BOARD OF APPEALS
for
MONTGOMERY COUNTY

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Case No. A-6794
APPEAL OF ANNE K. RZESZUT

OPINION OF THE BOARD
(Hearing held April 19, 2023)
(Effective Date of Opinion: May 31, 2023)

Case No. A-6794 is an administrative appeal filed December 14, 2022, by Anne K. Rzeszut (the "Appellant"). The Appellant charged error on the part of Montgomery County's Department of Permitting Services ("DPS") in the issuance of a building permit, No. 1007805, on November 17, 2022. The Appellant alleges that "[t]he perimeter retaining wall/fence, an accessory structure, violates the accessory structure setback standards and is set too close to the property line including, but not limited to, the rear property boundary." See Exhibit 1.

Building permit No. 1007805 was issued for the property at 4610 Davidson Drive, Chevy Chase, Maryland, 20815 (the "Property"). See Exhibit 3. The Property is Lot 49, Block C, Chevy Chase Terrace, in the R-60 Zone. The Appellant owns the property at 4617 Chevy Chase Boulevard, Chevy Chase, Maryland 20815.

Pursuant to section 59-7.6.1.C of the Zoning Ordinance, the Board scheduled a public hearing for April 19, 2023. On February 22, 2023, the Board granted the request of the owner of the Property, Patrick K. Keating, through his attorney, Soo Lee-Cho, to intervene in this appeal (the "Intervenor").

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 or for Summary Disposition on February 15, 2023. See Exhibit 4. The Appellant filed an opposition on April 10, 2023. See Exhibit 7(j). Also on April 10, 2023, the Intervenor filed a Joinder in Montgomery County's Motion to Dismiss or for Summary Disposition. See Exhibit 10. The Board, pursuant to Board Rule 3.2.5, decided the Motion to Dismiss or for Summary Disposition, the opposition thereto, and the joinder after the close of oral arguments prior to the scheduled hearing on April 19, 2023. Michele M. Rosenfeld, Esquire appeared on behalf of the Appellant, who was also present. Elana M. Robison, Associate County Attorney, represented Montgomery County. The Intervenor was represented by Ms. Lee-Cho.

Decision of the Board: County and Intervenor's Motions to Dismiss or for Summary Disposition **granted**;
Administrative appeal **dismissed**.

RECITATION OF FACTS

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

1. The Intervenor filed a BUILDING RESIDENTIAL PERMIT APPLICATION for the Property on September 23, 2022. See Exhibit 6(a). DPS issued building permit No. 1007805 for the Property on November 17, 2022. See Exhibit 3.

2. On December 22, 2022, DPS issued fence permit No. 1016583 for the Property. See Exhibit 6(d).

3. On January 13, 2023, DPS issued building permit No. 1016752 for the Property. See Exhibit 6(g).

MOTIONS TO DISMISS OR FOR SUMMARY DISPOSITION—SUMMARY OF ARGUMENTS

1. Counsel for the County argued that building permit No. 1007805 was granted for the construction of a two-story single-family dwelling, and that the reason for this appeal has nothing to do with that construction. She argued that the basis for this appeal is only about the wall and the fence constructed on the Property, both of which have their own separate permits. Counsel argued that even though the retaining wall was mentioned in the building permit application, it was not mentioned as part of the conditions in building permit No. 1007805. See Exhibits 3, 6(a).

Counsel for the County argued that the site plan for the single-family dwelling states that the wall will be designed by others. See Exhibit 6(c). She argued that this statement is a clear demonstration that the wall was not subject to review under the building permit for the dwelling. Counsel argued that permits for the wall and the fence were separately applied for, and a separate review was conducted for those permits. She argued that the Appellant obtained construction documents for the building permit and could have obtained documents for both the wall and the fence permit, which were posted at the Property. Counsel argued that there was no basis for the Appellant to blame the County for the fact that she did not realize there were separate permits that she did not appeal.

Counsel argued that to consider the fence and the wall based on the broad site plan submitted with the building permit would require consideration of the fence and the wall permits, which were not appealed. She argued that to consider a requirement for a guardrail in conjunction with the wall requires consideration of the wall permit, which

mentions a guardrail. See Exhibit 6(e). Counsel argued that section 59-6.4.3.C of the County's Zoning Ordinance (2014) governs measurements for walls and fences, as well as exemptions for both. She argued that, under that section, "any other wall or fence that is not on a property abutting a national historic park and is 6.5 feet or less in height when not abutting a Commercial/Residential, Employment, or Industrial zone" is exempt from building line and setback requirements, and that the Property is not abutting any of these zones. See section 59-6.4.3.C.3.c of the Zoning Ordinance. Counsel argued that both the wall and the fence are 6.5 feet or less and thus this exemption applies to both structures.

