

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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Case No. A-6473

**APPEAL OF LORD & TAYLOR, LLC
By Mindy C. Novack**

OPINION OF THE BOARD

(Hearing held October 28, 2015.
Effective Date of Opinion: December 11, 2015)

Case No. A-6473 is an administrative appeal filed August 27, 2015, by Mindy C. Novack for Lord & Taylor, LLC (the "Appellant"). The Appellant charges error on the part of Montgomery County's Department of Permitting Services ("DPS") in the July 28, 2015, issuance of Demolition Permit No. 702832 to "Demolish Mercantile Building" (570,187 SF) located at 11301 Rockville Pike (enclosed portion of White Flint Mall) (the "Property"). The subject Property is owned by White Flint Associates, LLC, which was permitted to intervene in this matter (the "Intervenor" or "White Flint"). The Appellant controls a large retail building (the Lord & Taylor store) that is surrounded by the Intervenor's property and abuts the enclosed mall for which the Demolition Permit was issued.

The Appellant asserts that DPS incorrectly issued the subject Demolition Permit, which it asserts should have been withheld "until [the] demolition work was in complete compliance with all provisions of the County Code and applicable building codes." Specifically, the Appellant asserts that the demolition will expose parts of the Lord & Taylor building that were never intended to be open and exposed to weather and nature to natural elements and forces; that the treatment proposed for that portion of the Lord & Taylor building was not in accordance with applicable code provisions; and that the permit should be revoked or rescinded until the demolition work is shown to be conducted in a manner that is consistent with Chapter 8 of the Montgomery County Code and provisions of the applicable building codes. The Appellant further asserts that Chapter 8 precludes the issuance of a permit unless the issuance is in compliance with Chapter 59 of the County Code (the "Zoning Ordinance"). The Appellant asserts that the demolition of the mall alters the zoning status of the resultant freestanding Lord & Taylor building, which it asserts will then not comply with the Zoning Ordinance. Consequently, the Appellant asserts that it will be unable to make structural changes to its building and will be unable to replace the structure due to casualty loss.

Pursuant to Section 59-7.6.1.C of the Zoning Ordinance, the Board held a public hearing on October 28, 2015. The Appellant was represented by Jody S. Kline, Esquire, of Miller, Miller & Canby. The Intervenor was represented by Robert G. Brewer, Jr., Esquire, of Lerch, Early & Brewer. Associate County Attorney Charles L. Frederick represented Montgomery County.

Decision of the Board: Administrative appeal **DENIED**.

PRELIMINARY MATTER

Despite filing an appeal which challenged only the issuance of Demolition Permit No. 702832, Appellant's pre-hearing submission evidences an intent on the part of the Appellant to challenge the issuance of Building (Alternation) Permit No. 716825, which was issued the same day as Demolition Permit No. 702832 (July 28, 2015). See Exhibit 11. Counsel for White Flint asserted as a preliminary matter that Building Permit No. 716825 was not appealed, and is not properly before the Board. Counsel for the County agreed, asserting that any appeal of that permit would not be timely under *NIH v. Hawk*, 47 Md. App. 189, 422 A.2d 55, (1980), cert. denied, 289 Md. 738 (1981). Counsel for the Appellant argued that Permit No. 716825, issued for construction/alteration of the interstitial space adjoining the east wall of the Lord & Taylor building, was issued in conjunction with Demolition Permit No. 702832, that the plans for the demolition and alteration reference each other, and that they should be read together. Counsel asserted that he had assumed that the Demolition Permit would be similar to what the Appellant's consultants had reviewed in March, and that his client was unaware that there had been a change.

The Board found that Section 8-23(a) of the Montgomery County Code, which authorizes the appeal of building permits, requires that any appeal be filed within 30 days after the 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. at 196-7, 422 A.2d at 59. The Board finds that Demolition Permit No. 702832 and Building/Alternation Permit No. 716825 are two separate permits. The Board further finds that the Appellant did not appeal Building (Alteration) Permit No. 716825 within 30 days of its issuance. Thus, because the Appellant did not timely appeal Building Permit No. 716825, the Board found that its correctness cannot be challenged in this proceeding.

