

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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Case No. A-6426

APPEAL OF RAYMOND S. AND BETH G. WITTIG

OPINION OF THE BOARD

(Hearing held April 2, 2014.
Effective Date of Opinion: May 16, 2014)

Case No. A-6426 is an administrative appeal filed December 30, 2013, by Raymond S. and Beth G. Wittig (the "Appellants"). The Appellants charge error on the part of Montgomery County's Department of Permitting Services ("DPS") in the December 3, 2013, issuance of Building Permit No. 656812 for the construction of an accessory structure (storage container) on property located at 4612 Holly Ridge Road, Rockville, Maryland 20853 (the "Property"), also known as Lot 3, Block D, Sycamore Acres subdivision, in the RE-1 zone. The subject Property is owned by Ruben Criscio, Jr., who was permitted to intervene in this matter (the "Intervenor").

The Appellants assert that DPS incorrectly issued the subject Building Permit, and that it should have been denied. Specifically, the Appellants assert deficiencies in the documentation submitted with the Building Permit application, and that with the addition of this accessory structure, the combined footprints of the accessory buildings on this Property would exceed the limitation set forth in footnote 52 to Section 59-C-1.31(g) of the Montgomery County Zoning Ordinance.

Pursuant to Section 59-A-4.4 of the Montgomery County Zoning Ordinance, codified as Chapter 59 of the Montgomery County Code (the "Zoning Ordinance"), the Board held a public hearing on April 2, 2014. The Appellants were represented by Rebecca D. Walker, Esquire, of Miles & Stockbridge. The Intervenor was represented by Douglas N. Gottron, Esquire. Assistant County Attorney Terri A. Jones represented Montgomery County.

Decision of the Board: Administrative appeal GRANTED.

FINDINGS OF FACT

The Board finds by a preponderance of the evidence that:

1. The Property, known as 4612 Holly Ridge Road in Rockville, is an RE-1 zoned parcel identified as Lot 3, Block D in the Sycamore Acres subdivision.

2. On December 3, 2013, the Intervenor applied to DPS for a building permit to construct a miscellaneous structure (container) on the subject Property. See Exhibit 13, pages 8-9. Building Permit No. 656812 was issued on December 3, 2013, for the requested construction. See Exhibit 3(a).

3. On December 30, 2013, Appellants timely filed this appeal, charging error by DPS in its decision to issue Building Permit No. 656812. See Exhibit 1(a).

4. Mr. Gregory McClain, a Plan Reviewer for the Department of Permitting Services in their Zoning section, who has worked for Montgomery County for the past 24 years (22 years in his current capacity), testified on behalf of DPS. Mr. McClain testified that he works the Zoning counter at DPS, reviewing plans for compliance with the Zoning Ordinance. He estimated that he reviews 1,000 building permit applications per month, and that he has reviewed a couple thousand shed and container permit applications. He testified that he relies on the documents submitted to him in making his decision regarding Zoning compliance. When asked if he was able to make the necessary calculations regarding the size and locational restrictions applicable to this container based on the documentation that was submitted with the building permit application, Mr. McClain testified that he was.

Mr. McClain testified that he is familiar with the subject Property and that he reviewed the permit application for this 8' x 20' container. See Exhibit 13, pages 8-11. He testified that his review entails making sure that the structure comports with the Zoning Ordinance in terms of its size, its placement on the lot, and the applicable setbacks. He testified that he identified the minimum setback distances for this container as being 10' from the rear lot line and 15' from the side lot line. Mr. McClain testified that the proposed accessory structure (container) is shown on Exhibit 13, page 11, as being 18' from the side lot line and 25' from the rear lot line, in the southwest corner of the subject Property, which he testified meets the required setbacks.¹ He stated that he explained to Mr. Criscio that the structure is required to be placed in accordance with these setbacks, and testified that the structure did not have to be located as shown, but rather could be located anyplace in the rear yard as long as it met the setbacks.

¹ When asked by a Board member if there was a front line setback requirement, Mr. McClain testified that an accessory structure in the RE-1 zone is required to be at least 80 feet from the street line, and that because the main building on this Property was set back 63' from the street line, he could estimate that the proposed accessory structure met the 80' setback.

Mr. McClain testified that there is a size restriction on allowable accessory structures. He testified that they cannot exceed 50 percent of the footprint of the main building. Mr. McClain testified that based on the Pictometry (an aerial photography program used in-house by DPS), he believed that the “1 story frame” building shown on Exhibit 13, page 11, to the north of the proposed accessory structure, was connected by a roof to the main (“1 story stone and frame”) building, and thus that the two were a single “main” building. He testified that footprint of the 8’ x 20’ container is 160 square feet. He testified that he calculated the footprint of the main building² and compared that to the footprint of the accessory structure, concluding that the footprint of the accessory structure did not exceed the statutory limit. He testified a Building Permit was issued for this structure. See Exhibit 13, page 12.

