

**BOARD OF APPEALS  
for  
MONTGOMERY COUNTY**

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[www.montgomerycountymd.gov/content/council/boa/index.asp](http://www.montgomerycountymd.gov/content/council/boa/index.asp)

**Case No. A-6436**

**APPEAL OF LAWRENCE H. MUSSER**

OPINION OF THE BOARD

(Hearing held June 25, 2014)  
(Effective Date of Opinion: July 15, 2014)

Case No. A-6436 is an administrative appeal filed April 28, 2014, by Mr. Lawrence H. Musser, Sr. (the Appellant). Mr. Musser charges error on the part of the County's Department of Permitting Services ("DPS") in its denial, dated March 13, 2014, of the Appellant's application for non-conforming use certification for a Landscaping/Paving business located at 23506-23500 Frederick Road in Clarksburg, MD 20871 (the "Property"), in the R-200 zone.

Pursuant to Section 59-A-4.4 of the Montgomery County Zoning Ordinance, codified as Chapter 59 of the Montgomery County Code (the "Zoning Ordinance"), the Board scheduled a public hearing on the appeal, with oral argument on preliminary motions, including the County's Motion and Memorandum of Points and Authorities in Support of Dismissal of Petitioner's Appeal, Appellant's Opposition to the County's Motion for Dismissal of Petitioner's Appeal, and the County's Reply to Petitioner's Opposition to Motion to Dismiss Petitioner's Appeal, to be held June 25, 2014. Pursuant to its authority in Section 2A-8 of the Montgomery County Code, the Board heard oral argument regarding the pending motions on June 25. Associate County Attorney Charles L. Frederick represented the County. Mr. John P. Roth, Esquire, appeared on behalf of the Appellant.

Decision of the Board:      Motion to Dismiss **granted**; administrative appeal dismissed.

**RECITATION OF FACTS**

**The Board finds, based on undisputed evidence in the record, that:**

1. The Property, located at 23506-23500 Frederick Road, Clarksburg, Maryland, is identified as Parcels P921 and P975, and is in the R-200 zone. See Exhibit 1. The combined acreage of these parcels is less than two acres. See Exhibit 3.

2. In a letter dated March 13, 2014, DPS informed the Appellant that his application for a non-conforming use (Landscape/Paving) at 23500 and 23506 Frederick Road in Clarksburg, Maryland, was denied. The letter explains that the landscape business “was not in use at this property or permitted when the zoned [sic] changed.” It states that in the R-200 zone, a landscape contractor use would require a special exception and a minimum of 2 acres. The letter further states that the Appellant had 30 days in which to appeal this decision to the Board of Appeals, and provided the Board’s telephone number. Counsel for the Appellant is listed as a cc on the letter.<sup>1</sup> See Exhibit 3.

3. The appeal form, which was signed by the Appellant and his attorney, and which contains an affirmation that the information contained in or filed with the appeal is true and correct, indicates that the DPS letter was mailed on March 18, 2014,<sup>2</sup> and received on March 21, 2014.<sup>3</sup> See Exhibit 1.

4. On April 28, 2014, the Appellant filed an appeal of the DPS letter denying his non-conforming use application with the Board of Appeals. See Exhibit 1.

5. On May 15, 2014, counsel for the County filed a Motion and Memorandum of Points and Authorities in Support of Dismissal of Petitioner’s Appeal, asserting that this appeal must be dismissed because it was not timely filed, and thus the Board lacks jurisdiction to hear it.

6. On June 12, 2014, counsel for the Appellant filed Petitioner’s Opposition to the County’s Motion for Dismissal, contending that the County’s request for dismissal is barred by the doctrine of equitable estoppel. Counsel asserted that the Appellant was confused by the DPS letter decision, which he felt was ambiguous, and was further confused about the reasons for the denial of his nonconforming use application after meeting with DPS Zoning and Site Plan Enforcement Inspector Andy Jakab to discuss the denial letter. Counsel elaborated on this at oral argument, indicating that the Appellant was confused by the mention in the DPS letter of a special exception, since the Appellant had not requested a special exception.<sup>4</sup> He noted that the DPS letter states that

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<sup>1</sup> The Appellant’s May 2, 2104, letter to the Board concerning this case states that his attorney did not receive a copy of DPS’s March 13, 2014, letter from the County, but rather that he (the Appellant) had forwarded his attorney a copy of the letter once he received it. See Exhibit 5(a).

