

**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-6571
APPEAL OF STEPHEN MCGARRY**

OPINION OF THE BOARD

(Hearing held July 25, 2018.)
(Effective Date of Opinion: September 6, 2018.)

Case No. A-6571 is an administrative appeal filed June 1, 2018 by Stephen J. McGarry (the "Appellant"). The Appellant charges error on the part of the Montgomery County Department of Permitting Services ("DPS") in its revocation of restore and/or repair permit #812834. The subject Property is located at 8112 Flower Avenue, Takoma Park, Maryland (the "Property"), in the R-40 zone.

Pursuant to section 59-7.6.1 of the Zoning Ordinance, the Board held a public hearing on July 25, 2018. The Appellant was represented by Eugene W. Policastri, Esquire. Associate County Attorney Charles L. Frederick represented Montgomery County.

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

FINDINGS OF FACT

The Board finds by a preponderance of the evidence that:

1. The Property is located at 8112 Flower Avenue, Takoma Park, Maryland 20912, and is zoned R-40.

2. On May 3, 2018, DPS revoked restore and/or repair permit #812834. See Exhibit 3. The reasoning for the revocation was "misrepresentation of the facts in the permit application/site plan." See Exhibit 3. DPS explained that the site plan the Appellant provided as part of his building permit failed to disclose the accessory structure the Appellant constructed on the Property in 2005/2006, and that "the omission misrepresented the existing accessory structures on your property which is a critical review for the zoning requirements of your proposed project." See Exhibit 3.

3. On June 1, 2018, the Appellant timely filed this appeal to the Board of Appeals. See Exhibit 1.

4. James Gregory Nichols, Manager, Site Plan Enforcement, Zoning and Site Plan Enforcement Division, DPS, testified that he has held his position for four years and has been in zoning enforcement for a number of years. He testified that his job duties involve enforcement of the County's Zoning Ordinance and that he has investigated thousands of complaints. Mr. Nichols testified that he also conducts inspections of new special exceptions and variances.

Mr. Nichols testified that he is familiar with the Property. He testified that DPS received an anonymous complaint about the size of a structure the Appellant was constructing on the Property. Mr. Nichols testified that the complainant stated that they were familiar with the old structure that had been on the Property and felt that the new structure was very large and close to the property line. He testified that he assigned DPS Site Plan Enforcement Inspector Kevin Carmody to investigate the complaint, and that he was in possession of Inspector Carmody's notes from his inspection.

Mr. Nichols testified that Inspector Carmody issued a Notice of Violation ("NOV") on April 20, 2018 for the Appellant to remove the structure on the Property or to reinstall the accessory structure to meet setback restrictions. See Exhibit 6, circles 42-43. He testified that at that time, DPS learned that the structure had been constructed without a proper permit. Mr. Nichols testified that the Appellant gave Inspector Carmody photographs of the structure. See Exhibit 6, circles 46-48, 51-56. He testified that Exhibit 6, circle 46 depicts the structure as it used to exist. Mr. Nichols testified that Inspector Carmody received a photograph of the structure and that he (Mr. Nichols) was able to compare that photograph with the photograph received from the Appellant and verify that both photographs depicted the same structure from different vantage points. See Exhibit 6, circles 46 and 50. He testified that Inspector Carmody also took a photograph and verified that there was a new structure on the Property. See Exhibit 6, circle 49.

Mr. Nichols testified that the pitch of the roof of the new structure depicted in Exhibit 6, circle 49 differs from that on the old structure. See Exhibit 6, circles 46 and 50. He testified that in the course of DPS's investigation, he learned that there had been a prior DPS enforcement action against the Appellant in August of 2017 for constructing this new structure without a permit. See Exhibit 6, circles 1-2. Mr. Nichols testified that this prior investigation was conducted by James Sackett, another DPS manager. He testified that Inspector Sackett had received a complaint about ongoing construction on the Property, discovered the Appellant did not have a building permit for the construction, and issued an NOV, a civil citation, and a stop work order to the Appellant in August and September of 2017. See Exhibit 6, circles 1-2.

