IN THE

COURT OF SPECIAL APPEALS OF MARYLAND

September Term, 2004

No. 447

DAVID REMES,

Appellant

v.

MONTGOMERY COUNTY, MARYLAND, et al.,

Appellees

On Appeal from the Circuit Court for Montgomery County, Maryland
(Durke G. Thompson, Judge)

BRIEF OF APPELLEE MONTGOMERY COUNTY, MARYLAND

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STATEMENT OF THE CASE

This case involves a challenge to the issuance of a building permit for construction of a single-family dwelling. (E. 211-213) David Remes, a neighbor, noted an appeal to the Board of Appeals and argued that the Department of Permitting Services (DPS) had erroneously issued a building permit for a home on lot 11, explaining that the lot had become merged with the adjoining lot 12 when the two lots were previously held by the same owner.[1] In addition, Mr. Remes complained that the proposed home exceeded the height requirement for the zone. (E. 211-213) The Board of Appeals heard the case de novo and concluded that DPS properly issued the building permit, rejecting Mr. Remes' contention that the lots had merged. (E. 325-331)

Mr. Remes then filed a petition for judicial review in the Circuit Court for Montgomery County, Maryland. (E. 351) The issues continued to focus on whether the two lots had merged based on the doctrine of equitable merger and whether the proposed structure exceeded the height restrictions for the zone. The circuit court reviewed the record and considered arguments of the parties. When the court affirmed the board's decision, Mr. Remes appealed to this Court. (E. 346, 501, 539-541)

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[1]The authority to appeal the issuance of a building permit to the Board of Appeals appears in Montg. Co. Code § 8-23 and § 2-112 (1994, as amended). (Apx. 5, 8) The ability to seek judicial review in the circuit court and further appeal to this Court appears in Montg. Co. Code §§ 2-114, 2A-2, and 2A-11. (Apx. 6-7)

QUESTIONS PRESENTED

I. Did the Board of Appeals correctly interpret the Zoning Ordinance to allow the Department of Permitting Services to issue a building permit for construction of a house on a recorded lot that met the minimum size requirements for the zone and satisfied the required setbacks?

II. Did the Board of Appeals properly interpret the calculation of the height of the proposed construction to meet the requirements of the Zoning Ordinance?

STATUTES, ORDINANCES, AND CONSTITUTIONAL PROVISIONS

The full text of all relevant statutes, ordinances and constitutional provisions appears in the record extract or in the appendix to this brief.

STATEMENT OF ADDITIONAL FACTS

The property located on Noyes Drive in Silver Spring, Maryland, was subdivided into four lots—10, 11, 12 and 13—in 1945. (E. Pocket 1) The original owners, Mr. Duffie's parents, purchased lot 12 in 1951 and lot 11 in 1954. (E. 239-245) They built a house on lot 12 in 1951, and constructed an addition during the 1960's. Mr. Remes believes that the swimming pool was installed on lot 11 around 1959. (E. 56-57, 221, 248, 300) In this way, the Duffies used both of the lots, with the house on one lot and the pool on the other. Mr. Remes owns lot 10, which adjoins lot 11. (E. 106) He suggests that the Duffies' two lots merged, because the addition to the house on lot 12 does not meet the setback requirements unless the two lots were treated as one, with lot 11 serving as the rear yard for lot 12. (E. 221-222)

Jonathan Duffie inherited lots 11 and 12 from his parents and transferred lot 11 to Design-Tech Builders, Inc., which participated in the administrative hearing as the holder of the challenged building permit. (E. 246-247, 302-303) The application for a building permit for lot 11 showed a recorded lot that contained the required minimum square footage for the zone. In addition, the rendition of the proposed structure showed that it would comply with the setback requirements for the R-60 zone. (E. 19; Pocket 1)

The zoning ordinance also provides that a house in the R-60 zone must not exceed two and one-half stories in height. To calculate the height, Mr. Remes wanted DPS to consider the "natural grade" on lot 11, which he believed to be the elevation of the ground in 1945 or 1946, before the pool was built. (E. 130) He further argued that the lowest level of the proposed house was a basement—not a cellar—which required that it be counted as a story of the house. (E. 176) Using this calculation, the proposed construction was three and one-half stories and did not satisfy the zoning ordinance.

The board of appeals found that lot 11 was a properly recorded lot and met the development standards of the zone. (E. 329) In addition, the board determined that the lowest level of the proposed house met the definition of a cellar and, therefore, complied with zoning requirements for height. Montg. Co. Code § 59-C-1.327(a). (E. 386-387) The Maryland-National Capital Park and Planning Commission intervened to participate in the case when it reached the circuit court to protect the Planning Board's responsibility for interpreting and applying the subdivision regulations for Montgomery County. *See* Montg. Co. Code § 50-4. (E. 361-365; Apx. 13)

ARGUMENT

Judicial review of an administrative decision requires the court to determine whether "there was substantial evidence on the record as a whole to support the agency's findings of fact and whether the agency's conclusions of law were correct." *Motor Vehicle Administration v. Atterbeary*, 368 Md. 480, 490-491, 796 A.2d 75, 81 (2002). The reviewing court will not substitute its judgment for the expertise of the agency or make its own findings of fact when the record contains substantial evidence to support the administrative decision. *Jordan Towing, Inc. v. Hebbville Auto Repair, Inc.*, 369 Md. 439, 450-451, 800 A.2d 768, 774-775 (2002). When the issue is fairly debatable, and reasonable persons could reach different conclusions based on the evidence, the court will not second-guess the agency's decision. *Stansbury v. Jones*, 372 Md. 172, 183, 812 A.2d 312, 318 (2002). Moreover, the agency decides how to resolve any conflicting evidence and determines what inferences to draw from the evidence. *Gigeous v. Eastern Correctional Institution*, 363 Md. 481, 497, 769 A.2d 912, 922 (2001).

The court may substitute its judgment only as to an error made on an issue of law. *Relay Improvement Association v. Sycamore Realty Company*, 105 Md. App. 701, 714, 661 A.2d 182, 188 (1995), *aff'd*, 344 Md. 57, 684 A.2d 1331 (1996). Even for issues of law, the court extends a degree of deference to the agency and often gives considerable weight to the agency's interpretation and application of the statute that the agency administers. *Annapolis Market Place, LLC v. Parker*, 369 Md. 689, 703, 802 A.2d 1029, 1038 (2002). In fact, decisions of agencies are entitled to the greatest weight and to a presumption of validity,

viewing the decision in the light most favorable to the agency. *Board of Physician Quality Assurance v. Banks*, 354 Md. 59, 68, 729 A.2d 376, 381 (1999).

When reviewing administrative decisions, this Court's role is precisely the same as that of the circuit court—to apply the substantial evidence test to the agency's decision and to determine whether the agency's decision is legally correct. *Capital Commercial Properties, Inc. v. Montgomery County Planning Board*, 158 Md. App. 88, 95, 854 A.2d 283, 287-288 (2004). The agency's order will be upheld on judicial review "if it is not based upon an erroneous determination of law, and if the agency's conclusions reasonably may be based upon the facts proven." *Montgomery County v. Buckman*, 333 Md. 516, 519 n.1, 636 A.2d 448, 450 n.1 (1994) (citations omitted).

