

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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Case No. A-6491

APPEAL OF ROBERT MILLSTONE et al.

OPINION OF THE BOARD

(Hearing held April 27, 2016)
(Effective Date of Opinion: May 20, 2016)

Case No. A-6491 is an administrative appeal originally filed February 16, 2016, by Robert Millstone (the "Appellant Millstone"). Appellant Millstone charged error on the part of Montgomery County's Department of Permitting Services ("DPS") in "the check-off of the zoning administrator on pending use and occupancy permit #338750 for change of use from vehicle service storage to recycling collection and processing." Appellant Millstone alleged that the check-off should have been disapproved because the facility was acting as an illegal junkyard, not as a recycling center. Appellant Millstone filed another administrative appeal April 15, 2016 charging error on the part of DPS in the April 4, 2016 issuance of Use and Occupancy Permit No. 338750, again asserting that the facility was being operated as an illegal junkyard and not as a recycling center.

On April 19, 2016, MIMCO, LLC (the "Appellant MIMCO") filed an administrative appeal charging error on the part of DPS in the April 4, 2016 issuance of Use and Occupancy Permit No. 338750, also asserting that the facility was being operated as an illegal junkyard. The facility is located at 801 E. Gude Drive, Rockville, Maryland 20850-1331 (the "Property"). The tenant to the Property, Balaji Prasad and Rockville Metals, LLC, was permitted to intervene in this matter (the "Intervenors").

Pursuant to section 59-7.6.1.C of the Zoning Ordinance, the Board scheduled a public hearing for May 25, 2016. Prior to the hearing, the Board held a pre-hearing conference on April 20, 2016, the subject of which was pre-hearing submissions by the parties, pursuant to the Montgomery County Code, § 2A-7(a). The Appellants were represented by Gary R. Jones, Esquire of Baxter,

Baker, Sidle, Conn & Jones P.A. The Intervenor was represented by Soo Lee-Cho, Esquire of Miller, Miller & Canby. Associate County Attorney Charles L. Frederick represented Montgomery County.

At the outset of the hearing, pursuant to Board Rule 2.4, the Board granted all Appellants' Motion to Consolidate all three administrative appeals, unopposed by Mr. Frederick or Ms. Lee-Cho. See Exhibit 12. Appellants all have businesses located at 1500 Southlawn Lane, Rockville, Maryland 20850. Pursuant to the County Code, § 2A-8 and Board Rule 3.2, the County submitted a Motion to Dismiss and for Summary Judgment of the administrative appeal, and Appellant Millstone filed an opposition. The Board, pursuant to Board Rule 3.2.5, decided the Motion for Summary Disposition at a work session on April 27, 2016.

Decision of the Board: Motion for Summary Disposition **granted**;
 administrative appeal **dismissed**.

RECITATION OF FACTS

The Board finds, based on undisputed evidence in the record, that:

1. The Property, known as 801 E. Gude Drive, Rockville, Maryland, is a heavy industrial zoned (IH-2.7 and H-70) parcel.
2. On March 23, 2016, Intervenor applied to DPS for a Use and Occupancy Permit for the Property. See Exhibit 3. The Intervenor's application was for a change in use of the Property from "vehicle service – storage" to "recycling collection and processing." See Exhibit 3. The application listed the primary use for the occupancy to be "recycling collection and processing". See Exhibit 3.
3. On April 4, 2016, DPS approved Intervenor's Use and Occupancy application and issued Intervenor's Use and Occupancy Permit No. 338750 for the Property. See Exhibit 9
4. On April 5, 2016, Appellant Millstone's attorney, Mr. Jones, filed a complaint with DPS requesting DPS investigate whether Intervenor was operating an illegal junk or scrapyard at the Property. See Exhibit 10, ex. 5. On April 21, 2016, DPS informed Mr. Jones that DPS managers and inspectors had inspected the Property on both announced and unannounced visits and had found that there was construction equipment and parking lot renovations occurring at the Property. See Exhibit 13, ex. 3. DPS found no recycling or scrap metal processing activity at the Property at that time, and therefore no violation of the Zoning Ordinance at the Property. See Exhibit 13, ex. 3.

