

**BOARD OF APPEALS  
for  
MONTGOMERY COUNTY**

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**Case No. A-6566**

**APPEAL OF MALCOLM BURKE**

OPINION OF THE BOARD

(Hearing held June 6, 2018)  
(Effective Date of Opinion: July 17, 2018)

Case No. A-6566 is an administrative appeal originally filed April 11, 2018, by Malcolm Burke (the "Appellant"). The Appellant charged error on the part of Montgomery County's Department of Permitting Services ("DPS") in "1) denial of complaint filed 2/16/18 w/Atiq Panjshir by email" and "2) denial of fence permit application #831789." See Exhibit 1. The Appellant filed an amendment to the initial administrative appeal on April 26, 2018 charging error on the part of DPS in the April 17, 2018 "'rejection' of application for work in public right of way." See Exhibit 4(a).

The subject property is Lot 4 and 5, Block A, Summer Park Subdivision, located at 5326 and 5332 Falmouth Road, Bethesda, Maryland, 20816 in the R-60 zone (the "Property").

Pursuant to section 59-7.6.1.C of the Zoning Ordinance, the Board scheduled a public hearing for June 6, 2018. Prior to the hearing, the Board held a pre-hearing conference on May 9, 2018, the subject of which was pre-hearing submissions by the parties, pursuant to the Montgomery County Code, section 2A-7(a). The Appellant appeared *pro se*. Kenneth and Sherry Bachman (the "Intervenors"), who own the property at 5332 Falmouth Road, were represented by Stuart Barr of Lerch, Early & Brewer and were permitted to intervene in this administrative appeal. Associate County Attorney Charles L. Frederick represented Montgomery County.

At the outset of the pre-hearing conference, Mr. Frederick informed the Board that he planned to file, by the end of that week, a motion to dismiss and for

summary disposition. The Board, exercising its authority to regulate the course of a hearing and in the interest of judicial efficiency, re-set the June 6, 2018 public hearing date to a motions hearing date to consider the County's motion to dismiss and for summary disposition, and re-scheduled the public hearing, should the motions hearing not dispose of the appeal, for July 18, 2018. Pursuant to sections 2A-7 and 2A-8 of the County Code and Board Rule 3.2, the County submitted a Motion to Dismiss and for Summary Disposition on May 11, 2018 (see Exhibit 8) and a Supplement to Motion to Dismiss and for Summary Disposition on May 17, 2018. See Exhibit 15. Intervenors filed a Statement in Support of the County's Motion to Dismiss and for Summary Disposition (see Exhibit 17), and the Appellant filed an Opposition to Montgomery County's Motion to Dismiss and for Summary Disposition, as Supplemented, and a Supplemental Opposition. See Exhibits 16 and 19.

The Appellant filed a Motion to Reconsider the Schedule Relief Granted to the County Attorney for the DPS, and to Reinstate the Duly Noticed Schedule for Case No. A-6566. See Exhibit 7. DPS filed an Opposition to Motion for Reconsideration (see Exhibit 9) and the Intervenors also filed an Opposition to Appellant's Motion for Reconsideration (see Exhibit 10). The Board considered the motion, and oppositions to, at their May 16, 2018 Worksession. On a motion by Member Stanley B. Boyd, seconded by Member Katherine Freeman, with Chair John H. Pentecost and Vice Chair Edwin S. Rosado in agreement, and Member Bruce Goldensohn necessarily absent, the Board voted 4 to 0 to deny the Appellant's motion to hold the administrative hearing, rather than a motions hearing, on June 6, 2018, noting that the Board has the authority to grant continuances and to modify the Board's schedule under the Board's Rules and section 2A of the County Code, and that should the County's Motion to Dismiss and for Summary Disposition dispose of the administrative appeal, it would be a waste of all the parties' resources not to consider the motion prior to the scheduled hearing date.