Looking to the site plan, Counsel argued that when a building permit site plan is submitted, it goes through zoning review. She argued that the review includes looking for whether there are any accessory structures on the property. Counsel argued that when this site plan was reviewed, the fence and the wall were not deemed to be accessory structures because they were under 6.5 feet, measured from the ground up, and therefore both were exempt from building line and setback restrictions. She argued that, in this case, the fence is not on top of the wall. Counsel referred the Board to a boundary survey, and noted that there is a gap of 0.08 of a foot between the wall and the fence. See Exhibit 6(j). She argued that because there is a separation between the wall and the fence, DPS treats them separately.

Counsel argued that section 59-6.4.3.C.1 of the Zoning Ordinance (2014) instructs how to measure the height of a fence or wall, and states that "[f]ence or wall height is measured from the lowest level of the grade under the fence or abutting a wall." She argued that, from DPS's perspective, as long as the fence is not directly on top of the wall, they are treated as separate and are measured separately. Counsel argued that these structures passed zoning review, and that if there is a violation, that is an enforcement issue and does not go into whether the permit was properly issued.

2. Counsel for the Appellant argued that, if the Board denies the County's motion, the Appellant will not need to rely on the fence and the wall permits to make her argument. She argued that the Appellant can make her argument based on the site plans in the record associated with the original building permit (permit No. 1007805). Counsel argued that, while the Appellant may reference the fence and wall permits because they had already been introduced into the record, they are not material to the appeal.

Counsel argued that building permit No. 1007805 was issued on November 17, 2022, and that construction of the wall began on the Property the day after the permit was issued. She stated that less than a week later, on November 23, the Appellant filed a complaint with DPS regarding the wall; she met with a DPS employee and received paper documents regarding the construction of wall. Counsel noted that the wall was completed on December 3, 2022, and that the fence was completed on December 14, 2022. She stated that the Appellant filed this appeal based on the only permit that was pending at the time of this construction, and that she hand delivered a copy of the appeal to the builder. Counsel argued that the permits for the fence and the wall were issued after they were built, on December 23, and that the site plans filed in conjunction with those permit

applications are materially the same as the one filed with the building permit, including the note to exclude the block wall. She argued that the block wall also includes a condition that it must include a guard rail , and that the only item that could be considered a guard for the wall is the fence.

Counsel referred the Board to Figures 1 and 2 In Exhibit 8 and explained that these Figures show the block wall with the fence in February of 2023. She explained that the Appellant lives right behind these structures and argued that these Figures provide a sense of the scale of the fence. Counsel stated that Figures 3 and 4 show the pre-construction condition of the Property, and argued that, at that time, the grade of the two properties (the Property and the Appellant's property) matched. She referred the Board to additional Figures in Exhibit 8 showing the construction on the Property. See Exhibit 8, p. 3-4 (Figures 6-8).

Counsel stated that Exhibit 8, Figure 5 depicts the Appellant's backyard. She argued that, when the Appellant filed a complaint about the fence and the wall, she only had the original building permit to rely on. Counsel argued that on November 25th, DPS sent an inspector to inspect the Property but took no action. She argued that DPS usually issues a stop work order if someone is building something not in accordance with what is allowed, and that therefore the Intervenor must have been building under the building permit at the time of the inspection.

Counsel argued that the Appellant hand-delivered this appeal to the builder on December 19, 2022, and that three days later DPS issued the fence permit. She argued that, post-build, DPS issued the permit for the retaining wall. Counsel argued that the note that the wall was to be designed by others was not part of the permit, and noted that same note was in the materials for the block wall itself. She argued that, based on all the information the Appellant was provided, the building permit that has been appealed related to the wall and the fence. Counsel argued that the Appellant took the additional step of providing the builder with the appeal, and that within days the Intervenor filed for additional permits. She argued that to now say that an appeal was required to be filed for the wall and the fence permits puts form over substance, and that there was no reason to appeal those permits when DPS had advised that construction was pursuant to the building permit. Counsel argued that the properties back to one another, so that unless the Appellant knew to look for a posting on the Property, that would not be something readily available to the Appellant.

