

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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<http://www.montgomerycountymd.gov/boa/>

Case No. A-6476

APPEAL OF MARC A. MARZULLO

OPINION OF THE BOARD

(Hearing held March 16, 2016.
Effective Date of Opinion: April 20, 2016.)

Case No. A-6476 is an administrative appeal filed September 21, 2015 by Marc A. Marzullo (the "Appellant"). The Appellant charges error on the part of Montgomery County's Department of Permitting Services ("DPS") in the June 26, 2015 issuance of Building Permit No. 716373, revised on September 23, 2015, to add a garage located at 8600 Goshen View Drive, Gaithersburg (the "Property"). The subject Property is owned by Michael Harbaugh, who was permitted to intervene in this matter (the "Intervenor"). The Appellant lives at 21604 Stableview Drive, Gaithersburg.

The Appellant asserts that DPS incorrectly issued the subject Building Permit and asserts the permit for the garage addition "should have been considered an accessory structure." Specifically, the Appellant asserts that the construction of the Intervenor's garage addition is not incidental or subordinate to the house and that, pursuant to Chapter 59 of the County Code (the "Zoning Ordinance") this garage addition should be not classified as a building addition but should instead be classified as an attached accessory structure for which there is no permitted zoning.

Pursuant to section 59-7.6.1.C of the Zoning Ordinance, the Board held a public hearing on March 16, 2016. The Appellant was represented by Brian W. Thompson of Jackson & Campbell, P.C. The Intervenor was represented by Alan H. Grant, Esquire, of Grant, Riffkin & Strauss, P.C. Associate County Attorney Charles L. Frederick 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 8600 Goshen View Drive in Gaithersburg, is an RE-2 zoned parcel identified as Lot 6, Block E of the Goshen Hunt Hills Subdivision.

2. On June 12, 2015, the Intervenor applied to DPS for a residential building permit to add an attached garage on the subject Property. See Exhibit 7, circle 4-16. On June 26, 2016, Building Permit No. 716373 was issued for the requested addition of an attached garage. See Exhibit 3(a).

3. On September 23, 2015, the Intervenor applied to DPS for a revision to Building Permit No. 716373. See Exhibit 7, circle 16-17. A revision to Building Permit was issued on September 23, 2015. See Exhibit 7, circle 21.

4. On September 21, 2015, Appellant timely filed an appeal, charging error by DPS in its decision to issue Building Permit No. 716373. See Exhibit 1.

5. Mr. Gregory McClain testified that he has been employed with DPS for 25 years and that he is currently a Permitting Service Specialist. He testified that his job functions include ensuring construction and building permits are in compliance with the Zoning Ordinance. Mr. McClain testified that he recalls reviewing the plans for the garage addition at the Property. See Exhibit 7, circle 4-16. He testified that the Property is zoned RE-2, single-family residential.

Mr. McClain testified that the original building permit application for the Property was for an attached garage. See Exhibit 7, circle 4-5. He testified that the Intervenor then submitted an application to revise the original building permit application. See Exhibit 7, circle 17-18. Mr. McClain testified that the revised building permit application was submitted for an interior alteration to add a bathroom to the original plans. See Exhibit 7, circle 19-20.

Mr. McClain testified that the structural plans for the attached garage at the Property were reviewed by the Residential Construction Division of DPS. See Exhibit 7, circle 6-16. He testified that the stamps on the plans verify that the building plan reviewers looked at the plans and verified that the plans met the required codes. See Exhibit 7, circle 6-16.

Mr. McClain testified that he conducted a zoning review of the application for an attached garage to a single family residence at the Property. See Exhibit 7, circle 4-20. He testified that following his review he determined that the proposed attached garage met the development standards for an RE-2 zone; that is, the application met the minimum setback requirements, the maximum lot coverage requirements, and the maximum height requirements. He testified that the Well and Septic Division of DPS also reviewed the plans and signed off on them. See Exhibit 7, circle 6.

Mr. McClain testified that the Intervenor's application met all of the zoning requirements and received all of the other necessary departmental sign-offs for DPS to issue Building Permit No. 716373. He testified that the structure is considered an attached garage because it shares a common wall with the existing structure. Mr.

McClain testified that, pursuant to section 2-42B(a)(2)(A) of the County Code, DPS is responsible for interpreting the Zoning Ordinance. He testified that in this case DPS determined that the garage was not an accessory structure because, by definition, an accessory structure "is not attached by any part of a common wall or common roof to the principal building." Section 59-3.7.4.A.1 of the Zoning Ordinance. Mr. McClain testified that Intervenor's garage is attached to the principal building and therefore did not satisfy the definition of an accessory structure.