The Appellant filed a Motion to Compel Production of Documents from the DPS and a Motion to Conduct a Detailed Survey of the Land at Issue in this Proceeding and for the Board of Appeals to Take Official Notice of the Findings Thereof. See Exhibits 11 and 12. DPS filed an opposition to both motions. See Exhibits 13 and 14. The Board considered the motions, and oppositions to, at their May 23, 2018 Worksession. On a motion by Vice Chair Edwin S. Rosado, seconded by Member Stanley B. Boyd, with Chair John H. Pentecost and Members Bruce Goldensohn and Katherine Freeman in agreement, the Board voted 5 to 0 to deny the Appellant's motion to conduct a detailed survey. On a motion by Chair John H. Pentecost, seconded by Member Katherine Freeman, with Vice Chair Edwin S. Rosado and Members Stanley B. Boyd and Bruce Goldensohn in agreement, the Board voted 5 to 0 to deny the Appellant's motion to compel, noting that DPS was in the process of obtaining the documents in the motion to compel for the Appellant.

The Appellant filed a Request for Oral Arguments on the County's Motion to Dismiss and for Summary Disposition.<sup>1</sup> See Exhibit 21. The Board, pursuant to Board Rule 3.2.4, granted the Appellant's motion for oral argument. The Board, pursuant to Board Rule 3.2.5, decided the Motion to Dismiss and for Summary Disposition and the supplement to the motion at the close of oral argument on June 6, 2018.

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

### **RECITATION OF FACTS**

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

1. The Property, located at 5326 and 5332 Falmouth Road, Bethesda, Maryland, 20816, is in the R-60 zone.
2. The Appellant owns the property located at 5409 Falmouth Road, Bethesda, Maryland, 20816, also in the R-60 zone. See Exhibits 1 and 8, ex. 9.
3. C. and J.B. Martin own the property located at 5326 Falmouth Road. See Exhibit 8, ex. 8. The Intervenors own the property located at 5332 Falmouth Road. See Exhibit 8, ex. 7.
4. On February 16, 2018, the Appellant sent an email complaint "concerning the Public Right of Way that runs from Falmouth Road to the Little Falls Stream Valley Park between 5326 Falmouth Road and 5332 Falmouth Road in Bethesda, 20816" to Atig Panjshiri, Manager, Right of Way Plan Review, Division of Land Development, DPS. See Exhibit 3(b). On March 26, 2018, Mr. Panjshiri informed the Appellant that DPS did not intend to take enforcement action against the owners of a fence placed on the Property. See Exhibit 3(b).
5. On March 26, 2018, the Appellant filed a permit application, #831789, to construct a fence in the area between 5326 Falmouth Road and 5332 Falmouth Road. See Exhibit 8, ex. 6. DPS subsequently denied the Appellant's fence permit application #831789. See Exhibit 3(a).
6. On April 4, 2018, the Appellant filed a "Work in Public Right of Way Permit Application" with DPS. See Exhibit 19, ex. B. DPS denied the Appellant's application to work in the public right-of-way by letter dated April 17, 2018. See

<sup>1</sup> The Appellant also filed a Motion to Introduce Documentary Evidence Into the Record and a Motion for the Board of Appeals to Conduct a Site Visit of the Subject Property at Issue in this Case, as well as Nearby Land Within a County Right of Way and Improved by Private Parties, and to Take Official Notice of the Findings Thereof. See Exhibits 18 and 20. Because the Board granted summary disposition in this case, the Board did not need to consider these two motions, which pertain to evidence to be introduced during an evidentiary hearing.

Exhibit 4(c) In that denial letter, DPS explained that the Appellant did “not own the property on either side of the area noted on the plat, nor the underlying fee simple title to the property in question.” See Exhibit 4(c).

**MOTION TO DISMISS AND FOR SUMMARY DISPOSITION—SUMMARY OF ARGUMENTS**

1. Counsel for the County argued that the Appellant’s initial appeal alleged that DPS erred in not taking enforcement action in response to the Appellant’s February 16, 2018 email complaint (see Exhibit 3(b)) and in not issuing a fence permit for application #831789. See Exhibit 1.

Counsel first argued that the Board does not have subject matter jurisdiction over DPS’s prosecutorial discretion, and that section 2-112 of the County Code does not authorize the Board to hear appeals on DPS’s enforcement decisions. Counsel further argued that the Annotated Code of Maryland, Courts and Judicial Proceedings Article, section 4-401, gives original jurisdiction over civil citations to the district courts, not the Board. He argued that in *Falls Road Community Association, Inc. v. Baltimore County*, 437 Md. 115, 142 (2014), the Maryland Court of Appeals held that courts do not have jurisdiction and are prohibited from second guessing the prosecutorial discretion of the counties. Counsel for the County argued that such discretion is an executive function and that the Board does not have the jurisdiction to second guess an executive branch decision on enforcement.

