

**BOARD OF APPEALS  
for  
MONTGOMERY COUNTY**

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Rockville, Maryland 20850  
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<http://www.montgomerycountymd.gov/boa/>

**Case No. A-6505**

**APPEAL OF ROBERT MILLSTONE**

OPINION OF THE BOARD

(Hearing held November 16, 2016)  
(Effective Date of Opinion: December 7, 2016)

Case No. A-6505 is an administrative appeal filed October 13, 2016 by Robert Millstone ("Appellant"). Appellant charged error on the part of Montgomery County's Department of Permitting Services ("DPS") in the "October 6, 2016 Determination that a junkyard is a permitted use in Montgomery Co. and that Rockville Metals is therefore not in violation of the County Code. See October 6 letter attached." Appellant alleged that DPS should have determined that Rockville Metals, LLC was operating a junkyard in violation of the Montgomery County Code and was not operating within the confines of its use and occupancy permit.

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 December 14, 2016. Prior to the hearing, the Board held a pre-hearing conference on November 16, 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 Intervenors were represented by Soo Lee-Cho, Esquire of Miller, Miller & Canby. Associate County Attorney Charles L. Frederick represented Montgomery County.

Appellant has a business 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 the administrative appeal, and Appellant filed an opposition. The Board, pursuant to Board Rule 3.2.5, decided the Motion for Summary Disposition at the pre-hearing conference on November 16, 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 July 15, 2016, Appellant's attorney, Mr. Jones, filed a complaint with DPS asking DPS to conduct an investigation and issue a Notice of Violation to Intervenor for operating an illegal junkyard at the Property. See Exhibit 3.

3. On October 6, 2016, DPS responded to Appellant's July 15, 2016 complaint. See Exhibit 3. In that responsive letter, Diane R. Schwartz Jones, Director of DPS, explained that DPS had issued a use and occupancy permit to Intervenor for recycling collection and processing. See Exhibit 3. Ms. Jones stated that DPS conducted investigations into the allegations outlined in Appellant's July 15, 2016 letter and found no zoning violations related to onsite operations at the Property. See Exhibit 3. DPS found that Intervenor were in compliance with the Zoning Ordinance. See Exhibit 3.

### **MOTION FOR SUMMARY DISPOSITION—SUMMARY OF ARGUMENTS**

1. Counsel for the County argued that the Appellants in this case are arguing that DPS's investigation, finding of no violation, and failure to issue a Notice of Violation to Intervenor is appealable to the Board. He argued that § 2-112 of the County Code does not provide the Board with jurisdiction to review a decision of DPS finding no violation of a use and occupancy permit or that an entity is not operating in violation of the Zoning Ordinance. Because the Board does not have subject matter jurisdiction to review DPS's decision, he argued that the Board should dismiss this appeal.

2. Counsel for the Appellants argued that this appeal was about DPS's determination that a junkyard is a permitted use in Montgomery County, and that this interpretation is not supported by the Zoning Ordinance. He argued that a 1997 Zoning Text Amendment rendered junkyards a

prohibited use in Montgomery County. He argued that the Board has the jurisdiction to hear this legal issue.

3. Counsel for the Intervenors argued that Rockville Metals was not a junkyard; it is an allowable recycling facility with a valid use and occupancy permit. She argued that DPS conducted an investigation and found no violation of the permit, and that the October 6, 2016 DPS letter does not make a legal conclusion that junkyards are allowed in Montgomery County. She explained that under State law provisions, Rockville Metals is licensed as a junkyard, but under County law, Rockville Metals is licensed as a recycling facility.

### **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.

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 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 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...”

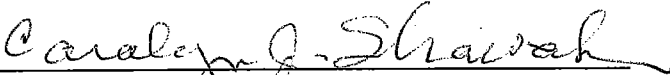
5. The Board finds that any controversy concerning DPS's determination that Intervenors were not in violation of the Zoning Ordinance does not involve any genuine issue of material fact to be resolved by the Board. Rather, the Board finds that the controversy surrounding DPS's

conclusion and October 6, 2016 letter is not a controversy for which the Board has appellate jurisdiction. The Board finds that dismissal should be rendered as a matter of law.

6. The Motion for Summary Disposition in Case A-6505 is granted, and the appeal in Case A-6505 is consequently **DISMISSED**.

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

  
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Carolyn J. Shawaker  
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book  
of the Board of Appeals for  
Montgomery County, Maryland  
this 7th day of December, 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).