Counsel referred the Board to the Appeal Charging Error in Administrative Action or Determination form, and argued that form outlines the reason for this appeal and cites the Code provision being appealed, section 59-4.4.9.B.2.c of the Zoning Ordinance (2014). See Exhibit 1. She argued that this provision concerns side and rear setbacks for accessory structures. In response to a question from the Board, Counsel argued that the retaining wall is the structure shown on the site plan for the building permit, and that whether that retaining wall is in the proper place is properly before the Board in this appeal.

Counsel explained that the highlighted section in Exhibit 8(d), ex. 004 shows the retaining wall. She noted that the height as shown is 6.5 feet maximum on the left side. Counsel noted that the highlighted area to the right is the proposed 6.0 foot fence. Counsel argued that this exhibit shows that, at the time of the building permit application, the Intervenor knew there was going to be a retaining wall on the Property and that it could be up to 6.5 feet in height. She argued that, under the international building code, if there is a vertical wall above a certain height (36 inches) there needs to be guard rail at the top, either within the structure or behind it. See Exhibit 7(i). Counsel argued that the purpose of this requirement is so that if someone is walking and runs into the retaining wall, they don't step over it and fall.

Counsel argued that, at the time the building permit application was submitted, there was going to be a retaining wall built on the Property that was going to require a guardrail so that the wall would exceed 6.5 inches, and that therefore the wall is an accessory structure. She argued that, as an accessory structure, the wall must meet the setbacks in section 59-4.4.9.B.2.c. of the Zoning Ordinance (2014). Counsel argued that the wall was reviewed and approved as part of the sediment control permit, which was required under the building permit itself.

In response to questions from the Board, Counsel argued that the fence and wall operate together. She argued that if the fence were removed the retaining wall no longer satisfies the building code requirement that there be a guardrail. Counsel argued that the wall is an imposing structure right on the property line that needs to be set back. She argued that this imposing structure is an accessory structure that is not subject to the exemption the County granted to allow it to be placed on the property line.

3. Counsel for the Intervenor argued that the problem with this appeal is that plans are intermingled between the building, wall, and fence permits. She argued that the Board's consideration of this appeal would require reaching into permits that the Appellant did not appeal. Counsel argued that there is a procedural defect in this case because the Appellant did not appeal the permits she is complaining about.

Counsel argued that the initiation of the wall construction was for sediment control. She argued that construction on the Property occurred as a step-by-step process, and that when construction started on the wall it was not to a height that required a separate permit. Counsel argued that when the wall reached a height that required a permit, one was obtained. She argued that the fact that the Appellant was watching the Property and interacted with DPS should have made her more aware of what was going on with the Property. Counsel argued that there was no legal basis for the Board to hear this appeal other than for an equitable ruling.

Counsel argued that the Property is a sloping site that slopes significantly toward the Appellant's property, and that a three-foot wall was installed to hold up sediment control measures, that is, to prevent run-off and hold the grade at the start of the construction to avoid damage to the Appellant's property. In response to questions from the Board, Counsel stated that the fence was not mentioned in the building permit, but

that it was shown on a global plan for the entire site. She explained that the Intervenor did not create a separate plan for the fence and used the same site plan when applying for the fence permit. Counsel argued that the fence details and the wall details came in conjunction with those permit applications, not with the building permit application.

Counsel argued that, were the Board to hear this case, it would be setting a bad precedent of allowing appellants to file an appeal for one permit, and then whatever is approved afterwards could be swept into the initial appeal. She argued that the Board should not hear this case just because the Appellant misunderstood or thought DPS said the wall and fence were constructed under the building permit. Counsel argued that the burden is on the Appellant to correctly file the appeal. She argued that DPS has posting requirements when it issues permits, and that the Intervenor followed these requirements. Counsel argued that the Intervenor obtained the permits in sequence, which happens all the time. She argued that this appeal concerns questioning DPS's professional review of the building permit. Counsel argued that appellants must file the requisite appeal or else they don't get an audience before Board.

Regarding the site plan, Counsel for the Intervenor argued that the Zoning Ordinance allows a wall and a fence with no setback if the structures are up to 6.5 feet, and that the site plan shows that this wall and fence comply with this requirement; therefore, they are not considered accessory structures. See Exhibit 6(c). Looking to the building code, she argued that nowhere does it say that a guard rail is required. See Exhibit 7(i). Counsel argued that this section says that guards shall be required for portions of open sided walking surfaces, and that there are no open sided walking surfaces involved in this case. She argued that the purpose is to prevent a fall but that a guard is not automatically required for every retaining wall. Counsel argued that, in this case, the fence is offset and there is no walking path.

