BOARD OF APPEALS
for
MONTGOMERY COUNTY

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Case No. A-6086

APPEAL OF JOSEPH RUSS
(Hearing Held November 2, 2005.

OPINION OF THE BOARD
(Effective Date of Opinion: February 25, 2010.)

Case No. A-6086 is an administrative appeal filed June 16, 2005 by Joseph Russ (the "Appellant"). Appellant charges error on the part of Montgomery County's Department of Permitting Services ("DPS") in the issuance of Building Permit No. 380025, originally issued May 18, 2005, for the construction of an addition to a single family dwelling on the property located at 1305 Parrs Ridge Drive, Spencerville, Maryland 20868 (the "Property"), in the RE-1 zone.

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 November 2, 2005. The Appellant appeared pro se. William Scott Money and Kristine Money, owners of the subject Property, were permitted to intervene (the "Intervenors"), and also appeared pro se. Assistant County Attorney Malcolm Spicer represented DPS.

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

FINDINGS OF FACT

The Board finds by a preponderance of the evidence that:

1. The Property, known as 1305 Parrs Ridge Drive in Spencerville, is an RE-1 zoned parcel identified as Lot 6, Block B, Parrs Ridge.

2. On April 14, 2005, an application was filed with DPS for a building permit to construct an addition to the subject Property. Building Permit No. 380025 was issued on May 18, 2005, for the requested addition. See Exhibit 15(a).

3. On June 16, 2005, Appellant timely filed this appeal, charging error by DPS in its decision to issue Building Permit 380025. See Exhibit 1. The Appellant filed a Commentary with his appeal in which he indicated his position that Building

Permit No. 380025 should not have been granted because it would have adverse effects on Appellant's lifestyle, property, and economic well-being. Specifically, the Appellant alleged that the proposed construction constituted visual blight, would cause crowding, would have environmental consequences such as blockage of sunlight, and would de-value the Appellant's property by detracting from its selling potential. The Appellant concluded his Commentary by stating that:

> Construction of the residential addition, as currently configured under Permit 380025, will adversely affect appellant's quality of life, both human and environmental, and have negative monetary implications. While county regulations exist with respect to heights, setbacks, and *horizontal* footprints, there seems to be scant attention paid in the granting of the Permit 380025 to what might be called a ***vertical*** "footprint," i.e., the billboard effect of having structures (or structural components) of inappropriate size and/or design in close proximity to adjoining properties.

The Appellant suggested that DPS might consider using computer modeling of line-of-sight simulations in connection with its granting of construction permits. See Exhibit 4.

4. Ms. Susan Scala-Demby, Zoning Manager for the Department of Permitting Services, testified on behalf of DPS. She testified that she was familiar with Building Permit No. 380025 and the application for that permit. See Exhibit 15(a). Ms. Scala-Demby testified that the permit was issued on May 18, 2005. She testified that the Property is currently zoned RE-1 (residential estate, one acre), but that prior to a 1982 sectional map amendment, the Property had been zoned R-200, and so pursuant to footnote 1 to Section 59-C-1.32 of the Zoning Ordinance ("Development Standards"), the R-200 development standards applied to this Property.[1] Ms. Scala-Demby testified that the Property had been evaluated under those standards, as follows:

   Ms. Scala-Demby stated that the side yard requirements for the R-200 zone would be a minimum of 12 feet on one side, with a sum of 25 feet for both sides. She then testified that the proposed construction would result in a side yard of 12 feet on one side, and 22 feet on the other, which she testified meets the minimum side setback requirements in the R-200 zone.

[1] Footnote 1 to Section 59-C-3.2 provides that "The following lots shall have the area and dimensional requirements of the zone applicable to them prior to their classification in the RE-2, RE-2C, and RE-1 zones: (1) A record lot approved for recordation by the planning board prior to the approval date of the most recent sectional map amendment that included the lot; and (2) A lot created by deed on or before the approval date of the most recent sectional map amendment that included the lot, and (3) In the RE-2C zone, a lot created as a one-family residence by a child of the property owner or the spouse of a child or by the parents of the property owner, provided the property owner can establish that he/she had title on or before March 16, 1982. This provision permits the creation of only one lot for each child, whether created for the child or the spouse of the child, and only one lot for the parents, whether created for one or both parents. The overall density of the property shall not exceed 1.1 dwelling units per acre in any subdivision recorded."

