

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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Case No. A-6479

APPEAL OF ROBERT J. ENGLEHART

OPINION OF THE BOARD

(Hearing held February 3, 2016.
Effective Date of Opinion: March 11, 2016.)

Case No. A-6479 is an administrative appeal filed November 17, 2015 by Robert J. Englehart (the "Appellant"). The Appellant charges error on the part of Montgomery County's Department of Permitting Services ("DPS") in the October 27, 2015 issuance of Building Permit No. 733238 to "Construct Residential Accessory Structure" located at 7221 Cedar Avenue, Takoma Park (the "Property"). The Appellant also charges error on the part of Montgomery County's Historic Preservation Commission ("HPC") in the September 16, 2015 approval and October 21, 2015 issuance of Historic Area Work Permit No. 725864 ("HAWP"). The subject Property is owned by Fawzia Ahmed and Steven Teles, who were permitted to intervene in this matter (the "Intervenors"). The Intervenors were represented by counsel, David W. Brown. The Appellant lives at 7217 Cedar Avenue, Takoma Park, which is next door to the Intervenors' property.

The Appellant asserts that DPS and HPC incorrectly issued the subject Construction Permit and HAWP, and asserts the permits "should have required side setback be 10 feet." Specifically, the Appellant asserts that the construction of the Intervenors' residential accessory structure will be 20 inches from Appellant's property line and that, pursuant to Chapter 59 of the County Code (the "Zoning Ordinance") this accessory building must be setback 10 feet from the side lot line. The Appellant further asserts that the garage which is currently in place on the Property is not being modified but instead is being completely demolished, and therefore any grandfathering provisions in the Zoning Ordinance are not applicable. Appellant also expressed concerns over fire, safety, and easements of light and air in allowing the construction of the accessory structure 20 inches from the Property's side lot line. Appellant further asserts that the land survey

Intervenors submitted is inaccurate because the border is legally determined by the property law provisions governing adverse possession.

Pursuant to section 59-7.6.1.C of the Zoning Ordinance, the Board held a public hearing on February 3, 2016. The Appellant appeared *pro se*. The Intervenors were represented by David W. Brown, Esquire, of Knopf & Brown. Associate County Attorney Charles L. Frederick represented Montgomery County.

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

FINDINGS OF FACT

The Board finds by a preponderance of the evidence that:

1. The Property, known as 7221 Cedar Avenue in Takoma Park, is an R-60 zoned parcel identified as Lot 11, Block 5 of the Takoma Park Subdivision.

2. On August 25, 2015, the Intervenors applied to the HPC for a HAWP to alter/renovate an accessory building on the subject Property. See Exhibit 7, circle 17-31. An HPC staff report dated September 9, 2015 recommended the HPC approve the Intervenors' HAWP application. See Exhibit 7, circle 13-17. On September 16, 2015, the HPC held a public hearing on the Intervenors' HAWP application and issued a Decision and Order approving the application with one condition: that the overhangs of the proposed dormers be reduced to 8". See Exhibit 6, circle 19-21. The HPC instructed DPS to issue the HAWP to Intervenors via a memorandum dated October 21, 2015. See Exhibit 6, circle 22. DPS issued HAWP Permit No. 725864 with conditions as directed by the HPC on October 21, 2015. Exhibit 3(b).

3. The City of Takoma Park informed DPS on October 21, 2015 that the city had been informed of Intervenors plans to apply for a building permit. See Exhibit 6, circle 24.

4. On October 21, 2015, Intervenors applied to DPS for a residential building permit to add to and alter an accessory building on the subject Property. Exhibit 6, circle 5-8. On October 27, 2015, Building Permit No. 733238 was issued for the requested extension to the accessory structure. See Exhibit 3(a).

5. On November 17, 2015, Appellant timely filed an appeal, charging error by DPS in its decision to issue Building Permit No. 733238. See Exhibit 1. At that time, Appellant also appealed the issuance of the HAWP Permit No. 725864, charging error by the HPC. See Exhibit 1.

6. Mr. Gregory McClain, a Permitting Services Specialist with the Department of Permitting Services, testified on behalf of DPS. Mr. McClain

testified that he has been with DPS for about 25 years and that his job responsibility is to review plans submitted to DPS to ensure they are in compliance with the County's Zoning Ordinance. He testified that, pursuant to the County Code, section 2-42B(a)(2)(A), DPS is responsible for interpreting the Zoning Ordinance.