Counsel for the County argued that, pursuant to *Holy Cross Hospital, Inc. v. Health Services Cost Review Commission*, 283 Md. 677, 683 (1978), the Board is an entity created by statute. He argued that the Board does not have inherent powers; the Board’s powers must be expressly provided by statute. Counsel for the County argued that no provision of law provides the Board with the authority to hear appeals on DPS’s decision not to seek enforcement or issue a civil citation.

Counsel for the County argued that the Appellant applied for a building permit to construct a fence in the area between 5326 and 5332 Falmouth Road, Permit # 831789. See Exhibit 8, ex. 6. He argued that to obtain a building permit under section 8-24(c) of the County Code, an applicant must be a qualified person, that is, the applicant must be the owner of the property or authorized by the owner of the property. Counsel argued that the Appellant does not hold a property interest in the Property and therefore cannot obtain a building permit for the Property. According, DPS properly denied Permit # 831789.

Counsel for the County further argued that the Appellant’s amendment to his initial appeal alleged that DPS erred in not granting the Appellant’s application to work in the public right-of-way. See Exhibit 4(a). He argued that the permit sought to construct a fence and to remove street trees in the public

right-of-way. Counsel for the County argued that under Chapter 49 of the County Code, there are two types of right-of-way permits: section 49-11 governs building structures in the right-of-way and section 49-35 governs requests for permission to perform any tree work on any roadside tree or to construct a road.

Counsel for the County argued that section 49-10(a) of the County Code states, "[e]xcept as provided in Section 49-11, in the public right-of-way, a person must not place, maintain, use, or exercise control over, any object or structure in the public right-of-way." He argued that section 49-10(d) of the County Code prohibits a person from allowing, again except as allowed in section 49-11, "the erection or placement of any structure, fence, post, rock, or other object in the public right-of-way." Thus, counsel argued that the Appellant must comply with section 49-11 to install a fence on the Property.

Counsel for the County argued that section 49-11(a)(3) of the County Code authorizes DPS to issue a permit to "install a temporary, removable obstruction or occupation of a right-of-way." He argued that this section would allow a person to erect a fence in the right-of-way. However, counsel argued that the Board does not have jurisdiction to hear appeals of the denial of a permit under section 49-11. Counsel argued that section 2-112 of the County Code lists the litany of code provisions the Board expressly has jurisdiction to hear appeals concerning, including sections 49-35 and 49-36 of the County Code, but does not include section 49-11 of the County Code. He argued that section 49-11 does not include a subsection outlining that an appeal under that section is under the Board's jurisdiction.

Counsel for the County further argued that the Board does have jurisdiction over appeals of section 49-35, which governs a right-of-way permit, but that under this section any permit issued for roadside tree work must comply with section 49-36A of the County Code. Counsel argued that under section 49-36A, the Appellant must hold title to the Property to obtain the permit under section 49-35 to remove roadside trees from the Property. Because the Appellant does not own the Property, Counsel for the County argued, he cannot obtain a permit to remove roadside trees from the Property.

2. The Appellant argued that DPS is an enforcement agency and does not have prosecutorial discretion. He argued that section 1-18(c) of the County Code authorizes the County Attorney's Office, not DPS, to prosecute code enforcement matters. The Appellant argued that section 1-18(f) of the County Code concerns a notice of violation, and that section 1-18(f)(4) provides that a person may not appeal to the Board a decision by an enforcement officer not to issue a notice of violation. He argued that section 1-18 does not prohibit a person from appealing to the Board the failure to issue a civil citation.

The Appellant argued that the legislature is presumed to act with complete knowledge. He argued that because section 1-18(f)(4) of the County Code bars

appeals for a failure to issue a notice of violation but section 1-18 does not bar appeals for a failure to issue a civil citation, then it is assumed that an appeal of the failure to issue a civil citation is authorized. The Appellant argued that citizens need an avenue to appeal actions by DPS. The Appellant noted that section 2-112(d) of the County Code states that "[t]he Board must hear and decide any other appeal authorized by law." He argued that section 2-112(d) of the County Code is a catch-all safe-harbor provision which provides the Board with the authority to hear any appeals consistent with the Board's authority.

