit could be issued. She testified that Mr. Cantor and Ms. Rosenfeld said that the home that had been on the subject Property was removed because of mold, which they thought could be considered a natural disaster.

Ms. Krasnow testified that she was unaware of another time that DPS had overturned Mr. Cornelius' recommendations. She then stated that not all permits come to Park and Planning. She testified that Park and Planning does not review permit applications for fences and decks, but does review plans for new construction.

Ms. Krasnow testified that in 1954, the zoning of the subject Property was R-R. She stated that Exhibit 11(s) is an excerpt from the 1954 Zoning Ordinance. In response to a Board question asking if there was a basis for determining the zoning of this Property in 1946, Ms. Krasnow testified that the 1948 Code talks about lots in the "A" zone being 5,000 square feet, and testified that she has no reason to question that this Property was at some point in the "A" zone, with a 5,000 square foot minimum.

In response to a Board question asking if the pre-1958 conveyance by deed of a portion of a lot would have established a new lot line, Ms. Krasnow testified that that may have worked in 1968, because at that time you could get a building permit for a piece of property that was created by deed, but that once the house on the property was torn down, she did not see how that would work because the property had been re-deeded. She then testified that in her opinion, the only way the Property would be buildable was if an exception was obtained under Section 50-20(b)(5) of the County Code. She testified that the Intervenors told Park and Planning that Section 50-20(b)(5) had been met in this case because of mold, but she said they had nothing to document the mold. She testified that Section 50-20(b) applies because the Property is comprised of parts of a lot. She testified that it is not a subdivided lot, and that it had been split into three pieces by deed. She testified that in 1968, two of those pieces were re-combined by deed, and that at that time, you could get a building permit for a property established by deed. She clarified that this did not result in a lot, but rather in a part of a lot. She testified that you cannot get a building permit for a property established by deed today except under Section 50-20(b). When asked specifically if the common ownership of these two pieces of lot 11 erased the line in the center, Ms. Krasnow said yes, and explained that this bigger, square piece of property was viewed as an "unplatted remainder of an resubdivided lot" which was created in 1968, when resubdivision by deed was permissible. She testified that the subject Property was not "more than one lot," but rather that it was a large part of a lot, and that the proposed construction did not cross lot lines. She testified that the resultant part of a lot was not a platted lot. When asked again by the Board if this square piece was an "unplatted remainder of a resubdivided lot" for purposes of Section 50-20(b), Ms.

Krasnow said that she was not a lawyer and did not know if the lot had actually been resubdivided.

When asked by the Board if Section 59-B-5.3 of the Zoning Ordinance would trump Section 50-20 of the County Code, Ms. Krasnow testified that she didn't believe the subject Property was "a lot recorded by deed prior to 1958" because she believed that this lot was recorded by deed in 1968.

When asked on cross-examination whether, when she and Ms. Conlon met with the Intervenors, Ms. Conlon had confirmed that there were other instances where houses were demolished because of mold, Ms. Krasnow replied yes. She went on to testify that if the Intervenors could provide documentation of a mold issue, that mold could be considered a natural disaster under Section 50-20(b)(5). Ms. Krasnow then confirmed that she had told the Intervenors that she needed documentation of the mold problem prior to the demolition of the home, and that sworn, after-the-fact testimony would not suffice. In response to a Board question asking what constituted a major mold problem, Ms. Krasnow testified that there was no established standard, but that the testimony of an expert such as a home inspector would suffice. When asked if Park and Planning had written procedures requiring written documentation of a mold problem prior to demolition, Ms. Krasnow replied no. Finally, when asked, if there had been credible evidence of sufficient mold to justify demolition of the home, if Park and Planning would have recommended that this building permit be approved, Ms. Krasnow said yes. She then testified that a permit could have been issued, but that the lot would still have been substandard.

In response to a Board question asking how a building permit could have been issued in 1968 for this Property, Ms. Krasnow testified that if this Property was previously in the A zone, then a house could have been constructed on either (or both) of the individual parcels. She testified that if someone wanted to combine these lots and build a single house, DPS would have allowed that because you would only have one house, instead of the two permitted. She testified that the Code tries to allow the use of old pieces of property. She testified that the problem with this Property was that the house had been demolished, and that no grandfathering provision currently applies.