Mr. Nichols testified that in response to the enforcement actions by DPS in 2017, the Appellant applied for a building permit for the structure through DPS's electronic application system, ePlans, on September 11, 2017. See Exhibit 6, circles 3-9. He testified that DPS reviewed the Appellant's application. See Exhibit 6, circles 6-8. Mr. Nichols testified that the Appellant submitted a site plan in conjunction with his ePlans building permit application, and that DPS Specialist II Robert Bell discovered issues with the site plan during DPS's review. See Exhibit 6, circle 9. He testified that the green bubbles depicted on the site plan were not part of the Appellant's original submission but were added by Mr. Bell and represent the issues Mr. Bell discovered with the site plan. See Exhibit 6, circle 9.

Mr. Nichols testified that ePlans is an electronic process for residents to apply for permits in an effort for DPS to go paperless. He explained the ePlans filing process follows the same process as to how DPS reviews paper submissions: the review starts in zoning and is given an application number, then the property for the application is identified. Mr. Nichols testified that the Appellant's initial ePlans building permit application did not pass zoning review.

Mr. Nichols testified that the Appellant's building permit application stated, under the Comments section, that "I began this project 2 years ago intending to repair/replace original structure. I discovered the bldg. had no foundation, and it basically fell apart as I attempted to repair it. I reincorporated pieces of the old structure where possible." See Exhibit 6, circle 3. He testified that a permit to repair or replace is issued when the applicant can restore a structure to its original condition. Mr. Nichols testified that, in this case, the Appellant had undertaken new construction on a structure that had completely disintegrated, including needing new foundation.

Mr. Nichols testified that, upon Mr. Bell's review of the Appellant's ePlans building permit application submission, Mr. Bell identified four problems with the application. See Exhibit 6, circles 7-8. First, the proposed structure did not comply with the side yard setback. See Exhibit 6, circle 7. Second, the proposed structure was located in the side yard and needed to be located in the rear yard. See Exhibit 6, circle 7. Third, the site plan the Appellant submitted was deficient and did not show an existing accessory structure already on the Property. See Exhibit 6, circle 8. Finally, the combination of all accessory structures on the Property would not comply with the Zoning Ordinance requirement that all accessory structures not exceed 50% of the footprint of the main building. See Exhibit 6, circle 8.

Mr. Nichols testified that a site plan submitted in conjunction with a building permit application is required to show all the structures on a property as well as any proposed structures. He testified that Mr. Bell tried to approximate the existing structure that was absent from the site plan onto the site plan the Appellant submitted by adding a green rectangle on the far left of the site plan. See Exhibit 6, circle 9. Mr. Nichols testified that Mr. Bell was able to observe this structure using a digital search system. Mr. Frederick explained that the additional green rectangles

Mr. Bell added to the site plan identify other problems with the application: the rectangle on the property line indicates that the proposed accessory structure is one foot from the side property line; the rectangle next to that indicates that the proposed accessory structure is in the side yard rather than the rear yard; and the rectangle furthest to the right indicates that the combination of all accessory structures on the Property exceeds 50% of the main building.

Mr. Nichols testified that upon Mr. Bell's review of the Appellant's application, his comments were sent to the Appellant electronically as part of the ePlans process. See Exhibit 6, circles 7-8. He testified that, instead of responding to Mr. Bell's comments in ePlans, the Appellant then physically came into DPS and went through DPS's Fast Track permit application process. Mr. Nichols testified that the Fast Track process was created because the County Council wanted to help customers go through the application process for simple projects. He testified that through Fast Track, an applicant will come into DPS with their documents and go through zoning review to see what they need to complete a project.

