

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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Case No. A-6433

APPEAL OF WILLIAM HARVEY

OPINION OF THE BOARD

(Hearing held May 28, 2014)
(Effective Date of Opinion: June 23, 2014)

Case No. A-6433 is an administrative appeal filed March 28, 2014, by Mr. William B. Harvey.¹ Mr. Harvey charges error on the part of the County's Department of Environmental Protection ("DEP") in its denial, dated February 24, 2014, of the request of Laytonsville Airport, LLC (the "LLC"),² that DEP reconsider its denial of the LLC's appeal of the Water Quality Protection Charge ("Charge") assessed for Davis Airport, which is owned by the LLC. Davis Airport is located at 7200 Hawkins Creamery Road, Gaithersburg, Maryland 20882 (the "Property"), in the RNC/TDR zone.

Pursuant to Section 59-A-4.4 of the Montgomery County Zoning Ordinance, codified as Chapter 59 of the Montgomery County Code (the "Zoning Ordinance"), the Board scheduled a public hearing on the appeal, with oral argument on preliminary motions,³ including a Motion to Dismiss, to be held May 28, 2014. Pursuant to its authority in Section 2A-8 of the Montgomery County Code, the Board heard oral argument on May 28. Associate County Attorney Charles L. Frederick represented the County. Mr. Harvey and Mr. Mathew Amsellem appeared pro se.

¹ While Mr. Harvey signed the appeal form, COMCOR 19.35.01.07.F, pursuant to which this appeal was filed, only provides for appeal by the property owner, which in the instant case is Laytonsville Airport, LLC. The record indicates that Mr. Harvey and Mr. Mathew Amsellem are co-owners of this LLC.

² Again, the request for reconsideration was actually filed by Laytonsville Airport, LLC, although Mr. Harvey signed the request as Managing Member. See Exhibit 8, pages 15-19.

³ The preliminary motions filed by the County in this case included a Motion to Dismiss, a Motion for Summary Disposition, and a Motion to Strike Appellant's Response to Motion to Dismiss and Pre-Hearing Submissions. Mr. Harvey filed a Response to Motion to Dismiss (dated April 16), and Mr. Harvey and Mr. Mathew Amsellem jointly filed a second Response to Motion to Dismiss (dated May 19).

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, known as 7200 Hawkins Creamery Road, Gaithersburg, Maryland, is an RNC/TDR zoned parcel identified as Parcel P777, 0001 Subdivision.

2. The Property is owned by Laytonsville Airport, LLC. See Exhibit 10, Attachments 1 (Real Property Consolidated Tax Bill) and 2 (SDAT data).

3. On September 30, 2013, the LLC filed an appeal of the Water Quality Protection Charge assessed for the Property, asserting that the Property was exempt from this tax. See Exhibit 8, page 12.

4. On November 23, 2013, the Director of DEP sent a letter to the LLC denying the LLC's appeal. See Exhibit 8, page 13.

5. On December 18, 2013, the LLC requested reconsideration of DEP's decision to deny the LLC's appeal of the Water Quality Protection Charge. See Exhibit 8, pages 15-19.

6. The Director of DEP sent the LLC a second letter, dated February 24, 2014, which indicated that under the current law, the Property is not exempt from the Water Quality Protection Charge, and thus the request for reconsideration was denied. See Exhibit 3.

7. On March 28, 2014, Mr. Harvey filed an appeal of DEP's February 24, 2014, letter. The appeal form states that while DEP's letter was dated February 24, it was postmarked March 15, and received March 19, 2014. Mr. Harvey affirmed the truthfulness and correctness of those statements by his signature. See Exhibit 1.

8. In his April 21, 2014, Response to Motion to Dismiss, Mr. Harvey asserts that the DEP letter was "'backdated' to February 24, 2014, and not sent to the Appellant until 21 days after the decision was issued." That Response proceeds to state that the appeal "was filed within ten days of Appellant's *receipt* of the decision" (emphasis *added*). See Exhibit 6(b), page 1.

CONCLUSIONS OF LAW

1. Section 2-112 of the Montgomery County Code provides the Board of Appeals with appellate jurisdiction over appeals taken under specified sections and chapters of the

Montgomery County Code. Subsection (d) of that Section provides that “[t]he Board must hear and decide any other appeal authorized by law.”

2. Section 19-35 of the Montgomery County Code authorizes the County to assess the Water Quality Protection Charge on certain residential and non-residential properties. Subsections (h), (i) and (j) of that Section provide for appeals of DEP decisions regarding this Charge to the Board of Appeals, as follows:

(h) A person that believes that the Director of Environmental Protection has mistakenly assigned a Charge to the person’s property or computed the Charge incorrectly may apply to the Director of Environmental Protection in writing for a review of the Charge, and request an adjustment to correct any error, not later than September 30 of the year that payment of the Charge is due. An aggrieved property owner may appeal the Director’s decision to the County Board of Appeals within 10 days after the Director issues the decision.

(i) A person that believes that the Director of Environmental Protection has incorrectly denied the person’s request for a credit under subsection (b) may appeal the Director’s decision to the County Board of Appeals within 10 days after the Director issues the decision.