On cross-examination by Mr. Thompson, Mr. McClain testified that he first learned about Intervenor's building permit application when it was filed. He testified that he did not review a plan wherein Intervenor's garage was not attached to the principal building and has no knowledge of such an application.

Mr. McClain read the definition of an accessory use, defined in section 59-3.7.4.B of the Zoning Ordinance: "[a]ccessory use means a use that is incidental and subordinate to the principal use of a lot or site or the principal building, and located on the same lot or site as the principal use or building. Any permitted or limited use in a zone may be an accessory use to any other use in the same zone; any applicable use standards must be satisfied." Mr. McClain testified that the parking of vehicles is an accessory use.

Mr. McClain testified that in this case, the principal use is the residence and the garage is subordinate to the residential use of the Property. He testified that the garage was about 5192 square feet and that the house was about 3200 square feet, and testified that the garage was much larger than the house. Mr. McClain testified that an accessory use is a subordinate use on the property, something incidental to the primary use.

Mr. Thompson introduced Exhibit 15, a County Planning Department document based on a September 2012 staff draft. He noted that the exhibit states "subordinate means that the footprint of the accessory building is smaller than the footprint of the main building." Mr. McClain testified that he would still consider the garage an accessory use because there is no habitable space in the garage.

Mr. McClain testified that the Property is about 75,000 square feet. He testified that the total build-on on the Property could not exceed 25% of that total square footage, which would amount to between 18,000 square feet to 19,000 square feet. Mr. McClain testified that the Intervenor could build an addition as large as 15,000 or 16,000 square feet.

6. Mr. Frederick informed the Board that on December 1, 2015, the County adopted Zoning Text Amendment ("ZTA") No. 15-09, which became effective December 21, 2015. ZTA No. 15-09 eliminated what had been section 59-7.4.1.C.3 of the Zoning Ordinance, which had required the Planning Director to review any building permit where construction would increase the gross floor area of any residential structure by more than 50% of the existing gross floor area. Mr. Frederick submitted a Hearing Memorandum of Law outlining the County's position that Building Permit No. 716373 did not require approval from the Planning Director. See Exhibit 14.

Mr. Thompson requested a week continuance to respond to Exhibit 14. Mr. Frederick and Mr. Grant objected to the continuance. The Board's Chair denied the request, noting that the issue of the application of section 59-7.4.1.C.3 of the Zoning Ordinance was raised at the Pre-Hearing Conference for this case on December 5, 2015. After granting Mr. Thompson a recess to review Exhibit 14, the Board reconvened and ruled that former section 59-7.4.1.C.3 of the Zoning Ordinance was not applicable to this proceeding because any changes to the law were meant to apply retroactively; therefore the law as of the date of the hearing was the law to apply.

7. Mr. Thompson called Mr. Mark Beall, who testified that he has been the Permitting Services Zoning Manager with DPS for two years. He testified that his job duties include overseeing plan reviews and providing interpretation of the Zoning Ordinance. Mr. Beall testified that he was familiar with the Property because the Appellant came into DPS in July or August of 2015 to inquire how Building Permit No. 716373 had been approved. Mr. Beall testified that he informed Appellant that Intervenor's garage addition was approved because it met all of the zoning requirements. He testified DPS considers the zoning requirements, not architectural issues.

Mr. Beall testified that when he met with Appellant in July or August of 2015, he informed Appellant of his right to appeal the issuance of Building Permit No. 716373. Mr. Beall testified that he was not familiar with the plans for the garage prior to his meeting with Appellant. He testified that he researched whether DPS had ever received a permit application for a garage that was not attached at the Property and found there was never an application for a detached garage at the Property.

Mr. Beall testified that parking vehicles is an accessory use and that the main use of the Property is the residential home. He testified that because people live in the house that is the primary use. Mr. Beall testified that size is not necessarily a variable when determining when a structure is subordinate, and that it was not a factor to consider in the approval of this building addition. Mr. Beall testified that "garage" is not a use listed in the Zoning Ordinance.

Mr. Beall testified that section 59-3.1.2 of the Zoning Ordinance governs use classifications, and that 59-3.1.2.E governs uses not specifically listed in the Zoning Ordinance. Reading that section, Mr. Beall stated "[s]ome factors DPS may consider in determining if a proposed use is similar in impact, nature, function and duration to an existing use include but are not limited to the type and size of structures." 59-3.1.2.E.2.e of the Zoning Ordinance. He testified that DPS did look to the type of structure, which was a garage and an accessory use. Mr. Beall further testified that DPS considered the size of the structure, determined that the structure met the lot coverage for the zone, and therefore found the garage met the size requirements in the Zoning Ordinance. He testified that the size of the garage compared to the size of the house is irrelevant because the garage is attached to the house.

Mr. Beall testified he has not spoken to the Intervenor about this building permit. He testified that DPS followed the correct procedures in issuing the building permit.