The present appeal requires this Court to determine whether the board and DPS properly interpreted the provisions in the County Code and the Zoning Ordinance governing the building permit issued for construction on lot 11. The board is entitled to a certain degree of deference based on its zoning expertise.

I. The Board of Appeals correctly interpreted the County Code and the Zoning Ordinance to allow DPS to issue a building permit for construction of a house on a recorded lot that met the minimum size requirements for the zone and satisfied the required setbacks.

While no testimony or evidence in the record shows a formal resubdivision of lots 11 and 12 into one lot, Mr. Remes seeks to have this Court apply the doctrine of equitable merger and treat the lots as one combined lot. This approach conflicts with Montgomery County law and practice. Moreover, to the extent that the house and additions on lot 12 may violate existing setback restrictions, those issues do not affect the issuance of a building permit for the independent lot 11, but affect only the construction on lot 12.

Montgomery County law precludes the application of the doctrine of merger.

Although Montgomery County operates under a charter form of government, with most of its authority deriving from the Express Powers Act, Md. Ann. Code art. 25A, § 5 (2001), the County derives its zoning authority exclusively from the Regional District Act. *Montgomery County v. Revere National Corp.*, 341 Md. 366, 383, 671 A.2d 1, 9 (1996); Md. Ann. Code art. 28, § 8-101 et seq. (2003). (Apx. 1) The same article grants the authority for subdivision of land and approval of general and master plans for development to the Planning Board. Md. Ann. Code art. 28, § 7-110 and § 7-116. (Apx. 1-3) The subdivision regulations appear in Chapter 50 of the County Code and identify the Planning Board as the entity that administers the chapter. Montg. Co. Code § 50-4. (Apx. 13) Under its Article 25A authority, the County enacted a building code, which appears in Chapter 8 of the County

Code and designates DPS as the agency that enforces the chapter. Montg. Co. Code § 8-11.[2] (Apx. 7)

The Montgomery County zoning ordinance requires that "[e]very building . . . shall be located on a lot . . . ." Montg. Co. Code § 59-A-5.2. (E. 377) The creation of that lot is accomplished by compliance with Montgomery County's subdivision law. By definition, subdivision includes both the division of land into one or more lots and the assembly of one or more lots or parcels into a larger one. Montg. Co. Code § 50-1. (Apx. 13) To combine lots in Montgomery County, a property owner must prepare and submit a plat showing the resubdivision. When the Planning Board approves it, the plat is then recorded in the County land records. Montg. Co. Code § 50-8. (Apx. 13-14)

The plats in the record show that lot 11 exists as a separate lot, with sufficient square footage to accommodate a single-family dwelling, which meets the elements of a buildable lot. *See* Montg. Co. Code § 59-C-1.322. (E. 432-433) The continued existence of lot 11 as a separate lot suggests that no plat was prepared or submitted to combine lots 11 and 12.[3]

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[2]The enforcement of the zoning ordinance also falls within the responsibilities of DPS. Montg. Co. Code § 2-42B(a). (Apx. 5) This Court recently acknowledged the distinction between the review authority of DPS and the Planning Board in light of the statutes that they each administer. *Capital Commercial Properties*, 158 Md. App. at 100-101, 854 A.2d at 291.

[3]The combination of the tax bills into one account is not unusual when the lots have the same owner and serves as a convenience rather than a reflection of any merger. (E. 57, 258-261, 273-275)

The building code further evidences the County's rejection of any merger of lots except through formal subdivision. To obtain a building permit, an owner submits an application that includes the plan specifications, engineering details, and a plot diagram that must show several details, including "[t]he lot upon which the proposed building is to be erected, lot dimensions, lot and block numbers and subdivision name . . . ." Montg. Co. Code § 8-24. (Apx. 8-9) The director must deny the application if it does not meet all requirements, and the department can correct errors in the plans during construction. Montg. Co. Code § 8-25 and § 8-26. (Apx. 9-13) A building permit will not be issued for construction of a dwelling or other structure without a showing that the building will be located on a lot shown on a plat recorded in the plat book of the County. Montg. Co. Code § 50-20(a). (E. 495) And issuance of a building permit for a dwelling or other structure that crosses a lot line is specifically prohibited. Montg. Co. Code § 50-20(b). (E. 495)

This has been the case since the Duffies built their home, and all references to area and setbacks related to a recorded lot. The area regulations in effect in 1950 specifically prohibited using lots in the combination suggested by Mr. Remes:

> No yard space or minimum area required for a building or use by this chapter shall be considered as any part of the yard space or minimum area for another building or use.

Montg. Co. Code § 176-3.c(1) (1950).[4] (E. 422) By 1968, when it appeared that this provision had not been adhered to in all instances,[5] the County Attorney made clear that the proper interpretation of the subdivision regulations required that, before a building permit could be issued for construction on property comprised of multiple lots, resubdivision had to occur. Otherwise, the construction would not be consistent with the purposes of the subdivision regulations. (E. 289)

This interpretation became subject to erosion again in the 1980's, when an assistant county attorney carved out an exception to the requirement that a double lot be re-platted before obtaining a building permit:

> [W]here the building is to span the boundary line of two adjoining lots, there is no danger that the second lot might be sold or built independently. In this situation we think it is not necessary to require a resubdivision into a single lot.

(E. 294) The Planning Board considered this "exception" to be an unacceptable interpretation that could result in development "quite different from what was expected at the earlier subdivision review." (E. 298) The District Council promptly acted to clarify

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[4]This provision remained virtually unchanged in 1955 and 1960. (Apx. 15-16)

[5]In this respect, the permit card maintained by DPS did not reflect the dimensions of the lots or any details of the originally built house on lot 12, nor the addition. (E. 300) At this juncture, it remains uncertain from the record whether the addition to the house was built with or without a permit, or if a permit was issued in error. The passage of time also creates a question of what action the County can pursue to correct any error, because a 3-year limitations period applies to compliance with an erroneous permit as well as non-compliance with a valid permit. *See* Md. Code Ann., Cts. & Jud. Proc. § 5-114 (2002). (Apx. 4-5)

beyond doubt that, when a property owner seeks to combine parcels for a building, the parcels must be resubdivided into one lot to obtain the building permit. (E. 278-288)

When DPS received the permit application for lot 11, it reviewed the applicable requirements in the zoning ordinance regarding lot size, setbacks, and height limits. Montg. Co. Code § 8-24 and § 8-25. (Apx. 8-10) Upon determining that the property appears as a separate lot on a plat recorded in the County's plat books, DPS proceeded to review the applicable zoning standards—height restrictions,[6] setbacks, and lot coverage limits. Montg. Co. Code § 50-20 and § 59-C-1.3. (E. 432-443, 495) Lot 11 contains eight thousand square feet, which exceeds the minimum lot size of six thousand square feet required in the R-60 zone, and the structure will satisfy the setbacks. Montg. Co. Code § 59-C-1.3 and § 59-C-1.625. (E. Pocket 1, 432-443; Apx. 14) Based on this application, DPS appropriately issued a permit for the construction of a conforming structure.