Mr. McClain testified that he reviewed Building Permit No. 733238 when the building permit application was submitted. He testified that the permit was for an accessory building on the property located at 7221 Cedar Avenue, Takoma Park, which is in the R-60 zone. See Exhibit 6, circle 9. He testified that at the time he received this building permit application, the plans for the accessory building had already been reviewed by the HPC. See Exhibit 6, circle 19-23. He testified that the plans had been approved by the HPC and that the HPC had stamped the plans, in the bottom right-hand corner, indicating approval of the plans. See Exhibit 6, circle 9. Following their review, the HPC sent DPS a memorandum instructing DPS to issue HAWP. See Exhibit 6, circle 22. Mr. McClain testified that DPS then issued the HAWP. See Exhibit 6, circle 23. Mr. McClain testified that the plans for Building Permit No. 733238 were also reviewed by the City of Takoma Park. See Exhibit 6, circle 24.

Mr. McClain testified that, upon his review of the plans for Building Permit No. 733238, he understood that the Intervenor's were proposing to extend the existing accessory structure already located on the property. He testified that the existing accessory structure did not meet the current zoning requirements for side setbacks. He testified that, based upon HRC's approval of the plans, the City of Takoma Park's approval of the plans, and the building permit application, he determined that the existing accessory structure was a non-conforming structure. He testified that this non-conforming structure became a conforming structure pursuant to section 59-7.7.1.A.1 of the Zoning Ordinance. He further testified that, under 59-7.7.1.A.1, the renovations to the existing accessory structure submitted by the Intervenor's in their building permit application were permitted.

Mr. McClain testified that he reviewed the height of the proposed accessory structure addition and that the maximum height of an accessory structure in the R-60 zone is 20 feet. Counsel for DPS explained that this maximum height is pursuant to section 59-4.4.9.B of the Zoning Ordinance. Mr. McClain testified that the building plans the Intervenor's submitted showed the maximum height allowable under law as well as the maximum height of the proposed structure, and the structure was within the 20 foot limit.

Mr. McClain testified that section 59-4.1.7.C.1.a of the Zoning Ordinance outlines how to measure the height of a building in a residential zone. Mr. McClain testified that, pursuant to the Zoning Ordinance, he measured the height of the accessory structure addition by using the difference between the eaves and the ridge of the roof, and that the mean height level was just over 14 feet. He testified that had the mean been over 15 feet, an additional setback would have been

needed to bring the accessory structure addition into compliance with the Zoning Ordinance. In this case, Mr. McClain testified that the submitted building permit complied with the minimum side setback requirements under 59-4.4.9.B of the Zoning Ordinance, which are five feet. He testified that the proposed addition to the existing structure was offset so that it would be constructed in compliance with the required five foot setbacks from the side property line.

Mr. McClain reviewed the proposed addition to the accessory structure outlined in Exhibit 6, circle 9. He testified that, on the exhibit, under the words "Site Plan" it indicated that one inch was equal to 10 feet on the plan. He also testified that Exhibit 6, circle 9 is a reduced version of the plans and that he reviewed scale drawings when he reviewed the building permit application. Mr. McClain testified that the hashed portion of the building on Exhibit 6, circle 9 refers to the proposed new addition to the existing non-conforming accessory structure. He testified that the exhibit shows that the new addition would be at least five feet from the side property line. See Exhibit 6, circle 9.

Mr. McClain testified that a second level was being added to the existing accessory structure. He testified that the second level would also be located at least five feet from the side lot. See Exhibit 6, circle 9. In response to a question from the Board, Mr. McClain testified that the new addition, represented by the hashed portion of Exhibit 6, circle 9, is in the shape of a reverse-L, and that the distance from the bottom of the L is five feet from the side line.

Mr. McClain testified that Exhibit 6, circle 11 shows the addition to the accessory structure in the top right-hand corner. He testified that the hashed portion to that drawing in the top right-hand corner diagram shows that there will be a two and a half foot offset from the existing accessory structure, which is two and a half feet from the side lot line, for a total of five feet. Mr. McClain testified that Exhibit 6, circle 12 also shows the second floor addition. He testified that the bottom right-hand diagram, on the right side of the exhibit, measures that it is five feet from the second level of the proposed extension to the side lot line.