Mr. Nichols testified that when the Appellant came into DPS, DPS employee Gregory McClain, who is now retired, reviewed the Appellant's building permit application. He testified that the Appellant did not go back to Mr. Bell, who had reviewed the Appellant's application electronically via ePlans. Mr. Nichols testified that Exhibit 6, circles 11-20 are the documents the Appellant submitted at the Fast Track counter.

Mr. Nichols testified that, in the scope of work section of the building permit application the Appellant submitted via Fast Track, the Appellant wrote "[t]his project is a reconstruction of an accessory building, located on the same footprint." See Exhibit 6, circle 11. He testified that the site plan the Appellant submitted via Fast Track also did not reflect the garage accessory structure that was on the Property at the time and had been noted by Mr. Bell in Exhibit 6, circle 9. See Exhibit 6, circle 20. Mr. Nichols testified that Mr. McClain did not request additional information from the Appellant and relied on the site plan that the Appellant submitted when reviewing the Appellant's building permit application. See Exhibit 6, circle 20. He testified that there was no evidence that the Appellant corrected his misrepresentation that there was not a garage already on the Property. See Exhibit 6, circles 11-20.

Mr. Nichols testified that building permit #812834 gave the Appellant permission to restore and/or repair the existing structure. See Exhibit 6, circle 10. He testified that the Appellant did not restore and/or repair the structure but instead engaged in new construction with new foundation and a new building. Mr. Nichols testified that he reviewed the Appellant's application and building permit for the construction of the existing garage which was not represented on the site plan for building permit #812834. See Exhibit 6, circles 22-40. He testified that the site plan submitted in conjunction with that application in 2005 included the garage which was absent from the site plan submitted in 2017. See Exhibit 6, circle 25. He testified

that both site plans were submitted by the Appellant, and that the Appellant could have submitted an accurate site plan for the 2017 application.

Mr. Nichols testified that, at the conclusion of his investigation into the Appellant's new structure and building permit #812834, he conferred with Mark Beall, the Manager of DPS's Zoning Department, and they both agreed that the site plan the Appellant submitted with his building permit application #812834 was deficient and that the permit was issued in error. He testified that the application did not and should not have passed zoning review. Mr. Nichols testified that DPS then took action to revoke building permit #812834. See Exhibit 3.

In response to questions from the Board, Mr. Nichols testified that the statement "Demolish Existing Garage" next to the structure at issue in this appeal on the Appellant's site plan for his 2005 building permit is a proposal to show what the Appellant proposed to do with that garage in 2005.

On cross-examination by Mr. Policastri, Mr. Nichols testified that the Appellant obtained a variance to construct a garage in 2005/2006. See Exhibit 7, ex. 5.¹ He testified that he had not been aware that the Appellant had previously obtained a variance when he was conducting his investigation in this case, and that he had not looked at the exhibits referenced in the variance Opinion. Mr. Nichols testified that the site plan provided to the Board in the variance case did not indicate that the garage structure at issue in this case was going to be demolished. See Exhibit 7, ex. 6.

On further cross-examination, Mr. Nichols acknowledged that, at the time the Appellant submitted his site plan, a DPS inspector had already been to the Property and observed what was on the Property. He testified that Inspector Carmody had been to the Property as well, and that the structure missing from the site plan was visible on Google Earth. Mr. Nichols testified that Mr. Bell discovered that the garage was missing from the site plan and was aware that the garage was on the Property.

On further cross-examination, Mr. Nichols testified that when the Appellant went to DPS and submitted his building permit application, the DPS reviewer, Mr. McClain, would not have also reviewed the Appellant's ePlans submissions and comments. He testified that the Fast Track process is designed to help customers get plans reviewed quickly, and that in that process DPS uses the documents that the customer submits to do their review. He testified that, while Mr. McClain likely knew that the Appellant had ePlans submissions, there was no protocol that Mr. McClain review those submissions.

¹ The Opinion of the Board in Exhibit 7, ex. 5 is not signed and is not the final Board Opinion. The final Board Opinion in variance case No. A-6062, Petition of Stephen J. McGarry, was issued on May 18, 2006.