Several distinctions render the analysis in* Friends of the Ridge *inapplicable to the present case.

Mr. Remes relies heavily on the analysis in *Friends of the Ridge v. Baltimore Gas & Electric Company*, 352 Md. 645, 724 A.2d 34 (1999). Yet, the underlying facts in that case, along with the statute involved, render the decision inapposite to the facts of the current appeal. In *Friends of the Ridge*, the Baltimore Gas and Electric Company (BG&E) operated a substation in Baltimore County and planned to expand the substation onto contiguous parcels. BG&E applied for a special exception to accommodate the use and sought a

[6]This aspect is discussed in Argument II, *infra*, and will not be repeated in this section.

variance to permit the proposed structure to cross the interior lot lines, rather than to comply with the required 50-foot setback from any lot line other than a street line. 352 Md. at 650 n.5, 724 A.2d at 36 n.5. The Baltimore County Board of Appeals granted the variance, and both the circuit court and this Court affirmed that decision.

The Court of Appeals concluded that BG&E did not need a variance, because "[u]nless the ordinance's language specifically and clearly prohibits it, an owner of contiguous parcels of real property . . . is free to combine them into larger and fewer parcels without violating the *zoning* code." 352 Md. at 648, 724 A.2d at 35-36 (emphasis in original). In doing so, the Court limited its ruling to the zoning requirements and did not address the subdivision perspective of creating lots. 352 Md. at 648-650, 724 A.2d at 35-37. The zoning doctrine of merger recognized in *Ridge* allowed BG&E to combine parcels to avoid the need for a variance from the zoning requirements by allowing BG&E to combine its undersized or substandard lots.[7] In this way, the individual undersized lots or parcels could be eliminated and brought into conformity with the zone:

> [I]f several contiguous parcels, each of which do not comply with present zoning, are in single ownership and, as combined, the single parcel is usable without violating zoning provisions, one of the separate, nonconforming

[7]Apparently, the zoning doctrine of merger, which merges substandard lots, was accepted for the first time in the *Ridge* decision. 352 Md. at 653 n.8, 724 A.2d at 38 n.8. Maryland has long recognized the general merger of estates in land, which occurs when a greater estate (e.g. fee simple) meets with a lesser estate (e.g. life estate) in one and the same person without any intermediate estate. When this happens, the lesser estate merges into the greater. *See Conrad/Dommel, LLC v. West Development Company*, 149 Md. App. 239, 271, 815 A.2d 828, 847 (2003) (citing *Bosley v. Burk*, 154 Md. 27, 139 A. 543 (1927)).

> parcels may not then or thereafter be considered nonconforming, nor may a variance be granted for that separate parcel.

Ridge, 352 Md. at 653, 724 A.2d at 38. Thus, the decision in *Ridge* allowed a property owner to combine several lots or parcels of land into one larger lot so that a "single parcel emerges for zoning purposes." *Ridge*, 352 Md. at 658, 724 A.2d at 40.

In the present case, there is no need to combine lot 11 with another lot in order to meet relevant zoning standards. Neither lot is substandard or undersized—both lot 11 and lot 12 meet the minimum standards for the zone. Moreover, given the County's long history of imposing exacting requirements for subdivision, which includes requirements for combining or dividing parcels, the doctrine of merger stands diametrically opposed to the clear dictates of County law. This further distinguishes the circumstances in *Friends of the Ridge* from the present case—because no statute or ordinance prohibited the merger in *Ridge*, a property owner who desired to merge several parcels of land for a single project for zoning purposes could do so without official action or "without the need for official subdivision . . . ." 352 Md. at 653, 724 A.2d at 38.

Unlike Baltimore County, Montgomery County law clearly prohibits subdivision by intent, requiring instead that a property owner submit a plat for recording in the land records to combine or divide land. And County law has prohibited the use of an adjoining lot to satisfy zoning setback requirements at least since the 1950's. (E. 422) Logically, the statute takes the County out of the scope of the ruling in *Ridge*, as the Court noted that merger would occur "[u]nless the ordinance's language specifically and clearly prohibits it." *Friends of the*

Ridge, 352 Md. at 648, 724 A.2d at 35-36. The building code, subdivision regulations, and zoning ordinance all contain language that specifically prohibits the merger proposed by Mr. Remes, and nowhere does County law allow the merger of lots except through formal subdivision.[8]

The construction on lot 12 does not create a merger with lot 11.

As a final attempt to invalidate the building permit issued for construction on lot 11, Mr. Remes contends that the addition built onto the house on lot 12 and the pool constructed on lot 11 could have been legal only if the two lots were treated as one, with lot 11 serving as the rear yard of lot 12. The board could not determine when the addition was built, nor could it determine whether the addition violated development standards when it was built. No one could even verify whether a building permit was issued for the addition. (E. 55-56) Arguably, any permit that was issued for the location of the addition violated the zoning ordinance and was issued erroneously.

For purposes of this case, however, the existence of possible zoning violations or invalid permits regarding lot 12 are not issues before this Court. The sole issue for this Court to decide is whether DPS properly issued the building permit on a separate recorded lot. In this respect, the situation mirrors that recognized by the Court of Appeals in *Ridge*—while the case was pending, BG&E had caused the three parcels to be combined by a resubdivision;

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[8]In practice, the doctrine would create an impossible burden for DPS. Essentially, for each building permit application, DPS would have to consider surrounding lots to verify that no lots were used in an informal combination. The plain language of the Code keeps the review manageable and relevant, and this Court should not disrupt that reasonable process.

although the petitioners claimed it was done improperly, the Court noted that, if that were the case, "it is a matter for another day." *Ridge*, 352 Md. at 649, 724 A.2d at 36.

Nor does this Court need to apply *Ridge* to prevent a nonconforming use that might result from an owner treating merged lots as separate. The pool on lot 11 is a permitted use, not a nonconforming use, and the one-family dwelling that will replace it is likewise a permitted use. Similarly, the residential use on lot 12 is and will remain a single-family detached dwelling—also a permitted use in the R-60 zone. Failure to apply the doctrine of merger does not result in a nonconforming use, which only occurs when "[a] use that was lawful when established and continues to be lawful, even though it no longer conforms to the requirements of the zone in which it is located because of the adoption or amendment of the zoning ordinance or the zoning map." Montg. Co. Code § 59-A-2.1. (E. 469) Based on the setback requirements and the longstanding rejection of attempts to treat adjoining lots as one without formal resubdivision, the encroachment of the addition into the setbacks remains a matter for DPS to handle through enforcement or when the owner of that lot seeks an additional building permit in the future.

While a resubdivision of lots 11 and 12 could correct the setbacks for the addition to the house on lot 12, the owner's choice not to do so does not render the lot substandard, but simply raises the separate issue of whether lot 12 now needs to remove the addition or seek a variance to permit it to remain. The de facto merger allowed by the doctrine of merger focused on avoiding substandard lots, not rectifying setback encroachments. 352 Md. at 653, 724 A.2d at 38; *see also Stansbury v. Jones*, 372 Md. at 180, 812 A.2d at 316. Application

of the doctrine in this case is not necessary and would violate the clear provisions of County law and the zoning ordinance.