MOTION FOR SUMMARY DISPOSITION—SUMMARY OF ARGUMENTS

1. Counsel for the County argued that the Board has jurisdiction to hear administrative appeals concerning the issuance of a Use and Occupancy permit. However, Appellants in this case are arguing that the Intervenor is or plan to use the Property in a manner inconsistent with the use authorized in Use and Occupancy Permit No. 338750. Such a violation would result in a civil enforcement action and would be under the exclusive jurisdiction of the District Court of Maryland, not the Board.

Counsel for the County further argued that once Intervenor applied for a Use and Occupancy permit, DPS must issue the permit if the application meets the requirements of the County Code. He argued that Appellants concede that a recycling center is permitted in the Property's heavy industrial zone, and there is no genuine issue as to whether DPS properly issued Use and Occupancy Permit No. 338750 for the Property.

Counsel for the County argued that the fact that the State of Maryland issued Intervenor a business license entitled "Junk DLR or Scrap Metal Pro" has no bearing on the issuance of the Use and Occupancy permit because land use control is a local, not State-wide, issue, and because a Use and Occupancy permit differs from a business license. Further, County counsel argued that there was no proof that this license indicated what type of business Intervenor planned to operate in the County.

2. Counsel for the Appellants argued that Intervenor's State of Maryland business license clearly shows that Intervenor intend to operate as a junkyard, not as a recycling center. He argued that the Intervenor's application for a Use and Occupancy permit was facially false and that a junkyard is not permitted in the Property's zone. He argued that DPS has an obligation to determine not only whether the permit applied for is allowed in the zone but also to determine if the permit requested is the appropriate permit for the actual use.

Counsel for the Appellants argued that Intervenor had been advertising to purchase metal prior to the issuance of the Use and Occupancy permit. He argued that Intervenor purchased steel for weight on April 22, 2016, evidencing that they are open for business and operating as a scrap or junkyard, not as a recycling center. He explained that Appellants have a non-conforming use to operate a junkyard at their property.

3. Counsel for the Intervenor argued that the issuance of Building Permit No. 716260 on November 2, 2015 was not timely appealed to the Board. She argued that the use of the word "junk" in the State business license does not evidence an intent on how Intervenor plan to operate their business, and that the use will be recycling and processing as permitted in the Property's zone. Counsel argued that nothing in the Zoning Ordinance precludes Intervenor from

purchasing metal as part of recycling collection and processing. She explained that Intervenors started to operate their business last week.

Counsel for the Intervenors further argued that Appellants sole basis for their appeal of the issuance of the Use and Occupancy permit is an anticipated violation of the Zoning Ordinance and is not based on any error by DPS in issuing the permit.

CONCLUSIONS OF LAW

1. Section 2-112(c) of the Montgomery County Code provides the Board of Appeals with appellate jurisdiction over appeals taken under specified sections and chapters of the Montgomery County Code, including section 8-23.

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

3. Under Section 2A-8 of the Montgomery County Code, the Board has the authority to rule upon motions and to regulate the course of the hearing. Pursuant to that section, it is customary for the Board to dispose of outstanding preliminary motions at a Board work session prior to the hearing. Board Rule 3.2 specifically confers on the Board the ability to grant Motions to Dismiss for Summary Disposition in cases where there is no genuine issue of material fact and dismissal should be rendered as a matter of law (Rule 3.2.2).

4. 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 [of Permitting Services], and may not appeal an amendment of a permit if the amendment does not make a material change to the original permit.

5. Section 59-7.6.1.C.1.a of the Zoning Ordinance provides that "[a]ppeals to the Board of Appeals may be made by any person, board, association, corporation, or official allegedly aggrieved by the grant or refusal of a building or use-and-occupancy permit or by any other administrative decision based or claimed to be based, in whole or in part, upon this Chapter, including the zoning map..."

6. Section 8-28 of the County Code provides for the issuance of Use and Occupancy certificates, as follows:

Sec. 8-28. Certificate of use and occupancy.

(a) New buildings. It shall be unlawful for any person to use or occupy a building hereafter erected in whole or in part until the certificate of use and occupancy as provided in chapter 59 of this Code shall have been issued by the director in accordance with the requirements of this chapter.