The Appellant further argued that he sought to remove fences and relocate trees, then to build a fence, on the Property. The Appellant questioned whether a person would need a building permit under Chapter 8 of the County Code to construct a fence. He argued that DPS can authorize a person to work in the public right-of-way, and that he had filed two permits: one to work in the public right-of-way and one to construct in the public right-of-way.

The Appellant argued that the Board does have jurisdiction to hear appeals under section 49-11 of the County Code under the catch-all language of section 2-112(d), which states that the Board may hear and decide any other appeal authorized by law. The Appellant argued that he filed a valid permit application under section 49-11 of the County Code, and that there is no requirement that he own the Property to obtain a permit under this section. He argued that non-owners have done work in the public right-of-way in the past. The Appellant argued that DPS's reasons for denying his permit application to work in the right-of-way are irrelevant: for example, it is irrelevant whether the Property was constructed as a path or what the Department of Transportation's intentions are as to the Property. See Exhibit 4(c).

The Appellant argued that, while he does not own the property on either side of the Property, he disagrees that he is not an authorized person for a right-of-way permit because section 49-11 of the County Code does not require ownership.

3. Counsel for the Intervenor argued that if the County had wanted to allow the Board to review DPS's enforcement action decisions, the County Code would expressly state that the Board has that appellate authority. He argued that the Property is owned by the Intervenor, who own the property at 5332 Falmouth Road, and the Martin family, who own the property at 5326 Falmouth Road. See Exhibit 8, ex. 7 and 8. Counsel for the Intervenor argued that the County can allow the Intervenor and the Martins to complete work on the Property because they are qualified applicants as owners of the Property.

Counsel for the Intervenor argued that the Appellant is not a qualified person to perform work in the right-of-way because the Appellant does not own the Property or any adjacent property. He argued that the Appellant is not a developer of the Property, is not a contract purchaser of the Property, and does

not lease the Property. Counsel for the Intervenors argued that even if the Property is a right-of-way, DPS has the authority to tell the Appellant that he cannot perform work in the right-of-way.

Counsel for the Intervenors further argued that sections 49-35 and 49-36 of the County Code expressly state that an aggrieved person may appeal to the Board. Counsel argued that section 49-11 does not contain this or a similar provision, and thus the Board does not have jurisdiction over appeals from section 49-11.

### **CONCLUSIONS OF LAW**

1. Section 2-112(c) of the Montgomery County Code states “[t]he Board has the following appellate jurisdiction” over appeals taken under specified sections and chapters of the Montgomery County Code, including sections 8-23, 49-35, and 49-35. Section 2-112(c) does not include section 49-11. Section 2-112(d) states that “[t]he Board must hear and decide any other appeal authorized by law.”

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 motions hearing prior to the hearing. Board Rule 3.2 specifically confers on the Board the ability to grant Motions to Dismiss for Lack of Jurisdiction in cases where the Board lacks jurisdiction and 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 8-24(a) – (c) of the County Code governs the application of a building permit, as follows:

Sec. 8-24. Application for permit.

(a) *When required.* It is unlawful to construct, enlarge, alter, remove or demolish a building or change the occupancy of a building from one use group to another requiring greater strength, exitway or sanitary provisions; or to change to a prohibited use; or create or alter any ownership unit when a use under an occupancy certificate or a structure exists on the parent lot; or to install or alter any equipment for which provision is made or the installation of which is regulated by this chapter, without first filing an application with the department in writing and obtaining the required permit therefor; except, that ordinary repairs as defined in Section 8-3 which do not involve any violation of this Chapter are exempt from this provision.

(b) *Form.* Application for a permit shall be submitted on forms prescribed by the director and shall be accompanied by the required fee as prescribed by this chapter.

(c) *Qualified applicants.* Application for a permit shall be made by the owner or lessee of the building or structure, or agent of either or by the licensed engineer or architect employed in connection with the proposed work. If the application is made by a person other than the owner in fee, it shall be accompanied by a duly verified affidavit of the owner or the qualified person making the application that the proposed work is authorized by the owner in fee and that the applicant is authorized to make such application. The full names and addresses of the owner, lessee, applicant and of the responsible officer, if the owner or lessee is a corporate body, shall be stated in the application.