II. The Board of Appeals properly interpreted the calculation of the height of the proposed construction to meet the requirements of the Zoning Ordinance.

Mr. Remes also complains that the board misinterpreted the zoning ordinance provisions governing the height of the proposed house, namely, whether the lowest level comprises a basement (which counts as one story) or a cellar (which does not count as a story).[9] As part of this argument, he contends that the board excluded relevant evidence of the "natural grade" that existed on lot 11 before the pool was built. The evidence in the record supported the board's interpretation of the ordinance and reflects that the board accepted all relevant evidence proffered by Mr. Remes.

DPS properly considered the finished grade to determine the mean level of the adjacent ground.

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[9]The definitions for these portions of a building appear in the zoning ordinance:

> **Basement:** That portion of a building below the first floor joists at least half of whose clear ceiling height is above the mean level of the adjacent ground.
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> * * *
>
> **Cellar:** That portion of a building below the first floor joists at least half of whose clear cellar ceiling height is below the mean level of the adjacent ground.
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> * * *
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> **Story:** That portion of a building included between the surface of any floor and the surface of the floor next above it or, if there be no floor above it, the space between such floor and the ceiling next above. A basement is counted as a story. A mezzanine floor shall be counted as a story if it covers more than one-third of the area of the floor next below it or if the vertical distance between the floor next below it and the floor next above it is 20 feet or more.

Montg. Co. Code § 59-A-2.1. (E. 448, 450; Apx. 14)

The zoning ordinance does not use the term "natural grade" and it does not require a property owner to return land to some prior grade in order to begin new construction. The relevant determination involves whether the proposed house meets the two and one-half story height for the zone in relation to the "mean level of adjacent ground" at the time of its construction—the finished grade. As a result, the grade of lot 11 that existed in 1945 is not a material fact—it will not assist in determining whether more than half of the clear ceiling height of the building's lowest level sits above or below the average level of the ground next to the building upon completion. Only evidence that explains the "mean level of adjacent ground" could aid the Board in deciding whether the lowest level had to be counted as a full story of the structure. Montg. Co. Code § 59-A-2.1. (E. 448, 450; Apx. 14)

To construe the zoning ordinance definitions of a cellar and a basement, general principles of statutory construction require that the statute be given its plain meaning and that it be read in context to effectuate the intent of the Legislature. *Armstead v. State*, 342 Md. 38, 56, 673 A.2d 221, 229 (1996). 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). Moreover, all words of a statute must be given effect and no portion of it may be rendered "meaningless, surplusage, superfluous, or nugatory." *Jung v. Southland Corp.*, 351 Md. 165, 177, 717 A.2d 387, 393 (1998) (citations omitted). In construing the language, however, the court will "neither add nor delete words in order to give the statute a meaning not otherwise communicated by the language used. . . ." *Blind Industries and Services v. Department of General Services*, 371 Md. 221, 231, 808 A.2d 782, 788 (2002). And the

court will avoid forced or subtle interpretations of the law. *Caffrey v. Department of Liquor Control*, 370 Md. 272, 292, 805 A.2d 268, 279 (2002).

In a case like this one, where an agency has adhered to a consistent and long-standing interpretation of a statute that it administers, the court will acknowledge the agency's expertise and defer to the agency's construction. *Jordan Towing, Inc.*, 369 Md. at 450, 800 A.2d at 775 (citing *Board of Physician Quality Assurance v. Banks*, 354 Md. at 68-69, 729 A.2d at 381). The reviewing court will give the greatest weight to an agency interpretation that derives from the adversarial process or appears in formal rules issued by the agency. *Marriott Employees Federal Credit Union v. Motor Vehicle Administration*, 346 Md. 437, 445, 697 A.2d 455, 459 (1997). Of course, no deference will be given to an interpretation that conflicts with a clear and unambiguous statute. *Id.* (citing *Falik v. Prince George's Hospital*, 322 Md. 409, 416, 588 A.2d 324, 327 (1991)).

The department's practice for determining whether the lowest level of a structure is a basement or a cellar begins with reference to the site plan, which shows the finished grade in relation to the building. (E. 33, 35, 305-312; Pocket 2) Delvin Daniels, a permitting services specialist for DPS, explained that the application showed a calculation for the mean level of the adjacent ground, along with the ceiling height of the lowest level of the house. (E. 14, 232) Logically, the height of the structure upon completion is the only relevant consideration, because that is when it must have an appearance that is compatible with the surrounding neighborhood and that meets the zoning requirements. Analysis of the calculations submitted by the applicant showed that at least half of the lowest level would

be below the average grade of the adjacent ground and, therefore, met the definition of a cellar. (E. 18-19) The zoning ordinance does not count a cellar as a story, so the proposed structure met the two and one-half story limitation. Montg. Co. Code § 59-A-2.1. (E. 450; Apx. 14)

The board accepted all relevant and probative evidence.

A careful review of the transcript reveals that Mr. Remes offered several photographs as evidence of the grade on lot 11 before the pool was installed. Although the board did not find the evidence very helpful, the pictures were admitted as evidence in the record. (E. 89, 233-238) The board also heard testimony from Norman Haines, a landscape architect called as a witness by Mr. Remes. Mr. Haines testified that he calculated the mean level of the adjacent ground and concluded that the lowest level of the house was a basement. (E. 89-95, 316-319) The issue became fairly debatable based on DPS' analysis of the lowest level as a cellar, along with the testimony of James Glascock, an engineering expert, who testified regarding his preparation of the site plan for Design Tech. (E. 18-19, 136-139) Mr. Glascock explained his intent to create a cellar and gave detailed calculations to support his efforts. (E. 139-145, 164, 309-312)

The only evidence "excluded" by the board was the testimony of Mr. Remes' architect, John Lourie. Without calling Mr. Lourie as a witness, Mr. Remes summarized the testimony that would have been given. (E. 129-130) The board did not have the opportunity to hear Mr. Lourie's testimony, but did not find the proffer to be helpful, because it addressed the grade of the lot before the pool was built—the board viewed its responsibility as one of

considering the finished grade as indicative of the mean level of the adjacent ground. (E. 130) Even if the original grade somehow was relevant, neither the photographs nor the proffered architect testimony provided specific numbers or detailed information regarding the elevation of the "natural grade" of lot 11 in 1947-48 or 1956. (E. 87)

The board always has the authority to exclude irrelevant evidence, and it did so in this instance. Montg. Co. Code § 2A-8(e). (Apx. 7) Evidence is relevant if it tends to establish or disprove a material fact. *Bern-Shaw Limited Partnership v. Mayor and City Council of Baltimore*, 377 Md. 277, 290, 833 A.2d 502, 509 (2003). A fact is material if its resolution will affect the outcome of a case. *Id.* The evidence that Mr. Remes claims was excluded regarding the grade of lot 11 before installation of the pool would not have aided the board in determining the "mean level of adjacent ground" required to decide whether the lowest level of the structure met the definition of a basement or cellar for zoning purposes. *See* Montg. Co. Code § 59-A-2.1. (E. 448, 450)

It remains unclear how or why the grade existing on lot 11 in 1956 could be viewed as "natural," while the grade from 1960 to the present (after installation of the pool) becomes "artificial." The evidence presented here does not reflect an attempt to raise the grade as a means to gain some undue advantage in calculating the height of the building.[10] (E. 86) Certainly, a 1 or 2-foot difference between the elevation of the ground on lot 11 in 2003 and

[10]Based on the definition of "height of building" in the zoning ordinance, if a house is set back less than 35 feet from the street, and is located on a terrace, its height above street grade may be increased by the height of the terrace. *See* Montg. Co. Code § 59-A-2.1. (E. 461)

the elevation in 1945 does not alter the compatibility of the proposed house with the surrounding area. The determination of the lowest level of the house as a basement or a cellar requires the board to refer to the mean level of adjacent ground—not natural grade or original grade. Based on the evidence presented to the board, the calculation of the "mean level" supported the finding that the proposed structure would be two and one-half stories in height when completed and would comply with the zoning ordinance.