On cross examination, Mr. McClain testified that this Permit was applied for and issued on December 3, 2013, and that no inspection of the Property occurred prior to the permit issuance. When asked by counsel for the Appellants what the term “shall,” as used in Section 59-A-3.32 of the Zoning Ordinance, meant, Mr. McClain agreed that “must” was a fair translation.³ At the request of counsel, Mr. McClain then compared the Location Drawing submitted with the Building Permit application, in the record at Exhibit 13, page 11, against the submission requirements of Section 59-A-3.32 (statutory language shown in *italics*), as follows:

59-A-3.32. Building permit.

Each application for a building permit shall be accompanied by duplicate copies of a plat drawn to scale showing: Mr. McClain initially testified that Exhibit 13, page 11, was not to scale. He later agreed with counsel for the Intervenor that this Drawing had a scale (1”=40’), but that the annotations made by the Intervenor to show the location of the proposed accessory structure were not drawn using that scale.

(a) *The lot upon which the building is proposed to be erected; lot dimensions, lot and block numbers and subdivision name, if any.* Mr. McClain testified that the Drawing satisfied this requirement.

(b) *The name and width of abutting streets.* Mr. McClain testified that the Drawing did not specify the width of the abutting street (it did include the name of that street).⁴

² While Mr. McClain had assumed that the “1 story stone and frame” structure and the “1 story frame” structure were joined by a roof and thus were a single “main” building, testimony at this hearing indicated that this assumption was erroneous and that the two buildings were not joined. Nevertheless, it seems that there is no question based on the testimony of Mr. Motazedi and the dimensions called out on Exhibit 13, page 11, that the footprint of the container does not exceed 50% of the footprint of what is actually the “main” dwelling (the “1 story stone and frame,” marked “#4612”).

³ Pursuant to subsection (a) of Section 59-A-2.2 of the Zoning Ordinance, “General rules of interpretation,” the word “shall” is mandatory and not optional.

⁴ Mr. McClain later testified that there is no reason that the width of an abutting street is necessary in order for DPS to review the permit at issue in this appeal.

(c) *The location, dimensions and use of existing buildings and other structures on the lot.* Mr. McClain testified that the locations and dimensions of existing buildings and other structures were called out on the Location Drawing, but that the “use” of those buildings was missing.⁵

(d) *The location, dimensions and proposed use of buildings and other structures for which a permit is requested.* Mr. McClain testified that the location and dimensions of the proposed structure were set forth on the Location Drawing, but that the “use” was missing.

(e) *Front and rear yard widths.* Mr. McClain testified that per the Location Drawing, the front and rear yards are 195 feet wide, and the Property is 200 feet deep.

(f) *North point, date and scale of plan.* Mr. McClain testified that the north point, date and scale of plan are all included on the Location Drawing.

Mr. McClain testified on cross examination that he knows there is information on the DPS website regarding accessory buildings and sheds. See Exhibit 14, pages 69-70. He testified that he does not review all of that material, but that permit applicants would review it. Counsel then read from this website guidance that permit applications require a site plan that “should be drawn to scale (1”=30’, 1”=20’) showing the size and location of the proposed shed, and all existing structures on the site, distances from lot lines, and drawn in accordance with an accurate boundary line survey.” See Exhibit 14, page 70. In response to questioning from counsel, Mr. McClain testified that he did not know if a location drawing and a boundary survey were the same thing, explaining that when you’re working with the public, boundary surveys, plot plan surveys, location drawings, etc., are all similar documents, and could in fact be the same drawing. He then testified that DPS would accept a plot plan that doesn’t have a 1”=30’ or 1”=20’ scale, as long as the applicant provides a scaled and dimensioned plan.

Mr. McClain agreed with counsel that the frame shed shown on Exhibit 13, page 11, in the southeast corner of the Property, had been demolished. He agreed that the maximum lot coverage in the RE-1 zone is 15 percent, and stated that while the Location Drawing submitted did not include a lot coverage calculation, he was able to calculate lot coverage based on the size of the lot (195’ x 200’ = 39,000 square feet) and the improvements shown on Exhibit 13, page 11. When told by counsel that the lot size resulting from that calculation did not match the square footage set forth on SDAT (37,897 square feet),⁶ and consequently asked which figure he used in doing his calculations, Mr. McClain testified that he used the SDAT figure. See Exhibit 14, page 7. When asked, after counsel read footnote 52 to Section 59-C-1.31(g), if he had checked to see if the proposed accessory structure was less than the greater of 50 percent of the footprint of the main building or 600 square feet, Mr. McClain testified that he had done

⁵ Mr. McClain later testified that the uses of the “1 story frame” and “1 story stone and frame” buildings were not relevant to the issuance of this Building Permit except as a point of reference for determining the 50 percent footprint limitation (i.e. the permissible size of the proposed accessory structure) and the location (permitted in the rear yard only).