FINDINGS OF FACT

The Board finds by a preponderance of the evidence that:

1. The Property, known as 11301 Rockville Pike in Kensington, and commonly referred to as the White Flint Mall, is a CR zoned parcel identified as Parcel 1, Plat 8715 of the White Flint Park Subdivision.
2. On February 4, 2015, Lerner Enterprises applied to DPS for a building permit to demolish the mall on the subject Property ("full mall demolition"). See Exhibit 10, pages circle

1-2. Demolition Permit No. 702832 was issued on July 28, 2015, for the requested demolition. See Exhibit 3(a).

3. On August 27, 2015, Appellant timely filed this appeal, charging error by DPS in its decision to issue Demolition Permit No. 702832. See Exhibit 1.

4. Mr. Hemal Mustafa, the Manager for Commercial Plan Review with the Department of Permitting Services, testified on behalf of DPS. Mr. Mustafa testified that he has Bachelor's and Master's degrees in Civil Engineering, that he is a certified building official by the International Code Council, that he teaches building codes and standards, and that he has worked for Montgomery County for the past 30 years in various capacities, including as a plan reviewer. He was accepted as an expert in civil engineering and the International Building Code.

Mr. Mustafa testified that he is familiar with all of the permits issued for the demolition of the White Flint Mall, including Demolition Permit No. 702832. He testified that when the application for that permit was filed, the International Building Code and arguably the International Energy Code, as adopted by Executive Regulation 8-12, applied. Mr. Mustafa testified that demolition permits are typically considered to be more administrative than substantive, and thus they typically do not come to him, but that permits for partial demolition are reviewed more carefully. He testified that DPS asks for drawings in connection with permits for partial demolition to ensure the structural safety of the remaining structure.

Mr. Mustafa testified that the County's prehearing submission (Exhibit 10) contains the Demolition Permit application at circles 1-3, the pest control certification required by Section 8-27(e) of the County Code at circles 4-6, and the utility cut-offs required by Section 8-27(d) at circle 7 (Pepco), circle 8 (WSSC), and circles 9-11 (Washington Gas). He testified that the Notice list required by Section 8-27(a) is included at circles 12-17 of Exhibit 10,¹ and that the bond required by Section 8-27(f) is included at circles 18-20. Because this is considered partial demolition in light of the adjoining Lord & Taylor structure, Mr. Mustafa testified that the County required the Intervenor to submit plans, and that the final plans approved in connection with this demolition permit are included at circles 22-32 of Exhibit 10. He testified that DPS was looking at multiple permits because they wanted to make sure that the adjoining building was not affected.

When asked by a Board member about the process involved with plan review, Mr. Mustafa testified that after intake, the plans go through architectural, structural, electrical, mechanical, site and zoning review. He testified that the reviewers make comments and that corrections are then made, noting that DPS views changes as "corrections" if made before the permit is issued, and "revisions" if made after the permit is issued.

With respect to the application for Demolition Permit No. 702832, Mr. Mustafa testified that when staff reviewed it, it said "full demolition." He testified that staff knew that Lord & Taylor was there, and was concerned about the impact of the demolition on the Lord & Taylor building. He testified that the Lord & Taylor building was designed independently from the mall, with glass doors to the mall, and that the common wall between Lord & Taylor and the mall needed

¹ Notice of this Demolition Permit was accomplished via posting, as well as posting on the website. See Transcript, page 41.

to be maintained. He testified that these things were incorporated in this permit and the alteration permit. He testified that DPS received comments from Lord & Taylor and corrections from White Flint in connection with what to do about the newly-exposed wall of the Lord & Taylor building.

