BOARD OF APPEALS
for
MONTGOMERY COUNTY

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Case No. A-6292

APPEAL OF DEBORAH VOLLMER

OPINION OF THE BOARD

(Hearings held September 9, 2009 and October 28, 2009.
Effective Date of Opinion: January 7, 2010)

Case No. A-6292 is an administrative appeal filed April 17, 2009, by Deborah A. Vollmer (the "Appellant"). The Appellant charges error on the part of Montgomery County's Department of Permitting Services ("DPS") in the April 2, 2009, issuance of Building Permit No. 499274 for the construction of a single family dwelling on the property located at 7200 44th Street, Chevy Chase, Maryland 20815 (the "Property"), in the R-60 zone. Specifically, the Appellant asserts that DPS incorrectly issued the subject building permit, and that it should have been denied. Appellant asserts first that the permit authorizes construction on a corner lot that is closer to one of the adjacent streets than permitted under the Zoning Ordinance.Appellant also asserts that issuance of the permit was unlawful because one of the setbacks for the new construction is inconsistent with a building restriction line shown on the plat.

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 September 9, 2009. The hearing was continued to October 28, 2009.

The Appellant was represented by David W. Brown, Esquire, of Knopf & Brown. Dr. Arthur Schwartz and Linda Schwartz, the owners of the subject Property, intervened in this case (the "Intervenors"), and were represented by Stephen J. Orens, Esquire, and Casey L. Moore, Esquire, of Miles & Stockbridge. Assistant County Attorney Malcolm F. Spicer represented Montgomery County.

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 7200 44th Street in Chevy Chase, is an R-60 zoned parcel identified as Lot 13, Block H in the Chevy Chase Section 8-B subdivision. The size of the Property is 9,000 square feet.

2. On October 31, 2008, Patrick K. Keating, on behalf of the Intervenors, applied to DPS for a building permit to construct a new single-family dwelling at the subject Property. Building Permit No. 499274 was issued on April 2, 2009, for the requested construction. See Exhibit 3.

3. On April 17, 2009, Appellant timely filed this appeal, charging error by DPS in its decision to issue Building Permit 499274. See Exhibit 1.

4. Ms. Robin Ferro, a Plan Reviewer and Permitting Services Specialist for the Department of Permitting Services, testified on behalf of DPS. Ms. Ferro testified that she had reviewed the plans at issue in this case. She testified that the Property in question is shown as Lot 13, Block H, on a plat recorded in the land records of Montgomery County in 1926. See Exhibit 6, page 7; Exhibit 17. Ms. Ferro testified that the plat shows a 25 foot building restriction line ("BRL") along "Bethesda Street," now called "Willow Lane." Ms. Ferro testified that in her 25 years with DPS, she had never enforced a BRL shown on a record plat that was not approved by Park and Planning. She testified that to the best of her knowledge, her actions reflected a consistent practice throughout DPS.

Ms. Ferro testified that the site plan initially filed with this building permit maintained a 7 foot setback from lot 12 (the lot owned by the Appellant). She testified that she reviewed and approved a revised site plan on October 12, 2009. See Exhibit 18. She testified that the revised site plan showed an 8.1 foot setback from lot 12, and a 15.26 foot setback from Willow Lane. She testified that the revised site plan showed a distance of 14.92 feet from Willow Lane to the belt course of the proposed construction, which she explained is a decorative element that is allowed by Section 59-B-3.3(b) of the Zoning Ordinance to project into any setback no more than 6 inches. See Exhibit 19.

Ms. Ferro testified that the subject Property is a corner lot, and that corner lots have two fronts under the definition of "lot, front of" in Section 59-A-2.1 of the Zoning Ordinance.[1] See Exhibit 8, page 6. She testified that a corner lot would normally have to meet a front setback on both of the streets that it faces, but explained that Section 59-C-1.323(a) states that if the adjoining lot on one of the streets does not front on that street, the setback from that street line must be at

[1] Section 59-A-2.1 of the Zoning Ordinance defines "Lot, front of" as follows: "Lot, front of: The sides of an interior or through lot which abut a street; in a corner lot, either side that abuts a street, if in conformity with frontage and setback requirements. A corner lot may front on either street if large enough to provide all minimum setbacks and yard area requirements."

least 15 feet in the R-60 zone. See Exhibit 8, page 7. Ms. Ferro then testified that the lot adjoining the subject Property along Willow Lane does not front on Willow, and thus DPS applied a 15 foot setback from the streetline along the Willow Lane side of the Property. In response to a Board question asking, with respect to the definition of "Lot, front of," and in particular, the sentence in that definition pertaining to corner lots,[2] what the ordinary meaning of the word "either" is, Ms. Ferro testified that it meant one or the other. When asked if the definition would have used the term "both" instead of "either," if the intent were that both yards be front yards, Ms. Ferro answered in the affirmative.