(b) Buildings hereafter altered. It shall be unlawful for any person to use or occupy a building hereafter enlarged, extended or altered to change from one use group to another, in whole or in part until a certificate of use and occupancy shall have been issued by the director certifying that the work has been completed in accordance with the provisions of the approved permit; except, that any use or occupancy, which was not discontinued during the work of alteration, shall be discontinued within thirty (30) days after the completion of the alteration unless the required certificate is secured from the director.

(c) Existing buildings. Upon written request from the owner of an existing building, the director shall issue a certificate of use and occupancy; provided, that there are no violations of law or orders of the director pending and it is established after inspection and investigation that the alleged use of the building has heretofore existed. Nothing in this chapter shall require the removal, alteration or abandonment of or prevent the continuance of the use and occupancy of a lawfully existing building, unless such use is deemed to endanger public safety and welfare.

(d) Changes in use and occupancy. After a change of use has been made in a building, it shall be unlawful for a person to reestablish a prior use that is not lawful for a new building of the same type of construction unless all the applicable provisions of this chapter are complied with.

(e) Temporary occupancy. Upon the request of the holder of a permit, the director may issue a temporary certificate of occupancy for a building or structure or part thereof before the entire work covered by the permit shall have been completed; provided, that such portion or portions may be occupied safely prior to full completion of the building without endangering life or public welfare.

(f) Contents of certificate. When a building or structure is entitled thereto, the director shall issue a certificate of use and occupancy within ten (10) days after written applications. The certificate shall certify compliance with the provisions of this chapter and the purpose for which the building or structure may be used in its several parts. The certificate of use and occupancy shall specify the use group, the fire grading, the maximum live load on all floors, the occupancy load in the building and all

parts thereof and any special stipulations and conditions of the building permit.

7. Section 59-7.4.2.A.1 of the Zoning Ordinance, pertaining to Use and Occupancy permits, states “[a] use-and-occupancy permit is required before any building, structure, or land can be used or can be converted, wholly or in part, from one use to another.”

8. Two of Appellants’ appeals are of the issuance by DPS of Use and Occupancy Permit No. 338750. Use and Occupancy permits are issued pursuant to Section 8-28 of the County Code, and thus are appealable to the Board under Section 8-23(a). The specifics of this appeal are set forth in the Recitation of Facts, above. All parties agree that the appeal of the “check off of the zoning administrator on pending use and occupancy permit #338750” is dismissed as moot.

9. All parties agree that recycling collection and processing is permitted in the Property’s heavy industrial zone pursuant to § 59-3.1.6 of the Zoning Ordinance. See Exhibit 13, p. 2.

10. The Board finds that any controversy regarding the correctness of the issuance of Use and Occupancy Permit No. 338750 does not involve any genuine issue of material fact to be resolved. There is no dispute that the Intervenor applied for a use and occupancy permit for a recycling collection and processing occupancy and that such occupancy is allowed in the Property’s zone. Rather, the Board finds that the controversy surrounds how the Property may be used following the issuance of Use and Occupancy Permit No. 338750, which is not a controversy before the Board. The Board finds that dismissal should be rendered as a matter of law.


11. The Board finds it unnecessary to consider the differences between a junk or scrapyards and a recycling collection and processing occupation because Use and Occupancy Permit No. 338750 was issued for a recycling collection and processing occupancy. Any subsequent use of the Property is not a matter currently before the Board.

12. It is unclear whether Appellants were also appealing the November 2, 2015 issuance of Building Permit No. 716260. See Exhibit 14, ex. A. Appellants first filed their appeal on February 16, 2016, over two months after the 30-day filing deadline to appeal the issuance of Building Permit No. 716260. If Appellants are also appealing the issuance of Building Permit No. 716260, that appeal is dismissed as untimely.

13. The Motion for Summary Disposition in Case A-6491 is granted, and the appeal in Case A-6491 is consequently **DISMISSED**.

On a motion by Vice Chair John H. Pentecost, seconded by Member Edwin S. Rosado, with Chair Carolyn J. Shawaker and Members Bruce Goldensohn and Stanley B. Boyd in agreement, the Board voted 5 to 0 to dismiss the administrative 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 20th day of May, 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).