Mr. Mustafa testified that the plans were changed to satisfy DPS that the Lord & Taylor building would be protected from the elements. He testified that DPS considered how the new "exterior" wall would work, and what its rating should be. He testified that when Lord & Taylor abutted the mall, it was permitted to have glass doors, which are not rated. He testified with the mall demolished, there was a need to maintain an appropriate fire separation distance. He testified that the demolition permit application indicates that this would be addressed in the alteration permit. Mr. Mustafa testified that DPS conditioned issuance of the demolition permit on the completion of the interstitial space for which Building (Alteration) Permit No. 716825 was issued. He testified that the construction permitted by Building Permit No. 716825 created a two-hour fire separation between the Lord & Taylor building and the interstitial space structure, that where their two roofs met it was weather-tight and water-tight, and that the insulation would meet energy standards. Thus he testified that the construction of the interstitial space under Permit No. 716825 accomplished the fire separation, weatherization, and energy efficiency protection needed for that portion of the Lord & Taylor building that would otherwise be exposed after the demolition. The plans associated with Building (Alteration) Permit No. 716825 are included at circles 33-42 of Exhibit 10. He testified that the ability to carry out the demolition under Demolition Permit No. 702832 was conditioned on completion of the work under Permit No. 716825.

Mr. Mustafa testified that he reviewed the final plans submitted in connection with the demolition. He testified that they conformed to Chapter 8 of the County Code and to the applicable building codes, and that he concluded that Demolition Permit No. 702832 should be issued.

On cross-examination, when asked if anything on the plans advises the reader as to the proposed treatment of the exposed wall, Mr. Mustafa testified that the cover page to the plans says "see condition of permit." See Exhibit 10, at circle 22. He testified that Exhibit 10, at circle 27, shows a cross-section of the common wall and the next wall, which is higher. He testified that Exhibit 10, at circle 24, the bubble in the center of that page references the other building permit (i.e. Building (Alteration) Permit No. 716825) ("A new wall under a separate building permit will be built to meet the requirements of the International Building Code and the International Energy Code and NFPA 101 along column line 'B'."). Mr. Mustafa testified that DPS added this comment to make sure that the required construction was done under the alteration permit before the demolition. He testified that DPS did not want an unstable structure, and highlighted circle 27 of Exhibit 10, showing the Lord & Taylor structure on the left and the taller second wall on the right.

When asked on cross-examination where on the demolition permit it says that the construction authorized by the alteration permit must be completed before doing the demolition, and where on the alteration permit it says the same, Mr. Mustafa clarified that DPS has no control over scheduling—that is the owner's responsibility—but noted that the demolition work was conditioned on completion of the work under the alteration permit, and that the alteration permit says as the first condition of that permit that this work "shall be placed prior to starting demolition work." See Exhibit 10, at circle 38 ("Reinforcing of the existing structural elements shown on SK&A drawings in permit application number AP-716825 shall be in place prior to starting

demolition work submitted under the application number AP-702832.”² There is also a handwritten note on the right next to “Code Analysis” saying “see condition of permit.” See also Exhibit 10, at circle 22. Mr. Mustafa testified that there should be a note on the plans or a separate sheet attached to the plans that will explain this condition, which there is. See Exhibit 17. He testified that if you went through the complete set of drawings under this permit, you would see details about the common wall between Lord & Taylor and the mall, and another existing wall which is the next bay, and that the details would show how this wall needs to be done. See Exhibit 10, at circle 27.

Mr. Mustafa testified that all of the sequencing put into the permit became part of this permit, and that it was to be followed by the architects and contractors. He noted that this particular job was being carried out under the third party inspection program, in which the owner hires a third party inspector, DPS reviews their credentials (e.g. licensed architect, licensed professional engineer), and if their credentials are acceptable, DPS approves them. He testified that the County will receive periodic reports about the demolition progress from the inspector, and thus will monitor the construction, but that the actual inspection will be done by a third party. That third party will submit a completion certificate to the County when the work is done.