⁶ SDAT indicates that 111 square feet of this Property are for County Use. See Exhibit 14, page 7.

this calculation, but that he did not have it with him. See Exhibit 13, page 3-4. He then testified that per Section 59-C-1.326, accessory structures must be located in the rear yard, and must not occupy more than 20 percent of the rear yard. He testified that a calculation showing that the proposed accessory structure met the 20 percent rear lot coverage restriction was not included with the Drawing submitted with the permit application. When asked how if he considered the use of other structures already existing on a property when approving a permit for an accessory structure, Mr. McClain testified that he did not. When asked how he determined that the use of this proposed accessory structure was "subordinate" to that of the main building,⁷ Mr. McClain testified that it was listed as a "container" and approved as an accessory structure that was subordinate to the main building. He testified that the 18' and 25' setbacks for this container were called out on the Location Drawing when he received the application, and that the applicant (Intervenor) has to place the structure either in accordance with the Drawing or in such a way as to meet the minimum setbacks. When asked by the Board how long he spent examining the Location Drawing before he issued this building permit, Mr. McClain testified that he is familiar with the requirements applicable to accessory buildings, and indicated that because the proposed accessory building met the size, location, and coverage restrictions set forth in the Zoning Ordinance, he approved this permit.

In response to questions from counsel for the Intervenor, Mr. McClain testified that when reviewing whether a proposed accessory structure met the 50 percent footprint requirement in footnote 52 to Section 59-C-1.31(g), he looks only at the footprint of the proposed accessory building, not at the combined footprint of all accessory buildings. When counsel read from the DPS website guidance concerning accessory buildings and sheds that an applicant was required to submit two copies of a "site plan," and asked what a "site plan" was, Mr. McClain testified that it was an instrument to identify the lot and the proposed improvements; he testified that the Location Drawing submitted with this permit application satisfied this requirement. See Exhibit 13, page 11, and Exhibit 14, page 70. He testified that a Location Drawing is sometimes called a House Location Survey, and that its purpose is to identify improvements on the site. When counsel asked if he was aware of any limitations on the use of these surveys, Mr. McClain testified that the engineers who prepare them usually provide some kind of disclaimer regarding the accuracy of the survey. This is because, as Mr. McClain testified, these surveys are prepared by field survey based on the recorded plat. He later testified, in response to Board questions, that this disclaimer/consumer information note is something surveyors use to protect themselves. He stated that short of getting another survey done by another company, this is what DPS uses. Pursuant to questioning from counsel, Mr. McClain

⁷ Section 59-A-2.1 defines "Building, accessory," as follows: "Building, accessory: A building subordinate, and located on the same lot with, a main building, the use of which is clearly incidental to that of the main building or to the use of the land, and which is not attached by any part of a common wall or common roof to the main building. In addition to any other meaning the word "subordinate" may have in this definition, on a lot where the main building is a one-family detached residential dwelling, except for an accessory agricultural building, subordinate means that the footprint of the accessory building is smaller than the footprint of the main building." See Exhibit 14, page 23.

agreed that the website guidance stated that the site plan "should" and not "must" be drawn to scale.

Still on cross examination by Intervenor's counsel, with respect to the requirement in Section 59-A-3.32 of the Zoning Ordinance that "duplicate copies of a plat drawn to scale" be submitted, Mr. McClain testified that two copies of the house location survey were submitted, and that the survey did have a scale, 1"=40'. Counsel then proffered that this document was drawn by a surveyor in 2008, with the exception of the container, which was drawn on the survey by the permit applicant to show DPS where the container would be located. Mr. McClain testified that there was no reason that the width of an abutting street was needed for a shed permit. He testified that the uses of the 1 story stone and frame building and the 1 story frame building were not relevant to the issuance of a building permit for an accessory building except as a point of reference for determining the 50 percent footprint limitation (permissible size) and the location (rear yard). He testified that the only exception to this would be if these buildings were used for an agricultural purpose; he stated that he had no knowledge that this Property was being used for agriculture. Mr. McClain testified that he would still have approved this permit today, and that he has no knowledge which would indicate that the proposed accessory building is not compliant.

Mr. McClain testified on re-cross that he was vaguely familiar with Section 59-A-2.2 of the Zoning Ordinance. When asked whether Section 59-A-3.32(d) suggested that the location of a structure that is shown in a drawing should be binding, Mr. McClain testified that he does not check the actual location after the permit is issued. Pursuant to further questioning, he agreed with counsel that the drawing is supposed to specify the location of the proposed structure, and that he did not have the authority to waive that. When asked by counsel for the Intervenor if an applicant could relocate a container to another place in the rear yard, as long as the new location complied with the Zoning Ordinance, Mr. McClain testified that he could. When asked if such an applicant would need another Building Permit, Mr. McClain testified that DPS acknowledges revisions to Permits, and that the revision would acknowledge the relocation of the structure.