<sup>2</sup> The postage and postal markings on the envelope in which DPS’s March 13, 2014, letter was mailed suggest that the letter may actually have been mailed on March 19, 2014. See Exhibit 5(b).

<sup>3</sup> The Appellant’s May 2, 2014, letter states that the DPS letter dated March 13, 2014, was received on March 24, 2014. See Exhibit 5(a).

<sup>4</sup> A review of the March 13, 2014, letter reveals that in addition to indicating that the landscape business was not in use at this property or permitted when the zone was changed, and that the nonconforming use application was denied, the letter also indicated that a landscape contractor in the R-200 zone requires a

the Appellant had 30 days to appeal its decision to the Board of Appeals but did not indicate when the 30 days started. Counsel argued that a combination of information which was communicated by the County and information which was not communicated by the County serve to equitably estop the County from seeking dismissal of this appeal on timeliness grounds.

7. On June 24, 2014, counsel for the County filed a Reply to Petitioner's Opposition to Motion to Dismiss Petitioner's Appeal, asserting that challenges to subject matter jurisdiction can be raised at any time, that if the Board lacks jurisdiction, any decision it enters in such a matter would be a nullity, and that the doctrine of equitable estoppel cannot be used to confer jurisdiction where none exists. The County further asserted that even if one were to accept the Appellant's argument that the doctrine of equitable estoppel could be used to bar the County's motion to dismiss, equitable estoppel should not be applied here because the Appellant had all the information he needed to file an appeal on April 17, prior to the expiration of the deadline for appeal, and yet waited 11 days, until April 28, to file his appeal.

### **CONCLUSIONS OF LAW**

1. Section 2-112 of the Montgomery County Code provides the Board of Appeals with appellate jurisdiction over appeals taken under specified sections and chapters of the Montgomery County Code, as well as authority to hear and decide "any other appeal authorized by law."

2. Section 59-A-4.3(a) of the Zoning Ordinance provides that "[a]ppeals to the Board may be made by any person, Board, association, corporation or official allegedly aggrieved by the grant or refusal of a building or use and occupancy permit or by any other administrative decision based or claimed to be based, in whole or in part, upon this chapter, including the zoning map."

3. Section 59-G-4.17 of the Zoning Ordinance, "Nonconforming use certification," provides that:

The owner of property who wishes to establish that the use of the property is nonconforming, under the provision of this code, must submit an application in a form prescribed by the Director. A nonconforming use certification must be issued by the Director if the Director determines that the use of the property is a nonconforming use as defined herein.

4. Section 59-G-2.1 of the Zoning Ordinance defines "Nonconforming use" as follows:

Nonconforming use: 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

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special exception and a property that is at least two (2) acres in size. See Exhibit 3.

which it is located because of the adoption or amendment of the zoning ordinance or the zoning map.

5. The Board of Appeals' Rules of Procedure provide that administrative appeals must be filed within 30 days after the decision was mailed:

2.0. Applications for administrative appeals.

Unless the applicable law specifies a shorter time, an appeal from an administrative decision must be filed within 30 days after the day the decision was mailed. The required forms must be obtained at the office of the Board of Appeals.

See Appendix J, Montgomery County Code.

6. Board Rule 3.2.1 provides for motions to dismiss:

3.2 Motions to dismiss.

3.2.1 Motion to dismiss for lack of jurisdiction. A party may at any time move to dismiss any issue in a case on the grounds that the Board lacks jurisdiction.

See Appendix J, Montgomery County Code.

7. 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.