When asked on cross-examination how a building permit could have been issued in 1968 for the square part of lot 11 pursuant to Section 50-20(b), Ms. Krasnow testified that 1968 was certainly before 1985, but that she was not certain that Section 50-20 was in existence in 1968.

7. Mr. Philip Cantor testified for the Intervenor. Mr. Cantor testified that he purchased the subject Property in March of 2006. He testified that when he purchased the Property, it had a single family dwelling on it. He testified that he purchased it with the intention of either renovating the existing house, renting it out, or tearing it down and rebuilding. He testified that he consulted with an engineering/surveying firm prior to the purchase, and that they told him that there were no issues with setbacks,3 and that the two lots should not be an issue as that

[3] When a Board member stated that this suggested that his intention was to tear the house down and rebuild, Mr. Cantor stated that the setbacks would apply to renovation as well.

had been done before. He testified that someone may have told him that a minor subdivision may be necessary. He testified that he purchased the Property without a home inspection, which said he was common at the time.

Mr. Cantor testified that the house on the Property was built on a slab, and had a pool in the backyard. He testified that the house was vacant for 10.5 months, and that it was vandalized. He testified that the house was in bad shape and could not be rented or renovated. He testified that mold was a problem. He testified that he first noticed the mold problem towards the end of 2006. He testified that after he saw the mold and mildew, he did not want to take a chance with renting out the house or renovating it. He testified that his wife led the committee at a local elementary school where the portable classrooms were filled with mold, causing numerous teachers and children, including his own son, to become sick. He testified that all of the portables at that school were eventually replaced because of the work done by his wife. He stated that that is why the mold issue resonated with him more intensely than it might with other people. He testified that he determined after walking through the house that demolition was the only option.

Mr. Cantor testified that he applied for a demolition permit in February, 2007, 11 months after he purchased the Property. He testified that no one told him that he needed to verify mold in the house prior to demolition, and that the application for a demolition permit does not ask why the structure is being demolished. He testified that he had never come across a house with mold before, and that he did not know that he would need any proof of it as justification for the demolition. He testified that he didn't realize the reason for the demolition was relevant. He testified that the house was demolished in March.

Mr. Cantor testified that he applied for a building permit in April, 2007, and that it wasn't until the end of that month that he learned that there was an issue with Park and Planning. Mr. Cantor testified that Park and Planning denied the permit, although DPS' zoning division had approved it with respect to setbacks, etc., and no other reviewing agencies had raised issues. He testified that after the denial, he contacted the County to find out why the permit had been denied, and was told that because the Property was less than 20,000 square feet, Park and Planning would not approve the permit.

Mr. Cantor then testified that he contacted the Appellants and told them that he'd like to work something out with them so that he could buy or lease part of their property. He testified that Mr. Wichtendahl indicated that they could work something out. He testified that he placed numerous calls to Mr. Wichtendahl, and that he finally got a call back two months later. He testified that Mr. Wichtendahl told him that he had been dealing with some personal issues. Towards the end of the year, Mr. Cantor felt he was making no headway, and testified that that was when he wrote Mr. Wichtendahl a letter, feeling that Mr. Wichtendahl was the only person who could help him to get his lot up to 20,000 square feet.[4] Mr. Cantor testified that his intent was to work out a deal, not to do anything unethical. He stated that it was at this point that he hired an attorney. He testified that if he could not build a single family house on the Property, the other uses to which it could be put were of no market value, and the lot would be useless.

[4] Mr. Cantor testified that he had contacted the other adjoining property owners, but that they were unable to deed over any of their property as that would have rendered their properties substandard.

Mr. Cantor testified that he has 26 years in the building business as Jendell Construction. He testified on cross-examination that he had also torn down and rebuilt a house at 6012 Poindexter Lane, and that the (then-)owner of the subject Property had contacted him about buying that Property. He testified that he purchases many homes, and that he figured he would either rent this home out, renovate it, or tear it down. He testified that at one point, he owned four rental houses in the County. When asked if he had ever made Mr. Wichtendahl an offer to buy his land, Mr. Cantor testified that he had never given Mr. Wichtendahl an actual price because he did not know how much of his (Mr. Wichtendahl's) land he would be willing to sell. Mr. Cantor testified that he thought perhaps that he was trying too hard to work something out with Mr. Wichtendahl, and that he was unable to communicate with him. He testified that the letter and $5,000 check were really an attempt to see if the conversation was still open. Mr. Cantor testified that he never received a call from Mr. Wichtendahl without his initiating it, and that he wanted to see if Mr. Wichtendahl still wanted to talk.

