BOARD OF APPEALS
for
MONTGOMERY COUNTY

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
240-777-6600

(www.montgomerycountymd.gov/mc/council/board.html)

Case No. A-6334

APPEAL OF MAUREEN MCNULTY, CAROLYN KILLEA, AND NEAL RUTLEDGE

OPINION OF THE BOARD

(Hearing held March 16, 2011)
(Effective Date of Opinion: April 28, 2011)

Case No. A-6334 is an administrative appeal filed January 4, 2011 by Maureen McNulty, Carolyn Killea, and Neal Rutledge (the "Appellants"). The Appellants charge error on the part of the County's Department of Permitting Services ("DPS") in its determination that the accessory structure in question ("Sea Container") does not violate the requirement that accessory structures be located in the rear yard and meets required setbacks. The Sea Container is located at 6 Thorne Road in Cabin John, Maryland 20818 (the "Property"), in the R-60 zone. Specifically, the Appellants assert that the Sea Container should be located in the rear yard, and should be set back 60 feet from the street.

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 to be held March 16, 2011. Pursuant to its authority in Section 2A-8 of the Montgomery County Code, the Board heard oral argument on preliminary Motion to Dismiss filed by the County, and on Opposition thereto filed by the Appellants. Assistant County Attorney Malcolm Spicer represented the County. The Appellants were represented by Michele Rosenfeld, Esquire.

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 is known as 6 Thorne Road, Cabin John, Maryland, and is an R-60 zoned parcel in the Cabin John Gardens Coop subdivision.

2. On August 11, 2010, DPS issued Building Permit No. 545156 for the construction of a shed at the subject Property. See Exhibit 5, page 4 (Building Permit).

3. On December 17, 2010, a Service Request was filed with DPS, presumably by one of the Appellants, asserting that:

> "The sea container [at 6 Thorne Road] is located in the side yard (not in the rear yard) and violates the minimum setback requirement from the street."

The December 18, 2010, Resolution of this Service Request reads as follows:

> "The sea container is in the same place as it was when the building permit for an accessory structure was granted. It is in the rear yard based on an imaginary line drawn from the rear of the house parallel to the front street. I am unable to determine the street line as this development had unclear right-of-way for the street versus some of the private property."

See Exhibit 3.

4. On January 4, 2011, the Appellants filed this appeal, challenging the correctness of DPS' December 18, 2011, determination that the Sea Container does not violate the requirement that accessory structures be located in the rear yard, and meets the setback standards. See Exhibits 1(a), (b), and (c).

MOTIONS TO DISMISS—SUMMARY OF ARGUMENTS

1. Counsel for the County argued that Building Permit No. 545156, which allowed the siting of the Sea Container in its current location, was issued on August 11, 2010, and that the Sea Container was located on the subject Property in accordance with that permit. Counsel asserted that the time to appeal the location of this structure ran from the issuance of the building permit, not from DPS' confirmation that the structure was located in accordance with that permit. As a result, Counsel argued that the January 4, 2011, appeal was untimely, and must be dismissed. In support of this, Counsel noted that Section 8-23(a) of the County Code provides that "[a]ny person aggrieved by the issuance … of a permit … under this Chapter may appeal to the County Board of Appeals within 30 days after the permit is issued…." Counsel asserted that initiating a complaint after the 30 days has run does not generate a new appealable event, otherwise there would be no end to the process. He argued that under *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 under *United Parcel Service, Inc. v. People's Counsel,* 336 Md. 569; 650 A.2d 226 (1994), statutes that set forth time limits for the filing of appeals are mandatory and jurisdictional, and failure to

comply with those time limits is fatal, and deprives the Board of jurisdiction over the appeal. In response to the assertion by Counsel for the Appellants that the complaint process set up by DPS can be distinguished from the situation in *Hawk*, where Appellants sought to maintain an appeal through a series of letters, Counsel for the County asserted that the DPS complaint process is not a substitute for the appeal process. He noted that people can write to DPS with their complaints, they can telephone their complaints in, and they can email their complaints in. He argued that the appeals process is different, and that it begins when a permit is issued, not when a complaint is filed.

With respect to the Appellants contention that this permit was not properly posted under Section 8-25A of the County Code, Counsel asserted that this is not a Section 8-25A case, stating that Section 8-25A does not apply to accessory structures, but rather to new construction on vacant land and to construction that affects the footprint or height of an existing structure. Thus, he also argued, the extension of time allowed by Section 8-25A(d) for improper posting under this Section does not apply because no posting is required in this case under this Section.