In response to questions from the Board, Counsel argued that both the wall and the fence are completely on the Property. She argued that the wall is 6.5 feet at one corner, and that it diminishes in height as it moves across the Property. Counsel stated that if the wall was considered an accessory structure, it would be subject to setback requirements. She argued that the fence and the wall are not a single structure.

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 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 59-6.4.3.C of the Zoning Ordinance (2014) provides that:

C. 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 the fence abuts:

(A) a Commercial/Residential, Employment, or Industrial zone; or

(B) a master planned right-of-way for a rail line; or

(C) any service road that provides access to a master planned right-of-way for a rail line;

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.

5. 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.

6. 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.

7. The Board finds that there are no genuine issues of material fact to be resolved by the Board. First, the Board finds that there is no dispute among the parties that fence permit No. 1016583 and building permit (for the retaining wall) No. 1016752 were not appealed, and that prior to the issuance of those permits they underwent a separate review process. Therefore, the only issue on appeal before the Board is whether DPS properly issued building permit No. 1007805. The Board finds that DPS issued building permit No. 1007805 for the construction of a single-family dwelling. The Board further notes that the Appellant's objection to the issuance of that building permit is the retaining wall and the fence, which were depicted on the site plan submitted with the building permit but were not reviewed by DPS before DPS issued building permit No. 1007805. The Appellant did not raise any objections to the single-family dwelling itself.

The Board further finds that both the wall and the fence are separate structures and that they are both 6.5 feet or less in height and do not abut a national historic park or a Commercial/Residential, Employment, or industrial zone. Therefore, the Board finds that building line and setback requirements do not apply to either the wall or the fence pursuant to section 59-6.4.3.C.3 of the Zoning Ordinance. Thus, even if the depiction of the wall and the fence in the site plan submitted with the building permit on appeal makes their location on the Property a subject of this appeal, the Board finds that DPS correctly issued the building permit because the structures are exempt from building line and setback requirements. Therefore, the Board finds that the appeal must be dismissed.

8. The County and Intervenor's Motions to Dismiss or for Summary Disposition in Case A-6794 are granted, and the appeal in Case A-6794 is consequently **DISMISSED**.

On a motion by Chair John H. Pentecost, seconded by Vice Chair Richard Melnick, with Member Laura and Member Alan Sternstein in agreement, and Member Caryn Hines necessarily absent, the Board voted 4 to 0 to grant the County and Intervenor's' Motion

to Dismiss or 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.

John H. Pentecost
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 31st day of May, 2023.

Barbara Jay
Executive Director

Concurring Statement of Board Member Sternstein, Appeal No. A-6794

I join in the decision of the Board of Appeals in this appeal but separately submit this statement to clarify the basis for my vote in favor of summary disposition. I do not agree or, therefore, vote that the Board lacks jurisdiction of this appeal. I do agree that, on the undisputed facts, including the stated, albeit dubious, view of the Department of Permitting Services ("DPS") regarding application of the definition of an accessory structure, that summary disposition is appropriate here. I would also observe that this controversy raises, again, the question whether the County, as a governmental, not private, party, should make every procedural objection it can conceivably make in opposition to an individual's or business's basic right to be heard, a policy matter for the County government. More so is the denial of the right to be heard questionable here, where DPS action permits replacing a picket fence between two lots having the same grade with a retaining wall making one lot 6.5 feet higher than the adjoining grade of Appellant's lot and making the wall, in combination with a fence immediately adjacent to it, as much as 11 feet and five inches higher than her lot.[1]

[1] Recently, the Board denied another motion to dismiss in an appeal challenging the issuance of an Historic Area Work Permit, even though the appellant had timely filed the appeal. The County contended that the appeal had become moot, even though the appellant had timely and otherwise properly filed an appeal challenging the issuance of the permit. The County argued that the appeal had become moot because, between the time that the citizen perfected his appeal and before the Board could hear the appeal, DPS,

For purposes of determining whether the Board had jurisdiction of this appeal and during the hearing on the County's Motion, I distinguished between whether the Appellant was seeking to challenge the Building Permit on grounds related to the location and size of the retaining wall and fence (matters specific to the site plan and application submitted for the Building Permit) or on grounds related to the engineering design and material specified for the wall and fence (matters specific to Wall and Fence Permits). See Tr. at 35:13-22; 36:20-37:7; 40:23-41:5; 41:9-14; 48:6-9).[2] Appellant's counsel (Tr. 37:10-14), counsel for the Intervenor, a construction company (Tr. 43:3-10; 44:7-8), and other members of the Board (Tr. 37:8) acknowledged the propriety of this distinction.