7. Section 1-18(b) – (f) of the County Code, which governs enforcement procedures, provides as follows:

(b) *Civil and Criminal Citations.*

(1) *Issuance.* An enforcement officer may issue a civil citation or a criminal citation to a person who the enforcement officer believes is committing or has committed a violation of County law. The form of the citation must be approved by the Chief Judge of the Maryland District Court, as required by State law.

(2) *Summons to Appear.* In addition to a citation, the enforcement officer may issue to the person receiving the citation a summons requiring the person to appear in court on a specified date. If the citation is a civil citation, the summons must specify that the person is not required to appear in court if the fine is paid



as provided in the citation. The enforcement officer must coordinate the selection of court dates with appropriate court officials.

(3) *Failure to furnish proof of identity.* A person issued a citation under this section must furnish proof of identity and age, upon request, to the enforcement officer who issues the citation. Any violation of this paragraph is a class C violation.

(4) *Responsibility of enforcement officer.* Within 10 working days after issuing a citation, the enforcement officer must deliver the original citation and summons to the Revenue Division of the Department of Finance or another office designated by regulation adopted under method (3). The Revenue Division must process a civil citation and summons as provided in subsection (c), and must forward a criminal citation and summons to the District Court within 10 business days after receiving it. Failure to deliver the citation or summons to the Revenue Division or the District Court does not affect the validity of the citation or summons.

(5) *Trial Schedule.* After a summons is issued, the District Court must schedule the trial on the date stated in the summons or notify the defendant of an alternative date. If no summons is issued, the District Court must schedule the case for trial and summon the defendant to appear. A defendant's failure to respond to a summons without good cause is contempt of court.

(6) *Prosecution by the County Attorney.* The County Attorney may prosecute a violation under this Section and exercise the normal discretion of a prosecutor.

(7) *Court costs.* A person found by the District Court to have committed a violation of County law is liable for the costs of the proceeding in the District Court.

(8) *Payment to County.* Any fine, penalty or forfeiture collected by the District Court must be paid to the County.

(9) *Appeals, motion for new trial, or revision of judgment.* As provided by law, a defendant who has been found to have committed a violation of County law may:

- (A) appeal;
- (B) file a motion for a new trial; or
- (C) file a motion to revise the judgment.

(c) *Civil Violations.*

(1) *Amount of fine.* An enforcement officer must designate a civil penalty on the citation in the amount set out in Section 1-19, unless a lower amount is set for a specific violation by a regulation adopted under method (1).

(2) *Election to stand trial.* A person who receives a civil citation may file with the County agency listed on the citation a notice of intention to stand trial. The notice must be filed within 15 days after receiving the citation or, if the 15th day falls on a County holiday, by the end of the next business day after the holiday. After receiving the notice of intention to stand trial, the agency must forward to the District Court the original citation, the summons, and the notice of intention to stand trial. After receiving these papers, the District Court must schedule the case for trial.

(3) *Default.*

(A) If a person who receives a civil citation does not pay the penalty by the date set on the citation and does not file a timely notice of intention to stand trial, the penalty is increased to double the original penalty. A lesser increase may be established for specific offenses by regulation adopted under method (1).

(B) If the penalty is not paid and the defendant does not request a trial within the required time, the County may ask the District Court to set a trial date.

(4) *Burden of Proof; rights of defendants.* In any proceeding to impose a civil penalty:

(A) the County has the burden to prove that the defendant has committed the offense by a preponderance of the evidence;

(B) the defendant may cross-examine witnesses, produce evidence or witnesses, and testify if the defendant elects to do so; and

(C) the defendant may be represented by counsel that the defendant selects and pays.

(5) *Adjudication.*

(A) The defendant may enter a plea of guilty or not guilty. The court must find the defendant guilty or not guilty.

(B) If it finds the defendant guilty, the court must impose the penalty and late payment penalties prescribed by County law. The court may suspend or defer the payment of the penalties under conditions that the court sets.

(C) if a defendant willfully fails to pay a penalty or any costs imposed by the court, the court may punish the failure as contempt of court.

(D) The penalties and costs imposed by the court constitute a judgment in favor of Montgomery County. If any penalty or cost is unpaid for 30 days after judgment is entered, the County may enforce the judgment in the same manner as any other civil judgment for money, or collect the judgment in the same manner as it collects real property taxes.