CONCLUSION

The board did not exclude any relevant evidence and even admitted some of Mr. Remes' evidence that had doubtful relevance. Based on the information and testimony presented, the board properly interpreted the zoning ordinance to permit the proposed construction on lot 11. The two lots did not merge by operation of law, based on the plain language of the zoning ordinance and the subdivision law. Moreover, the height of the structure complies with the restrictions delineated in the zoning ordinance. As a result, the board correctly concluded that DPS properly issued the building permit for lot 11, and this Court should affirm that decision.

Respectfully submitted,

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Statement pursuant to Maryland Rule 8-504(a)(8): This brief was prepared with proportionally spaced type, using Times New Roman font and 13pt type size.

APPENDIX

Excerpts from Maryland Annotated Code

Article 25A, § 5. Enumeration (2001)

The following enumerated express powers are granted to and conferred upon any county or counties which hereafter form a charter under the provisions of Article XI-A of the Constitution, that is to say:

* * *

(T) *Road, Waste Disposal, Soil Erosion and Building Ordinances*

To enact local laws enabling the county council to adopt from time to time, after reasonable notice and opportunity for public hearing and with or without modifications, ordinances and amendments thereof for the protection and promotion of public safety, health, morals, comfort and welfare, relating to any of the following: the location, construction, repair, and use of streets and highways; the disposal of wastes; the control of problems of soil erosion and of the preservation of the natural topography in newly developed and other areas; and the erection, construction, repair and use of buildings and other structures; and to enact local laws providing appropriate administrative and judicial proceedings, remedies, and sanctions for the administration and enforcement of such ordinances and amendments.

* * *

Article 28 (2003).

§ 7-110. Purposes of general plan and amendments.

The making of the general plan, including its parts, amendments, extensions, or additions, the protection of and the carrying out of the plan, and the exercise of all planning, platting, zoning, subdivision control, and all other powers granted in this title to the Commission or to the County Council of Montgomery County or the County Commissioners of Prince George's County shall be with the purposes of guiding and accomplishing a coordinated, comprehensive, adjusted, and systematic development of the regional district, the coordination and adjustment of this development with public and private development of other parts of the State of Maryland and of the District of Columbia, and the protection and promotion of the health, safety, morals, comfort, and welfare of the inhabitants of the regional district.

§ 7-116. Subdivision regulations generally.

(a) *Authorized; purposes; restrictions.* In exercising the powers granted to it by § 7-115 of this title, the Commission or the governing body of either county may prepare regulations and amendments governing the subdivision of land within the regional district or the respective portions of the regional district within Montgomery or Prince George's County. The regulations and amendments shall be adopted by the respective governing bodies of the counties, with whatever changes they consider appropriate, and shall be effective from the date of adoption or from such other date the governing body designates provided that such

adoption does not affect in any manner the administration of the regulations by the Commission or its functions under § 7-115 of this title. In Montgomery County, on the adoption of any subdivision regulation or amendment by the district council, the regulation or amendment shall be delivered within 3 days to the County Executive who within 10 days thereafter shall approve or disapprove the regulation or amendment. If the County Executive disapproves the regulation or amendment, it shall be returned to the council with the reasons for the disapproval stated in writing. The council, by the affirmative vote of 6 members, may enact the regulation or amendment over the disapproval of the County Executive. Failure of the County Executive to act within 10 days constitutes approval of the regulation or amendment. The regulations may provide for (1) the harmonious development of the district; (2) the coordination of roads within the subdivision with other existing planned or platted roads or with other features of the district or with the Commission's general plan or with any road plan adopted or approved by the Commission as part of the Commission's general plan; (3) adequate open spaces for traffic, recreation, light, and air, by dedication or otherwise, and the dedication to public use or conveyance of areas designated for dedication under the provisions of the zoning and subdivision regulations and for the payment of a monetary fee, in lieu of dedication, not to exceed 5 percent of the total new market value of the land, as stated on the final assessment notice issued by the State Department of Assessments and Taxation, that is the subject of an approved preliminary plan of subdivision to be used by the Commission to purchase open spaces for the use and benefit of the subdivision in cases where dedication would be impractical, provided that when, in the judgment of the Commission, suitable land is not available for acquisition to serve the subdivision from which a fee has been exacted, or if adequate open space has heretofore been acquired and is available to serve the subdivision, then the Commission may use the fee collected in lieu of dedication to develop or otherwise improve land or recreational facilities that will assist in supplying the overall recreational needs of the subdivision, and further provided that if the subdivision is in a municipality in Prince George's County that is not within the metropolitan district but is within the regional district and when requested by the municipality the mandatory fee in lieu of dedication received by the Commission shall be paid to and used by the municipality either to purchase open space for the use and benefit of the subdivision or to develop or otherwise improve land or recreational facilities that will assist in supplying the overall recreational and open space needs of the subdivision; (4) the reservation of lands for schools and other public buildings and for parks, playgrounds, highways, roads, mass transit facilities, including busways and light rail facilities, and other public purposes, provided no reservation of land for traffic, recreation or any other public purposes as herein provided shall continue for longer than three years without the written approval of all persons holding or otherwise owning any legal or equitable interest in the property; and provided further that the properties reserved for public use shall be exempt from all State, county, and local taxes during the period; (5) the conservation of or production of adequate transportation, water drainage and sanitary facilities; (6) the preservation of the location of and the volume and flow of water in and other characteristics of natural streams and other

waterways, including the establishment of a stormwater management program in Montgomery County which would allow the county to accept monetary contributions, the granting of an easement, or the dedication of land; (7) the avoidance of population congestion; (8) the avoidance of scattered or premature subdivision of land as would involve danger or injury to health, safety or welfare by reason of the lack of water supply, drainage, transportation or other public services or necessitate an excessive expenditure of public funds for the supply of services; (9) conformity of resubdivided lots to the character of lots within the existing subdivision with respect to area, frontage, and alignment to existing lots and streets; (10) control of subdivision or building (except for agricultural or recreational purposes) in flood plain areas or streams and drainage courses, and on unsafe land areas; (11) preservation of outstanding natural or cultural features and historic sites or structures; or (12) other benefits to the health, comfort, safety or welfare of the present and future population of the regional district. In Montgomery County, the regulations may require the provision of adequate recreational facilities or, in lieu of providing recreational facilities, payment of a fee not exceeding the cost of providing adequate recreational facilities to serve the subdivision.