On cross-examination by Mr. Frederick, Mr. Beall testified that the proposed use of the property is residential, not parking. He testified that other residences in the neighborhood have permitted garages.

On cross-examination by Mr. Grant, Mr. Beall testified that garages can be larger to hold more than two, five, or 10 cars.

On re-direct by Mr. Thompson, Mr. Beall testified that the original building permit listed the permit conditions as being a "2-car garage." See Exhibit 8, circle 59. He testified that the revised building permit listed the permit conditions as "attached garage." See Exhibit 8, circle 60. He testified that the Intervenor's garage is larger than a usual garage but that he does not know how many cars Intervenor plans to put in the garage. Mr. Beall testified he did not know why the garage was originally permitted as a 2-car garage. He testified that the permit was revised to include a bathroom in the mudroom on September 23, 2015 and at that time the permit condition was changed to just be an attached garage. See Exhibit 8, circle 60.

8. Mr. Michael Harbaugh testified that he has owned the Property since 2003. He testified that he is the manager and vice-president of a storm drain company and that he has ownership interest in the company. Mr. Harbaugh testified that his company owns trucks.

Mr. Harbaugh testified that his builder, New Vision Construction, submitted the building plans to DPS. He testified that he did not meet with DPS. Mr. Harbaugh testified that he plans to use the garage for his hobbies.

The Board noted that the record contains an email from Mr. Beall informing Appellant that the garage meets zoning requirements but that if the garage is used for commercial purposes DPS will investigate the matter as an enforcement issue.

9. Mr. Marc Marzullo testified that he is a civil structure engineer. He testified that he is familiar with the Property but that he does not know the Intervenor, Mr. Harbaugh.

Mr. Marzullo testified that he met with Mr. McClain and Mr. Beall on August 21, 2015. He testified that, at that time, Mr. McClain showed him the building plans and told him what was being built. Mr. Marzullo testified that when he spoke with Mr. McClain he felt Mr. McClain's answers "were not authentic" and that he asked to speak to Mr. McClain's supervisor, Mr. Beall. He testified that when he spoke with Mr. Beall, Mr. Beall was not familiar with the project.

Mr. Marzullo testified that when he asked Mr. McClain whether the Intervenor had submitted plans for the garage as an unattached structure, Mr. McClain informed him that he (Mr. McClain) had advised the Intervenor to submit plans with an attached structure so that the structure could be larger. Mr. Marzullo testified that the garage devalues the other properties in the area because it dwarfs the home and that it is only allowed because it is an addition.

The Board noted that DPS does provide a service of assisting residents with questions on how to proceed under the Zoning Ordinance.

CONCLUSIONS OF LAW

1. Section 2-112(c) 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, including section 8-23.

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 8-23(a) of the County Code provides that “[a]ny person aggrieved by the issuance, denial, renewal, amendment, suspension, or revocation of a permit, or the issuance or revocation of a stop work order, under this Chapter may appeal to the County Board of Appeals within 30 days after the permit is issued, denied, renewed, amended, suspended, or revoked or the stop work order is issued or revoked. A person may not appeal any other order of the Department, and may not appeal an amendment of a permit if the amendment does not make a material change to the original permit. A person must not contest the validity of the original permit in an appeal of an amendment or a stop work order.”

4. Section 59-7.6.1.C.3 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*. The burden in this case is therefore upon the County to show that Building Permit No. 716373 was properly issued.

5. Section 2-42B(a)(2)(A) of the County Code makes DPS responsible for “administering, interpreting, and enforcing the zoning law and other land use laws and regulations.”

6. Section 8-26 of the County Code, “Conditions of Permit,” requires compliance with the Zoning Ordinance:

Sec. 8-26. Conditions of permit.

* * * * *

(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.

* * * * *

7. Section 8-25 of the County Code, "Permits," reads as follows:

Sec. 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. Section 59-3.7.4 of the Zoning Ordinance, "Accessory Miscellaneous Uses," reads as follows:

Sec. 59-3.7.4. Accessory Miscellaneous Uses

A. Accessory Structure

1. Defined

Accessory Structure means a structure subordinate to and located on the same lot as a principal building, the use of which is incidental to the use of the principal building or to the use of the land. An Accessory Structure is not attached by any part of a common wall or common roof to the principal building.

2. Use Standards

Where an Accessory Structure is allowed as a limited use, it must satisfy the following standards:

a. In Agricultural and Rural Residential zones, the maximum footprint of an accessory building on a lot where the main building is a detached house is 50% of the footprint of the main building. Buildings for an agricultural use are exempt from this size restriction.

b. ~~In Residential Detached zones, the maximum footprint of an accessory building on a lot where the main building is a detached house is 50% of the footprint of the main building or 600 square feet, whichever is greater. Buildings for an agricultural use are exempt from this size restriction.~~

B. Accessory Use

Defined

Accessory Use means a use that is incidental and subordinate to the principal use of a lot or site or the principal building, and located on the same lot or site as the principal use or building. Any permitted or limited use in a zone may be an accessory use to any other use in the same zone; any applicable use standards must be satisfied.