In the form for Appeal Charging Error in Administrative Action or Determination ("Charging Form"), the reason Appellant gives for this appeal is explicitly that "[t]he perimeter retaining wall/fence, an accessory structure, violates the accessory structure, setback standards and is set too close to the property line, including but not limited to the rear property boundary." The specified Zoning Code provision violated was Section 4.4.9.B.2.c, which requires that an accessory structure longer than 24 feet along a rear lot line be setback two feet for every two feet in excess of the 24 feet. This necessarily required DPS to determine, at the Building Permit stage, whether the wall and fence would constitute an accessory structure.

Appellant plainly challenged matters concerning the locations and sizes (specifically, heights) for the retaining wall and the fence. If not already clear from the statement in the Charging Form – and it should be – Appellant's counsel during the hearing made clear Appellant's view:

> So at the time of the building permit application, it was clear that there was going to be ... [a] retaining wall ... [t]hat was going to require a guard. And it was evident that it would exceed the 6 foot 6 inches that is exempt from [the] setback provision that was cited by the County. So at the time of the building permit, there was a defined, noted, accessory structure.... [O]ne way or another, there is this retaining wall [that] qualifies as an [accessory]structure because of its height. And as a result, it must meet the setback requirements that are set forward in
> section 59.4.4.9 2 (c) which we cited in our appeal.

(Tr. 68:22-69:17.)

It is undisputed that, at the time DPS reviewed the application and plans for the Building Permit, it was aware that Intervenor proposed constructing a "retaining wall" having the maximum permitted height of 6.5 feet and that the International Residential Code ("IRC"), in particular, IRC Code Section R312.1 (guards for fall protection), required a guard of no less than 36 inches, to prevent a fall from heights over 30 inches, which would include a 6.5 foot retaining wall. Accordingly, the combined height of the wall and any guard would necessarily exceed 6.5 feet, as Appellant's counsel argued. Various

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through no act or action on the appellant's part, had issued a building permit for the property involved. See Motion to Dismiss, *In re Appeal of Faulkner*, No. A-6781 (denied Jan. 18, 2023).

[2] Citation is to Transcript, Motion to Dismiss Hearing, *In re Appeal of Rzeszut*, No. A-6794 (Apr. 19, 2023) ("Tr.").

highlighted notations on the Wall Permit plans confirm this and, indeed, show the guard directly on top of the wall.[3] As to the matters the Charging Form raised, they were plainly subject to review at the Building Permit stage and were, therefore, properly before the Board in this appeal.

Although Intervenor's counsel conceded, as noted, that matters of wall location were at issue in connection with the review for the Building Permit, counsel argued that there was no accessory structure at issue because the proposed retaining wall was no higher than 6.5 feet (Tr. 43:3-14). There can be no dispute, however, that, at the time of review, the IRC required the wall to include a guard, making the wall higher than 6.5 feet and an accessory structure. That the guard was going to be a 6 foot fence as opposed to some sort of railing makes no difference, as the IRC does not specify the form of the guard. Indeed, Intervenor originally proposed to place the fence on top of the wall (Motion to Dismiss at 2; Wall Permit plans), providing the required guard. That fence was eventually slightly moved did not change the issue that was part of Appellant's appeal, to wit: how the height of the wall and guard should be measured, no matter how the guard was constructed. The Wall Permit did not change the issue. It merely raised it again.

The County's counsel argued that consideration of the retaining wall was removed from the Building Permit review because, although the wall was expressly listed as part of the work in the permit application, it wasn't listed in the permit as issued (Tr. 7:13-8:2). Were that correct, however, then many other things stated as part of the work in the application also dropped out and were not authorized, because those things were all also not mentioned in the Building Permit. But Intervenor built all of those things, as well as the retaining wall, before, it is not disputed (Opposition to County's Motion to Dismiss at 1; Tr. 25:13-25), the Wall Permit was even issued. It is highly doubtful that permits list every work item specified in their application or shown on the site plan that DPS nevertheless reviews (or should review) and approves. Because the Board only heard argument on the County's Motion, there was no testimony taken, including any testimony that only work expressly stated in a permit itself is reviewed and authorized.