Ms. Ferro testified that she had reviewed earlier Zoning Ordinances to see when and where the reduced side yard setbacks for corner lots first appeared. She testified that the 1928 Zoning Ordinance had no such reduction. She testified that Section VIII.7 of the 1930 Zoning Ordinance contained a reduced side yard setback of 15 feet. See Exhibit 20.[3] Ms. Ferro went on to testify that Section VIII.4 of the 1941 Zoning Ordinance also allowed for a reduced side yard setback, indicating that the language in 1941 was slightly different from that used in 1930. See Exhibit 21.[4] Ms. Ferro testified that there were no changes to this language in the 1948 or 1952 Zoning Ordinances. She testified that none of these Ordinances defined "front of lot." Ms. Ferro testified that Section 176-8(d)(2) of the 1954 Zoning Ordinance (found in the 1955 County Code as Section 107-8(d)(2)) included a reduced setback, and that that Ordinance also included a definition of "lot, front of." See Exhibit 9, pages 21 and 26.[5] She read excerpts from both provisions into the record. Referencing the language for the reduced side setback in Section 107-8(d)(2), she noted that the lot that adjoins the subject Property "along the rear line thereof" is lot 1. Ms. Ferro then testified that the 1958 Zoning Ordinance changed the definition of "lot, front of," to read as it does today. She testified that the front of the subject Property is along 44th Street, and stated that the yard is large enough to meet all of the setback and yard requirements. When asked if she agreed with the Appellant, that the subject Property should be viewed as fronting on both 44th Street and Willow Lane, and

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[2] Again, the referenced sentence reads "A corner lot may front on either street if large enough to provide all minimum setbacks and yard area requirements."

[3] Section VIII.7 of the 1930 Zoning Ordinance provided that "In the case of corner lots having a side yard along a street upon which no lots front directly, between two adjacent cross streets, such side yard may be reduced to the minimum width of fifteen (15) feet."

[4] Section VIII.4 of the 1941 Zoning Ordinance read as follows: "In the case of a residential corner lot whose side lot line is along a side street upon which there are no front lot lines between the corner and the next street, the side yard along said side street may be reduced to a minimum width of fifteen feet."

[5] Section 107-2(76) of the 1955 Montgomery County Code defines "Lot, front of" as "The side of an interior or through lot which abuts a street; in a corner lot, the shortest side that abuts a street, except when sides abutting the streets are of equal length, the lot shall be considered to front on that street having the greater number of lot frontages." Section 107-8(d)(2), providing for a reduced side setback for corner lots, reads as follows:

> (2) Yard, side. … Each corner lot shall have a side building line at least twenty-five feet from and parallel to the side street line or a proposed side street line, if such has been established within the lot, to provide a side yard along the street side. When the lot adjoining the corner lot along the rear line thereof does not front on the side street of the corner lot or is in a nonresidential zone, the side building line and the side yard may be reduced to a minimum of fifteen feet.

should have to meet a street line (or established building line) setback from both of those streets, Ms. Ferro stated that she did not. She testified that the configuration of lots along the relevant portion of Willow Lane complies with Section 59-C-1.323(a). She noted that lot 1, which adjoins the subject Property on the Willow Lane side, does not provide a front yard along Willow Lane, and thus that pursuant to Section 59-C-1.323(a) of the Zoning Ordinance, the subject Property is entitled to a 15 foot setback along Willow Lane. She testified that lot 1 fronts on 45th Street, and meets the yard requirements. She testified that the house on lot 1 is set back 34 feet from 45th Street, and 16.8 feet from Willow Lane. See Exhibit 22. Finally, Ms. Ferro testified that the approval of a 15 foot setback for the subject Property along Willow Lane is consistent with the past practice of DPS in similar situations.

On cross-examination, Ms. Ferro testified that DPS uses its Code Interpretation Policies to spell out how the Code is to be applied. She testified that DPS believes that corner lots generally have two fronts, and require two front setbacks except in special cases. She testified that the "Corner Lot Setbacks for Main Dwellings-Side Street Requirement" diagram is available on the DPS website, that it shows side street requirements, and that it is similar to the situation in this case. See Exhibit 8, page 5. When asked if the direction the house faces determines the "front" of the house for setback purposes, Ms. Ferro indicated that it did not. She testified that this is a simple diagram, used to help people not familiar with zoning. She testified that DPS does not care where the front door is, or which side of the house faces the street. Rather, she testified that the determination of which street a house "fronts" on is based on the location of the rear and side yard setbacks. She testified that the diagram does not have lot dimensions, and that it is simply used to explain the concept of when DPS could apply a reduced setback. She testified in general, where a reduced setback is applied, the houses (whose lots adjoin each other) face opposite streets, and their rear yards face each other.