On further cross-examination, Mr. Nichols testified that when an applicant goes through ePlans, DPS has vetted and spent time reviewing the application. He testified that if an applicant comes in and wants personal contact that is acceptable as well. Mr. Nichols testified that, when an applicant comes into Fast Track, all prior submissions are irrelevant because the plans could have been modified. He testified that the DPS reviewer at Fast Track assumes they are looking at the current submission.

On further cross-examination, Mr. Nichols testified that in the Fast Track system, it is imperative that the DPS employee trust the documents are accurate. He testified that the applicant is responsible for the accuracy of the documents they submit because DPS assumes the documents are accurate. Mr. Nichols testified that in this case the Appellant did not need to come in with a new application because he already had one filed via ePlans, and that the Appellant was given just one application number, #812834, for both submissions.

On further cross-examination, Mr. Nichols testified that Mr. McClain retired about three months prior, in April 2018, and that he last spoke with him about the Appellant's case right before DPS decided to revoke the Appellant's permit. He testified that he told Mr. McClain that Mr. Bell had originally reviewed the Appellant's application. Mr. Nichols testified that the Appellant's building permit was to restore/repair when the Appellant built an entirely new structure. He testified that previously the structure was a lean-to shed and that it is now a two-story structure that looks like a chalet, and that it is much taller than it was previously.

On further cross-examination, Mr. Nichols testified that in the Fast Track process, mistakes can be made, and that if something is missing on a site plan a permit may be revoked. He testified that if the Appellant had submitted an accurate site plan he would not have proceeded further at the zoning counter and his application would have been denied. Mr. Nichols addressed Mr. Bell's four issues with the ePlans filing, including that the structure protruded 4 feet into the setback and that the structure was not located in the rear of the Property. See Exhibit 6, circle 7. Mr. Nichols acknowledged that this Property is a through lot with no rear, and that Mr. Bell may not have been aware of the Property's classification in suggesting the structure must be located in the rear. He testified that Mr. McClain could have used GIS, Google Earth, or another method to determine that there was an accessory structure missing from the site plan the Appellant submitted at the Fast Track counter.

On re-direct by Mr. Frederick, Mr. Nichols testified that an accessory structure is not allowed in a side yard. He testified that DPS does not grant variances. Mr. Nichols testified that when the Appellant applied for a variance in 2005, he handwrote the new garage onto the site plan as part of his submission. See Exhibit 7, ex. 6. He testified that for this current application, there was no indication that that garage existed on the site plan. See Exhibit 6, circle 20.

5. The Appellant testified that he purchased the Property in 2004 and, at that time, the house and the accessory structures on the Property were old. He testified that his first priority was to construct a useable garage, which he did through the variance granted in 2005/2006. The Appellant testified that his second priority was to repair the 1860 farmhouse, and that his last priority was to repair the shed at issue in this case, which has continued to deteriorate.

The Appellant testified that two years ago he started restructuring the rear wall of the shed that had the biggest holes in it, and that he took down the wall with a crowbar. He testified that the old fiberglass ceiling in the shed was collapsing. The Appellant testified that his intent was to salvage what he could and to replace the remainder. He testified that he did not apply for a permit because he did not think a permit was required to repair a structure.

The Appellant testified that his work on the wall involved removing sheathing and that the wall had been old siding nailed to studs. He testified he had to take the siding off and then had a frame with nothing holding it together. The Appellant testified that he had to put on new sheathing and that the wall looks like a new wall. He testified that he planned to get a new foundation under the structure.

The Appellant testified that he did most of the work on the structure himself and that he did not change the footprint of the structure. He testified that he started work with the south wall facing the house and that he did not completely demolish the structure; he used the old studs from the structure in the re-build but not the old sheathing. The Appellant testified that he had worked his way around to 2 ½ or 3 of the walls and framed the roof when his neighbors complained that the roofline of the new structure was not the same as that of the old structure.