(6) *Civil Matter.* Adjudication of a civil citation is not a criminal proceeding, and a finding of guilty does not impose any civil disability ordinarily imposed by a criminal conviction.

(7) *Effect of payment of penalty.* The payment of a civil penalty without a court finding under this Section is not an admission of guilt in any County licensing or permit proceeding, but does establish the "initial offense" charged in the citation for the purpose of calculating repeat offenses under Section 1-19. To be a repeat offense, an offense must be committed within one year after an initial offense.

(d) *Criminal Violations.* The trial of criminal citations is governed by State law and rules of court.

(e) *Correcting violations of law.*

(1) The court may order the defendant to:

(A) refrain from further violations; and

(B) correct any condition that is a continuing violation of County law.

(2) The court may order the County to correct, at the defendant's expense, any condition that violates County law.

(3) If the County corrects a condition that violates County law, the County must send the defendant a bill for the cost of correction by regular mail to the defendant's last known address, or by any other means that is reasonably calculated to bring the bill to the defendant's attention. If the defendant does not pay the bill within 30 days after it is presented, the County may file a verified statement of the costs of correcting violations with the court.

(4) The court must enter judgment against the defendant for the cost of correcting violations. The County may enforce a judgment so entered in the same manner as any other civil judgment for money, or collect the judgment in the same manner as it collects real property taxes.

(f) *Notice of Violation.*

(1) An enforcement officer may issue a notice of violation before issuing a citation.

(2) A notice of violation must:

(A) be in writing;

(B) describe in general terms a remedial action which, if taken, will achieve compliance with County law;

(C) specify a reasonable time to perform any required remedial action; and

(D) inform the recipient that noncompliance with the required remedial action is likely to result in the issuance of a civil or criminal citation under subsection (b)(1) which the enforcement agency can enforce in a court with jurisdiction.

(3) This subsection does not prevent an enforcement officer from:

(A) issuing a citation at any time, including after an enforcement officer has issued a notice of violation under which time remains for remedial action to be taken; or

(B) pursuing any remedy under Section 1-20.

However, an enforcement officer may issue a citation before time remains to complete any required remedial action under the notice of violation only if the violation presents a danger to public safety, health, or property.

(4) A person may not appeal to the Board of Appeals a decision by an enforcement officer to issue or decline to issue a notice of violation under this subsection.

(5) This subsection does not apply if another County law expressly allows an enforcement officer to issue a notice of violation or warning before a citation is issued.

8. Section 49-10 of the County Code, which governs obstruction of the public rights-of-way, states:

Sec. 49-10. Obstruction of public rights-of-way.

Except as provided in Section 49-11, in the public right-of-way, a person must not:

(a) place, maintain, use, or exercise control over, any object or structure in the public right-of-way;

(b) allow any object or structure owned by the person to occupy, obstruct, or encroach upon the public right-of-way;

(c) perform any reconstruction or maintenance work; or

(d) allow the erection or placement of any structure, fence, post, rock, or other object in the public right-of-way, except:

(1) mail boxes mounted on a support that will bend or break away on impact by a vehicle;

(2) individual residential newspaper boxes mounted on a support that will bend or break away on impact by a vehicle;

(3) street trees placed and maintained under Section 49-33(j);

(4) ground cover placed and maintained under Section 49-33(k);

(5) a temporary, removable obstruction or occupation of a right-of-way installed under a permit issued under Section 49-11; or

(6) as otherwise permitted by law.

Any object placed in the public right-of-way under Section 49-10(d) must not unreasonably impede use of a sidewalk or other right-of-way by pedestrians or persons in wheelchairs, or impede or endanger automobiles or other vehicles.

9. Section 49-11 of the County Code, which governs a permit to obstruct a public right-of-way, provides:

Sec. 49-11. Permit to obstruct public rights-of-way.