Ms. Scala-Demby stated that the required rear yard setback in the R-200 zone is 30 feet. She testified that the proposed addition is set back more than 30 feet from the rear line, and thus exceeds the minimum setback.

Ms. Scala-Demby testified that the minimum front yard setback in the R-200 zone is 40 feet. She testified that the proposed addition reflects a 40 foot front yard, and thus meets the minimum.

Ms. Scala-Demby testified that the maximum lot coverage in the R-200 zone is 25 percent. She testified that the subject Property is 20,650 square feet (see Exhibit 15(c)), and that 25 percent lot coverage would thus be a little over 5,000 square feet. She then testified that the footprint of the existing home plus that of the proposed addition would cover 2,528.91 square feet, or about 12.6 percent of the lot, which she testified was far less than the 25 percent lot coverage allowed.[2]

Ms. Scala-Demby stated that the maximum building height in the R-200 zone is 50 feet. She then testified that in her review of the plans submitted for this addition, she was able to determine that it was less than 50 feet, testifying that it was closer to 25 feet than to 50 feet.

Ms. Scala-Demby concluded by testifying that it was her opinion that Building Permit No. 380025 was properly issued by DPS.

On cross-examination, the Appellant asked Ms. Scala-Demby how the height of the house was measured. Ms. Scala-Demby testified that the Zoning Ordinance defines building height, and that under the development standards for the R-200 zone, the maximum height of the house could be 50 feet. She then testified that at the time this permit was issued, height would have been measured from the average finished grade in front of the house to the mean between the ridge and eaves of the roof, which conforms to the current Zoning Ordinance definition.

The Appellant asked Ms. Scala-Demby about her background, asking if she was an engineer or lawyer. Ms. Scala-Demby testified that she was not an engineer or lawyer. She testified that she has been with DPS since 1988. She explained that she had worked as a Zoning Investigator until 1999, going out into the field to investigate land uses and development standards under the Zoning Ordinance. She testified that in 1999, she took an interim position with DPS working on their budget, and that she came back as the Zoning Supervisor in 2001, where she has been ever since. The Appellant asked Ms. Scala-Demby approximately how many cases she is involved with on a yearly basis, to which she replied that she touched approximately 15,000 cases each year in one way or another. She testified that she was responsible for the zoning of almost every permit that DPS issues, adding that whether she reviews the permit personally or has her staff do it, she is the person responsible for it.

[2] On cross-examination, the Appellant asked Ms. Scala-Demby if the coverage she was referencing was the floor-area ratio, as defined in the County Code, to which Ms. Scala-Demby responded that there were no floor-area ratios in residential zones.

The Appellant asked about the definition of immediate family members, as that term is used on the building permit application. See Exhibit 15(a), page 2 of Building Permit application, under the heading "Homeowner Acting As New Home Builder Affidavit." The Chair questioned whether this affidavit would apply to the construction at issue in this case, since it was an addition and not new construction. Ms. Scala-Demby replied that it would not, since this was an addition and not a new home, agreeing with the Chair that the permit applicants had likely signed this portion of the building permit application rather than leaving it blank out of an abundance of caution.

The Appellant then inquired about the documents submitted in connection with the building permit, noting that the height of the house (or addition) and lot coverage were not specifically called out, but rather that one had to compute that oneself, using the information on the documents and the scales provided. See Exhibit 13(g). He indicated that he could compute the height, coverage and setbacks from these documents, but asked Ms. Scala-Demby if these were the only numbers that governed the appearance or aesthetics of the house. Ms. Scala-Demby confirmed that they were. He then asked her whether any consideration was given to the vertical footprint of the house in computing how it appears. Ms. Scala-Demby testified that that was not considered. The Appellant expressed his opinion that the required setbacks should be related to the height of the house, that there seems to be nothing which accounts for the perspective of the neighbors when viewing adjoining buildings, and that the development standards were not well-formulated.

