

**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-6573**

**APPEAL OF HAROLD R. FAUCON**

OPINION OF THE BOARD

(Hearing held October 24, 2018)  
(Effective Date of Opinion: November 13, 2018)

Case No. A-6573 is an administrative appeal filed July 6, 2018, by Harold R. Faucon (the "Appellant"). Appellant charged error on the part of Montgomery County's Department of Permitting Services ("DPS") in the issuance of a fence permit, number 840463, on June 11, 2018. Appellant alleged that the "[t]he fence should be at least 20 inches from adjacent structures."

Permit number 840463 was issued for the property at 4548 N. Chelsea Lane, Bethesda, Maryland 20814 (the "Property"). See Exhibit 3. Appellant owns the property at 4557 S. Chelsea Lane, adjacent to the Property. See Exhibit 1.

Pursuant to section 59-7.6.1.C of the Zoning Ordinance, the Board scheduled a public hearing for October 24, 2018. Pursuant to sections 2A-7 and 2A-8 of the County Code, and Board of Appeals' Rule of Procedure 3.2, the County filed a Motion to Dismiss and for Summary Disposition of the administrative appeal on August 29, 2018, and Appellant filed an Opposition to Montgomery County's Motion to Dismiss and for Summary Disposition on October 15, 2018. The Board, pursuant to Board Rule 3.2.5, decided the Motion to Dismiss and for Summary Disposition, and the opposition thereto, at the hearing after the close of oral arguments on October 24, 2018. Appellant appeared *pro se*. Associate County Attorney Charles L. Frederick represented Montgomery County. Randall Reiner, the managing member of 4548 N. Chelsea Lane, LLC, who had been permitted to intervene in this administrative appeal (the "Intervenor"), appeared *pro se*. Steven Levitas, who resides at 4552 N. Chelsea Lane and had also been permitted to intervene in this administrative appeal, also appeared *pro se*.

Decision of the Board: County's Motion for Summary Disposition **granted**;  
Administrative appeal **dismissed**.

**RECITATION OF FACTS**

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

1. Potomac Fences, Inc., the contractor authorized by the owner of the Property, filed an application with DPS on June 7, 2018 for a fence permit, number 840463. See Exhibit 9, circles 5-7.
2. On June 11, 2018, DPS issued fence permit number 840463 for the Property. See Exhibit 9, circle 4.

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

1. Counsel for the County argued that in his appeal, Appellant stated that DPS erred in granting fence permit number 840463 because the fence should be at least 20 inches from adjacent structures but Appellant provided no legal authority for that assertion. Counsel argued that Appellant failed to cite any legal provision that outlines this requirement and that without knowledge of what Appellant alleges DPS violated the County cannot proceed with its production of evidence.

Counsel for the County further argued that there is no dispute that this fence permit application was filed by a qualified applicant. He argued that the records in the fence permit application show that the fence is six feet in height and is located on the Property, and that the permit notes both of these facts. See Exhibit 9, circle 4. Counsel for the County argued that the County's Zoning Ordinance setback provisions do not apply to fences, as provided in section 59-6.4.3.C.3.c of the Zoning Ordinance. He argued that the Property is located in the R-60 zone and that, under section 8-25(a) of the County Code, if DPS determines that a fence permit complies with the law, DPS does not have any discretion and must issue the fence permit.

2. Appellant conceded that everything Counsel for the County said was true but that his issue was the impact that the fence had on neighboring properties. He submitted two photographs, labeled Exhibit 13(a) and (b), depicting the fence from his property and which he alleged showed debris, a metal pipe, and two 4x4's left on his property by the builder on the Property. Appellant argued that the fence was preventing him from complying with the County Code with respect to the maintenance of a shed on his property and was denying him rental income at his property.

Appellant argued that due to the fence, he cannot access the back of the shed on his property to replace it. He argued that the County should not issue a fence permit until a County representative speaks to all parties that could be impacted by the fence.

3. Intervenor Reiner argued that he had tried to work with Appellant both prior to and after construction of the fence. He submitted a group of photographs, labeled Exhibit 14(a)(i) through 14(e), showing the fence on the Property as well as the shed on

Appellant's property at various times. Intervenor Reiner argued that the fence was built for a spec house, that the fence was inside the Property line, and that Potomac Fences, Inc. had pulled a legitimate permit. He argued that there was enough room between the fence and the shed on Appellant's property to slide in plywood to repair the back of the shed.