On re-direct, Mr. McClain testified that he sees surveys that have been altered by hand on a daily basis. When asked why DPS would accept hand-drawn plans, Mr. McClain testified that it is because of the expense that would be incurred by the applicant in getting a new survey. He testified that the permit fee for an accessory building is \$75 or \$80, but that a modified survey would cost several thousand dollars.

5. Mr. Ehsan Motazedi, Division Chief, Zoning and Site Plan Enforcement, DPS, testified for DPS. Mr. Motazedi testified that he has been with DPS for 8 years. He testified that he has been a licensed civil engineer since 1985, and that prior to coming to work for the County, he worked in both the public and private sector. He testified that as Division Chief, he oversees a Division that reviews and issues Building Permits (among other things).

Mr. Motazedi testified that this Property was first brought to his attention by counsel for DPS. He testified that he met with the Appellants about this Property. He characterized the Appellants' argument as alleging that the permit application was deficient because the Drawing submitted was not to scale. Mr. Motazedi testified that DPS treats applications for projects involving 200 square feet or less differently than it treats other projects. He testified that these projects are mostly being done by citizen homeowners as opposed to contractors. He testified that DPS tries to educate these citizens with respect to where they can lawfully locate their proposed structure, identifying permissible locations to construct/place their structure. Mr. Motazedi testified that it would be an undue hardship to make a person who wants to install a \$500 shed pay \$100 for a permit and then \$5,000 to \$10,000 for a new survey to show the proposed location of the shed. Mr. Motazedi testified that this is what a new survey costs. He then testified that the Location Drawing in the record at Exhibit 13, page 11, has all the information that DPS needs from these average citizens, and that it contains enough information for DPS to issue a Building Permit.

Mr. Motazedi testified that it was not unusual for DPS to issue a Permit such as the one at issue in this appeal on the day the application is submitted. He testified that Mr. McClain reviews hundreds of these a day, and that the permit was probably issued within hours. He testified that it is DPS's policy to issue permits for sheds and fences quickly. He noted that storage PODS/containers do not require any structural review. He testified that unlike some Building Permits, the issuance of a Permit for a shed does not require an up-front, on-site inspection. He testified that an inspection is conducted after the accessory building is constructed/located, to ensure that it complies with the requisite locational/setback requirements. If these are met, the Permit is given final approval. Mr. Motazedi testified that PODs can be on a property without a Permit for seven days or less, but that if they are on site longer than that, they need a Permit. See Exhibit 13, page 13.

Mr. Motazedi testified that after he met with Mr. Wittig, he wanted to make sure that the container was placed properly on the Property, and so he sent inspectors to the Property. He testified that as currently located, the container meets all of the requisite setbacks. He acknowledged that this container was on-site before the issuance of the Permit.⁸ He testified that after this appeal was filed, he had reviewed Mr. McClain's actions with respect to the issuance of this Permit. He testified that he met with Mr. McClain and other plan reviewers, and that all of them agreed that they would have issued the Building Permit at issue in this appeal. He testified that this is DPS's regular policy and practice.

On cross-examination, when asked if DPS's practice and the requirements of the Zoning Ordinance were different, Mr. Motazedi testified that DPS follows the Zoning Ordinance 80 to 85 percent of the time, indicating that a different procedure is used to approve permits for small structures (those less than 200 square feet). When asked if

⁸ He testified on cross-examination that he did not know how long the container was on the Property before DPS issued a violation and informed the Property owner that a Building Permit was necessary.

DPS had ever applied to have the Ordinance changed to match their practice with respect to small structures, Mr. Motazedi testified that he knew of no such requests.

Mr. Motazedi testified on cross-examination that he had sent DPS Investigator Mark Moran to the Property to verify that this container met all of the development standards set forth in the Zoning Ordinance and that it was lawfully located on the Property. He testified that Mr. Moran verified all of the structures on the Property, and performed lot coverage calculations, taking into account all of the structures on the site.

Mr. Motazedi testified that the container is 8' x 20', and that he did not know its height. He testified that when reviewing a permit application for an accessory structure, DPS looks only at the individual structure for which the permit is sought to determine compliance with the 50% footprint limitation in footnote 52 to Section 59-C-1.31(g), but looks at all of the accessory structures on site to verify compliance with the 20% rear yard coverage restriction of Section 59-C-1.326(a)(1).

In response to a question from a Board member asking if it was still proper to approve this permit after correcting for Mr. McClain's mistaken belief that the "1 story frame" building was part of the main building, Mr. Motazedi testified that it was. He then testified that DPS tried to be as strict as they could in determining whether the 20 percent rear yard coverage limitation was met, testifying that DPS had calculated the square footage of the rear yard from the southern-most line of the "1 story frame" structure, even though that was not the main building (rear yard calculation: $56.6' \times 195' = 11,037$ square feet), and that they then added together the footprints of the entire "1-story frame" building (1,583 square feet) and the proposed container (160 square feet) to give a total square footage for the accessory structures of 1,743 square feet. He testified that using these very conservatively calculated numbers, these totals only yield a rear yard coverage of 15.8 percent ($1,743/11,037 = 0.1579$), which is less than the maximum 20 percent allowed. He testified that the pool is not counted in the lot coverage calculation, despite being an accessory structure, because it is not "covered," later explaining that only "roofed" structures are used to determine lot coverage.

