

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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Case No. A-6714

APPEAL OF JOHANNES STAGUHN et al.

OPINION OF THE BOARD

(Hearing held October 27, 2021)
(Effective Date of Opinion: November 17, 2021)

Case No. A-6714 is an administrative appeal filed August 10, 2021, by Johannes Staguhn, Kerstin Florian-Staguhn, Lynn Bush, and Harry and Emily Volz (the "Appellants"). The Appellants charged error on the part of Montgomery County's Department of Permitting Services ("DPS") in the July 12, 2021 issuance of Building Permit No. 876646 to construct a single-family dwelling located at 10201 Menlo Avenue, Silver Spring (the "Property"). The subject Property at the time of the issuance of the building permit was owned by Minter Farnsworth. The Appellants reside on Menlo Avenue (the Staguhn Appellants) and Barker Street.

Pursuant to section 59-7.6.1.C of the Montgomery County Zoning Ordinance (2014)¹, the Board scheduled a public hearing for October 27, 2021. Pursuant to sections 2A-7 and 2A-8 of the Montgomery County Code, and Board of Appeals' Rule of Procedure 3.2, the County filed a Motion for Summary Disposition of the administrative appeal on September 21, 2021. Appellants filed a Response to Montgomery County Motion for Summary Disposition on October 18, 2021. The Board, pursuant to Board Rule 3.2.5, decided the Motion for Summary Disposition, and the opposition thereto, at the close of oral argument on October 27, 2021.² Appellants appeared *pro se*. Associate County Attorney Walter E. Wilson represented Montgomery County.

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

¹ All references to the County's Zoning Ordinance refer to the 2014 Zoning Ordinance, unless indicated otherwise.

² Due to the COVID-19 pandemic, the oral argument was held via Microsoft Teams.

FINDINGS OF FACT

The Board finds by a preponderance of the evidence that:

1. The Property, known as 10201 Menlo Avenue in Silver Spring, is a RE-60 zoned parcel identified as Lot 13, Capital View Park Subdivision.
2. On or about July 12, 2021, DPS issued Building Permit No. 876646 to construct a single-family dwelling on the Property. See Exhibit 4.
3. On August 10, 2021, the Appellants timely filed an appeal charging error by DPS in its decision to issue Building Permit No. 876646. See Exhibit 1.

MOTION FOR SUMMARY DISPOSITION—SUMMARY OF ARGUMENTS

1. Mr. Wilson argued that the Appellants are contesting DPS's issuance of a residential building permit on a vacant lot. He argued that there was no genuine dispute of evidentiary fact for the Board to adjudicate, and therefore summary disposition was appropriate. Mr. Wilson argued that there was no administrative error by DPS in the issuance of Building Permit No. 876646 because the Director of DPS was following County law in the issuance of the permit for proposed work that conformed to Chapter 8 of the County Code and all other applicable laws.

Mr. Wilson argued that the Appellants appeal focused on issues relevant to the issuance of a sediment control permit but not relevant to the issuance of a building permit under Chapter 8 of the County Code. He argued that the complaints concerned sediment, a storm drain or water course issues, prevention of land-disturbing activity, and general assurance of compliance with the sediment control plan. The County's motion further argued that the Appellants' appeal justification references areas of disturbance infringing on an easement; excavations of bedrock and impacts on a stream; stream protection; excavation, fill, and drainage issues; and calculations regarding fill and excavations, some of which may relate to Sediment Control Permit No. 284824 issued June 18, 2020 and none of which relate to the building permit. Mr. Wilson argued that the Board does not have the authority to review complaints concerning a sediment control permit.

Mr. Wilson argued that DPS did not issue a stop work order for work performed under Building Permit No. 876646. He argued that while a person aggrieved by a stop work order can appeal that order, the Board does not have jurisdiction to review DPS's decision not to issue a stop work order. Mr. Wilson argued that DPS has prosecutorial discretion over whether or not to issue a stop work order.

In response to questions from the Board, Mr. Wilson argued that once work begins under a building permit, if a permittee is not complying with the approved plans or with the permits issued under Chapter 19 of the County Code (which governs erosion, sediment control, and stormwater management) then DPS inspectors would determine whether the permittee was in compliance. He argued that the issue of compliance is a separate issue from the appeal in this case, which concerns whether a building permit was properly issued. Mr. Wilson argued that there is no appellate review of a DPS decision to take or not take enforcement action.

Mr. Wilson argued that the DPS Director must confirm that a building permit applicant has obtained a sediment control permit before granting the building permit. He argued that, in this case, a sediment control permit was issued for the Property on June 18, 2020. See Exhibit 6, ex. A. Mr. Wilson reiterated that code enforcement falls under the prosecutorial discretion of DPS. He argued that if a DPS inspector finds that a permittee was not adhering to approved plans or permits, DPS could suspend the sediment control permit or issue a stop work order. Mr. Wilson argued that if the sediment control permit is suspended or revoked, then the building permit also gets suspended or revoked. He argued that, for this to occur, there must be a violation of Chapter 19 of the County Code.