With respect to Appellants contention that the permit states on its face that it must be posted on the job site, Counsel reiterated that this permit does not require conspicuous posting under Section 8-25A, and asserted that the language on the permit refers to the Section 8-25(g) posting requirement, which does not require conspicuous posting but rather requires that the permit be kept on site and available for inspection purposes. When asked by the Board what "posting" meant in the Section 8-25(g) context, Counsel stated that the building permit form uses the term "post," but that the law itself uses the term "kept." He argued that the language on the form did not make the law, and asserted that under Section 8-25(g), the permit could be kept on a counter inside the main building. When asked by the Board about the inconsistency between the heading for Section 8-25(g), "Posting of permit and site plans," and the actual language of that section (which requires that the permit "shall be kept on the site"), Counsel responded that the heading is not part of the substantive law, but rather is a short-hand reference to what is in there.

Counsel argued that unlike the situation in *Montgomery County v. Longo*, 187 Md. App. 25, 975 A.2d 312 (2009), there is no new set of facts in this case. He argued that this accessory structure (Sea Container) was located in the same place it was when the building permit was issued, and that consequently there are no new facts in this case, and no new appealable issue.

2. Counsel for the Appellants argued that the permit says on its face that it "must be posted on job site," and suggested that to interpret the permit's "posting" requirement as discretionary leads you down a slippery slope. She argued that the plain meaning of "posting" is to put something where it can be viewed by the public, and asserted that Section 8-25A requires posting of this permit. Counsel argued that posting was a condition of this permit's approval, that it was not posted, and that the time for appeal has been tolled even if the law does not require posting of this permit because the permit requires posting on its face.

Counsel distinguished this case from the *Hawk* case cited by the County. Counsel asserted that *Hawk* held that a series of letters did not constitute an appealable decision, but that the complaint in the instant case had been initiated through the formal complaint process set up by DPS, via an entry on the DPS website, and that the DPS inspector had given a formal answer. She argued that this is a different mechanism than a series of letters, and that it forms the basis for an appeal.

Counsel argued that the instant case does fall under the precedent set by *Longo*, stating that in *Longo*, the Court determined that there can be appealable issues that arise after the issuance of a building permit if there is a change in facts or circumstances. She argued that that is the case in this appeal. She stated that the DPS inspector said that the Sea Container was in the same place that it was when the permit was issued, and that he goes on to say that he cannot locate the streetline. Thus she argues that the DPS inspector essentially says that he does not know where the Sea Container is located, and that it is unclear if it is located where the permit allowed it to be located. She asserts that there is a factual question about compliance with the permit as issued, similar to the factual uncertainty about the extent of wall removed in the *Longo* case. In response to questioning by the Board, she acknowledged that her clients are not asserting that the Sea Container was moved after the building permit was issued.

In summing up her arguments regarding jurisdiction, Counsel for the Appellants asserted that the Board does have jurisdiction over this matter because the permit was not properly posted, thereby tolling the time for appeal. When asked by the Board if the County Code allows for an appeal for non-compliance with the provisions on the permit, Counsel responded that the *Longo* case allowed for this, not the Code. She also asserted that because of the DPS inspector's uncertainty about the location of the structure, this matter was appealable under *Longo*. Finally, she argued that the posted Resolution of this complaint constituted a final determination under a formal complaint process, and was therefore appealable. In this regard, she noted that the complaint was filed with DPS on December 17, 2010, that DPS posted its Resolution of that complaint on December 18, 2010, and that her clients' appeal was timely filed in January of 2011.

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. 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 to Dismiss, and the Appellants filed an Opposition to that motion. Board Rule 3.2 specifically confers on the Board the ability to grant Motions to Dismiss for lack of jurisdiction (Rule 3.2.1).

4. Section 8-23(a) of the County Code provides that "[a]ny 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."

5. Section 8-25(g) of the County Code, which bears the heading "Posting of permit and site plans," provides that "[t]he 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."