In response to Board questions, Mr. Cantor testified that he did not talk with DPS or Park and Planning prior to purchasing this Property. He testified that he was aware that it was zoned R-200, but that he did not know about the 20,000 square foot minimum. He stated that when he took the existing house down, he did not know that he needed to document the mold problem. He testified that the reason that a house comes down has never been an issue in the past (e.g. asbestos). He stated that he is not an expert in zoning. He testified that in his experience, he had not come across lots that were unbuildable.

In response to further Board questioning, Mr. Cantor testified that the house was furnished when he did his initial walk-through, prior to purchasing it, and therefore that what you could see was limited. He testified that there was no visible evidence of mold at that time.

8. Mr. Paul Bannen, who lives across the street from the subject Property at 11306 Luxmanor Road, testified for the Intervenors. Mr. Bannen testified that the front yard of his property and the subject Property match up. He testified that he was drawn to the neighborhood because of its sense of community. He testified that the neighborhood has community meetings twice a year. He testified that the open lot across the street from him makes him wonder about field mice, which he testified are associated with Lyme disease. He testified that he wants a neighborhood, and would prefer to see a home on the subject Property rather than a vacant lot. He testified that having a home would bring symmetry back to the street. He testified that when he moved into his house, he thought all of the lots had or would have a home on them.

9. Dr. Terry Kramer, who lives at 6012 Poindexter Lane (across Poindexter from lot 10), testified for the Intervenors. Dr. Kramer testified that from an aesthetic standpoint, she looks at a vacant lot over an existing small house, and that she will be looking right at any house that is built on the subject Property. She testified that from a health and safety standpoint, she is concerned about the wildlife potentially living on the vacant lot. She testified that she would like to see a house built on the subject Property, stating that she felt it was in the public interest to do so. She testified that a house would add to the tax base, whereas a vacant lot

would add nothing. She testified that she was concerned about property values, and that there were a number of lots in the Luxmanor subdivision which were not 20,000 square feet.

10. The County recalled Ms. Scala Demby at the end of the proceeding. At that time, Ms. Scala Demby testified that she remembered Mr. Wichtendahl talking about making an offer to purchase the square part of lot 11 from Chardell.5

In response to a Board question asking about how the Property could comply with Section 59-B-5.3 if it was recorded in 1968 by deed, Ms. Scala Demby testified that a deed was recorded when the property changed hands, but that the lot itself had been recorded in 1952, when the parcel was split into three pieces by deed. She testified that when the one piece was re-deeded to a new owner, it was not physically changed, and was the same lot created in 1952. She testified that common ownership is not an issue, and that the two lots were not combined by deed in 1968.

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. Chapter 50 of the County Code regulates the subdivision of land. Subsection (b) of Section 50-20 of that Chapter provides that:

Sec. 50-20. Limits on issuance of building permits.

* * * * *

(b) A building permit must not be approved for the construction of a dwelling or other structure, except a dwelling or structure strictly for agricultural use, which is located on more than one lot, which crosses a lot line, which is located on the unplatted remainder of a resubdivided lot, or which is located on an outlot, except a building permit:

(1) applied for on or before February 1, 1985;

[5] Mr. Wichtendahl again denied that he ever had any intention of buying the Property.

