

**BOARD OF APPEALS  
for  
MONTGOMERY COUNTY**

751 Twinbrook Parkway  
(Next to Meadow Hall Elementary School)  
Rockville, MD 20851  
240-777-6600  
<http://www.montgomerycountymd.gov/boa/>

**Case No. A-6681  
APPEAL OF RICHARD DIETRICH III AND GINGER H. DIETRICH**

**OPINION OF THE BOARD**

(Hearing held March 17, 2021.  
Effective Date of Opinion: April 7, 2021.)

Case No. A-6681 is an administrative appeal filed January 4, 2021 by Richard Dietrich III and Ginger H. Dietrich (the "Appellants"). The Appellants charge error on the part of Montgomery County's Department of Permitting Services ("DPS") in the December 2, 2020 issuance of Building Permit No. 916455 to construct a single-family dwelling located at 6105 Kennedy Drive, Chevy Chase (the "Property"). The subject Property is owned by William Becker. Michael Villa with Foxhall Homes, LLC represented that he was authorized to represent the property owner and was permitted to intervene in this matter (the "Intervenor"). The Appellants reside at 6111 Kennedy Drive, Chevy Chase.

The Appellants assert that Building Permit No. 916455 was issued in error and assert that the legal issue in this case is "[m]ay the County authorize one utilizing the grandfathering seven-foot side yard standards in the 1952 Zoning Ordinance to also take advantage of the later-enacted projection exemptions, now found in §59.4.1.7.B.5.a, to further narrow the side yard by two or three feet (three feet for steps; two feet for chimneys)?"

Pursuant to section 59-7.6.1.C of the Zoning Ordinance<sup>1</sup>, the Board held a public hearing on March 17, 2021.<sup>2</sup> The Appellants were represented by David W. Brown, Esquire. Associate County Attorney Charles L. Frederick represented Montgomery County. The Intervenor appeared *pro se*.

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

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<sup>1</sup> All references to the Zoning Ordinance refer to the Montgomery County Zoning Ordinance (2014) unless otherwise indicated.

<sup>2</sup> Due to the COVID-19 pandemic, the public hearing was held remotely via Microsoft Teams.

## **FINDINGS OF FACT**

### **The Board finds by a preponderance of the evidence that:**

1. The Property, known as 6105 Kennedy Drive in Chevy Chase, is an R-90 zoned parcel identified as Lot 12, Block 2, Kenwood Section 2 Subdivision.

2. On or about June 11, 2020, Foxhall Homes, LLC applied to DPS for a residential building permit to raze the existing house and construct a new single-family house on the subject Property. See Exhibit 5, circle 6-19. On December 2, 2020, Building Permit No. 916455 was issued for the construction of a single-family dwelling on the Property. See Exhibit 5, circle 5.

3. On January 4, 2021, the Appellants timely filed an appeal charging error by DPS in its decision to issue Building Permit No. 916455. See Exhibits 1, 3(b).

4. At the outset of the hearing, Mr. Brown addressed the motion in to limit testimony that he filed as part of his pre-hearing submission. See Exhibit 6, circle 2-4. After discussion of the motion with Mr. Brown and Mr. Frederick, the Board decided to handle any objection to the testimony of Mark Beall, Zoning Manager, Zoning and Site Plan Enforcement Division, DPS, at the time that testimony was offered.

5. Mark Beall, Zoning Manager, Zoning and Site Plan Enforcement Division, DPS, testified that he has worked for DPS since 2001, has been reviewing zoning plans since 2006, and has been the Zoning Plan Review Manager since 2014. He testified that his job duties include conducting zoning plan reviews and managing zoning plan reviewers who review building permit applications for setbacks, lot coverages, and uses that are or are not allowed. Mr. Beall testified that his review of plans includes reviewing the plans for development at the Property.

Mr. Beall testified that the Zoning Ordinance underwent a rewrite in 2014, that the current Zoning Ordinance took effect on October 30, 2014, and that the grandfathering provision at issue in this case, found in section 59.7.7.1.D.2.c of the Zoning Ordinance, has been a part of the Zoning Ordinance since the Ordinance took effect. See Exhibit 5, circle 24. He testified that the Property is a lot that was fixed in size by a plat before 1958 and that Exhibit 5, circle 19 is the plat for the Property. Mr. Beall testified that the plat was recorded in 1953 and that, to his knowledge, the plat has not changed in size since it was recorded. See Exhibit 5, circle 19.