Mr. McClain testified that he reviewed the building plans and approved them as being in compliance with the Zoning Ordinance. He testified that he stamped his approval on the site plan portion of the application. See Exhibit 6, circle 9. He testified that the Building Construction Section of DPS also reviewed the building plans and stamped their approval of the construction portion of the addition to the accessory structure. See Exhibit 6, circle 9. Mr. McClain testified that it is his opinion that Building Permit No. 733238 was properly issued.

On cross-examination by Appellant, Mr. McClain testified that he believed portions of the existing walls for the existing accessory structure would remain. Referring to Exhibit 6, circle 12, Appellant questioned whether what he alleged was a rear roof had a mid-point measurement. DPS County counsel objected to the classification of the structure as a rear roof and explained that it was instead a

dormer. In response to a Board question, Mr. McClain testified that because the dormer was less than 50% of the length of the roof and was not formally part of the roof, he did not factor the dormer as part of the determination of the mean height of the structure. He testified that had the dormer for this proposed addition made up at least 50% of the roof, he would have considered conducting measurements from the ridge to the eaves of the dormer.

When asked on cross-examination by Appellant whether, under the Zoning Ordinance, section 59-4.1.7.C.3.a, the dormer would be intended for human occupancy, Mr. McClain testified that he could not determine that. Referring to Exhibit 6, circle 15, Mr. McClain testified that the plans indicate a loft at the second floor. Referring to Exhibit 6, circle 11, Mr. McClain testified that the second floor is referred to as a new family room. Mr. McClain testified that the dormer isn't used in determining the height of the roof.

On cross-examination by Appellant, Mr. McClain testified that, by looking at the site plans, he could determine the floor area, height, and footprint of the existing structure. In response to a Board question, Mr. McClain testified that, if he had larger plans, he could make the calculations, but the plans he had at the hearing had numbers printed on them that were so small they were barely legible. He testified that the width of the existing structure was about 13.1 feet. Mr. McClain further testified that the length of the existing structure was just under 20 feet. He testified that the square footage of the existing structure was about 248 square feet. Mr. McClain testified that the new structure would increase the square footage by 114 square feet.

In response to questions by the Board, Mr. McClain testified that the second level of the addition would be about 13 ½ feet by 11 ½ feet. See Exhibit 6, circle 11, diagram 3. He testified that the second floor would be 155 square feet. Mr. McClain testified that there would be more than 50% increase in square footage. He testified that the overall length of the building would be 24 feet. Mr. McClain testified that the original garage was just under 20 feet in length. He testified that there would be an increase in the footprint square footage. Mr. McClain agreed with the Board that the width of the new building would increase from 13.1 to 16 feet. See Exhibit 6, circle 11.

On cross-examination by Appellant, Mr. McClain testified that it is long-established DPS policy that a dormer that is less than 50% of the roof area doesn't count in measurement of the height of the structure.

On cross-examination by Intervenors, Mr. McClain testified that the height limit of an accessory structure in an R-60 zone is 20 feet, and that the proposed building does not exceed that height limit. He testified that the definition of encroachment, found in section 59-1.4.2 of the Zoning Ordinance, reads "[a]ny structure that is located between the lot line and the required setback lines or above the height limit." Mr. McClain testified that no part of the proposed building

structure exceeded the height limit. Referring to the Zoning Ordinance, section 59-4.1.7.C.3.a, Mr. McClain testified that there were no height encroachments in this case and therefore whether the dormer fit within the definition of an allowable height encroachment under section 59-4.1.7.C.3.a was not relevant to this case.

On further cross-examination by Intervenors, Mr. McClain testified that an existing non-conforming structure is conforming under section 59-7.7.1.A.1 as long as the new work to the structure complies with the Zoning Ordinance, such as staying out of any minimum setback areas. Mr. McClain testified that all of the new work for this accessory building stayed out of the five foot setback, which was why he concluded that the structure complied with section 59-7.7.1.A.1.