Mr. Mustafa testified that Exhibit 10, at circle 27, shows a two-hour fire separation, which he testified was established in accordance with the International Building Code. He testified that IBC Section 402.4.2.2 talks about openings between anchors and malls. He testified that if there were tenants on either side, a two hour rating is required. He testified that if there were no neighbors, there is no fire rating. He testified that in the absence of any use, he looked at Section 402.4.2.2.1 (a two hour, retail-to-retail rating) and determined that the minimum rating should be two hours. He explained that if a factory or high hazard use were put next door, the rating would need to be upgraded.

A full set of plans for Permit No. 702832 was then introduced, including the DPS official notes. See Exhibit 17. Counsel for the County noted that the first page lists “Conditions of Permit,” and states that the reinforcing of the existing structural elements shown on the SK&A drawings in permit application number AP716825 shall be in place prior to starting demolition work. See Exhibit 17.

5. Mr. Hadi Mansouri, the Chief Operation Officer of DPS, testified for the County. As the COO for DPS, he is responsible for the daily operation of the Department.

Mr. Mansouri testified that the International Building Code permits local jurisdictions to perform some engineering or inspections for which specialty knowledge is required by hiring third parties, because this work has to be done by specialty engineers. In the instant case, an agreement was made with Mr. Kehnemui and SK&A, the engineering firm of record for this project, that Mr. Kehnemui and his staff would be in charge of reviewing and following the construction means and middle, and that SK&A would monitor that the permit conditions are met. Mr. Mansouri testified that the timing of the inspections is related to the activity on the site, and that SK&A must be on site for an activity related to the means and middle because they are the construction engineer of record. He testified that they prepare a report that is submitted to the County, to the owners, and

² Exhibit 10, at circle 24, also contains a note referring to the second permit.

to the general contractor. Mr. Mansouri testified that DPS also has professional engineers monitoring the demolition. He testified that Chi Wong, who works for DPS and reports to Mr. Mustafa, is monitoring this for the County, in essence "checking on the checker." Mr. Wong goes to the site once or twice a week, depending on the construction activity.

Mr. Mansouri testified that DPS had a pre-construction meeting with White Flint and SK&A after the issuance of this permit. He testified that this was a condition of the permit, and that this is where the sequencing of the actual demolition was done, e.g. which crane would move first, which piece is going to be taken, etc. Mr. Mansouri testified that DPS does not usually require monitoring of demolition, but that in this case, DPS wanted to make sure that it was done in a safe manner, and that is why they required a special inspection agreement.

Mr. Mansouri testified on cross-examination that the inspections he referred to have occurred, adding that any time there is activity on site an inspection is required. He testified that he was not aware of any problems with the inspections, and that Mr. Mustafa, who is an engineer, has been reviewing them. He testified that the County had insisted that a structural engineer of record be obtained to provide services in connection with this Demolition Permit before the permit was issued. He testified that he was familiar with SK&A and with Mr. Kehnemui, who was his professor in graduate school, and stated that this firm is acceptable to the County.

6. Mr. Mark Beall, the Zoning Manager for DPS's Division of Zoning and Site Plan Enforcement, testified on behalf the County as an expert in the field of Montgomery County Zoning. Mr. Beall has been with the County since 2001, began working as a zoning site plan compliance reviewer in 2006, and was named Zoning Manager in June of 2014. His daily activities include reviewing building permit plans, interpreting the Zoning Ordinance, and providing interpretations of the Zoning Ordinance for others. He stated that he "live[s] and sleep[s]" Chapter 59 (the Zoning Ordinance).

Mr. Beall testified that the Zoning and Site Plan section typically does not get involved with demolition unless there are complaints. He testified that he reviewed Demolition Permit No. 702832 at the request of counsel for the County, including what would be left of the mall (i.e. the interstitial space) and the Lord & Taylor building. He testified that contrary to the assertions made by Lord & Taylor, the demolition does not create an illegal structure under the Zoning Ordinance, testifying that he found no violations of Chapter 59 for the interstitial space or the Lord & Taylor building.