(a) Unless this Section prohibits the issuance of a permit, the Director of Permitting Services may issue a permit to:

(1) reconstruct or repair a sidewalk, shared use path, driveway, curb, or other structure;

(2) install, repair, locate, or replace underground utilities or infrastructure under a sidewalk or shared use path; or

(3) install a temporary, removable obstruction or occupation of a right-of-way;

(4) close a curb lane, sidewalk, or shared use path in conjunction with the construction or reconstruction of an abutting structure; or

(5) install permanent, nonstandard structures in the right-of-way that were approved by the Planning Board, the City of Rockville, or the City of Gaithersburg in a site plan as a site element of streetscape. Streetscape includes street furnishings, fixtures and elements in connection with public use of the right-of-way but does not include enclosed structures or vaults or improvements for private use. The permit applicant must execute a declaration of covenants that runs with the land on which the project associated with the streetscape is being developed to perpetually maintain the permitted streetscape in a good and safe condition; return the right-of way to its condition before the permitted streetscape was installed if the nonstandard permitted streetscape is removed; and indemnify the County from any cost or liability associated with the construction, maintenance, use or removal of the nonstandard permitted streetscape.

(b) The Director must not issue a permit for reconstruction or repair of a sidewalk or shared use path for more than 6 months, or to close a curb lane,

sidewalk, or shared use path for work on an abutting structure, utilities, or infrastructure for more than 15 days, unless a safe alternate walkway or shared use path is provided on the same side of the street:

- (1) in a Metro Station Policy Area, Town Center Policy Area, or other area expressly identified in a Council resolution;
- (2) within 20 feet of a bus stop or mass transit station entrance; or
- (3) on a road:
  - (A) designated as a major or arterial highway;
  - (B) of 4 lanes or more; or
  - (C) designated as a business district street.

The Director may allow a covered walkway to serve as an alternate walkway.

(c) The Director may issue a permit to rebuild or repair a sidewalk or shared use path for more than 6 months, or to close a curb lane, sidewalk, or shared use path for work on abutting structures, utilities, or infrastructure for more than 15 days, without requiring that a safe alternate sidewalk or shared use path be provided on the same side of the street, if the Director finds that:

- (1) based on a certification submitted by a professional engineer, construction of such a sidewalk or shared use path is not possible; or
- (2) the street is closed.

(d) The Director may grant one extension for no more than 15 days of a permit to close a roadway lane, sidewalk, or shared use path for work on abutting structures, utilities, or infrastructure without requiring that a safe alternate walkway or shared use path be provided on the same side of the street on a showing of extreme hardship.

(e) The Director must not issue or extend in duration or area any permit to close a sidewalk or shared use path to use the area for vehicle parking or storage of construction materials.

(f) The Director must include conditions in each permit to assure public safety in the work area.

(g) Before the Director issues a permit under this Section to close a sidewalk, curb lane, or shared use path, the Director of Transportation must approve a temporary traffic control plan.

(1) A professional engineer must certify for the applicant that the plan minimizes inconvenience to the public, provides necessary warnings, and includes safe and reasonable pedestrian alternatives in accordance with accepted engineering standards.

(2) The permit and the traffic control plan must require signage during construction to inform pedestrians about the duration of the obstruction, the permit number, and the County contact telephone number to call.

(h) A permittee must have a valid franchise, as defined in Section 49-20, before the permittee installs, repairs, or maintains any utility or infrastructure in the public right-of-way.

10. Section 49-35(a) of the County Code, which governs a right-of-way permit, states "[a] person must not construct any road, sidewalk, shared use path, curb and gutter, driveway, or drainage structure; begin any such

construction (including clearing, grading, and tree cutting); or perform any tree work on any roadside tree (including removing a stump on a County right-of-way), without a permit from the Director of Permitting Services. Any permit issued for roadside tree work must comply with Section 49-36A. In this Article, "roadside tree" means any plant that has a woody stem or trunk which grows all, or in part, in the right-of-way of any County public road."

11. Section 49-36A, which governs roadside tree work, provides, at (a) and (b):

Sec. 49-36A. Roadside tree work.

(a) *Right-of-way permit required.* The Department must not issue a building or related permit to an applicant for any demolition, clearing, pre-construction activity, construction, or development that is likely to result in the trimming, pruning, root-pruning, cutting, or removal of, or injury to, a roadside tree unless the applicant obtains a right-of-way permit from the Department under Section 49-35.

(b) *Applicability; exceptions.*

(1) A person (including a government agency) may receive a right-of-way permit to perform tree work on a roadside tree if the person:

(A) holds title to the land where the roadside tree is located;

(B) owns property abutting the right-of-way at the point where the tree is located;

(C) is a government agency that has an easement for the public right-of-way where the tree is located;

(D) is responsible for providing tree care to the tree;

(E) is a public utility; or

(F) is an authorized agent of any of these.