On redirect, Mr. McClain examined Exhibit 6, circle 12, the top left portion of the diagram labeled with a circle 4. He testified that the structure in the exhibit had one roof for the purposes of calculating roof height. He further testified that the portion of the diagram with the window was a dormer. Mr. McClain testified that DPS has a long-standing policy that has been in place since he started with the department that has been consistently applied wherein if a dormer is less than 50% of the roof structure, the actual roof is the primary structure used to determine the height of the building.

On re-cross by Appellant, Mr. McClain testified that DPS does not take into account the internal occupancy space a structure covers in determining whether the structure is the primary roof structure. He testified that DPS instead looks to what is the larger surface area of the roof.

On additional redirect, Mr. McClain testified that closing windows and putting on siding would be a cosmetic alteration. See Exhibit 6, circle 12.

On re-cross by Intervenors, Mr. McClain testified that, based upon the DPS long-standing rule concerning dormers being less than 50% of the roof, it would not have mattered had the dormer height been higher than the ridge line of the main roof. He testified that it would be a concern if the dormer was higher than the main roof and over the 20 foot limit, but that was not a concern in this case.

In response to questions by the Board, Mr. McClain testified that the proposed structure would still be an accessory structure; it would just be larger. He testified that he considered the proposed structure to fall under section 59-7.7.1.A.1. Examining the photograph labeled 11 attached to Exhibit 7, Mr. McClain testified that the new structure would maintain a level where the current garage is located and then the rest of the build-up would go up a level five feet from the property line.

7. Mr. Eric Saul testified for the Intervenors. Mr. Saul testified that he is a licensed architect with experience designing residential buildings in Montgomery County, and his resume was submitted to the Board. See Exhibit 8, circle 4-5. Mr.

Saul testified that he is familiar with the Zoning Ordinance and that he has experience designing buildings that comply with the Zoning Ordinance. In response to questions from the Board, Mr. Saul testified that he has previously designed buildings for Takoma Park and that he has testified at a Board of Appeals for Montgomery County variance hearing. Mr. Saul was admitted as an expert in the field of architecture and in designing buildings in compliance with the Zoning Ordinance, with no objection from Appellant.

Mr. Saul testified that he drew up the architectural plans for the Intervenors found in Exhibit 6. He testified that in designing the plans, he followed the Zoning Ordinance and DPS rules. He testified that his calculations met with these requirements. He testified the mean height of the roof was 14 feet four inches, which was below the 15 foot requirement. Mr. Saul testified that he has designed at least six garage buildings with dormers over the past eight years and that he has always known the rule concerning a dormer making up less than 50% of the roof. Mr. Saul testified that he specifically designed the dormer in this case to be under 50% of the size of roof so that it would not be included in the roof's measurements. He testified that by his calculation the dormer was 47.9% of the roof.

Mr. Saul testified that Exhibit 7, circle 11 is a drawing he prepared and labeled. Mr. Saul testified that he was not going to change the structure of the existing garage; he planned to keep the footings, walls, roof and basic structure of the garage. He testified that he did not want to change the existing roofline and therefore one section of the building was shorter than the other. Mr. Saul testified that he would have liked to make that existing portion taller but that he kept it exactly as it is so that he complied with the Zoning Ordinance.

Mr. Saul testified that if he had torn down the entire building and then built only the portion of the structure that is five feet from the property line, he would not have had a problem obtaining a building permit. He testified that in this case he had retained the non-conforming structure and replaced the portion that was on the other side of the five foot setback line. Mr. Saul testified that he intends to close the window on the existing garage because there is a fire code that does not allow a window within three feet of the property line and this window was only two and a half feet from the property line. Mr. Saul testified that he was not creating a whole new wall on the existing structure.

Mr. Saul testified that he and the Intervenors decided not to just start over with a whole new structure at the five feet setback line because they wanted to retain more floor space and to satisfy historic requirements. Mr. Saul testified that he was involved in the HAWP and that they looked to maintaining a historic look and feel to the neighborhood and to match the architecture. Mr. Saul testified that the HPC thought that two dormer pieces on the original plans, which had a two foot overhang, would be too overwhelming in scale for the neighborhood, and wanted the dormer to have a lesser overhang of eight inches so that it did not

compete with the main roof. Mr. Saul testified that he adjusted his plans as requested by the HPC. He testified that the HPC did not raise any other concerns about the plans.