When asked on cross-examination what it meant for a (corner) lot to "front on" a street if the lot was vacant, Ms. Ferro testified that such a lot would have two front lot lines, but that the "front" of the lot has not been determined because there was no building on it. She went on to testify that once a building was constructed on the lot, the determination would be made as to where the lot "fronts," and to which are the rear and side yards. In response to a similar question, asking where the first house built in a neighborhood of vacant lots would front, Ms. Ferro stated that the lot may front on either street. She went on to testify that the subject Property is not large enough to provide frontage on Willow Lane because the "rear yard" would not be adequate. Ms. Ferro was then asked if, when constructing a house on a corner lot, a developer has a choice about where to locate the rear and side yards, to which Ms. Ferro replied that if the lot is large enough to accommodate a rear setback from either (interior) lot line (e.g. if the lot were square), then the developer could choose. She went on to explain that the rear yard needs to be opposite the front yard, in light of the

definitions of "lot line, rear," and "yard, rear," both found in Section 59-A-2.1 of the Zoning Ordinance.[6]

In response to cross examination by counsel for the Intervenor, Ms. Ferro testified that the rear yard of lot 1 will abut the rear yard of the subject Property, based on the approved building plans. She testified that the house on lot 1 fronts on 45th Street, and confirmed that it is set back 16.8 feet from Willow Lane. When asked who makes the choice as to which side of the building is the front, since the Zoning Ordinance provides that either side can be the front, Ms. Ferro testified that the front is determined by the placement of the building. When asked if DPS will force a property owner to choose one side or the other to be the front, Ms. Ferro testified that DPS has never done so, and would not do so. When asked if the proposed construction on the subject Property complied with all applicable setbacks, Ms. Ferro testified that it did. When asked if, once the front yard is determined, any of the remaining three yards can be chosen to be the rear, Ms. Ferro testified that by definition, the rear yard has to be opposite the front yard, and that in the case of the subject Property, if the house fronts on 44th Street, there is no choice as to which yard is considered the rear yard.

5. Ms. Deborah Vollmer, Appellant, testified that she lives at 7202 44th Street in Chevy Chase, on the lot just north of the subject Property. See Exhibit 22. She testified that she grew up in the house at 7202 44th Street, and that she has always considered it home. She testified that she moved to California after law school, but that she had moved back into the house in 1997, and that she intends to stay there. Ms. Vollmer testified that when the Intervenors purchased the subject Property, she had received a Long & Foster postcard in the mail with a picture of the house currently existing on the subject Property, and that the card said that the house was "just listed" and "under contract." See Exhibit 25. She testified that the postcard depicts the 1928 house, and that it evokes memories for her. She testified that she had been in the house on numerous occasions, and that the photographs on the card depict the inside of the house accurately. Ms. Vollmer testified that she feels aggrieved by the Intervenors' actions with respect to the subject Property because they want to tear down the existing house and detached garage. She testified that the whole idea of "bigness" takes light away from her house. She testified that there are also issues with a shared driveway.

[6] Section 59-A-2.1 of the Zoning Ordinance defines "Lot line, rear," as follows: "Lot line, rear: The lot line generally opposite or parallel to the front lot line, except in a through lot. If the rear lot line is less than 10 feet long or the lot comes to a point at the rear, such rear lot line is assumed to be a line not less than 10 feet long lying wholly within the lot, parallel to the front lot line, or in the case of a curved front lot line, parallel to the chord of the arc of such front lot line." That section defines "Yard, rear," as follows: "Yard, rear: Open space extending across the full width of lot between the rear line of the lot and the nearest line of the building, porch or projection thereof. The depth of such yard is the shortest horizontal distance between the rear lot line and the nearest point of the building. When the rear lot line is less than 10 feet long or if the lot comes to a point at the rear, the depth of rear yard is measured to an assumed rear lot line, as defined under "lot line, rear.""

In response to a Board question asking if the largest photograph on the Long & Foster postcard depicts the front of the house, Ms. Vollmer testified that it did. When asked which street the house faced, she replied that it faced 44th Street. When asked if she knew how far the existing house was set back from Willow Lane, Ms. Vollmer replied that she did not.