The Appellant testified that he does not know who the first County employee was who visited the Property and put up a stop work order. At that time, he testified that he asked the County employee what he was doing and was told that there had been a complaint about the new structure and that he would need a permit. The Appellant testified that he stopped work and put together the information he would need for a permit application.

The Appellant testified that he went online on the DPS website and read what was required for accessory structures. He testified that he used a t square and a drawing board, started drawing, and submitted an application on ePlans. The Appellant testified that the DPS website had a statement that everything had to be submitted via ePlans. He testified that his submission included a photocopy of his hand drafted drawings and the permit application, and that he paid online. The Appellant testified that he submitted this application in September of 2017.

The Appellant testified that the permit application on ePlans also asked him to submit a site plan. He testified that he went to the documents he obtained when he purchased the house and used the site plan from those documents, which is the

same site plan he used when he applied for the variance. The Appellant testified that, for the variance application, he drew the proposed garage into the site plan. He testified that he could not find the file folder from when he built the garage in 2005/2006. The Appellant testified that he did not think to draw that garage in for this application because he was focused on the building he was applying for this time, not on the garage.

The Appellant testified that the site plan he submitted also shows another old shed that he has torn down. He testified that he did not focus on the DPS requirement that all structures should be represented on the site plan submitted. The Appellant testified that, had he known, he would have drawn the garage into the site plan. He testified that when he received Mr. Bell's comments on his application via ePlans, he could not figure out how to respond to them online. See Exhibit 6, circles 7-8. He testified that he then called Inspector Sackett at DPS because Inspector Sackett was his only contact with at DPS whom he had personally met, other than the first County employee who put up the stop work order, whom he did not believe was Inspector Sackett.

The Appellant testified that he told Inspector Sackett that he had received comments on his application through ePlans and didn't know how to respond. He testified Inspector Sackett told him he had applied in the wrong place, that the online system was for new construction, and that he should come into DPS with his drawings and go through the Fast Track process. The Appellant testified that he came into DPS's offices within a week, went through the standard intake process at DPS, and submitted his building permit application. He testified that DPS then sent his application through the Fast Track walk through process.

The Appellant testified that his Fast Track application had the same application number as his ePlans application, and that the drawings and site plan he submitted were all the same for both applications. He testified that the site plan did not include the garage. Exhibit 6, circle 20. The Appellant testified that he has been straightforward with everyone he has dealt with in the County about what he was doing and that he provided Mr. Carmody with photographs. See Exhibit 6, circles 46-48.

The Appellant testified that the structure he was seeking to repair had not been used as a garage for 40 years. He testified that the structure was not suitable for a modern car. The Appellant testified that, before he began work on the structure, it had a high point of nine and a half feet, and that the high peak was now 16 feet. He testified that he added new walls that were ten feet high, and that the roof was now a standard 712 pitch, not a steep pitch. The Appellant testified that the old metal roof did not have a sufficient slope to drain and that it had holes in it. He testified that he did not think there would be a problem going from a roof with a single slope to one that sloped in two directions. The Appellant testified that he changed the roofline to make it more functional and attractive.

The Appellant testified that the first County employee who observed the structure said that the structure was too tall and too close to the property line. He testified that he intended to change the roof when he began work on the structure. The Appellant testified that Exhibit 6, circles 12-19 show the dimensions of the structure and that he submitted these documents with his permit application.

The Appellant testified that, at the Fast Track window, he did not flag Mr. Bell's comments because Inspector Sackett had told him to bring his drawings and walk them through Fast Track. He testified that when he submitted his plans at Fast Track, DPS knew he had applied via ePlans. The Appellant testified that the Fast Track process included a preliminary review and a review where the reviewer looked at his plans, and that his application went through the zoning department. He testified that he submitted the site plan at Fast Track without the green rectangles that Mr. Bell had drawn on the site plan. See Exhibit 6, circle 9.