(2) approved after February 1, 1985, for development that crosses a lot line where a wall is located on, but not over, the lot line and there are projections for the roof, eaves, and foundation footings which project not more than 2 feet across the vertical plane of the lot line; and projections for sills, leaders, belt courses and similar ornamental features which project not more than 6 inches across the vertical plane of the lot line;

(3) for an aboveground or underground public facility or amenity that crosses the vertical plane of any lot line, as projected below grade, if shown on a CBD Zone Project Plan for optional method development, approved in accordance with the procedures of Division 59-D-2; or if shown on a Development Plan approved in accordance with the procedures of Division 59-D-1;

(4) for an underground parking facility that crosses the vertical plane of any lot line, as projected below grade, or extends into a public right-of-way if that extension is approved by the appropriate public agency;

(5) for the reconstruction of a one-family dwelling that is located on part of a previously platted lot, recorded by deed before June 1, 1958, if the dwelling is destroyed or seriously damaged by fire, flood or other natural disaster or;

(6) for an addition to an existing one-family dwelling, a porch, deck, fence or accessory structures associated with an existing one-family dwelling located on part of a previously platted lot, recorded by deed before June 1, 1958.

4. Chapter 59 of the County Code contains the County's Zoning Ordinance. The following provisions are relevant to the Board's decision in this case: Section 59-A-2.2(a), Section 59-A-3.34, and Section 59-B-5.3. Those provisions are reproduced below:

Sec. 59-A-2.2. General rules of interpretation.

(a) In this chapter, words used in the present tense include the future; the singular number includes the plural number and the plural the singular; and the word "shall" is mandatory and not optional.

Sec. 59-A-3.34. Review by commission.

The Director must not issue a building permit for: (1) construction of a new principal structure; (2) construction that increases the gross floor area of an existing commercial structure; or (3) construction that substantially increases the gross floor area of any one-family structure, until the application has been submitted to the Commission or its designee for review for conformity with this Chapter.

Sec. 59-B-5.3. One-family dwelling.

Any one-family dwelling in a residential zone or agricultural zone that was built on a lot legally recorded by deed or subdivision plat before June 1, 1958, is not a nonconforming building. The dwelling may be altered, renovated, or enlarged, or replaced by a new dwelling, under the zoning development standards in effect when the lot was recorded, except that:

(a) a lot recorded before March 16, 1928, in the original Maryland-Washington Metropolitan District, must meet the development standards in the 1928 Zoning Ordinance;*
(b) one-family dwellings and accessory structures on a lot legally recorded by deed or subdivision plat before June 1, 1958, in the Upper Montgomery County Planning District must comply with the setback, yard, and area coverage standards applicable to the lot in the 1956 Zoning Ordinances for the Upper Montgomery Planning District;
(c) the maximum building height and maximum building coverage in effect when the building is altered, renovated, enlarged, or replaced by a new dwelling applies to the building; and
(d) an established building line setback must conform to the standards for determining the established building line in effect for the lot when any alteration, renovation, enlargement, or replacement by a new dwelling occurs. Any building permit issued before November 23, 1997 must conform to the development standards in effect when the lot was recorded.

5. The County has taken the position that the subject Property is comprised of two "deed" lots which were recorded in 1952 (i.e. before 1958), and thus, under Section 59-B-5.3 of the Zoning Ordinance, the dwelling that previously existed on that Property can be replaced by a new dwelling under the zoning development standards in effect at the time the lot was recorded. The County notes that under the Rules of Interpretation in Section 59-A-2.2(a) of the Zoning Ordinance, the singular includes the plural, and vice versa. Thus, the County argues that the reference in Section 59-B-5.3 to a dwelling built on a "lot" that was legally recorded before June 1, 1958, should also be read to apply to a dwelling built on "lots" that were legally recorded before that date.

The Appellants, on the other hand, through witness Krasnow, have taken the position that the subject Property was recorded in 1968, when two of the parts of lot 11 came under common ownership, and thus that the protections offered older lots by Section 59-B-5.3 do not apply to this Property. Again through witness Krasnow, Appellants have taken the position that the only way in which the Property would be buildable, once the original house was torn down, was if an exception could be obtained under Section 50-20(b)(5) of the County Code.

The Intervenors have taken the position that the Property was buildable under both Section 59-B-5.3, because it was recorded prior to June 1, 1958, and under Section 50-20(b)(5), because the original house had to be demolished due to a natural disaster, namely mold.