On cross-examination, Mr. Beall testified that no site plan review is required for a demolition permit, and that no site plan review is required for the interstitial space. When asked if the Demolition Permit was a building permit, Mr. Beall replied that it was not, and when asked if a Use and Occupancy Permit was required for the interstitial space, he responded that it was not because it was not a use.

7. Mr. Robert Hubbard testified for Lord & Taylor. Mr. Hubbard testified that he had worked for the County from 1977 until 1996, that he had served as Director of DPS from 1996 until 2006, and that he currently works as a private consultant. He stated that he had previously appeared as an expert before the Boards of Appeals for Montgomery and Anne Arundel Counties,

and the District Court and Circuit Court in Montgomery County. He was offered as an expert in the interpretation and application of building codes, regulatory schemes, and the Zoning Ordinance in Montgomery County. In response to questioning from counsel for the Intervenor, Mr. Hubbard testified that he has a bachelor's degree in urban studies with a specialization in architecture, and was a certified building official by the International Code Committee from the early 1980's until he left Montgomery County in 2006. He stated that he has no professional licenses, is not a member of any professional associations, and has not taught or lectured on this topic in recent years. He stated that he is familiar with the International Building Code and with Chapter 59, and added that he has stayed up to date with the changes to Chapter 59 (presumably referring to the 2014 adoption by the County of a new Zoning Ordinance). In response to continued questioning, he clarified that he has not appeared as an expert before the Board of Appeals in Montgomery County since leaving County service in 2006, but that he had been qualified as an expert in Anne Arundel County in 2012. In response to a question from the Board Chair asking when he had worked as a zoning reviewer, Mr. Hubbard stated that he spent two years in the 1980's working as a manager, and that he also worked as a zoning plan reviewer for about 6 months in the late 1970's or early 1980's. Counsel for both the Intervenor and the County objected to the designation of Mr. Hubbard as an expert in the field for which he was offered on the basis of the foregoing, including his lack of professional degrees and licenses, the fact that he has not been recognized as an expert in this particular field before, and the breadth of the field for which he was being offered as an expert, and the Chair sustained their objection.

Mr. Hubbard testified that Lord & Taylor hired him because they were concerned about the impact of the removal of the mall on the safety of the people using the Lord & Taylor store, including Lord & Taylor employees, particularly as it relates to exiting. He testified that Lord & Taylor was also concerned about environmental factors associated with the demolition. He testified that when the mall came into existence, the whole, from a land use perspective, was considered a regional shopping center, but from a building code perspective, was considered a covered mall and anchor building. He testified that the openings between the covered mall and anchor building are allowed by the building code. He testified that if the covered mall were to go away, you would have an opening that is not protected and an exterior wall that is not weatherproofed and has no thermal protection. He testified that he told Lord & Taylor that they have an independent building, and that while exitways, mechanical systems, and fire protection were not an issue, and structural issues were not of concern, the protection of the new openings was a concern.

Mr. Hubbard testified that when they met with DPS to discuss the proposed demolition plans, the plans showed nothing being retained between the old mall and the Lord & Taylor building. He testified that the Director of DPS talked about a 15 foot walkway, but that there was no indication of the interstitial space. Mr. Hubbard testified that Lord & Taylor sent the Director a list of questions setting forth their concerns in March, including that Lord & Taylor did not know how their building would be protected. He testified that they were told there would be weather and thermal protection.

In response to a Board question, Mr. Hubbard testified that the plans in the record at Exhibit 17 were not the plans that were presented to him in March, 2015. He testified that the new plans raise more questions than they answer.