When asked on cross-examination how DPS determines if the use of an accessory structure is subordinate to that of the main building, Mr. Motazedi testified that use is something DPS comes across all the time. He testified that the use of the accessory structure has to be subordinate to the purpose of the main structure, which in this case was a single-family home.⁹ He then testified that DPS would not know the actual use unless they received a complaint and went to the site to inspect.

In response to questions from counsel for the Intervenor, Mr. Motazedi testified that for at least the past eight years—the time he has been with DPS—it has been the

⁹ With this statement, Mr. Motazedi was presumably invoking the definition of "accessory building" in Section 59-A-2.1 of the Zoning Ordinance, which states that "[i]n addition to any other meaning the word 'subordinate' may have in this definition," if the main building on a property is a one-family detached dwelling, then except in the case of an agricultural accessory building, "subordinate means that the footprint of the accessory building is smaller than the footprint of the main building."

Department's policy to treat applications for small accessory structures differently than the Zoning Ordinance requires. He testified that one of the major reasons for this is a cost consideration. He testified that based on the application as submitted, this Permit could have been issued as it was issued. He testified that to the best of his knowledge, the container is currently located in compliance with the Zoning requirements.

6. Appellant Raymond Wittig testified for the Appellants. Mr. Wittig and his wife live next door to the subject Property (left side), at 4618 Holly Ridge Road, Rockville, MD 20853. He testified that he has lived there for 34 years, and that he is familiar with the subject Property. He testified that the "1 story frame" and "1 story stone and frame" buildings shown on the Location Drawing are not connected.

Mr. Wittig testified that he was in his yard at the end of October, 2013, when he heard a large noise. He testified that he saw a truck dropping a shipping container between his fence and Mr. Criscio's accessory structure (presumably referring to the 1-story frame building). He testified that he took the photograph in the record at Exhibit 14, page 9, using the newspaper to show the date. He testified that he looked at the County Code and learned that commercial sea containers are allowed. He testified that after the container had been there for eight days, he hired an attorney. He testified that he filed a complaint asserting that the container was in the side yard instead of the rear. Mr. Wittig testified that he took additional photos, explaining that Exhibit 14, page 10, was taken on October 28th from the back of his yard; that Exhibit 14, page 11, was taken from the forward edge of his fence; the Exhibit 14, page 12, shows that the container was placed in the Intervenor's side yard; and that Exhibit 14, page 13, also shows that the container was in the side yard.

Mr. Wittig testified that after the complaint was filed, the Intervenor requested a Building Permit, which was granted, and the container was moved from the side yard to the rear yard, behind the accessory structure (again, this presumably refers to the 1 story frame building). See Exhibit 14, pages 14-15. He testified that this is the current location of the container. He explained that Exhibit 14, page 15, shows the trees he has planted to screen the view of the container from his property.

Mr. Wittig testified that he has applied for Building Permits before, and that he is familiar with the plans that are required. He testified that when he applied for Building Permits, he submitted all the required documents.

When asked about his understanding of the 50 percent footprint limitation set forth in footnote 52 to Section 59-C-1.31(g) of the Zoning Ordinance, Mr. Wittig testified that he did not understand how DPS could look only at the container for which the permit was being sought and issue a Building Permit without considering anything else on the Property, including an existing accessory building (again, this presumably refers to the "1 story frame" building) that is almost the same size as the main house. He testified that when you add the additional 160 square feet for the proposed container, the total square footage covered by accessory buildings becomes even larger. Mr. Wittig then described

a drawing that he and his wife had prepared, augmenting the Location Drawing that had been submitted by the Intervenor with his Building Permit application. See Exhibit 14, page 66. He explained that the solid red blocks on their drawing depict structures which were on the ground when the Permit was applied for, but were not shown on the Location Drawing. He testified that he had re-drawn the outline of the proposed container to better depict its actual size. Mr. Wittig testified that for him, the problem is that a residential lot is supposed to be a residential lot. He testified that DPS does not look at what exists on a property when they approve a permit, but rather considers only the proposed new structure. He testified that because of this, DPS traps itself into having to approve additions, sheds, etc., if they meet lot coverage, as long as the footprint does not exceed 50 percent of the main building. Mr. Wittig testified that his neighbor could put 12 containers on his Property without violating the 15 percent limitation on lot coverage or the 20 percent restriction on rear yard coverage. He testified that for this reason, he believes that the 50 percent footprint limitation in footnote 52 to Section 59-C-1.31(g) should be read as a cumulative restriction on the footprint of all accessory structures on a property. He testified that DPS should not have issued this Permit.