Mr. Saul further testified that his plans enlarge the footprint of the existing structure. He testified that the structure was getting wider on the far side and getting longer by four feet outside of the setback area. Mr. Saul testified that the structure was also getting taller. Mr. Saul testified that his understanding of the Zoning Ordinance, section 59-7.7.1.A.1, was that as long as the enlargements occurred in a lawful area than they could be added to the non-conforming structure. He testified that he has done additions to several houses that were non-conforming. Mr. Saul testified that any other reading of the law would mean that if a part of a building were outside of the setback, the whole building would be outside of the setback, which would be contrary to the DPS's interpretation of the law for the past 50 years.

On cross-examination by Appellant, Mr. Saul testified that the four foot rear portion of the structure is covered by roof, and that there is a dormer over that four foot section. See Exhibit 7, circle 11. Mr. Saul testified that the existing garage is old and that all of the current roofing material will probably be replaced. He testified that the existing portion of the garage will have Hardie Plank siding. See Exhibit 7, circle 4.

In response to questions from the Board, Mr. Saul testified that he interpreted the HPC's staff report to state that the current garage had been altered over time and that the new design did not have to follow strict historic guidelines. See Exhibit 7, circle 4. Mr. Saul testified that the building code enables someone to build up to a property line, and that the fire code then requires that if the wall is up to the property line, the wall must be fire rated. He testified the fire code does not allow any openings within three feet of a property line. Mr. Saul testified that beyond three feet from the property line, the fire code does not require any protection. He testified that because the current garage window was an opening within three feet the Intervenor had decided to close the window for safety reasons. He testified that the remaining new building would be five feet from the property line and therefore the fire code was not concerned about it.

8. While Mr. Englehart engaged in cross-examination of the County's and Intervenor's witnesses, he did not put on any witnesses of his own. Mr. Englehart did submit written materials, which are in the record at Exhibit 7.

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 sections 8-23 and 24A-7.

2. Section 2A-2(d) of the Montgomery County Code provides that the provisions in Chapter 2A govern appeals and petitions charging error in the grant or denial of any permit or license or from any order of any department or agency of the County government, exclusive of variances and special exceptions, appealable to the County Board of Appeals, as set forth in section 2-112, article V, chapter 2, as amended, or the Montgomery County Zoning Ordinance or any other law, ordinance or regulation providing for an appeal to said board from an adverse governmental action.

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

4. Section 59-7.6.1.C.3 of the Zoning Ordinance provides that any appeal to the Board from an action taken by a department of the County government is to be considered *de novo*. The burden in this case is therefore upon the County to show that Building Permit No. 733238 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 24A-7 of the County Code, “Historic area work permits-Application procedures; appeals,” reads as follows:

Sec. 24A-7. Historic area work permits-Application procedures; appeals.

(a) Applications. An applicant for an historic area work permit must file an application with the Director. The application must contain all information the Commission requires to evaluate the application under this Chapter.

(b) Referral of application. Within 3 days after the application is complete, the Director must forward the application to the Commission for review.

(c) Public meeting. When the Commission receives the application, the Commission must schedule a public meeting to consider the application.

(d) Notice. The Commission must notify the Director and any citizen or organization that the Commission reasonably determines has an interest in the application of the time and place of the public meeting.

(e) Conduct of Commission meeting. The public meeting on the application must be informal and formal rules of evidence do not apply. The Commission must encourage interested parties to comment and must keep minutes of the proceedings on the application.

(f) Action by the Commission.

(1) The Commission must make a public decision on the application under paragraph (2) not later than 45 days after the applicant files the application or 15 days after the Commission closes the record on the application, whichever is earlier.

(2) The Commission must instruct the Director to issue or deny the permit. The Commission may require the Director to issue the permit with reasonable conditions necessary to assure that work under the permit does not harm the historical, architectural, archeological or cultural value of the historic resource.

(3) If the Commission instructs the Director to deny the permit, the Commission must notify the applicant in writing why the Commission denied the application.