(j) The Board of Appeals may hear and decide all appeals taken from a decision of the Director of Environmental Protection under this Section as provided in Article I of Chapter 2A.

3. Section 19.35.01.07 of the Code of Montgomery County Regulations (COMCOR), implementing Section 19-35, provides for appeals of the Water Quality Protection Charge. Like Section 19-35, paragraphs F and G of COMCOR Section 19.35.01.07 make clear that the Board of Appeals has jurisdiction to hear appeals, and that any such appeals must be filed “within 10 days after the Director issues that decision”:

F. If the Director does not approve the request for reconsideration, the property owner may appeal the Director's final decision within 10 days after the Director issues that decision as provided in Chapter 2A, Article I, of the County Code.

G. The County Board of Appeals is the designated authority charged with hearing and deciding all appeals taken from the Director's final decision to deny any relief requested under this regulation.

4. 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.

5. 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, a Motion for Summary Disposition, and a Motion to Strike Appellant's Response to Motion to Dismiss and Pre-Hearing Submissions. Mr. Harvey filed two Responses to Motion to Dismiss, one dated April 16 (filed by Mr. Harvey alone), and the second dated May 19 (filed jointly by Mr. Harvey and Mr. Mathew Amsellem).

6. The Board finds, based on the evidence of record, that as a factual matter, this appeal was filed more than 10 days after the issuance of the February 24, 2014, DEP letter. Mr. Harvey would like this Board to interpret "issuance" as meaning the day he received the DEP letter, but that is not what the County Code or regulations say—they both clearly reference the date of issue, not a time period that is tied to service or receipt. In *Sterling v. Atlantic Automotive*, 399 Md. 375, 383-385, 924 A.2d 328, 333-334 (2007), a petition for a writ of certiorari had to be filed within 15 days after the "issuance" by the Court of Special Appeals of its mandate. The Court found that issuance meant the date the mandate was entered, and did not agree with Ms. Sterling's argument that it should have included an additional three days because she received the mandate by mail. The Court looked to the wording of the appeal provision itself to see what triggered the start of the clock. See *Sterling*, 399 Md. at 383-385, 924 A.2d at 333-334. In the case before the Board, both the County Code and COMCOR refer to an appeal period running from the date DEP issues its decision. Thus under the plain language of the statute and the regulations, and under relevant case law, the time period for this appeal started running when the letter denying reconsideration was issued, not when it was (or should have been) received.

With that as prelude, the Board turns to the facts. It is undisputed that the DEP letter was dated February 24, 2014, and that this appeal was filed on March 28, 2014. See Exhibits 1 and 3. If the DEP letter were in fact issued on February 24, then this appeal was filed 32 days later, clearly outside the ten day appeal window.⁴ That said, Mr. Harvey disputes the date of issuance, claiming somewhat inconsistently that the February 24 DEP letter was postmarked March 15, 2014, as was stated on the face of this appeal, and that it was not "sent to the Appellant until 21 days after the decision was issued,"⁵ as

⁴ Rule 14 of the Board's Rules of Procedure provides instructions for computing time, as follows:

14.0. Computing time.

Time must be computed as follows:

(1) Do not count the day of the event that begins a time period (e.g. the day a decision is entered into the Opinion Book).

(2) Include the last day of a time period unless it falls on a Saturday, Sunday, Federal, State or County holiday. In that case the time period ends on the next business day.

(3) If the required time period is more than 7 days count Saturdays, Sundays and holidays as days. If the time period is 7 days or less do not count Saturdays, Sundays or holidays.

See Appendix J of the Montgomery County Code.

⁵ Twenty-one days after February 24, 2014, would be March 17, 2014, two days later than the March 15,

he asserted in his April 16 Response to Motion to Dismiss. See Exhibit 1 and Exhibit 6(b), page 1. Under either of these scenarios, this appeal is still not timely. If the DEP letter decision were issued on March 15, as Mr. Harvey indicated on the face of this appeal, the time to appeal "within 10 days after the Director issue[d]" his decision would run on March 25, and thus this March 28 appeal would be untimely. If the DEP letter decision were found to have been issued "21 days after the decision was issued," as was stated in the Response to Motion to Dismiss, the issuance date would be March 17, 2014 (if one were to start counting on February 25, the day after the February 24 date on the letter), and the ten day window in which to appeal the letter would expire on March 27. Thus the March 28, 2014, appeal would still be untimely.

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

8. The County's Motion to Dismiss in Case A-6433 is granted, and the appeal is consequently **DISMISSED**. Having determined that it lacks jurisdiction to consider this appeal, the Board did not consider the remaining motions.

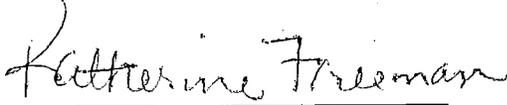
On a motion by Vice Chair David K. Perdue, seconded by Member Carolyn J. Shawaker, with Chair Catherine G. Titus, Member Stanley B. Boyd, and Member John H. Pentecost in agreement, the Board voted 5 to 0 to grant the Motion to Dismiss and thus to dismiss the appeal, and adopted the following Resolution:

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 23rd day of July, 2014.



Katherine Freeman
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).