9. Section 59-3.1.2.E of the Zoning Ordinance, "Uses Not Specifically Listed," reads as follows:

Sec. 59-3.1.2.E. Uses Not Specifically Listed

* * * * *

1. Uses listed are general. DPS must determine whether a specific use falls within the general use or is similar in impact, nature, function and duration. Uses that are not allowed as permitted, limited, or conditional are prohibited, unless the use is deemed similar in impact, nature, function, and duration.

2. Some factors DPS may consider in determining if a proposed use is similar in impact, nature, function and duration to an existing use include but are not limited to:

- a. The type of items or services sold and the nature and quantity of inventory on the premises;
- b. Any processing done on the premises, including assembly, manufacturing, and distribution;
- c. The amount and nature of any adverse impacts generated on the premises, including but not limited to noise, smoke, odor, illumination, glare, vibration, radiation, and fumes;
- d. Any hazardous materials used on the premises;
- e. The type and size of structures;
- f. The number of employees and customers in relation to business hours and employment shifts; and
- g. Parking requirements, turnover, and the potential for shared parking with other use types.

* * * * *

10. The Board finds, based on the testimony of Mr. McClain, Mr. Beall, Mr. Harbaugh, and Mr. Marzullo, and the evidence of record, that the application for Permit No. 716373 satisfied the requirements of section 8-25 of the County Code, as follows:

The applicant (Intervenor) submitted the requisite application for a building permit to DPS on June 12, 2015, as required by section 8-25(a). See Exhibit 7, circle 5-16. DPS conducted a review of the building permit application and found that the application conformed to all requirements of Chapter 8 and all other applicable laws and regulations, as required by section 8-25(a). DPS issued Building Permit No. 716373 on June 26, 2015. Exhibit 3(a)

Building Permit No. 716373 was signed by the Director of DPS, as required by section 8-25(d). Exhibit 3(a). DPS stamped approval of the building plans submitted by Intervenor with their building permit application, as required by section 8-25(e). Exhibit 7, circle 6.

Intervenor submitted a revision to his application for a building permit to DPS on September 23, 2015. See Exhibit 7, circle 17-20. The purpose of this revision was to add a bathroom to the addition. See Exhibit 7, circle 19-20. DPS approved the revision on September 23, 2015. Exhibit 8, circle 60.

11. The Board finds, based on the testimony of Mr. McClain and Mr. Beall, that the garage addition meets all of the height, lot coverage, and setback requirements for a building permit. The Board finds, based on the testimony of Mr. McClain and Mr. Beall, that the plans submitted in connection with the building permit and the revision to the building permit conformed to Chapter 8 of the Montgomery County Code and to the applicable building codes, and thus that there were no Chapter 8 or building code-related problems with the issuance of Building Permit No. 716373. The Board finds that the proposed addition is an addition to the principal residential structure and complies with all applicable zoning regulations, in accordance with section 8-26(g) of the County Code.

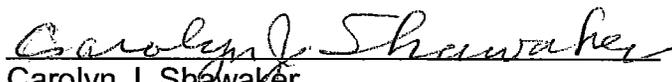
12. The Board further finds that ZTA No. 15-09 made substantive changes to the Zoning Ordinance effective December 21, 2015, including eliminating section 59-7.4.1.C.3 of the Zoning Ordinance. This section, which required building permit applications for certain additions to residential structures be approved by the Planning Director, was not considered by the Board as a requirement in this case because the section had been eliminated from the Zoning Ordinance prior to the Board's hearing. In land use and zoning cases, "in the absence of contrary legislative intent, a substantive change to the law occurring during the pendency of land use litigation and before any substantive rights vest, is to be applied to the pending litigation matter." *McHale v. DCW Dutchship Island, LLC*, 415 Md. 145, 170 (2010). Absent a legislative intent to the contrary or any vested rights, the Board finds ZTA No. 15-09 applies to this case.

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. 716373 was properly issued, and that the appeal should be denied.

The appeal in Case A-6476 is DENIED.

On a motion by Member Stanley B. Boyd, seconded by Member Edwin S. Rosado, with Chair Carolyn J. Shawaker and Vice Chair John H. Pentecost in agreement, and with Member Bruce Goldensohn necessarily absent, the Board voted 4 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.


Carolyn J. Shawaker
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 20th day of April, 2016.


Barbara Jay
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).