In reply to Appellants' arguments, Mr. Wilson argued that he agrees that the Board has appellate jurisdiction over the issuance of a building permit, but not over the issuance of a sediment control permit. He argued that, as attested to by George Muste, Division Chief for Residential Construction and Fire Code Compliance for DPS, work proposed under a building permit must conform to all the requirements of Chapter 8 or any of the applicable residential building, structural, electrical, mechanical, and energy conservation codes. See Exhibit 6, ex. A. He argued that DPS only has to confirm that a permittee has obtained a Chapter 19 sediment control permit before issuing a building permit and that, if the proposed work conforms to all the requirements of Chapter 8 and all other applicable laws and regulations, the Director must issue the permit. Mr. Wilson argued that Mr. Muste had found that "the work proposed under Building Permit No. 876646 conforms to all requirements of Chapter 8 and the residential building, structural, electrical, mechanical, and energy conservation codes." See Exhibit 6, ex. A.

Mr. Wilson argued that once work is underway for permits issued under Chapter 19, if DPS determines that the work does not conform to Chapter 19, DPS can suspend or revoke the sediment control permit. He argued that this determination would be handled as a permitting or code enforcement issue. Mr. Wilson argued that, in this case, since the applicant had obtained a sediment control permit prior to any land-disturbing activity and the proposed work in the building permit application conformed to Chapter 8 of the County Code and other applicable laws, the DPS Director was legally obligated to issue the building

permit. He argued that the action to issue the building permit was purely ministerial, and that had the DPS Director failed to issue this building permit the Director could have been subject to a mandamus action.

Mr. Wilson argued that the conservation easement that is part of Appellants' concerns was granted to the Maryland National Capital Park and Planning Commission and that the County is not a party to that easement. See Exhibit 6, circle 2. He argued that therefore the County does not have any standing to enforce the terms and conditions of that easement. Mr. Wilson argued that the excavation of bedrock is not relevant to the issue of whether DPS erred in issuing Building Permit No. 876646. He argued that DPS did not misapply the law in issuing this building permit.

Mr. Wilson argued that section 8-26(i)(3) of the County Code, which states that all work under a building permit "shall conform to plans approved and/or permits issued in accordance with Chapter 19 of the Code" could subject a permittee to a citation through code enforcement. He argued that if a permittee is performing work not in accordance with the permit issued or plans approved, that is a code enforcement issue. Mr. Wilson argued that if DPS investigates and determines work is being done in accordance with plans or the permit issued, DPS has a right to make that determination, and the Board does not have authority to second guess code enforcement decisions.

Mr. Wilson argued that the issue before the Board is whether, when DPS issued the building permit, the proposed work conformed to Chapter 8 and all applicable laws, and whether the applicant had obtained a sediment control permit. He argued that if the applicant meets these requirements, then the DPS Director is obligated to issue the building permit. Mr. Wilson argued that after the issuance of the building permit, if a permittee is doing something that does not conform to the sediment control permit, that permit can be revoked, and then the building permit also gets revoked. He argued that DPS must first determine whether a permittee is in violation, and that is a separate issue from whether the building permit should have been issued.

Mr. Wilson argued that if a complainant is unhappy with a DPS inspector, they can complain to their supervisor, the DPS Director, or the County government leadership. He argued that the decisions of a DPS inspector should not be arbitrary or capricious, but that the Board does not have the authority to second guess the actions of DPS inspectors.

2. Appellant Johannes Staguhn argued that violations that could result in the building permit being revoked have occurred at the Property, and that DPS has been made aware of these violations. He argued that if any work on the Property is in violation of other codes, including Chapter 19, then DPS has to revoke the building permit, and that since these violations have occurred, the Appellants are asking that DPS revoke the building permit until all of these

violations have been resolved. Appellant Staguhn argued that Chapter 8 of the County Code is the law, and that section 8-26 requires that all work conform to Chapter 19 of the County Code. He argues that when it comes to the law, DPS does not have discretion, and that if there is a violation of the law it must be prosecuted.

Appellant Staguhn argued that Chapter 8 of the County Code requires that all other applicable laws and regulations be complied with in order for a building permit to be issued. He argued that the area of disturbance on the Property that has been torn over is part of a conservation easement, which has nothing to do with sediment control. Appellant Staguhn argued that the massive excavation that has occurred at the Property is construction and also has nothing to do with sediment control. He argued that sediment control includes actions such as putting up fences, and that taking out huge amounts of bedrock has nothing to do with Chapter 19 and is directly covered under Chapter 8.

Appellant Staguhn argued that many of Appellants' complaints concern violations that are not only sediment control issues, but are very broad violations of County or State law. He argued that all of these violations must be considered, and that if they are not addressed then the building permit cannot be issued. Appellant Staguhn argued that all work must conform with Chapter 19, and that the Appellants will show that the work on the Property did not conform with the approved plans.