On cross-examination, Mr. Wittig agreed with counsel that the size of the container does not exceed 20 percent of the rear yard, but voiced his belief that this container made the cumulative footprint of all accessory buildings exceed the 20 percent rear yard coverage limitation. He testified that DPS must interpret the footprint limitation in footnote 52 to Section 59-C-1.31(g) in a cumulative fashion because under Section 59-A-2.2, the singular number includes the plural and the plural includes the singular, and thus DPS must look at the footprint of all accessory structures to determine whether the 50 percent footprint limitation is exceeded.¹⁰

When asked by a Board member if he would still be upset if the other accessory building (the 1 story frame structure) were not on site when the Intervenor got the permit for this container, Mr. Wittig responded that that was hard for him to answer, but that he would be mad. He questioned how Mr. McClain made decisions about what was subordinate or incidental to a residential property, and testified that sea containers do not belong in residential neighborhoods. He testified that DPS made a serious error in this case because sum of all the accessory structures on this Property is close to 100 percent of the footprint of the main building. When asked if he was asserting that the lot coverage that resulted from the 1 story frame structure and the container exceeded 20 percent of the rear yard or 15 percent of the total lot, Mr. Wittig testified that he had not done those calculations.

7. Mr. Richard Ratcliff, who resides at 4607 Holly Ridge Road, also testified for the Appellants. Mr. Ratcliff testified that he lived diagonally across the street from the subject Property, and that he can see it. He testified that he was familiar with the Building Permit and with the container. Mr. Ratcliff testified that the container is not

¹⁰ Footnote 52 to Section 59-C-1.31(g) reads, in relevant part, as follows: "the footprint of an accessory building on a lot where the main building is a one-family detached residential dwelling must not exceed the greater of 50 percent of the footprint of the main building or 600 square feet."

consistent with a residential zone and does not belong. He testified that a sea container is a commercial item. He testified that he is concerned about his property value and about how his neighborhood looks. He testified that there are other properties on their block where the 50 percent footprint rule is exceeded. He stated that he is concerned that DPS issues Permits without considering the 50 percent footprint rule and without looking at the integrity of the neighborhood. He testified that he was disappointed to discover that maintaining the integrity of a neighborhood is not one of DPS's tasks. He noted that if he sells his house and the property value goes down because the integrity of the neighborhood is not there, he pays the price. He stated on cross-examination that his neighborhood does not have a homeowners' association.

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-A-4.3(e) of the Zoning Ordinance provides that any appeal to the Board from an action taken by a department of the County government is to be considered *de novo*. The burden in this case is therefore upon the County to show that Building Permit No. 656812 was properly issued.

5. Section 59-A-2.1 of the Zoning Ordinance contains the following definitions:

Building: A structure having one or more stories and a roof, designed primarily for the shelter, support or enclosure of persons, animals or property of any kind.

Building, accessory: A building subordinate, and located on the same lot with, a main building, the use of which is clearly incidental to that of the main building or to the use of the land, and which is not attached by any part of a common wall or common roof to the main building. In addition to any other meaning the word "subordinate" may have in this definition, on a lot where the main building is a one-family detached residential dwelling, except for an accessory agricultural building, subordinate means that the footprint of the accessory building is smaller than the footprint of the main building.

Structure: An assembly of materials forming a construction for occupancy or use including, among others, buildings, stadiums, gospel and circus tents, reviewing stands, platforms, stagings, observation towers, radio and television broadcasting towers, telecommunications facilities, water tanks, trestles, piers, wharves, open sheds, coal bins, shelters, fences, walls, signs, power line towers, pipelines, railroad tracks and poles.

Use: Except as otherwise provided, the principal purpose for which a lot or the main building thereon is designed, arranged, or intended, and for which it is or may be used, occupied, or maintained.

6. Section 59-C-1.31 of the Zoning Ordinance, entitled "Land uses," reads as follows:

"No use is allowed except as indicated in the following table:

-Permitted Uses. Uses designated by the letter "P" are permitted on any lot in the zones indicated, subject to all applicable regulations.

-Special Exception Uses. Uses designated by the letters "SE" may be authorized as special exceptions under Article 59-G."

Subsection (g) of Section 59-C-1.31 provides that "accessory buildings, structures and uses" are Permitted Uses in the RE-1 zone, subject to the footnote 52, which reads as follows:

52 Except for a building accessory to an agricultural use, the footprint of an accessory building on a lot where the main building is a one-family detached residential dwelling must not exceed the greater of 50 percent of the footprint of the main building or 600 square feet. Any accessory building for which a building permit was issued before July 11, 2006 may continue as a conforming building under the standards in effect when the building permit was issued; however, if a building permit that was issued before July 11, 2006 is revoked, but later approved, the accessory building must comply with the standards in effect at the time of the later approval. Any replacement or reconstruction of an accessory building constructed under a building permit issued

before July 11, 2006 must comply with the standards in effect when the building is replaced or reconstructed.