4. Intervenor Steven Levitas argued that he intervened because, if the Board finds in favor of Appellant and requires the fence to be moved further from Appellant's property, he would like the fence to be moved the same distance from his property. He argued that the fence is presently 22 inches from his property line and that he has no complaints about the fence.

### **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 number 839068 was properly issued.

5. Section 8-25(a) of the County Code provides that DPS "must examine or cause to be examined each application for a building permit or an amendment to a permit within a reasonable time after the application is filed. If the application or the plans do not conform to all requirements of this Chapter, the Director must reject the application in writing and specify the reasons for rejecting it. If the proposed work conforms to all

requirements of this Chapter and all other applicable laws and regulations, the Director must issue a permit for the work as soon as practicable.”

6. Section 59-4.1.7.B.5.d.i of the Zoning Ordinance provides that any fence or wall may encroach into any setback under section 59-6.4.3.C of the Zoning Ordinance.

7. Section 59-6.4.3.C of the Zoning Ordinance provides:

## **Fences and Walls**

### **1. Measurement of Height**

Fence or wall height is measured from the lowest level of the grade under the fence or abutting a wall.

### **2. Height and Placement**

a. A fence, wall other than retaining wall, terrace, structure, shrubbery, planting, or other visual obstruction on a corner lot in a Residential zone can be a maximum height of 3 feet above the curb level for a distance of 15 feet from the intersection of the front and side street lines.

b. A deer fence on a corner lot in a Residential zone must not be located closer to the street than the face of the building.

c. A wall or fence must not be located within any required drainage, utility or similar easement, unless approved by the agency with jurisdiction over the easement.

### **3. Exemptions from Building Line and Setbacks**

Building line and setback requirements do not apply to:

- a. deer fencing:
  - i. in an Agricultural or Rural Residential zone; or
  - ii. behind the front building line for property in a non-Agricultural or non-Rural Residential zone unless the property adjoins a national historical park.
- b. a retaining wall where changes in street grade, width, or alignment have made such structures necessary;
- c. any other wall or fence that is not on a property abutting a national historic park and is:
  - i. 6.5 feet or less in height when not abutting a Commercial/Residential, Employment, or Industrial zone; or
  - ii. 8 feet or less in height when located in a Residential zone and the fence abuts a Commercial/Residential, Employment, or Industrial zone;
- d. a rustic fence on a property abutting a national historical park;
- e. any boundary fence behind the front building line, if the property is located within 100 feet of a parking lot in a national historical park; and
- f. deer fencing and any other fence that is 8 feet or less in height, if the property is farmed and agriculturally assessed.

8. Under section 2A-8 of the 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 the outset of or 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). Under Board Rule 3.2.2, the Board may, on its own motion, consider summary disposition or other appropriate relief.

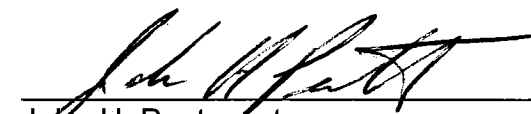
9. Under Board Rule 3.2.4, the Board has the discretion to hear oral argument on a motion to dismiss, and under Board Rule 3.2.5, the Board must decide the motion after the close of oral argument or at a worksession.

10. The Board finds that there are no genuine issues of material fact to be resolved by the Board. The Board finds that there is no dispute that building permit number 840463 complies with all requirements of the County Code and the Zoning Ordinance, including the developmental requirements for height and placement found in section 59-6.4.3.C of the Zoning Ordinance. The Board finds, based upon the uncontested evidence, that the fence is 6 feet tall and is located on the Property, and thus complies with section 59-6.4.3.C.3 of the Zoning Ordinance. Because building permit number 840463 complies with all requisite laws, the Board further finds that DPS was required to issue the building permit under section 8-25(a) of the County Code as a matter of law.

11. The County's Motion to Dismiss and for Summary Disposition in Case A-6573 is granted, and the appeal in Case A-6573 is consequently **DISMISSED**.

On a motion by Member Stanley B. Boyd, seconded by Member Bruce Goldensohn, with Chair John H. Pentecost and Member Katherine Freeman in agreement, and Vice Chair Edwin S. Rosado necessarily absent, the Board voted 4 to 0 to grant the County's Motion to Dismiss and for Summary Disposition and 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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John H. Pentecost  
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book  
of the Board of Appeals for  
Montgomery County, Maryland  
this 13th day of November, 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).