The Appellant asked Ms. Scala-Demby if DPS makes any on-site visits, during or after construction, to check on the structural requirements of the main floor or its aesthetics/appearance. Ms. Scala-Demby testified that building inspectors go out and inspect the structural elements of the construction, but that no one checks the aesthetics. The Appellant then asked if the aesthetics of proposed construction are in any way checked during the permit review process, perhaps with the use of computer software that would show the relationship between the new construction and adjoining properties. Ms. Scala-Demby testified that this does not happen. The Appellant then asked Ms. Scala-Demby to confirm that DPS basically uses lot coverage, height, and setbacks as the primary criteria to determine how a house looks. Ms. Scala-Demby agreed that that was correct. The Appellant asked if DPS considers environmental factors such as the blockage of the sun that might be caused by new construction, or the effect of that construction on sound and wind, to which the Chair replied that those public health and safety types of issues were presumably considered by the County Council when they established the minimum setbacks and other limitations in the Zoning Ordinance. The Chair went on to say that if those types of issues were not specifically addressed in the Zoning Ordinance, they were not a part of the review undertaken by Ms. Scala-Demby's Department.

The Appellant asked Ms. Scala-Demby if the code requirements for a home office were different from those for a hobby room, noting that the site plan indicates the addition of a "new 2 car garage with office above" it, while the second floor plan refers to a new "hobby room" above the garage. See Exhibit 15(b). Ms. Scala-Demby replied that they were not.

5. At the outset of the Appellant's testimony, the Chair urged the Appellant to address with specificity how he believed that DPS' review of this building permit violated the Zoning Ordinance. The Appellant testified that he believed there were three ways that DPS had failed in their review. First, the Appellant asserted that the County building code had been violated. Second, he asserted that consideration should have been given to the inadequacies in the code.[3] Finally, the Appellant testified that his third concern involved what he referred to as "questionable and curious representations of the permit law."

The Appellant then indicated that subsections (d) and (e) of Section 59-G-3.1 of the Zoning Ordinance (relating to the granting of a variance) were not followed. The Appellant read Section 59-G-3.1(e) into the record, noting that it says that "[a]ny allegation of error or any appeal from any action, inaction, order or decisions pertaining to calculation of building height or approved floor area ratio (FAR) standard shall be considered according to the provisions governing appeals for a variance (section 59-G-3.1), rather than as an administrative appeal." He then argued that his administrative appeal should fall under this Section because it refers to an allegation of error. The Chair stated that floor-area ratios do not apply in residential zones, and thus that the only way the Appellant could proceed under this Section was if he was alleging an error pertaining to the calculation of the height of the building. The Chair suggested that if, in addition to height, the Appellant intended to pursue arguments involving the violation of setbacks or other development standards, those could only be pursued under the broader authority for administrative appeals. At this point the Appellant stated that the thrust of the case he had intended to bring fell under Section 59-G-3.1(d), which prohibits variances that are detrimental to the use and enjoyment of adjoining or neighboring properties. When the Chair clarified that the Board could only look at that if the Appellant could show an error in the calculation of the building height, the Appellant admitted that he agreed with Ms. Scala-Demby, that the height of the proposed construction was properly represented in the construction drawings, and that he could not argue that it had been erroneously calculated.[4] The Chair then asked the Appellant one last time if he could point to a specific section of the Zoning Ordinance that DPS had violated in issuing this permit, and he stated that other than Section 59-G-3.1, he could not.

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-4.3(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*.

[3] The Chair at this point noted that the Board was not sitting to hear about inadequacies of the Code, at which point the Appellant acknowledged that this had already been covered.

[4] See Exhibit 4, in which the Appellant stated that the proposed construction is only 25 feet in height, thereby confirming the testimony of Ms. Scala-Demby.

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. Footnote 1 to Section 59-C-1.32 of the Zoning Ordinance indicates that:

   The following lots shall have the area and dimensional requirements of the zone applicable to them prior to their classification in the RE-2, RE-2C, and RE-1 zones: (1) A record lot approved for recordation by the planning board prior to the approval date of the most recent sectional map amendment that included the lot; and (2) A lot created by deed on or before the approval date of the most recent sectional map amendment that included the lot, and (3) In the RE-2C zone, a lot created as a one-family residence by a child of the property owner or the spouse of a child or by the parents of the property owner, provided the property owner can establish that he/she had title on or before March 16, 1982. This provision permits the creation of only one lot for each child, whether created for the child or the spouse of the child, and only one lot for the parents, whether created for one or both parents. The overall density of the property shall not exceed 1.1 dwelling units per acre in any subdivision recorded.