Mr. Beall testified that for lots platted pre-1958, section 59.7.7.1.D.2.c of the Zoning Ordinance enables an applicant to use the side yard and rear setback required by its pre-1958 zoning in effect when the lot was first created. He testified that for exceptions for setback encroachments into this side setback, DPS uses the exceptions set out in the current Zoning Ordinance. Mr. Beall testified

that since he started with DPS in 2006, then under the 2004 Zoning Ordinance, and now under the current Zoning Ordinance, DPS has employed a similar practice. He testified that now that he is a manager, he trains his employees as he was trained by previous reviewers, that is, to use the grandfathering provision to obtain the side yard and rear setback and the current Zoning Ordinance for exceptions into any setback, when reviewing building permit applications.

Mr. Beall testified that when he was first employed by DPS as a plan reviewer in 2006, he was trained on how to apply the grandfathering provision in the 2004 Zoning Ordinance by four or five plan reviewers, some of whom had been employed by DPS for 20 or 30 years. He testified that the previous manager had input in his training and trained employees the same way. Mr. Beall testified that this training was to apply the side yard setback when the lot was platted and the current exceptions to the development standards for side yard setbacks.

Mr. Beall testified that he reviewed the application for the Property. See Exhibit 5, circle 6-19. He testified that the application includes the building plans for the Property and that, after zoning review, Building Permit No. 916455 was issued. See Exhibit 5, circle 5. Mr. Beall testified that the building plans were ultimately revised at the request of the applicant to remove the side stairwell in the side yard setback.

Mr. Beall testified that the projection off the side of the proposed residence is a chimney for a fireplace. He testified that because this plat was platted before 1958, in 1953, the 1952 Zoning Ordinance applies to the side setback, and that under the 1952 Zoning Ordinance a seven-foot setback is allowed. See Exhibit 5, circle 21. Mr. Beall testified that in his review of the plans for the Property, he determined that the distance from the side lot line to the main building would be 7.5 feet from the side lot line. He testified that the fireplace dimensions scaled under 2 feet towards the side lot line, so that the fireplace has a 1.5-foot projection towards the side of the house; it is 5 feet wide.

Mr. Beall testified that the overall width of the house from front to back is 40.8 feet, including a brick veneer. He testified that the fireplace is 1/8 the length of the house. Mr. Beall testified that the chimney projects into the side setback 1.5 feet past the 7-foot side setback. He testified that under the section 59.4.1.7.B.5.a.v of the current Zoning Ordinance, a chimney may project a maximum of 2 feet into any setback. See Exhibit 5, circle 24. Mr. Beall testified that this chimney is permissible because it projects 1.5-feet into the side setback.

Mr. Beall testified that under the 1952 Zoning Ordinance, there is an exception allowing a chimney to project into the side setback. See Exhibit 5, circle 23. He testified that this exception enables a Building Inspector to make a determination whether the chimney projection is open and provides an unobstructed view of the side yard, that is, that the chimney does not obstruct light and ventilation. See Exhibit 5, circle 23. Mr. Beall testified that this chimney does not appear to be intrusive and it is kept open to ventilation and light, therefore

meeting the requirement to allow a chimney to project into the side setback under the 1952 Zoning Ordinance.

In response to questions from the Board, Mr. Beall testified that the chimney is almost even with the peak of the house. See Exhibit 5, circle 12-13. He testified that the DPS policy to use the current Zoning Ordinance for pre-1958 parcels when considering setback encroachments is not written down but that DPS's website states that these exceptions are allowed and that this DPS policy has been in place since before he was employed by DPS. Mr. Beall testified that the rationale for the policy is that the grandfathering provision is for the setback itself and that provision does not state that it applies to exceptions. See Exhibit 5, circle 24. He testified that the Zoning Ordinance permits grandfathering only setbacks, not exceptions. Mr. Beall testified that the 1952 Zoning Ordinance provides for a 7-foot setback on each side, and that there is no total setback requirement for both sides combined. See Exhibit 5, circle 21.