6. Curt Schreffler, President and Owner of CAS Engineering, testified on behalf of the Intervenors. Mr. Schreffler was accepted as an expert witness with respect to the plans he prepared for the subject Property. See Exhibit 26. Mr. Schreffler testified that he was familiar with the Zoning Ordinance as it related to the R-60 zone, including applicable setbacks, height restrictions and yard requirements. He testified that he had implemented this knowledge in connection with other residential projects, including projects in Chevy Chase. He testified that he was retained by Dr. Schwartz in July, 2008, to prepare civil engineering documents. He testified that he surveyed the Property, that he prepared the site plan for the building permit, and that he prepared a storm water management plan in connection with review by The Town of Chevy Chase.

Mr. Schreffler testified that the side of the subject Property that borders 44th Street is 60 feet in length, and that the side that runs along Willow Lane is 150 feet in length. He testified that the Property is 9,000 square feet. He testified that the Property is relatively level, and that it is improved with an existing two-story home and garage. He testified that the Property shares a driveway with the lot to the north (lot 12, the Appellant's lot). Mr. Schreffler testified that the existing house is set back 16.5 feet from Willow Lane. He testified that he is familiar with the County's established building line (EBL) provisions.[7] He testified that an EBL of 30.1 feet applies along 44th Street, but that no EBL applies along Willow Lane because there is only one other house between intersecting streets, and that by definition, one house doesn't create an EBL.

He testified that the subject Property (lot 13) is a corner lot. He testified that the lot adjoining the subject Property along Willow Lane does not front on Willow, and therefore that a 15 foot setback applies along Willow Lane. He stated that the proposed new construction is set back 15.26 feet from Willow Lane. Mr. Schreffler testified that the EBL along 44th Street is 30.1 feet, and that the proposed construction meets that setback. He testified that the R-60 zone requires a 20 feet setback along the rear, and that the proposed house is set back more than 20 feet from the rear line. Finally, he testified that the required side yard setback is 8 feet, and that the proposed construction satisfies that.

Mr. Schreffler testified that the house on lot 1 (located at 7201 45th Street) is set back 34 feet from 45th Street, and 16.8 feet from Willow Lane. He testified that this development pattern is maintained by the proposed new construction. He testified that with a 15.26 foot setback from Willow Lane, the proposed new construction on the subject Property meets the 15 foot setback required along

[7] See Section 59-A-5.33 of the Zoning Ordinance.

that street. He testified that he agreed with the testimony of Ms. Ferro regarding the applicability of the reduced setback for certain corner lots.

Mr. Schreffler testified that the subject Property is highlighted on the plat. See Exhibit 17. He testified that he has prepared subdivision plats before. He testified that Exhibit 17 does not indicate that it has been approved or signed by the Maryland National Capital Park and Planning Commission (MNCPPC).

Finally, Mr. Schreffler testified that in his professional opinion, the proposed construction complies with all applicable standards of the County Code and of the Zoning Ordinance.[8] He testified that this house will also require a building permit from the Town of Chevy Chase, and stated that it was his understanding that the Town had approved that permit, clarifying that he had not seen it.

On cross-examination, Mr. Schreffler testified that the site plan that was approved by the Town of Chevy Chase was not the revised site plan in the record at Exhibit 18, but that he understood that the revised site plan had been sent to the Town. He testified that he had prepared the original site plan using grandfathered side setbacks because, historically, he has applied a 7 foot side setback and a 15 foot streetline setback, but after hearing the arguments at the Board hearing on September 9, he had revised the site plan. When asked by a Board member if he had submitted the original or revised site plans to Park and Planning, he stated that he had not. When asked if there was any requirement with new construction that would require an applicant to submit his or her site plan to Park and Planning, Mr. Schreffler testified that he did not think so, going on to state that perhaps DPS forwarded the site plans to Park and Planning as a courtesy. He testified that he did not talk with Park and Planning about this Property.

When asked by a Board member why the building restriction line shown on Exhibit 17 was inapplicable, and why it didn't preclude construction of a building closer than 25 feet to Willow Lane, Mr. Schreffler testified that he had done other projects with platted BRLs, and that they haven't been enforced by DPS or by MNCPPC. He testified that he didn't know why they weren't enforced. He testified that the owner's dedication on this plat speaks to recording a covenant running with the land (which he read into the record), and that that was never done, based on his inspection of the chain of title.[9] When asked by the Board what the significance of MNCPPC signature on or approval of a plat would be, Mr.

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[8] Mr. Schreffler later stated that he thought this question was specific to the requirements of Chapter 59 (the Zoning Ordinance). On being told that it was not, Mr. Schreffler testified that to the best of his knowledge, the revised site plan met all applicable rules and regulations.