As a result, and based on the uncontroverted testimony of Ms. Scala-Demby that the subject Property is currently zoned RE-1 (residential estate, one acre), but that prior to a 1982 sectional map amendment, the Property had been zoned R-200, the Board finds that the R-200 development standards apply to the subject Property.

4. Section 59-C-1.323 of the Zoning Ordinance provides that in the R-200 zone, the following setbacks and height limitations apply:

   (a) Minimum Setback from street. A main building must not be nearer to any street line than the distance shown: 40 feet*

   *Subject to an established building line in accordance with Section 59-A-5.33, if applicable.

   (b) Setback from adjoining lot. A main building must not be nearer to any lot line than the following:

(1) Side:		
	-One side:	12 feet
	-Sum of both sides:	25 feet
(2) Rear:		30 feet

5. Section 59-C-1.327 of the Zoning Ordinance provides that in the R-200 zone, the maximum height of any building or structure is 50 feet.

6. Section 59-C-1.328 of the Zoning Ordinance provides that the maximum percentage of net lot area that may be covered by buildings, including accessory buildings, in the R-200 zone is 25 percent.

7. Board Rule 3.2.2 allows the Board, on its own motion, to seek summary disposition of a matter on the grounds that the application and other supporting documentation establish that there is no genuine issue of material fact to be resolved and that dismissal or other appropriate relief should be rendered as a matter of law.

8. The Board finds that Ms. Scala-Demby testified conclusively that the proposed construction meets the front, side, and rear setbacks required by the Zoning Ordinance, and that it comports with the Zoning Ordinance's height and lot coverage restrictions. The Appellant presented no evidence to show that the proposed construction violated any of these development standards, and in fact admitted that the construction comported with the height limitations. Thus the Board finds that in this case, there is no genuine issue of material fact to be resolved with respect to whether the subject Property met the applicable development standards.

The Board further finds that because the Appellant admitted that the proposed construction complies with the height restrictions, he cannot challenge the issuance of this permit under Section 59-G-3.1 on grounds that it somehow constituted a variance from the height limitations that is detrimental to the use and enjoyment of adjoining or neighboring properties. Indeed, the evidence of record does not indicate that a variance was needed or granted in connection with the issuance of this building permit.

Assuming that the Appellant intended that his appeal be heard pursuant to the broader authority in Section 8-23 of the Montgomery County Code and Section 59-A-4.3(e) of the Zoning Ordinance, the Board notes that aside from his assertion that the proposed construction is detrimental to the use and enjoyment of his property under Section 59-G-3.1(d), the Appellant has failed to direct the Board to any provision of the Zoning Ordinance or other applicable law which he asserts DPS violated in its issuance of Building Permit No. 380025 or pursuant to which he believes relief can be granted. DPS, on the other hand, has presented uncontested evidence indicating that the proposed construction complies with all applicable development standards, and thus that the permit was properly issued. Accordingly the Board, on its own motion, has determined that this appeal should be dismissed under its authority in Board Rule 3.2.2.

9. Based on the foregoing, the Board finds that this matter should be dismissed. The Board notes that although this appeal is being dismissed because there are no material facts in dispute and because Appellant failed to state a claim upon which relief could be granted, DPS did meet its burden of demonstrating by a preponderance of the evidence that Building Permit No. 380025 was properly issued

The appeal in Case A-6086 is **DISMISSED**.

On a motion by Member Wendell Holloway, seconded by Vice Chair Donna Barron, with Chair Allison Fultz, and Members Angelo Caputo and Caryn Hines in agreement, the Board voted 5 to 0 to dismiss the appeal at the conclusion of the November 2, 2005 hearing. Due to an inadvertent administrative error, the Board's written decision was not issued timely. Therefore, at its Worksession on February 17, 2010, on a motion by David K. Perdue, Vice-Chair, seconded by Walter S. Booth, with Carolyn J. Shawaker, Stanley B. Boyd and Catherine G. Titus, Chair, in agreement, the Board re-adopted its decision.

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 25th day of February, 2010.

_____
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).