In response to cross-examination from Mr. Brown, Mr. Beall testified that he has been the manager for building permits the entire time the current Zoning Ordinance has been in effect. He testified that during that time, this grandfathering provision under section 59.7.7.1.D.2.c has not been legally challenged. Mr. Beall testified that he was trained under the 2004 Zoning Ordinance when he started with DPS in 2006. He testified that under the 2004 Zoning Ordinance, a property would be able to use the grandfathered 7-foot side yard setback and the projection exceptions under the 2004 Zoning Ordinance.

In response to further cross-examination from Mr. Brown, Mr. Beall testified that lots recorded in the 1950s, depending on their lot area and width and how the plot was recorded, could have as little as a 5-foot side setback. He testified that the chimney exception under the 1952 Zoning Ordinance does not have a numerical requirement. See Exhibit 5, circle 23. Mr. Beall testified that the exception applies based on the judgment call of the inspector as to whether the chimney obstructs light and ventilation. He testified that this provision is technically an exception into a setback but there is no numerical standard.

In response to re-direct from Mr. Frederick, Mr. Beall testified that the proposed house was going to be 24.93 feet in height. He testified that the maximum height in the zone is 30 feet.

6. Appellant Richard Dietrich III testified that he first learned about this project when a sign went up on the Property. He testified that he was interested in the project as a neighbor and obtained the information for the building permit application, then met with the builders and spoke with the property owners. Mr. Dietrich testified that he expressed concern about the proximity of the proposed large house to his house. He testified that his initial concern was about the stairs and that the chimney was less apparent on the drawings and he couldn't tell what the chimney's dimensions were. Mr. Dietrich testified that he was happy that the house itself would have a side setback of 7.5 feet.

Mr. Dietrich testified that he consulted with a builder, who suggested he consult a structural engineer about whether there would be any problems caused by the proximity of the stairway and chimney of the house on the Property to his house. Mr. Dietrich testified, over objection from Mr. Frederick, that the structural engineer informed him that to do the dig that was proposed on the Property would almost certainly cause damage to his property.

Mr. Dietrich testified that allowing the chimney to encroach an additional 2 feet into the side setback results in the chimney being 5 ½ feet from the property line. He testified that he is concerned about the visual impact, light, his enjoyment of his property, and potential damage. Mr. Dietrich testified that he shared these concerns with builders and the Property owner through numerous emails but did not receive a response.

Mr. Dietrich testified that the house that was on the Property was demolished in early January 2021. He testified that the structural engineer he consulted suggested he hire a geotechnical engineer to look at the soil and where the excavation was going to be done on the Property. Mr. Dietrich testified that this is a very difficult situation for him and that the dig ended up being a problem, resulting in two stop work orders being issued on the Property. He testified that the concrete pour has already occurred for the chimney and that it is very close to his property. Mr. Dietrich testified that he does not understand why the County has allowed this. He testified that the side setbacks are 7.5 feet on one side and 12.5 feet on the other side, resulting in an already very generous amount of space that the house will take up on the Property. Mr. Dietrich testified that he believes the placement of the chimney in the side setback will have a negative impact on his property.

In response to questions from the Board, Mr. Dietrich testified that the first stop work order was issued on the Property was because the builder cut through the angle of repose for his retaining wall. He testified that the second stop work order was issued after the concrete foundation for the chimney was poured, and there was a collapse, approximately 8 feet in size, in that area. Mr. Dietrich testified in connection with the second stop work order that the aggressive overcut was done to accommodate the chimney, and that the soil collapsed into the pit right around the chimney area.

In response to further questions from the Board, Mr. Dietrich testified that he does not have a problem with the height of the proposed house. He testified that his problem is the proximity of the house to his house. Mr. Dietrich testified that the chimney is the highest point on the proposed house, and it is going to be close to his house.

In response to cross-examination from Mr. Frederick, Mr. Dietrich testified that the plans to have stairs on the side of the house have been removed. He testified that the chimney is also an area of concern because it protrudes into the side setback. Mr. Dietrich testified he had complaints about the construction on the Property undermining a retaining wall on his property, that County inspectors

came out and issued stop work orders, and that those stop work orders have been removed.