[9] The owner's dedication reads in relevant part:

> "And do further hereby declare and establish perpetually the building restriction lines as hereon indicated beyond which the erection of any building, porch, or any other structure of a permanent nature exceeding four (4) feet vertically is restricted;
>
> And do further hereby agree to set forth in all conveyances as a covenant running with the land the building restriction lines as shown and defined hereon;".

Schreffler directed the question to the attorney for the Intervenors, but stated that if the plat had been approved, it may indicate that the Planning Board had exercised some jurisdiction. He went on to say that it appeared that this plat had never been heard by the Planning Board.

When asked by a Board member if there were any requirements unique to Chevy Chase which were intended to retain the character of existing housing, Mr. Schreffler responded that the County and Chevy Chase have enacted legislation to preserve the character of neighborhoods by reducing height and allowable lot coverage.

On re-direct, Mr. Schreffler was shown two deeds from 1928, ostensibly conveying two separate properties--the subject Property (lot 13) and the Appellant's property (lot 12)—from Monroe and Robert Warren, the original owners of the entire platted area shown on Exhibit 17, to their initial purchasers. See Exhibits 27 and 28. 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*.

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. Section 8-25(a) of the County Code provides that DPS must examine each application for a building permit, as follows:

> (a) Action on application. The Director must examine or cause to be examined each application for a building permit or an amendment to a permit within a reasonable time after the application is filed. If the application or the plans do not conform to all requirements of this Chapter, the Director must reject the application in writing and specify the reasons for rejecting it. If the proposed work conforms to all requirements of this Chapter and all other applicable laws and regulations, the Director must issue a permit for the work as soon as practicable.

4. Section 59-A-2.1 of the Zoning Ordinance, "Definitions," sets out the following definitions:

* * * * *

Lot, corner: A lot abutting on 2 or more streets at their intersection, where the interior angle of the intersection does not exceed 135 degrees.

* * * * *

Lot, front of: The sides of an interior or through lot which abut a street; in a corner lot, either side that abuts a street, if in conformity with frontage and setback requirements. A corner lot may front on either street if large enough to provide all minimum setbacks and yard area requirements.

* * * * *

Lot line, rear: The lot line generally opposite or parallel to the front lot line, except in a through lot. If the rear lot line is less than 10 feet long or the lot comes to a point at the rear, such rear lot line is assumed to be a line not less than 10 feet long lying wholly within the lot, parallel to the front lot line, or in the case of a curved front lot line, parallel to the chord of the arc of such front lot line.

* * * * *

Yard, rear: Open space extending across the full width of lot between the rear line of the lot and the nearest line of the building, porch or projection thereof. The depth of such yard is the shortest horizontal distance between the rear lot line and the nearest point of the building. When the rear lot line is less than 10 feet long or if the lot comes to a point at the rear, the depth of rear yard is measured to an assumed rear lot line, as defined under “lot line, rear.”

* * * * *

5. Section 59-A-3.34 of the Zoning Ordinance, entitled “Review by Commission,” reads as follows:

> The Director [of DPS] 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 [Maryland-National Capital Park and Planning] Commission or its designee for review for conformity with this Chapter.

6. Section 59-C-1.323(a) of the Zoning Ordinance (“Yard Requirements for a Main Building, Minimum Setback from Street”) provides in relevant part that in the R-60 Zone:

> A main building must not be nearer to any street line than … 25 feet … [s]ubject to an established building line in accordance with Section 59-A-5.33, if applicable.
>
> In the case of a corner lot, if the adjoining lot on one of the streets either does not front on that street or is in a nonresidential zone, the setback from that street line must be at least … 15 feet.

7. DPS Code Interpretation Policy ZP0404-03, interpreting Section 59-C-1.323 of the Zoning Ordinance, and entitled "Yard Requirement: Corner Lots," states in relevant part that:

The Department is frequently required to identify the applicable front, side, and rear yard setbacks for dwellings situated on corner lots. For purposes of clarity and consistency, the following criteria will be employed for such determination:

- Each corner lot has two front yards and therefore requires a front setback from each street. In limited circumstances when one adjoining lot is also a corner lot, a reduced side street setback will be applied.

- For new construction, the applicant may choose which interior lot lines will be considered the side or rear lot line, provided that both a side and a rear yard are created for setback purposes. The orientation of the front entrance or access from the street does not always determine which side yard will be considered the rear.

See Exhibit 8, page 3.

8. The 1926 plat for the subject Property states in the Owner's Dedication that the Owners:

> [Do] further hereby declare and establish perpetually the building restriction lines as hereon indicated beyond which the erection of any building, porch, or any other structure of a permanent nature exceeding four (4) feet vertically is restricted;
> And do further hereby agree to set forth in all conveyances as a covenant running with the land the building restriction lines as shown and defined hereon.