Mr. Hubbard testified that Exhibit 15 shows the adjacent building, with its fire-rated wall, a thermal barrier/insulated wall, and structural protection. He testified that if this were not there, the party wall with Lord & Taylor would not be maintained and would not have weather protection. He testified that before a building permit is issued, the building must be defined in terms of its use. He testified that the use of the interstitial space was not defined, and that one cannot determine appropriate fire separation without a use. In response to a Board question asking if he would have issued this permit if he were the Director, Mr. Hubbard responded, in the face of a continuing objection, that he would not have issued it.

On cross-examination, Mr. Hubbard testified that he had reviewed the preliminary plans for the demolition permit, and had hoped that there would be some revisions to those plans. He testified that once a plan conforms, DPS has to issue a permit. He testified that the Lord & Taylor building was built as if it were a stand-alone (“anchor”) building. He testified that it has support to all exterior walls, and that it was approved as a retail/mercantile use. He testified that the mall also had a Use and Occupancy Permit, which he assumes was for a retail use.

Mr. Hubbard testified that White Flint was originally constructed as a “regional shopping center,” which he stated the Zoning Ordinance defined as having at least 600,000 square feet and at least 50 tenants. He noted that this definition has not changed since 1977. He testified that Lord & Taylor is currently zoned CR3.0 C1.5 R2.5 H200 because of the comprehensive rezoning and the White Flint zoning sector plan. See Exhibit 20. Mr. Hubbard testified that the new Zoning Ordinance changed the CR zones. He testified that when the demolition is completed, Lord & Taylor, the interstitial space, parking areas E and F, and the surface parking lot will remain. Looking at the Use Table in the new Zoning Ordinance, Mr. Hubbard testified that “Regional Shopping Center” no longer appears as an allowable use, and that he did not know what the successor category of uses would be. He testified that the Lord & Taylor building would be less than 120,000 square feet, and that it may be classified as a retail/service establishment, which is a limited use in this zone. Mr. Hubbard testified that Section 59-3.5.11.B.2.a.iv of the Zoning Ordinance talks about retail/service establishments in the CR zones that are within ½ mile of a Metro station. See Exhibit 22. He testified that Lord & Taylor is within ½ mile of the metro. See Exhibit 23. He read Section 59-3.5.11.B.2.a.iv(b) aloud (“Parking facilities, excluding access driveways, must be located below-grade or in a structure behind or within the primary building.”). He testified that parking lot E was not inside or in front of the Lord & Taylor building, but rather was to the side of the Lord & Taylor store. He testified that parking lot F and the surface parking lot were not inside the Lord & Taylor building, but rather were in front of it. See Exhibit 19.

8. Counsel for Lord & Taylor recalled Mr. Beall. When asked if remaining parking lots E and F, and the surface parking lot, would be in conformance with Section 59-3.5.11.B.2.a.iv(b) of the Zoning Ordinance, Mr. Beall testified that he did not believe that Section 59-3.5.11.B.2.a.iv(b) applies in this case because the site design was done before this Zoning Ordinance was enacted and so is conforming under Section 59-7.7.1.A.1. When asked if the new Zoning Ordinance should apply because the proposed demolition would have the effect of converting this former regional shopping mall to a retail store, Mr. Beall testified that the site factors are grandfathered in if they existed when the new Zoning Ordinance took effect. When asked what Lord & Taylor would be if the mall were demolished, Mr. Beall testified that it would be a retail use, and when asked if the

remaining parking would be considered legal because it was grandfathered, Mr. Beall answered in the affirmative. When asked if the demolition would trigger Section 59-3.5.11.B.2.a.iv(b) and take this out of the universe of properties covered by Section 59-7.7.1.A.1, Mr. Beall disagreed, explaining that it might be different if the Intervenor were trying to add new parking, but that this parking already exists. He went on to testify that DPS cannot make the Intervenor go through and meet today's standards, reemphasizing that this site design existed prior to the adoption of the new Zoning Ordinance. Mr. Beall testified that DPS has been interpreting Section 59-7.7.1.A.1 in this way since the new Zoning Ordinance took effect.