7. Section 59-C-1.326(a)(1) of the Zoning Ordinance provides that an accessory building or structure “must be located in a rear yard and must not occupy more than 20 percent of the rear yard.”

8. Section 59-C-1.328 of the Zoning Ordinance provides that the “maximum percentage of net lot area that may be covered by buildings, including accessory buildings” in the RE-1 zone is 15 percent.

9. Subsection (a) of Section 59-A-2.2 of the Zoning Ordinance, “General rules of interpretation,” provides that:

(a) In this chapter, words used in the present tense include the future; the singular number includes the plural number and the plural the singular; and the word "shall" is mandatory and not optional.

10. Section 59-A-3.32 of the Zoning Ordinance, “Building Permit,” lists items which must be provided with a Building Permit application:

Sec. 59-A-3.32. Building permit.

Each application for a building permit shall be accompanied by duplicate copies of a plat drawn to scale showing:

- (a) The lot upon which the building is proposed to be erected; lot dimensions, lot and block numbers and subdivision name, if any.
- (b) The name and width of abutting streets.
- (c) The location, dimensions and use of existing buildings and other structures on the lot.
- (d) The location, dimensions and proposed use of buildings and other structures for which a permit is requested.
- (e) Front and rear yard widths.
- (f) North point, date and scale of plan.

11. DPS’s guidance entitled “Development Standards for the RE-1 Zone,” which can be accessed from the DPS website under the heading “Zoning,” and then “Development Standards,” states with respect to accessory buildings that “The footprint of an accessory building must not exceed 50% of the footprint of the main building (one-family detached dwelling). The limit does not apply to a building accessory to an agricultural use.” It goes on to set forth the required setbacks, and to indicate that accessory buildings can be located in the rear yard only, and can occupy a maximum of 20% of the rear yard. See Exhibit 15, page 10.

12. DPS's guidance entitled "Accessory Buildings and Sheds" states that "Single-story sheds with a floor area of 200 square feet or less require a completed building permit application and two copies of a site plan. The site plan should be drawn to scale (1"=30', 1"=20') showing the size and location of the proposed shed and all existing structures on the site, distances from lot lines, and drawn in accordance with an accurate boundary line survey. No construction plans are required. A zoning specialist will review these applications prior to issuance of a permit." See Exhibit 14, page 70.

13. The Board finds based on the testimony of Mr. Motazedi that DPS applies different requirements to applications for accessory structures with a floor area of 200 square feet or less, and those with a floor area greater than 200 square feet. The Board further finds, per the testimony of Mr. Motazedi, that the process DPS uses with these smaller accessory structures is only 80 to 85 percent compliant with the Zoning Ordinance. While the Board appreciates that DPS adopted this disparate treatment to make the permitting process more "user-friendly" and more economical for the citizen-applicants who generally seek these permits, the Board finds that substantial compliance with the law is not compliance with the law. Per Section 59-A-2.2(a) of the Zoning Ordinance, the term "shall" is mandatory and not optional. Thus where Section 59-A-3.32 of the Zoning Ordinance states that each building permit application "shall" be accompanied by certain items, the Board finds that each application must contain those items. Therefore in the instant case, the Board finds that the application submitted for Building Permit No. 656812 was deficient for the following reasons, as acknowledged by Mr. McClain on cross-examination:

a. While the Location Drawing submitted with the permit application was originally drawn to scale, the hand-drawn annotations made by the Intervenor to show the location of the proposed container were not. A scaled drawing is required by the introduction to Section 59-A-3.32 of the Zoning Ordinance.

b. The Location Drawing specified the name of the abutting street but did not specify the width of that street, as is required by Section 59-A-3.32(b).

c. The locations and dimensions of existing buildings and other structures were called out on the Location Drawing, but their "uses" were not. Section 59-A-3.32(c) requires that the location, dimensions and use of existing structures be called out. Similarly, the "use" of the proposed structure was not identified on the Location Drawing; Section 59-A-3.32(d) requires that this be specified.

See Exhibit 13, pages 8-11. In addition, the Board notes that the 2008 Location Drawing submitted with this application no longer accurately reflects the buildings on this Property. Mr. McClain testified that the frame shed in the southeast corner of the Property had been demolished. Mr. Wittig testified that there were existing additions to the 1 story frame building and to the 1 story stone and frame building that were not reflected on the Drawing submitted with the permit application; he provided an amended version of the Location Drawing showing those additions. See Exhibit 14, page 66. The

Board finds that without an accurate depiction of the structures currently existing on this Property, DPS could not have undertaken to accurately calculate whether the addition of the proposed container would cause the structures on site to exceed the rear yard and lot coverage restrictions set forth in Sections 59-C-1.326(a)(1) and 59-C-1.328 of the Zoning Ordinance. Given that neither this nor the other previously mentioned inadequacies had been remedied as of the time of the hearing, the Board finds that this Building Permit application did not and does not satisfy the requirements of the Zoning Ordinance. Accordingly, the Board finds that DPS should not have accepted this Permit application, and therefore that Building Permit No. 656812 should not have been issued.