See Exhibit 6 at page 7.

9. The Board finds that the Appellant has standing to bring this action since she owns the property next door to the subject Property, and thus is deemed "prima facie, to be specially damaged and, therefore, a person aggrieved." *Bryniaski v. Montgomery County Board of Appeals,* 247 Md. 137, 145, 230 A.2d 289, 294 (1967). The Board notes that counsel for all of the parties acknowledged that Appellant had standing to bring this action during the October 29 hearing.

10. As noted above, Section 59-A-2.1 of the Zoning Ordinance defines "lot, front of," as follows:

> "The sides of an interior or through lot which abut a street; in a corner lot, either side that abuts a street, if in conformity with frontage and setback requirements. A corner lot may front on either street if large enough to provide all minimum setbacks and yard area requirements."

The Appellant argues that this definition requires that a corner lot have two front yards if it is large enough to accommodate all required setbacks and area requirements, and that because the subject lot is large enough, DPS should have required two front yards. The Board disagrees and finds that the term "either" as used in the second sentence of that definition (modifying "street") is commonly interpreted to reference the existence of two possible choices. This interpretation was confirmed by Ms. Ferro in her testimony. The Board further finds that the use of the term "may" in that sentence is permissive and not mandatory, again allowing for the existence of a choice. The Board agrees with the County that if the District Council had intended that a corner lot always have two fronts (provided the other yard and setback requirements were met), it would have drafted the second sentence of this definition unambiguously to say that "A corner lot shall front (or must front) on both streets if large enough to provide all minimum setbacks and yard area requirements." The definition was not drafted as such, and thus the Board finds that the definition of "lot, front of" should be interpreted to allow for instances where a corner lot has only one "front."

The Board further finds that interpreting the definition of "lot, front of" to allow for a choice of fronts in certain instances allows for a consistent and harmonious construction of that definition with Section 59-C-1.323(a) of the Zoning Ordinance (dealing with minimum setbacks for a main buildings from the street).[10] Section 59-C-1.323(a) prescribes a setback for a main building , and then provides for a reduced setback along one street in the case of a corner lot "[i]f the adjoining lot on one of the streets either does not front on that street or is in a nonresidential zone."[11] This reduced streetline setback would be inconsistent with the definition of "lot, front of" if that definition were read to require two front yards for every corner lot. In addition to providing for a harmonious interpretation of statutes and policies, the Board also finds that, with respect to corner lots, interpreting "lot,

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[10] Case law indicates that when the Court "construe(s) 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). General principles of statutory construction also require that all pertinent parts, provisions and sections of a statute be viewed in context and so as to assure a construction consistent with the entire legislative scheme. *Ford Motor Land Development v. Comptroller*, 68 Md. App. 342, 346, 511 A.2d 578, 580, *cert. denied*, 307 Md. 596, 516 A.2d 567 (1986). To this end, no part of a statute may be "rendered surplusage, superfluous, meaningless, or nugatory." *Rossville Vending Machine Corporation v. Comptroller*, 97 Md. App. 305, 315, 629 A.2d 1283, 1288, *cert. denied*, 333 Md. 201, 634 A.2d 62 (1993).

[11] In the R-60 Zone, the street line setback in such a case is reduced from 25 feet (or the applicable established building line) to 15 feet.

front of" to allow, under the described circumstances, for a single front yard for setback purposes allows the Board to give effect to the reduced setback language in Section 59-C-1.323(a), which would otherwise have been rendered meaningless had the Board adopted the Appellant's interpretation of that term.[12]

DPS issues Code Interpretation Policies to promote consistent application of the Zoning Ordinance and to explain zoning requirements to the general public. The Code Interpretation Policies are not law, but the Board gives them effect when they are not inconsistent with the Zoning Ordinance. Here, DPS has published Code Interpretation Policy ZP0404-3, interpreting Section 59-C-1.323, which states in relevant part that "Each corner lot has two front yards, and therefore requires a front yard setback from each street. In limited circumstances when one adjoining lot is also a corner lot, a reduced side street setback will be applied." The diagram entitled "Corner Lot Setbacks for Main Dwellings-Side Street Requirement," accompanying Code Interpretation Policy ZP0404-3, illustrates the situation in the case at issue, where adjoining corner lots "front" on opposite streets and a reduced side street setback should be applied along the street side perpendicular to the shared (rear) boundary. The Board finds that Policy ZPO404-3 and the Corner Lot Setbacks diagram are not inconsistent with the Zoning Ordinance, and that DPS correctly applied them in this case.