* * *

(e) *Plats of land reserved.* The Commission shall prepare a plat of any land reserved for public use under the provisions of this section, showing the survey location of the land, names and addresses of the owners, and any other information required for filing among the land records of the county in which the land reserved is located and for its proper indexing. The plat shall comply with all requirements for recording of plats among the land records and be recorded by the clerk of the court of the county in which the land is situated.

(f) *Present regulations retained.* The subdivision regulations heretofore adopted by the Commission and now in effect within the respective portions of the regional district in Montgomery and Prince George's counties are deemed to have been adopted in accordance with the provisions of this section. These regulations apply respectively within the portions of the regional district within each county until modified in accordance with this section.

(g) *Appeals.* A final action by the Commission on any application for the subdivision of land within 30 days after the action is taken by the Commission, may be appealed by any person aggrieved by the action, or by any person, municipality, corporation or association, whether or not incorporated, which has appeared at the hearing in person, by attorney or in writing to the circuit court for the county which may affirm or reverse the action appealed from, or remand it to the Commission for further consideration. When an appeal is filed the procedures described in § 8-105 (b) of this article shall be applicable to the Commission and other parties as is appropriate.

* * *

§ 8-101. Powers generally.

(a) *Designation of district councils; bi-county district council.* The County Councils of Montgomery County and Prince George's County are each individually designated, for the

purposes of this article, as the district council for that portion of the regional district lying within each county, respectively. Sitting together, they are jointly designated, for the special purposes delineated in this article, as the bi-county district council for the entire Maryland-Washington Regional District. The adoption of an ordinance or resolution by the bi-county district council shall be accomplished only by the affirmative votes of a majority of the total membership of each district council.

(b) *Grant of zoning power.*

* * *

(2) Except as otherwise provided in §§ 8-126 and 8-127 of this subtitle, each district council, respectively, in accordance with the conditions and procedures specified in this article, may by ordinance adopt and amend the text of the zoning ordinance and may by resolution or ordinance adopt and amend the map or maps accompanying the zoning ordinance text to regulate, in the portion of the regional district lying within its county, (i) the location, height, bulk, and size of buildings, other structures, and units therein, building lines, minimum frontages, depths and areas of lots, and percentages of lots which may be occupied; (ii) the size of lots, yards, courts, and other open spaces; (iii) the erection of temporary stands and structures; (iv) the density and distribution of population; (v) the location and uses of buildings and structures and units therein for trade, industry, residence, recreation, agriculture, public activities, and other purposes; and (vi) the uses of land, including surface, subsurface, and air rights therein, for building, trade, industry, residence, recreation, agriculture, forestry, or other purposes.

* * *

Cts. & Jud. Proc. § 5-114. Setback line restrictions.

* * *

(b) *In general.*

* * *

(2) A governmental entity may not initiate an action or proceeding arising out of a failure of a building or structure to comply with a setback line restriction more than 3 years after the date on which the violation first occurred if the building or structure was constructed or reconstructed:

(i) In compliance with an otherwise valid building permit, except that the building permit wrongfully permitted the building or structure to violate a setback line restriction; or

(ii) Under a valid building permit, and the building or structure failed to comply with a setback line restriction accurately reflected in the permit.

(3) For purposes of paragraph (2) (i) of this subsection and notwithstanding any other provision of State or local law to the contrary, a building permit that was otherwise validly issued, except that the permit wrongfully permitted the building or structure to violate a setback line restriction, shall be considered a valid building permit.

(4) For purposes of paragraph (2) of this subsection, the date on which the violation first occurred shall be deemed to be the date on which the final building inspection was approved.

* * *

Excerpts from Montgomery County Code (1994), as amended

Chapter 2. Administration.

§ 2-42B(a). Functions; Advisory Committee.

(a) Functions. The Department of Permitting Services is responsible for:

(1) reviewing building plans and specifications, building permits, occupancy permits, and licensing facilities for compliance with fire prevention law. In exercising these functions, the Director must consult with the Director of Fire and Rescue Services in all matters involving the interpretation, application, or revision of fire prevention laws and codes.

(2) code enforcement, inspection, and licenses (except where those functions are assigned by law to another department or agency), including:

(A) administering, interpreting, and enforcing the zoning law and other land use laws and regulations;

(B) administering, interpreting, and enforcing construction codes, and laws and regulations governing sediment control, stormwater management, floodplain management, special protection areas, and pond and excavation safety;

(C) issuing building, electrical stormwater discharge, and on-site water supply and sewage disposal permits;

(D) administering and enforcing agricultural preservation and historic resources laws and regulations.

* * *

§ 2-112. Jurisdiction.

(a) The County Board of Appeals must exercise all functions of a Board of Zoning Appeals. Any reference to a Board of Zoning Appeals for the County in state or County law means the County Board of Appeals.

(b) The Board must hear and decide each application for a special exception, unless Chapter 59 directs otherwise.

(c) The Board has the following appellate jurisdiction.

The board must hear and decide each appeal taken under:

Those appeals involve:

* * *

Section 8-23 County building code

* * *

§ 2-114. Appeals from decisions.

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 the county which shall have power to affirm the decision of the board, or if such decision is not in accordance with law, to modify or reverse such decision, with or without remanding the case for rehearing as justice may require. Whenever any such appeal is taken a copy thereof shall be served on the board by the clerk of the court and the board shall promptly give notice of the appeal to all parties to the proceeding before it and shall, within the time limit prescribed by the Maryland Rules of Procedure, file with the court the originals or certified copies of all papers and evidence presented to the board in the proceeding before it, together with a copy of its opinion which shall include a statement of the facts found and the grounds for its decision. Any party to the proceeding in the circuit court aggrieved by the decision of the court may appeal from such decision to the court of appeals within thirty (30) days from the date thereof. The review proceedings provided by this section shall be exclusive.

Chapter 2A. Administrative Procedures Act.

§ 2A-2. Applicability.

This Chapter governs the following administrative appeals and proceedings and applies whether a hearing is conducted by a hearing examiner or another designated official.

(a) Complaints and actions involving discriminatory acts or practices prohibited under Article I of Chapter 27, as amended, for which hearings are provided or required by that chapter before the Montgomery County Commission on Human Relations or specified panels of said commission.

(b) Complaints and actions arising under Chapter 29, for which hearings are held by the Commission on Landlord-Tenant Affairs.

(c) Appeals, grievances and complaints filed pursuant to Chapter 33, as amended, for which hearings are provided or required by that Chapter before the Montgomery County Merit System Protection Board.

(d) 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.

(e) Complaints and actions filed with or by the Department of Housing and Community Affairs under Section 11-4 when a hearing is required or provided before a cease and desist order is issued.

(f) Appeals and complaints filed under Chapter 5, when a hearing is required or allowed by that Chapter before the Animal Matters Hearing Board.

(g) Such other hearings as hereinafter provided for by law or executive regulations which are specifically designated as being governed hereby. In this regard, the County Executive is hereby authorized to add or delete additional quasi-judicial authorities from time to time by executive regulation adopted under method (2) of section 2A-15 of this Code.