7. In closing, Mr. Frederick argued that this lot was platted in 1953, allowing the use setbacks from the 1952 Zoning Ordinance. He argued that this house is being constructed with a 7.5-foot setback from the side lot line and that the projection for the chimney, which has a dimension of 2 feet by 5 feet, extends 1.5-feet into the side setback. Mr. Frederick argued that the 1952 Zoning Ordinance allows for a 7-foot side setback, and that DPS has consistently applied current exceptions to setbacks from pre-1958 Zoning Ordinances.

Mr. Frederick further argued that the rationale for DPS' interpretation is that the development of this house flows through the current Zoning Ordinance. He argued that the grandfathering provision provides for use of the 1952 Zoning Ordinance for the side setback, not for the side setback and exceptions. See Exhibit 5, circle 24. Mr. Frederick argued that the current Zoning Ordinance does not say not to apply the current exceptions, and that the grandfathering provision does not say to apply the Zoning Ordinance in effect at the time the lot was platted for setbacks and exceptions. He argued that the Appellants are asking the Board to add language to the current grandfathering provision, which violates the rules of statutory construction. Mr. Frederick argued that the Appellants may not add language to the statute to reach the conclusion they want.

Mr. Frederick argued that it is clear that the side setback from the 1952 Zoning Ordinance applies, and since the construction of the house flows through the current Zoning Ordinance, that Ordinance applies to the exceptions for the chimney. He argued that this house complies with the 1952 building setbacks. He argued that the chimney is a building feature and the grandfathering exemptions refer to setbacks, not exceptions for building features.

8. In closing, Mr. Brown argued that the Appellants agree that the property is qualified to use the 1952 development standards, and that if the current exceptions were applicable to this case the project meets those standards. He argued that the 1952 Zoning Ordinance provided for a 7-foot setback but had no exception for a chimney; while it was possible on a case-by-case basis for an applicant to go to a building inspector and ask for his permission, on the inspector's judgment call, to put a chimney in the setback, there was no established standard allowing an applicant to ignore the setback standard.

Mr. Brown further argued that, when side yard requirements were increased to 10 feet in 1954, allowable projections into the setback of 3 feet would still result in a 7-foot setback. He argued that, ever since 2014, developers have been willing to accept the County's interpretation to cherry pick portions of the Zoning Ordinances by reducing the side setback to 7 feet under the old Zoning Ordinance and then reducing the setback even more by using the exceptions under the current Zoning Ordinance. Mr. Brown argued that the only sensible interpretation of the grandfathering provision is to protect existing areas by not giving a more generous interpretation of side yard setbacks.

Mr. Brown argued that a builder can build under current standards, but if they want to use the grandfathering provision, they must use the rules in effect at the time. He argued that there is no evidence an inspector in 1952 would have allowed a chimney to project into the 7-foot setback. Mr. Brown argued that DPS' longstanding interpretation is inconsistent with the law and should not be allowed to stand. He argued that Mr. Beall can not testify about what a 1952 inspector's judgment would be, and that there is no reason for the artificial distinction between the setback standard and the setback exception.

### **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. 911404 was properly issued.

5. 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."

6. Section 4.1.7.B.5 of the Zoning Ordinance, Setback Encroachments, states (emphasis added):

## **5. Setback Encroachments**

Any building or structure must be located at or behind the required building setback line, except:

### **a. Building Features**

i. Any unenclosed porch, deck, terrace, steps, or stoop may project a maximum of 3 feet into any side setback, or any side street setback of less than 25 feet and may project a maximum of 9 feet into any front setback, rear setback, or any side street setback where the side street setback is a minimum of 25 feet. This encroachment includes an unenclosed roofed porch or terrace.

ii. Any roofed and unenclosed steps or stoop may project a maximum of 3 feet into any side setback, or any side street setback of less than 25 feet and may project a maximum of 9 feet into any front setback, rear setback, or any side street setback where the side street setback is a minimum of 25 feet. Any roof covering unenclosed steps or a stoop may project a maximum of 3 feet into any setback.

iii. An unenclosed balcony may project a maximum of 6 feet into a required setback, if such projection is a minimum of 2 feet from the vertical plane of any lot line.

iv. A sill, leader, belt course, or similar ornamental feature may project a maximum of 6 inches into any setback. Where a wall is located on a lot line, any such projection may extend across a lot line under Chapter 50 (Section 50-20).