When asked why Section 59-3.5.11.B.2.a.iv(i) existed if this Section does not apply to regional shopping centers, Mr. Beall testified that he did not know why that provision was there, stating that it may be there in case there a new regional shopping center was developed, and agreeing with counsel that it was conceivable that it was there to address parking if another regional shopping center was rezoned CR. When asked, if White Flint were to develop more than 500,000 square feet, if under Section 59-3.5.11.B.2.a.iv(h), parking could be located between the stores and the street with Planning Board approval, Mr. Beall answered in the affirmative; when asked if the reverse was true, if the Planning Board did not approve the parking between the stores and the street, that it could not be done, Mr. Beall repeated that this was an existing site with existing conditions. Thus he testified that under Section 59-7.7.1.A.1, it may be continued, renovated, repaired and reconstructed, as long as the floor area was not increasing.

9. Counsel for Lord & Taylor recalled Mr. Hubbard, who testified that Section 8-26(g) of the County Code, pertaining to building permits, requires compliance with 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 Demolition Permit No. 702832 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 8-27 of the County Code, “Demolition or removal of buildings,” reads as follows:

Sec. 8-27. Demolition or removal of buildings.

(a) Notice. The Director must mail written notice, at least 10 days before the Director issues a permit to remove or demolish a building or structure, to the owner of each adjacent and confronting lot. The applicant must give the Department the name and address of the owner of each adjacent and confronting lot. The notice must identify the building or structure to be demolished or removed, specify the process for issuing the permit and the time limit to appeal the issuance of a permit to the Board of Appeals, and include any other information the Director finds useful. The Director need not deliver this notice if unsafe conditions require immediate demolition or removal of the building or structure.

(b) Signage. The Director need not deliver the notice required by subsection (a) if, at least 10 days before the Director issues a permit to remove or demolish a building or structure, the applicant posts at a conspicuous location on the lot a sign describing the proposed demolition or removal, specifying the process for issuing the permit and the time limit to appeal the issuance of a 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).

(c) Special notice for older buildings. At least 30 days before the Director issues a permit to demolish or remove a building, other than a single-family dwelling, that will be more than 25 years old when it is demolished or removed, the Director must list the address of the property on a properly designated website or other widely available form of electronic notice.

(d) Notice to utilities. Before the Director may issue a demolition or removal permit, the applicant must notify each connected public utility and obtain a written release confirming that all service connections and appurtenant equipment, such as meters and regulators, have been safely disconnected and sealed.

(e) Permit requirement; conditions. A person must not demolish or remove a building or structure unless the Director has issued a permit to do so under this Section. Each demolition or removal permit must require the applicant to:

- (1) before demolishing or removing a building or structure, exterminate any rodents or other pests in it;
- (2) after demolition or removal, clear all construction and demolition debris;
- (3) restore the established grade of the surrounding land, unless a sediment control permit is otherwise required; and
- (4) at all times keep the site free from any unsafe condition.

(f) Bond or surety. Each applicant for a demolition or removal permit must file a performance bond, cash, certificate of guarantee, or surety with the Department, in an amount equal to the cost of demolition or removal, to assure the safe and expedient demolition or removal of the building or structure and clearing of the site. If the building or structure is not demolished or removed and the site is not cleared of all debris within the time specified in the permit, but not sooner than 60 days after the permit is issued, the Director may enter the property, demolish or remove the building or structure, clear the site of debris, and take action to forfeit the performance bond, enforce the guarantee, or otherwise reimburse the Department for its cost.

(g) Definitions. As used in this Section:

- (1) remove means to move a building or structure substantially intact from or within a site; and
- (2) demolish means to tear down or destroy an entire building or structure, or all of a building or structure except a single wall or facade.