The Board was persuaded by the County's recitation of the statutory history surrounding the reduced side street setback in Section 59-C-1.323(a) and finds that the reduced street line setback is intended to apply where, as here, the rear yards of houses located on corner lots that front on parallel streets abut one another. The evidence of record demonstrates that County Zoning Ordinances since 1930 have contained a provision allowing for just such a reduction. The language of the 1954 Zoning Ordinance is particularly instructive as to the situation contemplated for application of this reduced setback when it refers to lots "adjoining the corner lot along the rear line thereof." See Exhibit 9, pages 2-5. See also testimony of R. Ferro. This interpretation is consistent with DPS practice, per the testimony of Ms. Ferro, and is consistent with the guidance given to the public by DPS on its website via Code Interpretation Policy ZP-0404-3. See Exhibit 8, pages 3 and 5. Case law indicates that the expertise of an agency in administering its own statutes should be respected. See *Annapolis Marketplace, LLC v. Parker*, 369 Md. 689, 703, 802 A.2d 1029, 1037 (2002) (quoting *Board of Quality Assurance v. Banks*, 354 Md. 59, 68-69, 729 A.2d 376, 381 (1999)). The Board finds that this interpretation is reasonable and is legally correct, as corroborated by its legislative history.

Based on the testimony and evidence of record, and applying the relevant provisions in the Zoning Ordinance, as interpreted above, the Board finds that lot

[12] Here again, case law instructs that 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). Appellants had urged that this Board find that the subject Property fronted on Willow Lane because, in an undeveloped state, it was large enough to provide all minimum setbacks and yard area requirements.

1, which adjoins the subject Property along Willow Lane and is located at 7201 45th Street, "fronts" on 45th Street, as follows. The undisputed testimony of Mr. Schreffler and Ms. Ferro is that the house on lot 1 is set back 34 feet from 45th Street, but only 16.8 feet from Willow Lane. See Exhibit 22. Ms. Ferro testified that the house on lot 1 "fronts" on 45th Street, that lot 1 does not provide a front yard along Willow Lane but does meet the reduced side street line setback from Willow Lane per consistent DPS practice, and that lot 1 (as currently developed) meets all of the other yard requirements. The Board finds that, consistent with Ms. Ferro's testimony, at 16.8 feet, the setback of the house on lot 1 from Willow Lane is inadequate to be a front yard setback, and the yard between the house and the adjacent lot on 45th Street is inadequate to be a rear yard (which must be opposite the front yard). Therefore lot 1 cannot "front" on Willow Lane. In contrast, the 34 foot setback from 45th Street does suffice as a front yard setback, and the opposite yard adjoining the subject lot qualifies as a rear yard. The Board further finds that the 16.8 foot setback of that house from Willow Lane would satisfy the reduced street line setback contemplated for corner lots. In light of Ms. Ferro's testimony that it is the placement of a building on a lot that determines which are the front, side, and rear yards, depending on where the required setbacks can be met in light of such placement, the Board finds that Ms. Ferro was correct in concluding that lot 1 "fronts" on 45th Street, not on Willow Lane.

In light of the evidence of record which demonstrates that the subject Property and lot 1 abut each other along Willow Lane, and in light of the Board's findings (1) that the existing house on lot 1 "fronts" on 45th Street, and (2) that Section 59-C-1.323(a) of the Zoning Ordinance allows for a reduced setback along one street in the case of a corner lot "[i]f the adjoining lot on one of the streets either does not front on that street…", the Board finds that DPS correctly determined that the subject Property was entitled to a reduced setback of 15 feet along Willow Lane.

11. The Appellant has argued that DPS erred in issuing Building Permit No. 499274 because the proposed construction violates a 25 foot building restriction line shown on the plat along the Willow Lane side of the Property (formerly Bethesda Street). See Exhibit 17. The County argued that taken in the light most favorable to the Appellant, this BRL is at most a restrictive covenant, and that the County has no authority to enforce such a covenant, to the extent that it was ever established or has any continuing validity. Indeed, Ms. Ferro testified that in her 25 years with DPS, she had never enforced a BRL shown on a record plat that was not approved by Park and Planning,[13] and that to the best

[13] Mr. Schreffler testified that the plat in this case does not indicate that it has been approved or signed by Park and Planning. A review of the document in evidence confirms this. See Exhibit 17. In addition, documents submitted by the Intervenors note that the (1926) plat was recorded before the establishment of the Maryland-Washington Regional District, and the creation of the Maryland-National Capital Park and Planning Commission (which occurred in 1927), and thus that this plat could not have been reviewed and approved by Park and Planning prior to its recordation. See Exhibit 6 at page 14.