In response to questions from the Board, the Appellant testified that when he applied for a variance in 2005/2006, the site plan showed the structure at issue here because that structure was on the original survey, and that he added in the proposed garage. See Exhibit 6, circle 25. He testified that he typed in "Demolish Existing Garage" on that site plan because he did not know what he was going to do with that structure at the time. See Exhibit 6, circle 25. The Appellant testified that he no longer has that site plan.

On cross-examination by Mr. Frederick, the Appellant testified that in 2005 he needed a variance for a garage because he has a through lot with no rear yard under the Zoning Ordinance. He testified that to obtain the variance, he had to prove a number of things. The Appellant testified that the structure at issue in this case was discussed at the variance hearing, and that he had testified at that time that the structure was built in the 1860's and had no closet or storage, and that he needed a new garage to house antique cars and personal belongings because his house has no basement and minimum storage.

On further cross-examination, the Appellant testified that at the variance hearing he called the structure at issue in this case a converted chicken coop that was not weather tight and not suitable for storage of personal property, cars, or clothing. He testified that the structure was a shed with a metal roof, doors that would not close, broken windows and missing window panes back in 2005 and 2006. The Appellant acknowledged that this testimony was ten to 12 years before he began this repair on the structure. The Appellant further acknowledged that in 2006 he testified that the roof on the structure was seven and a half feet in the front and sloped down to six feet in height, but stated that this testimony must have been made in error.

On further cross examination, the Appellant testified that he found Mr. Bell's comments about his building permit application "squirrely." He testified that Mr. Bell told him he could not put a new garage where the old one was because it was

located one foot from the property line and that if he tore down the structure he would need a variance to build an accessory structure. The Appellant acknowledged that he had not sought a variance in this case.

On further cross examination, the Appellant testified that he missed the requirement that the site plan he submitted as part of this building permit application show all the structures on the Property.

6. Robert Bell testified that he is a Permitting Services Specialist II with DPS and has been employed in that position for 15 years. He testified that he reviewed Appellant's ePlans submission in this case on September 28, 2017 and made comments on the application. See Exhibit 6, circles 7 and 8. Mr. Bell testified that he also looked at the site plan the Appellant submitted. See Exhibit 6, circle 9.

Mr. Bell testified that he made the green rectangles on the Appellant's submitted site plan. See Exhibit 6, circle 9. He testified that when he looked at the proposed structure he immediately saw that it violated the side setback. Mr. Bell testified that he is familiar with a through lot, and that it makes sense that there is no rear lot on the Property because it is a through lot. He testified that he was not familiar with the variance granted on the Property in 2005/2006 at the time he reviewed the Appellant's application.

Mr. Bell testified that he used a digital search system, most likely MCATLAS, to obtain a birds eye and street side view of the Property to see what was on the Property. He testified that he then saw the garage that was on the Property but not on the submitted site plan, and found that the accessory structures on the Property would be more than 50% the footprint of the main structure.

Mr. Bell testified that once he had finished with his comments on the Appellant's application in ePlans, he sent them to the Appellant electronically for either corrective action or for the Appellant to respond. He testified that he believed employees at DPS had access to ePlans, but that tasks were specifically assigned to an employee and only that employee and their supervisor could fully access those assigned tasks. Mr. Bell testified that when an applicant walks plans through Fast Track, the reviewer would not have access to the applicant's ePlans but could have notice if an application had been denied and any notes in ePlans if the reviewer went into the system and looked. He testified that by bringing in physical papers an applicant is bypassing the ePlans system.

Mr. Bell testified that the general online permit system DPS uses does not look at ePlans, and that ePlans and the Fast Track system are not linked. He testified that there would be a note in the online permit system indicating why a building permit application was denied, but that the reviewer at Fast Track would have to click on that note. Mr. Bell testified that a permit denial on a Property could also be for another application on that property, and therefore may not apply to the application at the Fast Track counter.