The Board notes that if it were to accept the County's contention that the Property is grandfathered by Section 59-B-5.3 of the Zoning Ordinance, it would essentially be finding in part that the subject Property is comprised of two separate "deed" lots, both of which were recorded in 1952. See Tr. at page 19. The Board would then be faced with reconciling the language in two potentially conflicting provisions, Section 59-B-5.3 of

the Zoning Ordinance and Section 50-20(b)(5) of the County Code.[6] Section 59-B-5.3 allows the replacement of any one-family dwelling built on a lot that was legally recorded by plat or deed prior to June 1, 1958. The County asserts that under the general rules of interpretation, this Section would also allow the replacement of a one-family dwelling built on "lots" recorded before June 1, 1958. Section 50-20(b) of the County Code would seemingly contradict this, in that it prohibits the approval of a building permit for construction of a dwelling which is located on more than one lot, which crosses a lot line, which is located on the unplatted remainder of a resubdivided lot, or which is located on an outlot. Paragraph (5) of that Section, however, contains an exception for the reconstruction of a one-family dwelling located on part of a previously platted lot, recorded by deed before June 1, 1958, if the prior dwelling was destroyed or seriously damaged by fire, flood or other natural disaster.

The Court of Special Appeals described the Court's, and thus the Board's, task in construing conflicting zoning regulations as follows 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). … [W]hen we "construe two statutes that involve the same subject matter, a harmonious interpretation of the statutes is 'strongly favored.'" *Dep't. of Public Safety & Corr. Servs. v. Beard*, 142 Md. App. 283, 302, 790 A.2d 57, *cert. denied*, 369 Md. 180, 798 A.2d 552 (2002) (citation omitted). When "two enactments—one general, the other specific—appear to cover the same subject, the specific enactment applies." *Id.*

In addition, general principles of statutory construction 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 a court 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 Court 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).

---

[6] If the Board were to accept the Appellant's position, Section 59-B-5.3 would be inapplicable to this Property, which Appellants assert was recorded in 1968. Nevertheless, per Appellants, the building permit could be issued for the Property if it satisfied the exception criteria in Section 50-20(b)(5). Because the Board's reconciliation of Sections 59-B-5.3 and 50-20(b)(5) in the instant case requires that the latter be met, the Board's acceptance of the County position for purposes of analysis is of no consequence.

With this as background and in attempting to reconcile these provisions, the Board concludes that while both Section 59-B-5.3 of the Zoning Ordinance and Section 50-20(b)(5) of the County Code allow the replacement of one-family dwellings on property recorded by deed before June 1, 1958, Section 50-20(b)(5) speaks explicitly to the replacement of dwellings that are located on more than one lot, that cross a lot line, that are located on the unplatted remainder of a resubdivided lot, or that are located on an outlot. The Board finds that this language is more specific than the language of Section 59-B-5.3, which refers only to the time of recordation, and that thus under the accepted rules of statutory construction and applicable case law, the more specific provision applies. The Board therefore concludes that this has the effect of creating a subset of the replacement dwellings that would otherwise be grandfathered by Section 59-B-5.3 but that, because of their location, must also qualify for an exception under Section 50-20(b)(5). The Board notes that this construction has the effect of harmonizing these potentially conflicting provisions without rendering any part of either provision meaningless. Furthermore, it gives weight to the more specific language of Section 50-20(b), and is not unreasonable.

Applying this construction to the facts at hand, and assuming, without finding, that the subject Property is comprised of two "deed" lots which were recorded in 1952, the Board now turns to the question of whether Building Permit No. 450831 was correctly issued.[7] The Board finds that under its construction of Sections 59-B-5.3 and 50-20(b)(5), the building permit for this replacement dwelling could not have been issued solely under Section 59-B-5.3, but rather must also qualify for an exception under Section 50-20(b) because the proposed construction spans two lots. The Intervenor has advanced the theory that the presence of mold should be considered a "natural disaster" sufficient to allow the issuance of a building permit under Section 50-20(b)(5). Indeed, Mr. Cantor testified that he demolished the old house on the subject Property because of mold, and Ms. Krasnow testified that the presence of mold could be considered a "natural disaster" sufficient to allow the issuance of a building permit for this Property under Section 50-20(b)(5), provided there was documentation of the mold problem prior to the demolition of the house. The Board finds, however, that other than his testimony before the Board, Mr. Cantor provided no evidence of a mold problem. The Board further finds that other testimony by Mr. Cantor contradicts his stated concern about a mold problem, or at least undermines the stated gravity of that problem, as follows:

> Mr. Cantor testified that the previous owners of the now-demolished house had lived in the house until he bought it. See Tr. at page 91. The Board finds that this evidences that any mold that may have been present was not so bad as to make the house uninhabitable, at least of March 2006.
>
> Mr. Cantor testified that mold was not visible when he did his initial walk through. See Tr. at page 84. The Board finds that this suggests that any mold that might have been present in the house at the time of purchase was not so extensive as to be visible.