8. Section 59-7.7.1.A of the Zoning Ordinance, pertaining to structures and site design existing at the time of the adoption of the new Zoning Ordinance, reads as follows:

Section 7.7.1. Exemptions

A. Existing Structure, Site Design, or Use on October 30, 2014

1. Structure and Site Design

A legal structure or site design existing on October 30, 2014 that does not meet the zoning standards on or after October 30, 2014 is conforming and may be continued, renovated, repaired, or reconstructed if the floor area, height, and footprint of the structure is not increased, except as provided for in Section 7.7.1.C for structures in Commercial/Residential, Employment or Industrial zones, or Section 7.7.1.D.5 for structures in Residential Detached zones.

2. Use

Except for a Registered Living Unit, any use that was conforming or not nonconforming on October 29, 2014 and that would otherwise be made

nonconforming by the application of zoning on October 30, 2014 is conforming, but may not expand.

9. The Board finds, based on the expert testimony of Mr. Mustafa and the evidence of record, that the application for Demolition Permit No. 702832 satisfied the requirements of Section 8-27 of the County Code, as follows:

The applicant (Intervenor) provided a Notice list, as required by Section 8-27(a). See Exhibit 10, circles 12-17. The permit was posted on the Property itself and online, and thus in accordance with Sections 8-27(b) and (c), mailed notice was not necessary. See Tr., page 41.

The applicant provided proof that all of the utilities have been safely disconnected and sealed, as required by Section 8-27(d). See Exhibit 10, at circle 7 (Pepco), circle 8 (WSSC), and circles 9-11 (Washington Gas).

The applicant provided proof that Section 8-27(e), relating to pest control and extermination, has been complied with. See Exhibit 10, circles 4-6.

The applicant provided the bond required by Section 8-27(f). See Exhibit 10, circles 18-20.

10. The Board finds, based on the testimony of Mr. Mustafa and the various notations contained in the plans about which Mr. Mustafa testified, that the ability to carry out the demolition under Demolition Permit No. 702832 was conditioned on completion of the work permitted by Building/Alteration Permit No. 716825. See Exhibit 10, circles 21-42. The Board further finds, based on the expert testimony of Mr. Mustafa, that the construction permitted by Building Permit No. 716825 accomplished the fire separation, weatherization, and energy efficiency protection needed for that portion of the Lord & Taylor building that would otherwise be exposed following the mall demolition under Demolition Permit No. 702832. Finally, the Board finds, based on the testimony of Mr. Mustafa, that the plans submitted in connection with the demolition 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 Demolition Permit No. 702832.

11. Based on the expert testimony of Mr. Beall, the Board finds that site plan review is not required for a demolition permit.

12. The Board further finds, based on Mr. Beall's expert testimony, that the resultant Lord & Taylor building complies with all applicable zoning regulations, and is in fact conforming under Section 59-7.7.1.A.1 of the Zoning Ordinance. The Board similarly finds, per Mr. Beall, that the remaining parking lots E and F, and the surface parking lot, are also conforming under Section 59-7.7.1.A.1 of the Zoning Ordinance because the site design existed before October 30, 2014. The Board notes that Mr. Beall testified that the demolition allowed by Demolition Permit No. 702832 does not create an illegal structure under the Zoning Ordinance, and that he found no violations of the Zoning Ordinance by the Lord & Taylor building or the interstitial space. See Tr., p. 82.

Accordingly, the Board finds that the proposed demolition complies with all applicable zoning regulations, in accordance with Section 8-26(g) of the County Code.

13. Based on the foregoing, the Board finds that DPS has met its burden of demonstrating by a preponderance of the evidence that Demolition Permit No. 702832 was properly issued, and that the appeal should be denied.

The appeal in Case A-6473 is **DENIED**.

On a motion by Vice Chair John H. Pentecost, seconded by Member Edwin S. Rosado, with Chair Carolyn J. Shawaker and Members Stanley B. Boyd and Bruce A. Goldensohn in agreement, the Board voted 5 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 15th day of December, 2015.



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).