14. Based on the foregoing, the Board finds that DPS HAS NOT met its burden of demonstrating by a preponderance of the evidence that Building Permit No. 656812 was properly issued.

The appeal in Case A-6426 is **GRANTED**.

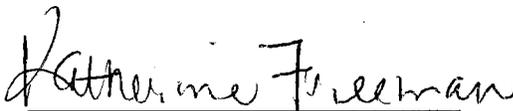
On a motion by Member Stanley B. Boyd, seconded by Member Carolyn J. Shawaker, with Chair Catherine G. Titus and Member John H. Pentecost in agreement, and Vice Chair David Perdue not in agreement, the Board voted 4 to 1 to grant the appeal and adopt the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above, and the concurring and minority opinions attached below, 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 16th day of May, 2014.



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).

Concurring Opinion of Stanley B. Boyd

While I concur with the majority opinion, an application for a permit should not be denied if only one or two minor omissions occur (e.g., width of abutting streets, uses of the current structures, or the use of the proposed structure), especially if the proposed structure is less than 200 square feet. To require a new plot plan because the one submitted has one or two minor omissions would be excessively costly. DPS should be able to process applications quickly and at minimal cost to the applicant.

However, in the current case, there were several omissions and outright inaccurate representations. The two large buildings were not connected as represented. There were additions to the 1-story frame and 1-story stone and frame buildings not reflected on the drawing submitted in the permit application. The proposed structure was not drawn to scale or located properly on the plot. There was a question as to where the rear yard line should be drawn. "The site plan must be drawn to scale (1"=30', 1"=20') showing the size and location of the proposed structure and all existing structures on the site, the distances from lot lines, and drawn in accordance with an accurate boundary line survey." (DPS instructions to applicants)

For these reasons, the DPS should not have issued a permit and the appeal should be granted.

Minority Opinion of David K. Perdue

There is an old adage in the law that bad facts can make for bad law. I believe this case would have been decided differently if, instead of a commercial sea container, the homeowner had sought a permit for a standard prefabricated storage shed, perhaps equipped with flower boxes and faux shutters. There is no question that a large steel box designed for the transport of goods by sea on a container ship is an ugly addition to any residential property. There is also no dispute, however, that such structures are permitted in residential zones in this county if placed in compliance with the applicable development standards.

In this case, the evidence presented at the hearing established that the sea container was located in compliance with the setbacks for an accessory structure, that it did not exceed 50% of the footprint of the main building, and that when added to the coverage of the existing accessory structures on the property it did not increase the rear lot coverage above the permitted limit. Hence, the proposed accessory structure complies with all the applicable development standards, and the Department was right to approve the permit.

The position of the majority is that the appeal should be granted because the permit application was deficient. Tellingly, the majority does not adopt the appellant's argument that the 50% rule should be applied cumulatively to all accessory structures on the property as opposed to the Department's interpretation that the rule only applies to the individual structure that is the subject of the permit application. The majority's ruling is simply that the application paperwork was not in order. This crabbed view of the zoning ordinance does not adequately credit the Department's experience in reviewing thousands of permit applications each month and its ability to determine what information is needed or not needed to grant or deny a particular application.

At the time of the hearing, the Department had all the information necessary to decide that the proposed accessory structure was lawful under the zoning ordinance. It knew the size of the structure, its location on the lot, the square footage of the lot, the square footage of all existing structures on the lot, and the size of the rear yard. The majority's finding to the contrary in section 13 of its Conclusions of Law is contradicted by the testimony of Mr. Motazedi that he instructed a Department inspector to visit the site before the hearing to measure the existing structures and determine compliance with the development standards. Mr. Motazedi explained the compliance calculations himself at the hearing and his calculations were not challenged.

The fact that these calculations were not done (or not done properly) at the time the permit was granted is not a reason to grant the appeal. An administrative appeal is a *denovo* proceeding in which the Department is permitted to carry its burden of proof with new evidence, which it did in this case. It is also not persuasive that other information called for in a permit application, such as the width of the adjoining street and the uses of the existing structures on the lot, was not provided. None of the missing information could have rendered the installation of the sea container unlawful. As the primary administrator of the zoning ordinance, the Department has some latitude, in the interest of efficient and effective application of the ordinance, to decide what is and is not necessary for a particular permit application. That DPS exercised its discretion here to expedite and limit the costs to a homeowner of a permit for a simple storage structure is, in my view particularly appropriate. I fear that the result of the majority's decision will not be greater compliance with the zoning ordinance but the opposite, as residents install unpermitted structures to avoid the hassle and expense of complying with the unnecessarily strict reading of the permit application requirements that the majority resolution demands.