8. Under Section 2A-8 of the Montgomery County Code, the Board has the authority to rule upon motions and to regulate the course of the hearing. Pursuant to that section, it is customary for the Board to dispose of outstanding preliminary motions at the outset of the hearing or, as was the case here, to bifurcate the proceedings and set a separate hearing date for preliminary motions. In the instant matter, the County filed a Motion and Memorandum of Points and Authorities in Support of Dismissal of Petitioner's Appeal, the Appellant filed an Opposition to the County's Motion for Dismissal of Petitioner's Appeal, and the County filed a Reply to Petitioner's Opposition. Board Rule 3.2 specifically confers on the Board the ability to grant Motions to Dismiss for lack of jurisdiction (Rule 3.2.1).

9. The Board finds, based on the evidence of record, that as a factual matter, this appeal was filed more than 30 days after the mailing of the DPS letter denying the Appellant's nonconforming use application. The appeal form submitted by the Appellant and his attorney states on its face that the DPS letter decision was mailed on March 18,

2014. See Exhibit 1. The May 2, 2014, letter submitted by the Appellant echoes this date. See Exhibit 5(a). That said, the Board notes that the date-stamped postal markings on the envelope in the record at Exhibit 5(b) seem to indicate that the DPS letter may have been mailed on March 19, 2014. See Exhibit 5(b). In order to meet the 30 day filing deadline for administrative appeals that is set forth in Board Rule 2.0, the Board finds that this appeal would have had to have been filed by April 17 or 18, 2014, depending on whether the DPS letter decision was mailed March 18 or 19.<sup>5</sup> Either way, the Board finds that this appeal, which was filed on April 28, 2014, is not timely. See Exhibit 1.

10. Maryland case law makes clear, in *National Institutes of Health Federal Credit Union v. Hawk*, 47 Md. App. 189, 422 A.2d 55 (1980), *cert. denied*, 289 Md. 738 (1981), and *United Parcel Service, Inc. v. People's Counsel*, 336 Md. 569; 650 A.2d 226 (1994), that statutes that set forth time limits for the filing of appeals are jurisdictional, and that failure to comply with those time limits is fatal and deprives the Board of jurisdiction over the appeal. See *Hawk*, 47 Md. App. at 196-7, 422 A.2d at 59. Thus as a factual and legal matter, the Board concludes that it has no jurisdiction to hear this appeal because it was filed more than 30 days after DPS's letter decision to deny the Appellant's nonconforming use application was mailed, and that this appeal must be dismissed.

11. The County's Motion and Memorandum of Points and Authorities in Support of Dismissal of Petitioner's Appeal in Case A-6436 is granted, and the appeal is consequently **DISMISSED**. Having determined that it lacks jurisdiction to consider this appeal, the Board did not consider the remaining motions.

On a motion by Vice Chair David K. Perdue, seconded by Chair Catherine G. Titus, with Member Carolyn J. Shawaker in agreement, and with Member John H. Pentecost necessarily recused and Member Stanley B. Boyd necessarily absent, the Board voted 3 to 0 to grant the Motion and Memorandum of Points and Authorities in Support of Dismissal of Petitioner's Appeal and thus to dismiss the appeal, and adopted 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.

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<sup>5</sup> Rule 14 of the Board's Rules of Procedure provides instructions for computing time, as follows:

14.0. Computing time.

Time must be computed as follows:

- (1) Do not count the day of the event that begins a time period (e.g. the day a decision is entered into the Opinion Book).
- (2) Include the last day of a time period unless it falls on a Saturday, Sunday, Federal, State or County holiday. In that case the time period ends on the next business day.
- (3) If the required time period is more than 7 days count Saturdays, Sundays and holidays as days. If the time period is 7 days or less do not count Saturdays, Sundays or holidays.

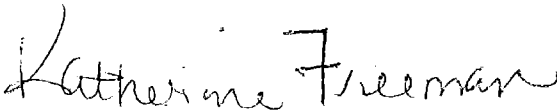
See Appendix J of the Montgomery County Code.



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Catherine G. Titus  
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book  
of the Board of Appeals for  
Montgomery County, Maryland  
this 15<sup>th</sup> day of July, 2014.



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Katherine Freeman  
Executive Director

**NOTE:**

Any request for rehearing or reconsideration must be filed within ten (10) days after the date the Opinion is mailed and entered in the Opinion Book (see Section 2A-10(f) of the County Code).

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County in accordance with the Maryland Rules of Procedure (see Section 2-114 of the County Code).