of her knowledge, her actions reflected the consistent practice of DPS.[14] Mr. Schreffler testified that the 1926 plat contains no indicia that it was ever approved by Park and Planning. No party disputed the fact that the recordation of this plat predates the creation of the Maryland-National Capital Park and Planning Commission, and no party has been able to produce any evidence to indicate that this plat was ever retroactively approved or otherwise acted on by Park and Planning. In addition, Mr. Schreffler testified that the Owner's Dedication on the 1926 plat evidences the owners' intent to "set forth in all conveyances as a covenant running with the land the building restriction lines" shown on the plat, but that based on his inspection of the chain of title, the owner never followed through on this. In support of this, he testified that the 1928 deeds conveying the subject Property (lot 13) and the Appellant's property (lot 12) from the original owners to their initial purchasers both contained a paragraph with various restrictive covenants and an expiration date, but did not include covenants pertaining to a 25 foot building restriction line (or any required setbacks). He also testified that the area had been developed without regard to this BRL, testifying that the existing house on the subject Property, built in 1928, is set back only 16.5 feet from Willow Lane, and that the existing house on Lot 1 is set back only 16.8 feet from Willow, despite the 25-foot BRL shown along Willow Lane (Bethesda Street) on the 1926 plat.

The evidence in the record strongly suggests that this building restriction line was not properly established and thus cannot be enforced. The plat was recorded prior to the establishment of the Park and Planning Commission, there is nothing in the record to indicate that the plat was ever approved by Park and Planning, testimony indicates that DPS does not enforce BRLs shown on plats that were not approved by Park and Planning, the original owners of the platted property did not follow through on their stated intent to include this BRL as a covenant running with the land in all conveyances, and the pattern of existing development, at least along Willow Lane, does not adhere to this BRL. Having said that, the Board does not need to decide this. Even if one were to assume that the building restriction line shown on the plat has any continuing validity, the Board finds that enforcement of a restrictive covenant such as this (unapproved) BRL is a private right of action and beyond the jurisdiction of this Board and DPS. See *Chayt v. Maryland Jockey Club*, 179 Md. 390, 398; 18 A.2d 856, 860 (1941), *Perry v. Board of Appeals for Montgomery County*, 211 Md. 294, 299-300; 127 A.2d 507, 508-09 (1956). This is consistent with the position taken by the Board in the Appeal of Joanne G. Smale (A-6147, see Exhibit 16), and with the position of DPS as articulated in the testimony of Ms. Ferro.

12. Finally, the Board finds that Section 59-A-3.34 of the Zoning Ordinance requires DPS to submit a building permit application to the Planning Board for "review" for conformity with "this Chapter," but does not require Planning Board "approval." The Board notes that as used in this Section, "this

[14] Mr. Schreffler also testified that he had done other projects with platted BRLs, and that they had not been enforced by DPS or by Park and Planning.

Chapter" clearly refers to Chapter 59, the Zoning Ordinance. Accordingly, the Board finds that DPS' issuance of Building Permit No. 499274 without regard for the recommendation of Planning Board staff that a minor subdivision to remove the BRL be undertaken[15] did not violate Section 59-A-3.34, since the subdivision regulations (including minor subdivision) are found in Chapter 50.

The Board further notes that the Appellant has not shown any provision in the Zoning Ordinance or County Code other than Section 59-A-3.34 pursuant to which Park and Planning would be required to review this building permit for compliance with the subdivision regulations. Thus the Board concludes that DPS did not run afoul of the requirement in Section 8-25(a) of the County Code that the permit be issued "[i]f the proposed work conforms to all requirements of this Chapter and all other applicable laws and regulations…" since Section 59-A-3.34 was complied with, and the subdivision regulations in Chapter 50 are not "applicable" to the issuance of this building permit.

13. 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. 499274 was properly issued.

The appeal in Case A-6292 is **DENIED**.

On a motion by Vice Chair David Perdue, seconded by Member Stanley B. Boyd, with Chair Catherine G. Titus and Members Walter S. Booth and Carolyn J. Shawaker in agreement, the Board voted 5 to 0 to deny the appeal and adopt the following Resolution:

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

_____

Catherine G. Titus
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland

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[15] See March 20, 2009 letter from Catherine Conlon to Reginald Jetter at Exhibit 6, page 18. The Board notes that Section 50-1 of the Montgomery County Code defines "Minor subdivision" as "[t]he division, resubdivision or assemblage of a lot, tract or parcel of land, including minor adjustments to existing lot lines, that does not require the approval of a preliminary plan of subdivision prior to the submittal of a record plat application." The Board further notes that the procedures for approval of a minor subdivision are set forth in Chapter 50 (Section 50-35A) of the County Code, not in the Zoning Ordinance (Chapter 59).

This 7th day of January, 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).