(2) The following activities are not subject to this Section (except subsection (f)) and do not require a right-of-way permit:

(A) cutting or clearing a public utility right-of-way or land for an electric generating station licensed under Sections 7-204, 7-205, 7-207, or 7-208 of the Public Utilities Article of the Maryland Code, or any successor provision, if:

(i) any required certificate of public convenience and necessity has been issued under Section 5-1603(f) of the Natural Resources Article of the Maryland Code or any successor provision; and

(ii) the cutting or clearing is conducted in a way that minimizes the loss of forest;

(B) routine maintenance of a public utility right-of-way, and cutting or clearing any tree by a public utility as necessary to comply with applicable vegetation management requirements or to maintain, repair, replace, or upgrade any public utility transmission or distribution line; or

(C) cutting or clearing a public utility right-of-way or land for a new transmission or distribution line.

12. The Board finds that the motion to dismiss should be granted because the Board does not have jurisdiction over DPS's decision to take enforcement action or over appeals for permits to obstruct the public right-of-way under section 49-11 of the County Code. The Board finds that the Board's jurisdiction is delineated in the County Code, and that the Board's jurisdiction does not include jurisdiction to hear administrative appeals concerning DPS's failure to issue a civil citation. The Board further finds that the Board's authority to hear cases on DPS's exercise of authority is limited and does not include DPS enforcement decisions. The Board finds that the County Code, and specifically section 2-112(c) and section 49-11, do not provide the Board with jurisdiction to hear appeals from section 49-11, and thus the Board lacks jurisdiction over any appeal under section 49-11 for a permit to obstruct the public right-of-way.

The Board finds that any controversy does not involve any genuine issue of material fact to be resolved. There is no dispute that the Appellant does not own the Property. The Board finds that because the Appellant is not the owner of the Property nor authorized by the owner of the Property to apply for a building permit, the Appellant is prohibited under Chapter 8 of the County Code from obtaining a building permit to erect a fence on the Property.

The Board further finds that, while the Board has jurisdiction to hear an appeal of DPS's denial to issue a right-of-way permit under section 49-35 of the County Code, because the Appellant does not own the Property, he cannot obtain a permit to perform any tree work on any roadside tree on the Property. The Board finds, as noted above, that the Appellant's request to construct a fence on the Property would require a building permit under Chapter 8 of the County Code and would not require a right-of-way permit under section 49-35 of the County Code which, in addition to tree work, governs "road, sidewalk, shared use path, curb and gutter, driveway, or drainage structure," not fences.

13. The Motion to Dismiss and for Summary Disposition in Case A-6566 is granted, and the appeal in Case A-6566 is consequently **DISMISSED**.

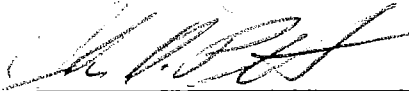
On a motion by Chair John H. Pentecost, seconded by Member Katherine Freeman, with Vice Chair Edwin S. Rosado and Members Stanley B. Boyd and Bruce Goldensohn in agreement, the Board voted 5 to 0 to dismiss the administrative appeal alleging the Board has jurisdiction over DPS's enforcement decisions.

On a motion by Chair John H. Pentecost, seconded by Vice Chair Edwin S. Rosado, with Members Stanley B. Boyd, Bruce Goldensohn, and Katherine Freeman agreement, the Board voted 5 to 0 to dismiss the administrative appeal denying the Appellant's application for building permit #831789.

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

and Katherine Freeman in agreement, the Board voted 5 to 0 to dismiss the administrative appeal denying the Appellant's application for a permit to work in the public right-of-way and adopt the following Resolution:

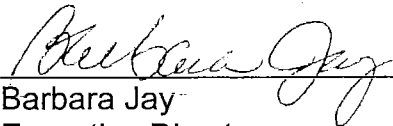
**BE IT RESOLVED** by the Board of Appeals for Montgomery County, Maryland that the opinion stated above be adopted as the Resolution required by law as its decision on the above entitled petition.



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John H. Pentecost  
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book  
of the Board of Appeals for  
Montgomery County, Maryland  
this 17th day of July, 2018.



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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).