In response to questions from the Board, Mr. Bell testified that DPS is trying to get all applicants to use ePlans so that they can upload their documents and get their results all from their homes.

On cross examination by Mr. Frederick, Mr. Bell testified that the comments he made on the Appellant's application were based upon the Appellant's description of the construction, including that the structure had no foundation and that he would have to incorporate new construction materials in with the old materials. See Exhibit 6, circles 7 and 8. He testified that his comments were based upon the conclusion that the construction would be new construction. Mr. Bell testified that he sent a denial of the application to the Appellant via ePlans and the Appellant received and opened the denial that same day.

On further cross examination, Mr. Bell testified that he has worked the Fast Track counter since Mr. McClain retired, and that a reviewer at that counter does not have access to the same resources as one would have through ePlans. He testified that a reviewer at the Fast Track counter relies upon the representations in the application. Mr. Bell testified that if he has time at the Fast Track counter he will do more research and determine if there are any notes in the online permit system, but a lot of time there are time constraints when an applicant comes to the Fast Track counter. He testified that because the permit system and ePlans are two different systems, a Fast Track reviewer may not have looked at ePlans or had time to thoroughly research the Appellant's application.

CONCLUSIONS OF LAW

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

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

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

appeal an amendment of a permit if the amendment does not make a material change to the original permit. A person must not contest the validity of the original permit in an appeal of an amendment or a stop work order.”

4. Section 59-7.6.1.C.3 of the Zoning Ordinance provides that any appeal to the Board from an action taken by a department of the County government is to be considered *de novo*. The burden in this case is therefore upon the County to show that Building Permit No. 812834 was properly revoked.

5. Section 8-21 of the County Code provides that “[t]he director may revoke a permit or approval issued under the provisions of this chapter in case of any false statement or misrepresentation of fact in the application or on the plans on which the permit or approval was based or in case of any violation of the conditions upon which such permit was issued.”

6. 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.”

7. Section 8-26(g) of the County Code, which governs the conditions of a permit issued under Chapter 8, provides that “[t]he 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.”

8. Section 59-4.4.10.B.2.d of the Zoning Ordinance governing accessory structures in the R-40 zone provides that “[t]he maximum footprint of an accessory building on a lot where the main building is a detached house is 50% of the footprint of the main building or 600 square feet, whichever is greater. Buildings for an agricultural use are exempt from this size restriction.” Section 59-4.4.10.B.2 of the Zoning Ordinance also provides that the side setback for an accessory structure in the R-40 zone is five feet.

9. The Board finds, based on the testimony of Mr. Nichols, that a site plan submitted in connection with a building permit application is required to show all of the structures on a property, as well as any proposed structures. The Board further finds, based on the testimony and the evidence of record, that the site plan submitted by the Appellant in both ePlans and through Fast Track did not show a garage on the Property, which was a misrepresentation of facts on the plans on which the approval of the Permit No. 812834 was based. The Board finds that this representation need not be intentional for DPS to revoke a permit. The Board further finds that the building which the Appellant constructed used new materials and is taller than the original building, and therefore is a new construction, not a repair or replace of the original structure. The Board finds that the new construction did not comply with the Zoning Ordinance setback requirements and the requirement that


all accessory structures, including the garage omitted from the site plan, not exceed 50% of the main building footprint.

10. Based on the foregoing, the Board finds that DPS has met its burden of demonstrating by a preponderance of the evidence that permit #812834 was properly revoked, and that the appeal should be denied.

The appeal in Case A-6571 is **DENIED**.

On a motion by Member Stanley B. Boyd, seconded by Member Katherine Freeman, with Chair John H. Pentecost, Vice Chair Edwin S. Rosado, and Member Bruce Goldensohn in agreement, the Board voted 5 to 0 to deny the appeal and adopt the following Resolution:

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



John H. Pentecost
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 6th day of September, 2018.



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).