* * *

§ 2A-8. Hearings.

* * *

(e) Evidence. The hearing authority may admit and give appropriate weight to evidence which possesses probative value commonly accepted by reasonable and prudent persons in the conduct of their affairs, including hearsay evidence which appears to be reliable in nature. It shall give effect to the rules of privilege recognized by law. It may exclude incompetent, unreliable, irrelevant or unduly repetitious evidence, or produce evidence at its own request.

The hearing authority may take official notice of commonly cognizable facts, facts within its particular realm of administrative expertise and documents or matters of public record. Parties shall be notified of matter and material so noticed while the record in the case is open and shall be afforded an opportunity to contest the facts so noticed.

* * *

§ 2A-11. Judicial review.

Any party aggrieved by a final decision in a case governed by this article, whether such decision is affirmative or negative in form, may appeal said decision to the circuit court for Montgomery County, Maryland, in accord with the provisions of the Maryland Rules of Procedure governing administrative appeals. Said court shall have the power to affirm, reverse or modify the decision or remand the case for further proceedings as justice may require. The filing of such appeal shall not stay the order of the hearing authority. Any party to the proceeding in the circuit court may appeal from such decision to the appellate courts of Maryland pursuant to applicable provisions of the Maryland Rules of Procedure.

Chapter 8. Buildings.

§ 8-11. Generally.

The Director enforces and administers this Chapter.

§ 8-23. Board of appeals.

(a) Any person aggrieved by the issuance, denial, renewal, or revocation of a permit or any other decision or order of the Department under this Chapter may 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.

(b) After notice and hearing, the Board may affirm, modify, or reverse the order or decision of the Department.

(c) Any party may appeal a decision of the Board to the Circuit Court under Section 2-114.

§ 8-24. Application for permit.

(a) *When required*. It shall be unlawful to construct, enlarge, alter, remove or demolish a building or change the occupancy of a building from one use group to another requiring greater strength, exitway or sanitary provisions; or to change to a prohibited use; or to install or alter any equipment for which provision is made or the installation of which is regulated by this chapter, without first filing an application with the department in writing and obtaining the required permit therefor; except, that ordinary repairs as defined in section 8-3 which do not involve any violation of this chapter shall be exempt from this provision.

(b) *Form*. Application for a permit shall be submitted on forms prescribed by the director and shall be accompanied by the required fee as prescribed by this chapter.

(c) *Qualified applicants*. Application for a permit shall be made by the owner or lessee of the building or structure, or agent of either or by the licensed engineer or architect employed in connection with the proposed work. If the application is made by a person other than the owner in fee, it shall be accompanied by a duly verified affidavit of the owner or the qualified person making the application that the proposed work is authorized by the owner in fee and that the applicant is authorized to make such application. The full names and addresses of the owner, lessee, applicant and of the responsible officer, if the owner or lessee is a corporate body, shall be stated in the application.

(d) *Description of work*. The application shall contain a general description of the proposed work, its location, the use and occupancy of all parts of the building or structure and of all portions of the site or lot not covered by the building and such additional information as may be required by the director.

(e) *Plans and specifications*. The application for the permit shall be accompanied by not less than two (2) copies of specifications and of plans drawn to scale, with sufficient clarity and detailed dimensions to show the nature and character of the work to be performed. When quality of materials is essential for conformity to this chapter, specific information shall be given to establish such quality; and in no case shall this chapter be cited or the term "legal" or its equivalent be used as a substitute for specific information. The director may waive the requirement for filing plans when the work involved is of a minor nature.

(f) *Plot diagram*. There shall also be filed in duplicate with each application for a building or occupancy permit, a plot plan drawn to scale showing:

(1) The lot upon which the proposed building is to be erected, lot dimensions, lot and block numbers and subdivision name, if any;

(2) Name and width of abutting streets;

(3) Location, dimensions and use of existing buildings and other structures on the same lot;

(4) The location, dimensions and proposed use of buildings and other structures for which a permit is requested;

(5) Front and rear yard widths; and

(6) North point and scale of plan.

(g) *Engineering details*. The director may require adequate details of structural, mechanical and electrical work including computations, stress diagrams and other essential technical data to be filed. All engineering plans and computations shall bear the signature of the engineer or architect responsible for the design.

(h) *Amendments to application*. Subject to the limitations of subsection (i) of this section, amendments to a plan, application or other records accompanying the same may be filed at any time before completion of the work for which the permit is sought or issued and such amendments shall be deemed part of the original application and shall be filed therewith.

(i) *Time limitation of application*. An application for a permit for any proposed work shall be deemed to have been abandoned six (6) months after date of filing, unless such application has been diligently prosecuted or a permit shall have been issued; except, that for reasonable cause, the director may grant one (1) or more extensions of time for additional periods not exceeding ninety (90) days each.

§ 8-25. Permits.

(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.

(b) Time limit.

(1) A building permit is invalid if:

(A) an approved inspection, as required by this Chapter, is not recorded in the Department's inspection history file within 12 months after the permit is issued and a second approved inspection is not recorded in the Department's inspection history file within 14 months after the permit is issued; or

(B) the authorized work is suspended or abandoned for a period of 6 months.

(2) The Director must extend a permit for 6 months if the permit holder, before the permit expires, files a written request for an extension and pays an extension fee equivalent to the minimum fee then applicable to the original permit. Except as provided in paragraph (3), the Director must not grant more than one extension per permit under this subsection.

(3) For any building located in an enterprise zone, the Director may extend a permit for additional 6-month periods if the permit holder:

(A) shows good cause for each extension;

(B) requests an extension in writing before the permit expires; and

(C) pays the fee specified in paragraph (2).

(c) Reserved.

(d) Signature to permit. The director or his authorized representative shall attach his signature to each permit issued.

(e) Approved plans. The director shall stamp or endorse in writing both sets of corrected plans "approved" and one set of such approved plans shall be retained by him and the other set shall be kept at the building site, open to inspection of the director or his authorized representative at all reasonable times.

(f) Approval in part. The director may issue a permit for the construction of foundations or any other part of a building or structure before the entire plans and specifications for the whole building have been submitted; provided, that adequate information and detailed statements have been filed complying with all the pertinent requirements of this chapter. The holder of such permit for the foundations or other part of a building or structure shall proceed at his own risk with the building operation and without assurance that a permit for the entire structure will be granted.

(g) Posting of permit and site plans. The building permit or a true copy thereof and a copy of the building or other plans covered by the permit shall be kept on the site of operations open to inspection by the department, fire or police officials, in the course of their duties, during the entire time the work is in progress and until its completion.

(h) Notice of start and other inspections. At least twenty-four (24) hours' notice of start of work under a building permit shall be given to the department unless this requirement is waived in the building permit.

At least twenty-four (24) hours' notice shall be given the department for inspection of footings, concrete reinforcement, fire stopping and similar details before they are covered up.

§ 8-26. Conditions of permit.