[7] Again, because the Board's reconciliation of Sections 59-B-5.3 and 50-20(b) concludes that the building permit for this replacement dwelling could not have been issued solely under Section 59-B-5.3, but rather must also qualify for an exception under Section 50-20(b), the Board's assumption for analysis purposes that these deed lots were recorded in 1952 (rather than 1968) does not affect its ultimate disposition of this case.

> Mr. Cantor testified that he kept the HVAC system running while the house was vacant, and that it wasn't until the end of 2006 that he first noticed a mold problem. See Tr. at page 91. The Board concludes that running the heating and air conditioning systems would have limited the growth of mold in the home by regulating the temperature and humidity while the house was vacant.
>
> Mr. Cantor testified that he did not hire an inspector to look at the house prior to or at any time after the purchase. See Tr. at pages 68, 70-71, and 81-82. The Board finds that Mr. Cantor's failure to have the house inspected, even after the purchase, evidences a lack of concern about the physical condition of the home and specifically about a potential mold problem, and thus detracts from the weight the Board gives his statements that he was considering renting or renovating the home.
>
> Mr. Cantor testified that while he hadn't consulted a home inspector prior to (or after) purchase, he had consulted with an engineering firm prior to purchasing the Property, to ensure that any new construction on the Property would comply with applicable setbacks. See Tr. at pages 676, 79, 86-87, and 88-90. The Board notes that this engineering firm is the only professional firm with which Mr. Cantor testified he consulted in connection with this purchase. Again, the Board finds that this suggests, contrary to his testimony that he was considering many options for this Property (renting, renovating, or demolishing and rebuilding), that Mr. Cantor's actual intent when he purchased this house was to demolish and rebuild. The Board finds that this is demonstrated both by his lack of concern with the physical condition of the existing home (as evidenced by his failure to have the home inspected), by his apparent pre-purchase concern with the setbacks pertaining to the Property, and by the fact that the previous owners had approached him about buying the Property because he had demolished and rebuilt another home in their neighborhood. See Tr. at pages 76-77.

Section 50-20(b)(5) of the County Code permits reconstruction of a one-family dwelling if the dwelling is "destroyed or seriously damaged by fire, flood or other natural disaster." The Board is not persuaded by Mr. Cantor's testimony that he demolished the original house because it had such a severe mold problem that it could not be rented or renovated. Mr. Cantor testified that demolishing the original house and rebuilding was one of three options on the table when he purchased the Property, prior to any suggestion that there might be a mold problem. He presented no evidence to corroborate his testimony or otherwise indicate that any mold problem with the house was such that the house was "destroyed or seriously damaged" by it, as would be required under Section 50-20(b)(5). He did not consult with any experts to verify the existence or extent of mold in the house, or to ascertain ways in which any mold that was present could be abated. In *Angelini v. Harford County*, 144 Md. App. 369, 798 A.2d 26 (2002), the Maryland Court of Special Appeals described the distinction between the burdens of production and persuasion:

> To satisfy the burden of production is not remotely to satisfy the burden of persuasion. … It is never the case that the Board must be either 1) persuaded by the appellant to act or 2) persuaded by the opponents not to act. … There is only

> one burden of persuasion and it points in only one direction. … The tribunal that needs to be persuaded may always conclude, 'We have heard what the applicant had to say and we have heard nothing to the contrary, but we are still unpersuaded.' *Id*., at 376-377.

It appears to this Board that Mr. Cantor 's testimony regarding the existence and extent of mold in the building is self-serving and is offered as an after-the-fact justification to qualify for an exemption under Section 50-20(b)(5). The Board is not persuaded that mold was present in the house or, if mold was present, that it was so extensive that it had destroyed or so seriously damaged this house that it had to be demolished. Thus the Board finds that this building permit could not be issued pursuant to the "natural disaster" exception in Section 50-20(b)(5) of the County Code. Having concluded that this building permit could not have been issued solely under Section 59-B-5.3 of the Zoning Ordinance, and did not meet the exception in Section 50-20(b)(5) of the County Code, the Board holds that Building Permit 450831 was issued in error and should be revoked.