3. Appellant Lynn Bush argued that the County keeps circling back to the argument that the Board is precluded from hearing this case because the Board does not have jurisdiction over issues arising under a sediment control permit. She argued that the actions that the Appellants are complaining of should not have been done under the sediment control permit, and that the developer should not have done this work under that permit. Appellant Bush argued that excavating significant amounts of bedrock has nothing to do with a sediment control permit, and that the accumulation of dirt on the Property is creating environmental problems that should not have been allowed under the sediment control permit.

Appellant Bush argued that she asked the former owner of the Property, Mr. Farnsworth, about the work that was being done under the sediment control permit, and he informed her that he was doing the work under that permit because that permit was not appealable. She argued that the Appellants' position is that the Board wrongfully allowed work to be done under the sediment control permit. Appellant Bush argued that anything can be built under the sediment control permit and the Appellants have no recourse because they can't challenge that permit. She argued that the developer is working under that permit to avoid any review as well as to avoid the requirement that they comply with County Code requirements.

Appellant Bush argued that the Appellants came to the Board as soon as these violations became apparent, and that the Appellants pointed out that these violations were not properly within the parameters of the sediment control permit. She argued that these violations should have been performed under the building permit, and that therefore these challenges are properly before the Board.

4. Appellant Emily Volz argued that the work performed under the sediment control permit is creating more sediment. She argued that the work has changed the way rainwater comes on the Property, has changed the course of the stream, and has added sediment to the edge of Appellant Bush's stream. Appellant Volz argued that when the Appellants were previously before the Board, the Board told them that the DPS permit process would address their concerns. She argued that the developer then performed the work under the sediment control permit so that the Appellants could not appeal their actions.

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. Section 2-112(c) does not provide the Board with appellate jurisdiction over appeals taken under any section of Chapter 19 of the Montgomery County Code.

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

3. 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. Sec. 8-25(a), Permits, of the County Code states:

(a) Action on application. The Director 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.

5. Section 8-26 of the County Code governs the conditions of a building permit. Subsection (i) Compliance with excavation, grading and sediment control regulations, provides that:

(1) Unless the construction is exempted by Chapter 19, an applicant for a building permit must obtain a sediment control permit before the building permit is issued.

(2) If a sediment control permit is suspended or revoked, the building permit for construction within the area subject to the sediment control permit may be suspended or revoked.

(3) All work shall conform to plans approved and/or permits issued in accordance with Chapter 19 of this Code.

6. Section 1-18 of the County Code governs enforcement actions by the County government. Section (f)(4) provides that "[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."

7. 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 the building permits, including Building Permit No. 876646, were properly issued.

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 after oral argument on the motions prior to the hearing. Board Rule 3.2 specifically confers on the Board the ability to grant motions to dismiss for summary disposition in cases where there is no genuine issue of material fact and dismissal should be rendered as a matter of law (Rule 3.2.2). Under Board Rule 3.2.2, the Board may, on its own motion, consider summary disposition or other appropriate relief.

9. Under Board Rule 3.2.5, the Board must decide the motion after the close of oral argument or at a worksession.

10. The Board finds, based on the County's motion and arguments by all

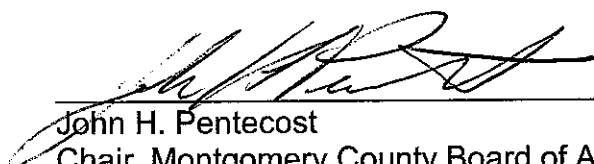
parties, that Building Permit No. 876646 was properly issued. The Board finds that the Board has jurisdiction over the issuance of the building permit, and that at the time this building permit application was submitted, the proposed work to be performed under the permit conformed to all requirements of Chapter 8 and all other applicable laws and regulations, and that the applicant had obtained a sediment control permit. In support of this finding, the Board relies upon the affidavit for Mr. Muste, who affirmed both that "the work proposed under Building Permit No. 876646 conforms to all requirements of Chapter 8 and the residential building, structural, electrical, mechanical, and energy conservation codes" and that the coordination of the permit requirements of Chapter 19 with this application requires only that DPS confirm that the building permit applicant had first obtained a Chapter 19 sediment control permit, which the applicant did in this case. See Exhibit 6, ex. A. The Board further finds that the Appellants do not dispute that the work proposed to be performed under the building permit conformed to all requirements of Chapter 8 of the County Code and to the residential building, structural, electrical, mechanical, and energy conservation codes. Therefore, the Director of DPS was required to issue Building Permit No. 876646.

The Board further finds that it does not have jurisdiction over a sediment control permit or over the discretionary prosecutorial decisions of DPS to prosecute or decline to prosecute alleged violations of the law. While the Board finds that it would have jurisdiction over the issuance or revocation of a stop work order, that is not at issue in this appeal, and the Board does not have jurisdiction over a decision not to issue a stop work order or over DPS decisions on code enforcement issues. The Board finds that the actions the Appellants have appealed all concern issues that the Board does not have appellate jurisdiction over, and that because Building Permit No. 876646 was properly issued, this appeal must be dismissed.

11. The Appellants' appeal in Case A-6714 is **DISMISSED**.

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

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



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 November, 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).