(a) Generally. No permit to begin work for new construction, alteration, removal, demolition, or other building operation shall be issued until the fees authorized in this section are paid to the department nor shall an amendment to a permit necessitating an additional fee because of an increase in the estimated cost of the work involved be approved until the additional fee is paid. The department must not issue building permits for a residence, except a building designed to be used as a residence for the person's own or immediate family use, under the provisions of section 26A-12 of chapter 26A, to any person except a licensed building contractor or authorized agents of the licensed building contractor.

(b) Compliance with code. The permit shall be a license to proceed with the work and shall not be construed as authority to violate, cancel or set aside any of the provisions of

this chapter except as specifically stipulated by legally granted waivers or modifications as described in the application. The issuance of a permit shall not prevent the department from thereafter requiring a correction of errors in plans or in construction or of violations of this chapter and all other applicable laws or ordinances specifically referring thereto. Certification by a certified engineer that the plans and specifications are in compliance with this chapter shall be accepted by the director as prima facie evidence that all the requirements of this chapter have been met unless he discovers otherwise.

(c) Compliance with permit. All work shall conform to the approved application and plans for which the permit has been issued and any approved amendments thereto.

(d) Compliance with plot plan. All new work shall be located strictly in accordance with the approved plot plan.

(e) Change in plot plan. No lot or plot shall be changed, increased or diminished in area from that shown on the official plot plan, unless a revised diagram showing such changes accompanied by the necessary affidavit of owner or applicant shall have been filed and approved; except, that such revised plot plan will not be required if the change is caused by reason of an official street opening, street widening or other public improvement.

(f) Compliance with plumbing and gas fitting regulations. Permits for the erection, enlargement or alteration of buildings will not be issued until evidence has been presented that the plans of the proposed building comply with all applicable regulations relating to water supply, sewerage, drainage, plumbing and gas fitting.

(g) Compliance with zoning regulations. The building or structure must comply with all applicable zoning regulations, including all conditions and development standards attached to a site plan approved under Chapter 59. The issuance of a permit by the Department for the building or structure does not affect an otherwise applicable zoning regulation.

(h) Compliance with location certificate. Before any first floor construction of a building or structure is placed upon the foundation walls thereof, the owner of such building or structure shall provide the department with two (2) copies of a location plat, certified by a land surveyor entitled by law to practice property line surveying in the state; except, that a professional engineer entitled by law to practice in this state may provide such certification only where property lines and corners are already existing and determined on the ground. This plat shall be drawn accurately to an appropriate scale and shall show the actual location of the building or structure walls with respect to property lines and existing buildings or structures on the same lot, parcel or tract.

(i) Compliance with excavation, grading and sediment control regulations.

(1) Unless the construction is exempted by Chapter 19, an applicant for a building permit must obtain a sediment control permit before the building permit is issued.

(2) If a sediment control permit is suspended or revoked, the building permit for construction within the area subject to the sediment control permit may be suspended or revoked.

(3) All work shall conform to plans approved and/or permits issued in accordance with Chapter 19 of this Code.

(j) Compliance with performance bond for construction of streets before issuance of permit. As used in this subsection, the phrase "such streets" means streets abutting the building site plus those extensions of streets necessary to meet the minimum requirements of Chapter 49.

(1) No permit shall be issued for the erection of any building or structure unless the applicant shall first deliver to the County a performance bond for the construction of streets in all rights-of-way abutting the property upon which such building or structure is to be erected plus those extensions of streets necessary to meet the minimum requirements of Chapter 49 of this Code; provided, that no performance bond for the construction of streets shall be required to the extent that:

a. Such streets are paved with a hard surface and have been accepted for maintenance or are being maintained by the County; or

b. Construction of such streets has been authorized by the County Council on a front foot assessment basis.

(2) The performance bond to be delivered shall be that bond required by Section 49- 40 of this Code, and such bond shall be in an amount to cover the entire cost of construction of such streets.

(3) If the applicant owns, or is obligated by contract to develop, all or substantially all of the property abutting the streets, a bond in an amount to cover the cost of grading of the streets is sufficient to obtain a building permit. When the applicant does not own, and is not obligated by contract to develop, all or substantially all of the property abutting the streets, the applicant may demand that the Director of the Department of Public Works and Transportation present to the County Council the applicant's proposal to construct the streets on a front-foot-assessment basis. If the County Council refuses to authorize the construction of the streets on a front-foot-assessment basis, the Department must not require the applicant to post a performance bond.

(4) Whenever the applicant must post a performance bond to cover the entire cost of construction, the applicant simultaneously must apply to the Department of Permitting Services for a permit to construct the streets. If the bond covers only grading, the applicant simultaneously must apply for a permit to grade the streets.

(5) If the construction or grading guaranteed by such bond is not begun and completed within a period of one (1) year after the delivery of such bond, the County may proceed to cause such work to be done, in accordance with the provisions of Chapter 49 of this Code and hold the principal or surety on such bond or both liable for the cost thereof.

(k) Location of underground utilities. On all work calling for excavation exceeding twelve (12) inches in depth, the applicant shall provide evidence of the location of all utility lines within the area of the proposed excavation.

(l) Compliance with stop work orders. The issuance of a permit shall be expressly conditioned upon the applicant's prompt compliance with all stop work orders issued by the Director.

Chapter 50. Subdivision of Land.

§ 50-1. Definitions.

For the purposes of this chapter, the following words and phrases shall have the meanings respectively ascribed to them by this section. All terms used in this chapter which are defined in Chapter 59 or the road construction code shall have the same meaning as the definition therein, unless otherwise defined herein.

* * *

Resubdivision: A change in any lot line of a recorded lot or parcel of land. Resubdivision includes the assembly of recorded lots or parts of lots. A resubdivision is a subdivision.

* * *

Subdivision: The division or assemblage of a lot, tract or parcel of land into one (1) or more lots, plots, sites, tracts, parcels or other divisions for the purpose, whether immediate or future, of sale or building development and, when appropriate to the context, relating to the process of subdividing or to the land or area subdivided; provided, that the definition of subdivision shall not include a bona fide division or partition of exclusively agricultural land not for development purposes. A resubdivision is a subdivision.

§ 50-4. Administration of chapter.

This chapter shall be administered by the county planning board.

§ 50-8. Same-Filing and approval of plats.

Whenever any subdivision or resubdivision of land is proposed to be made within the district, and before any contract for the sale of or any offer to sell such subdivision is made, or before any development or construction of any building takes place within a subdivision or any part thereof, the subdivider thereof or his agent shall file, in accordance with procedure prescribed in this chapter, a plat of the proposed subdivision with the board for its approval and the approved record plat shall be recorded in the land records of the county, except as provided in section 50-9.

Chapter 59. Zoning.

§ 59-A-2.1. Definitions.

* * *

Story: That portion of a building included between the surface of any floor and the surface of the floor next above it or, if there be no floor above it, the space between such floor and

the ceiling next above. A basement is counted as a story. A mezzanine floor shall be counted as a story if it covers more than one-third of the area of the floor next below it or if the vertical distance between the floor next below it and the floor next above it is 20 feet or more.

* * *

§ 59-C-1.62. Development standards.

§ 59-C-1.625. Lot area and width.

§ 107-4. General regulations. (1955)

§ 104-4. General regulations. (1960) [footnote omitted]