6. Section 8-25A of the County Code provides for public notice of certain types of building permits via a posting requirement, as follows:

> Sec. 8-25A. Permits affecting certain residential properties; public notice.
>
> (a) If a permit is issued under Section 8-25 for new construction on vacant residentially or agriculturally zoned land, or construction of a building or structure that would affect the footprint or height of any existing structure located on residentially or agriculturally zoned land or that is exempt from and exceeds any applicable building height limit, the Director must promptly require the recipient to post on the lot a conspicuous sign describing the proposed construction, specifying the time limit to appeal the issuance of the permit to the Board of Appeals, and including any other information the Director requires. The sign must conform to design, content, size, and location requirements set by regulation under Section 8-13(a).
>
> (b) The regulations adopted under subsection (a) may allow a central sign to be posted, or otherwise vary the design, content, size, or location requirements, for any subdivision that consists of more than 5 new dwellings at a single site.
>
> (c) The recipient must post the required sign within 3 days after the Department releases the permit to the recipient, and must maintain the sign until 30 days after the permit was released.
>
> (d) If the recipient of a permit does not post a sign as required by this Section, the permit is automatically suspended until the recipient has posted the proper sign. If the recipient begins work under the permit without having posted the sign as required, the Director must immediately issue a stop work order. During

> the 30-day period after the sign is properly posted, any person may appeal the issuance of the permit as if the permit had been released to the recipient on the day the sign was posted.

7. The Board finds that the evidence in the record indicates as a factual matter that this appeal was filed more than 30 days after the issuance of Building Permit No. 545156, the permit having been issued on August 11, 2010, and the appeal filed on January 4, 2011. See Exhibits 1(a) and 5. The Board further finds that Section 8-23(a) of the Montgomery County Code requires that appeals be filed within 30 days after a permit is issued, and that case law in Maryland makes clear that this time limit is jurisdictional and mandatory. See *National Institutes of Health Federal Credit Union v. Hawk*, 47 Md. App. 189, 196-7, 422 A.2d 55, 59 (1980), cert. denied, 289 Md. 738 (1981).

In addition, the Board finds that under Section 8-25A of the County Code, there is no posting requirement for the issuance of a building permit for this accessory structure because it is not a permit for new construction on vacant land, nor is it a permit for construction that will affect the footprint or height of an existing structure. Thus the Board concludes that the time in which to appeal Building Permit No. 545156 could not have been extended due to improper posting pursuant to Section 8-25A(d) beyond the usual 30 days. The Board further concludes that the language of Section 8-25(g), while purporting in its heading to pertain to "posting," by its own words requires only that the permit be "kept" on site, and the Board finds that there has been no allegation that this was not done.

With respect to the question as to whether this was a *Hawk*-type case (involving continuing correspondence about a past action) or a *Longo*-type case (involving a change of facts), the Board notes that the Appellants have conceded that the Sea Container is located in the same place that it was when the building permit was issued, and that this was what the DPS inspector had noted in his Resolution. The Board finds, therefore, that there has been no change of "facts on the ground" as there was in *Longo*, but rather that the filing of this complaint with DPS, and its subsequent resolution, are in the nature of the continuing correspondence concerning an unchanged past action, as was the case in *Hawk* and *UPS*. The Board finds that the issuance of the permit was the operative event which started the time for appeal in this matter, not the issuance of the DPS inspector's resolution confirming that the location of the Sea Container was unchanged from the time of the permit issuance, and that this appeal is therefore untimely. As noted by the Court of Appeals in *United Parcel Service, Inc. v. People's Counsel,* 336 Md. 569, 650 A.2d 226 (1994), "[i]f this were not the case an inequitable, if not chaotic, condition would exist. All that an appellant would be required to do to preserve a continuing right of appeal would be to maintain a continuing stream of correspondence, dialogue, and requests … with appropriate departmental authorities even on the most minute issues of contention with the ability to pursue a myriad of appeals ad infinitum." 336 Md. at 584, *quoting National Institutes of Health Federal Credit Union v. Hawk*, 47 Md. App. 189, 422 A.2d 55, 58-59 (1980) *cert. denied* 289 Md. 738 (1981).

As a factual and legal matter, therefore, the Board concludes that it has no jurisdiction to hear this appeal because it was filed more than 30 days after the issuance of Building Permit No. 545156, and that the appeal must be dismissed.

7. The Motion to Dismiss in Case A-6334 is granted, and the appeal is consequently **DISMISSED**.

On a motion by Vice Chair David K. Perdue, seconded by Member Stanley B. Boyd, with Chair Catherine G. Titus in agreement, and Members Walter S. Booth and Carolyn J. Shawaker opposed, the Board voted 3 to 2 to grant the Motions to Dismiss 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.

_____
Catherine G. Titus, Chair
Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 28th day of April, 2011.

_____
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).