6. The Intervenor in this case has asserted that any finding that Building Permit No. 450831 was issued in error would result in an unconstitutional taking of the subject Property under the Fifth Amendment to the United States Constitution. The Intervenor cites to Lucas v. South Carolina Coastal Council, 505 U.S. 1003; 112 S. Ct. 2886 (1992), for the proposition that the takings clause is violated when a land-use regulation denies an owner economically viable use of his or her land. The Maryland Court of Appeals noted in Baltimore v. Borinsky, a case which looked at whether a zoning restriction so compromised the use of property as to constitute an unconstitutional taking absent the granting of a variance, that:

   > The legal principles whose application determines whether or not the restrictions imposed by the zoning action on the property involved are an unconstitutional taking are well established. If the owner affirmatively demonstrates that the legislative or administrative determination deprives him of all beneficial use of the property, the action will be held unconstitutional. But the restrictions imposed must be such that the property cannot be used for any reasonable purpose. It is not enough for the property owners to show that the zoning action results in substantial loss or hardship. *Pallace v. Inter City Land Co., 239 Md. 549, 212 A. 2d 262*; *DePaul v. Board, 237 Md. 221, 227-29, 205 A. 2d 805 (1965)* and cases therein cited. Where, as here, the facts are undisputed, the question is one of law, and the conclusion of the lower court is not entitled to the presumption of correctness which attaches to findings of fact. *Pallace v. Inter City Land Co., supra.*
   >
   > In this case, all three of the Appellee's witnesses testified that, in their opinion, the property could not be economically or feasibly used for residential purposes. However, facts adduced by the evidence must also be considered…. *Baltimore v. Borinsky*, 239 Md. 611 at 622-623, 212 S.2d 508 at 514 (1965). (The requested variances in *Borinsky* were denied, and the Court determined that that denial did not amount to a taking.)

Unlike *Lucas*, where construction on property that was vacant when purchased was negatively impacted by subsequent legislative enactments, and *Borinsky*, where the

property for which the variances were sought contained arguably antiquated uses, in the instant case, the ability to obtain a building permit for construction at the subject Property was not impacted by legislative enactments after purchase, and the facts indicate that there was an existing beneficial and economically viable use on the subject Property at the time of purchase. The evidence shows that a house was built on the subject Property in 1968, and that that house existed on the Property and indeed, was occupied, until the Property and house were purchased by the Intervenor in 2006. Mr. Cantor testified that at the time of purchase, he was considering renting or renovating the then-existing house. While the Board is not persuaded that these options were truly representative of Mr. Cantor's intent at the time of purchase, they do represent options that were available to him – and they demonstrate that there were beneficial and economically viable uses to which this Property could have been put other than Christmas tree sales, parking or agriculture. Nothing in the Zoning Ordinance or County Code would have prohibited the continued use of the then-existing house as a residence. Unfortunately for Mr. Cantor and Chardell Partners, it was their own action in undertaking to demolish this house, and not any action or legislative change undertaken by the County, that has placed this Property in its current predicament. Given that it was the Intervenor's decision to remove the then-existing residence, the Board finds that its decision to revoke Building Permit 450831 for construction of a new residence is not the cause of any alleged lack of beneficial use, and is not a taking.

7. Based on the foregoing, the Board finds that Building Permit No. 450831 was not properly issued because it could not be issued pursuant to Section 59-B-5.3 alone, and did not fall within the exception allowed by Section 50-20(b)(5) of the County Code.

The appeal in Case A-6263 is **GRANTED**.

On a motion by Vice Chair David K. Perdue, seconded by Member Carolyn J. Shawaker, with Chair Catherine G. Titus and Member Stanley B. Boyd in agreement, and Member Walter S. Booth necessarily absent, the Board voted 4 to 0 to grant 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.

_____

Catherine G. Titus
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 19th day of June, 2009.

_____

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).