(4) The commission must instruct the Director to issue the permit if the Commission finds that:

(A) denial of the permit would prevent the reasonable use of the property or impose undue hardship on the owner; and

(B) within 120 days after the finding in subparagraph (A), no person seeking preservation has submitted an economically feasible plan for preserving the structure.

(5) If the Commission does not act on an application within the time periods provided in this subsection, the application is approved, unless the applicant agrees to extend the deadline for Commission action.

(g) Miscellaneous provisions.

(1) The applicant for a permit has the burden of production and persuasion on all issues the Commission determines. If another historic preservation organization holds a deed of easement for the property in the application, the applicant must submit proof to the Commission that the

organization conducted an exterior architectural review and approved the action for which the applicant is seeking a permit.

(2) (A) The Commission may, by regulations issued under method (2), delegate authority to a County employee qualified in historic preservation and assigned to staff the Commission to review and approve an application for work that commonly has no more than an insignificant effect on an historic resource.

(B) The regulations:

(i) must describe the types of work that staff can review and approve, and require the Commission to review any application that is not clearly subject to staff approval; and

(ii) may waive the public meeting and notice requirements of subsections (c) and (d) for applications clearly subject to staff approval.

(C) If the staff denies or does not act on an application within 5 days after the Commission received the application from the Director, the Commission must review the application de novo.

(D) Staff must report monthly to the Commission and each appropriate Local Advisory Panel about any application reviewed by the staff in the previous month, including the disposition of the application.

(3) A permit may impose conditions that require waiver of a provision of the building code if the waiver is allowed under the "historic structures" provision of the building code adopted under Section 8-14 and the code inspector determines that waiver is appropriate for the specific work covered by the permit.

(4) The Director must enforce this Chapter.

(h) Appeal.

(1) Within 30 days after the Commission makes a public decision on an application, an aggrieved party may appeal the Commission's decision to the Board of Appeals, which must review the decision de novo. The Board of Appeals may affirm, modify, or reverse any order or decision of the Commission.

(2) A party may appeal a decision of the Board of Appeals under Section 2-114.

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

Sec. 8-25. Permits.

(a) Action on application. The Director must examine or cause to be examined each application for a building permit or an amendment to a permit within a reasonable time after the application is filed. If the application or the plans do not conform to all requirements of this Chapter, the Director must reject the application in writing and specify the reasons for rejecting it. If the proposed work conforms to all requirements of this Chapter and all other applicable laws and regulations, the Director must issue a permit for the work as soon as practicable.

(b) Time limit.

(1) A building permit is invalid if:

(A) an approved inspection, as required by this Chapter, is not recorded in the Department's inspection history file within 12 months after the permit is issued and a second approved inspection is not recorded in the Department's inspection history file within 14 months after the permit is issued; or

(B) the authorized work is suspended or abandoned for a period of 6 months.

(2) The Director must extend a permit for 6 months if the permit holder, before the permit expires, files a written request for an extension and pays an extension fee equivalent to the minimum fee then applicable to the original permit. Except as provided in paragraph (3), the Director must not grant more than one extension per permit under this subsection.

(3) For any building located in an enterprise zone, the Director may extend a permit for additional 6-month periods if the permit holder:

(A) shows good cause for each extension;

(B) requests an extension in writing before the permit expires; and

(C) pays the fee specified in paragraph (2).

(c) Reserved.

(d) Signature to permit. The director or his authorized representative shall attach his signature to each permit issued.

(e) Approved plans. The director shall stamp or endorse in writing both sets of corrected plans "approved" and one set of such approved plans shall be retained by him and the other set shall be kept at the building site, open to inspection of the director or his authorized representative at all reasonable times.

(f) Approval in part. The director may issue a permit for the construction of foundations or any other part of a building or structure before the entire plans and specifications for the whole building have been submitted; provided, that adequate information and detailed statements have been filed complying with all the pertinent requirements of this chapter. The holder of such permit for the foundations or other part of a building or structure shall proceed at his own risk with the building operation and without assurance that a permit for the entire structure will be granted.

(g) Posting of permit and site plans. The building permit or a true copy thereof and a copy of the building or other plans covered by the permit shall be kept on the site of operations open to inspection by the department, fire or police officials, in the course of their duties, during the entire time the work is in progress and until its completion.