**v. A chimney or flue as part of a detached house, duplex, or townhouse may project a maximum of 2 feet into any setback.**

vi. A chimney or flue as part of an apartment may project a maximum of 4 feet into any setback, if such extension remains a minimum of 2 feet from the vertical plane of any lot line.

vii. Any building eave, cornice, or light shelf may project a maximum of 2 1/2 feet into any setback, if such extension remains a minimum of 2 feet from the vertical plane of any lot line. Where a wall is located on a lot line, any such projection may extend across a lot line under Chapter 50 (Section 50-20).

viii. Any bay window, oriel, entrance, vestibule, or balcony, 10 feet in width or less, may project a maximum of 3 feet into any setback. The total length of all bay windows and oriels on a building façade is a maximum of 50% of the linear footage of the façade.

ix. Any unenclosed fire escape or outside stairway may project a maximum of 5 feet into any side street, side, or rear setback.

7. Section 7.7.1.D, Exemptions, of the Zoning Ordinance states:

## **D. Residential Lots and Parcels**

### **1. Residential Lot**

Unless adjoining lots have merged by virtue of ownership and zoning requirements, DPS may issue a building permit for a detached house on any Agricultural, Residential, or Rural Residential zoned lot or parcel identified on a plat recorded before October 30, 2014, a part of lot recorded before June 1, 1958, or a deed recorded before June 1, 1958, without regard to the street frontage and lot size requirements of its zoning, except as provided in Section 7.7.1.D.3.b.

### **2. Pre-1958 Parcel**



A detached house on a platted lot, parcel, or part of a previously platted lot that has not changed in size or shape since June 1, 1958, exclusive of changes due to public acquisition, may be:

- a. constructed under its current zoning without regard to the minimum lot width at the front lot line and front building line;
- b. reconstructed either on its current footprint and up to its current maximum building height; or
- c. constructed or reconstructed in a manner that satisfies the maximum building height, lot coverage, and established building line of its zone when the building permit is submitted and the side yard and rear setback required by its pre- 1958 zoning in effect when the lot, parcel, or part of a lot was first created.

8. The Board finds, based on the testimony of Mr. Beall and the documents provided, that there is no disagreement that the 7-foot side setback from the 1952 Zoning Ordinance applies in this case. Therefore, the only issue in this case is whether the 2014 or the 1952 Zoning Ordinance applies to the exception allowing a chimney to encroach into this side setback. The Board finds that the 2014 Zoning Ordinance exception applies to this case, allowing the chimney to encroach a maximum of 2 feet into any setback.<sup>3</sup> In so finding, the Board notes that DPS is charged with interpreting the Zoning Ordinance, and that Mr. Beall testified that it is DPS' long-standing practice to apply the grandfathering provision for a setback along with the current Zoning Ordinance for any exception.

The Board further finds that development on the Property is under the 2014 Zoning Ordinance, and accordingly the 2014 grandfathering provision in section 7.7.1.D.2.c, and the 2014 chimney exception provision in section 4.1.7.B.5.a.v, apply. The Board finds that the Appellants' interpretation of section 7.7.1.D.2.c of the Zoning Ordinance would require adding language in that section, which violates the rules of statutory construction. Because the chimney projects less than 2 feet into the side setback, the Board finds no error in the issuance of this building permit.

10. Based on the foregoing, the Board finds that DPS has met its burden of demonstrating by a preponderance of the evidence that Building Permit No. 916455 was properly issued, and that the appeal should be denied.

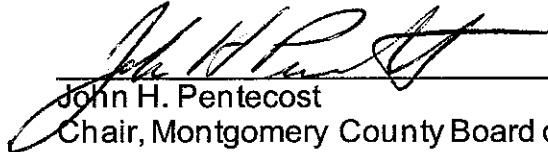
The appeal in Case A-6681 is **DENIED**.

On a motion by Chair John H. Pentecost, seconded by Member Richard Melnick, with Vice Chair Bruce Goldensohn, Member Mary Gonzales, and Member Caryn Hines in agreement, the Board voted 5 to 0 to deny the appeal and adopt the following Resolution:

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<sup>3</sup> The Board notes that even if the 1952 Zoning Ordinance applied, that ordinance contains an exception for chimneys to encroach in a side setback under the discretion of the building inspector, and that Mr. Beall testified that the chimney in this case met that exception. See Exhibit 5, circle 23.

**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 7th day of April, 2021.

  
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).