(h) Notice of start and other inspections. At least twenty-four (24) hours' notice of start of work under a building permit shall be given to the department unless this requirement is waived in the building permit.

At least twenty-four (24) hours' notice shall be given the department for inspection of footings, concrete reinforcement, fire stopping and similar details before they are covered up.

9. 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.

10. The Board finds, based on the testimony of Mr. McClain and the expert testimony of Mr. Saul, and the evidence of record, that the application for Permit No. 733238 satisfied the requirements of section 8-25 of the County Code, as follows:

The applicants (Intervenors) submitted the requisite application for a building permit to DPS on October 21, 2015, as required by section 8-25(a). See Exhibit 6, circle 5-8. Prior to submitting that application, the Intervenors obtained a HAWP, which was approved by the HPC on September 16, 2015. See Exhibit 6, circle 19-21. Intervenors had also informed the City of Takoma Park that they were applying for a building permit. See Exhibit 6, circle 24.

DPS conducted a review of the building permit application and found that the application conformed to all requirements of Chapter 8 and all other applicable laws and regulations, as required by section 8-25(a). Tr. 7-19. DPS issued Building Permit No. 733238 on October 27, 2015. Exhibit 3(a)

Building Permit No. 733238 was signed by the Director of DPS, as required by section 8-25(d). Exhibit 3(a).

DPS stamped approval of the building plans submitted by Intervenors with their building permit application, as required by section 8-25(e). Exhibit 6, circle 9.

11. The Board finds, based on the testimony of Mr. McClain and Mr. Saul's expert testimony, that DPS has a long-standing policy wherein, in determining the mean height of a roof, if a dormer is less than 50% of the roof portion of the structure, it is not considered to be part of the primary roof. The Board finds, based on the testimony of Mr. McClain, that the plans submitted in connection with the building permit conformed to Chapter 8 of the Montgomery County Code and to the applicable building codes, and thus that there were no Chapter 8 or building code-related problems with the issuance of Building Permit No. 733238.

12. The Board further finds, based on Mr. McClain's testimony and Mr. Saul's expert testimony, that the proposed accessory building complies with all applicable zoning regulations, and that the existing garage is conforming under section 59-7.7.1.A.1 of the Zoning Ordinance because the garage existed before October 30, 2014 and was considered a nonconforming structure at that time. The Board notes that both Mr. McClain and Mr. Saul testified that the building renovation of the existing conforming garage and the addition allowed by Building Permit No. 733238 do not create an illegal structure under the Zoning Ordinance. Accordingly, the Board finds that the proposed extension and renovation of the residential accessory structure 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 Building Permit No. 733238 was properly issued, and that the appeal should be denied.

The Board found that section 24A-7(h) of the Montgomery County Code, which authorizes the appeal of historic area work permits, requires that any appeal be filed within 30 days after the HPC makes a public decision on an application, 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 HAWP Permit No. 725864 and Building Permit No. 733238 are two separate permits. The Board further finds that the Appellant did not appeal HAWP Permit No. 725864 within 30 days after the HPC made a public decision on Intervenor's HAWP application. The HPC made their public decision on September 16, 2015 and Appellant filed his appeal on November 17, 2015. Thus, because the Appellant did not timely appeal HAWP Permit No. 725864, the Board found that its correctness cannot be challenged in this proceeding.

The appeal in Case A-6479 is **DENIED**.

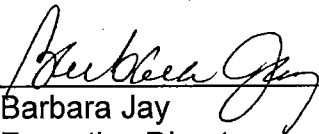
On a motion by Vice Chair John H. Pentecost, seconded by Member Edwin S. Rosado, with Chair Carolyn J. Shawaker and Member Bruce Goldensohn in

agreement, and with Member Stanley B. Boyd necessarily absent, the Board voted 4 to 0 to deny the appeal and adopt the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above be adopted as the Resolution required by law as its decision on the above entitled petition.


Carolyn J. Shawaker
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 11th day of March, 2016.


Barbara Jay
Executive Director

NOTE:

Any request for rehearing or reconsideration must be filed within ten (10) days after the date the Opinion is mailed and entered in the Opinion Book (see Section 2A-10(f) of the County Code).

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County in accordance with the Maryland Rules of Procedure (see Section 2-114 of the County Code).