Counsel also argued that a note on the Building Permit site plan stated that the wall was to be designed by others, thereby also showing that the wall was not to be a subject of the Building Permit review (8:23-9:2). The language in the note, however, is "design by others," not "constructed or built by others." Because of geotechnical engineering and special material requirements, retaining walls are required to be designed and approved by civil engineers but may be constructed by builders, as Intervenor did (Tr. 24:29-25:25), provided the design is followed. Indeed, the Wall Permit plans show that they were designed and approved by persons other than the person who designed the site plan.

In short, although the retaining wall is now effectively and safely holding back a 6.5 foot mound of dirt, Intervenor's and the County's legal arguments are empty of any

[3] The Wall Permit plans expressly specify "**GUARD RAILS PER IRC2018 SECTION R-312.1.**" (Emphasis in original.) Likewise, the County's Architectural and Structural Reviews accompanying the Wall Permit provide "Guard Rails shall comply with Section R-312.1 of the 2018 IRC 1 & 2 Family Dwelling as amended by Montgomery County."

support for the view that the Board has no jurisdiction of this appeal. The matters that Appellant challenges were squarely and first presented at the Building Permit stage and were properly and timely brought before the Board by her Charging Form. That Wall and Fence permits were issued subsequently did make them the first to raise Appellant's matters. They did nothing more than raise them again, giving Appellant additional opportunity to bring the appeal that she had already brought, though doing so would have been redundant.

Instead of the Board's jurisdiction, the dispositive matter in this appeal is a legal issue regarding the application, by the DPS, of the Zoning Code, in particular, Code Sections 3.7.4.A.1 (definition of accessory structure) and 6.4.3.C.1 (measurement of fence and wall height), and the IRC, in particular Section R312.1 (guards for fall protection). According to the record, the horizontal separation between the top of the retaining wall and the bottom of the fence is .08 of a foot, that is, slightly less than an inch, the fence being above and slightly to the rear of the top of the wall. As constructed, the fence and wall combined total at least 9' 6" above Appellant's property adjacent to the bottom of the wall, rising to as much as 11' 5" above it.

Section 6.4.3.C.1 of the Code provides that "[f]ence or wall height is measured from the lowest level of the grade under the fence or abutting a wall." The record is clear that in applying this provision, DPS measures the height of a wall and a fence adjacent to the wall separately only where the fence is not directly atop the wall. Indeed, Intervenor originally proposed to build the fence on top of the wall, because the IRC guard requirement (Motion to Dismiss at 2; Wall Permit plans). DPS, however, initially denied the Wall Permit, commenting that the plans had to be revised to state that a fence will not be located on top of the wall (Motion to Dismiss at 2), so that the height of the wall and fence would be measured separately. For this reason alone, the fence was constructed slightly set back from the top of the wall.

Chapter 2A of the Montgomery County Code, the County's Administrative Procedure Act, provides in Section 2A-8(i) that the standard of review the Board is to apply in appeals of administrative decisions is de novo review. And, here, although the matter is not black and white, there is ample reason to argue that DPS has erred as a matter of law in its application of zoning regulations. Specifically, although the regulation governing measurement of permissible height provides that height is to be measured from "the lowest level of the grade" below a fence or abutting a wall, how should what "the grade" is be determined where the fence or wall is on top of a berm of earth constructed under the fence or wall but immediately sloping to a significantly lower grade still close to the wall or fence? Is the relevant grade that precisely under the fence or abutting the wall (that is, the top of the berm) or the grade within inches or feet from the fence or wall, just beyond the sides of the berm? If a retaining wall is used to stabilize construction on both or even one side of the berm, as Intervenor did, is the berm nevertheless part of the wall or fence construction and, therefore, part of its height?

Also, the regulations require the retaining wall to be constructed with a guard at the top of it, and the Wall Permit explicitly requires so. Yet, according to DPS, by placing the bottom of the fence slightly less than an inch behind the top of the wall, the fence and

the wall are considered separate.[4] If they are separate, then is the wall in compliance with the guard requirement? Should the fence be treated as both separate and not separate from the wall, or is there an inconsistency here? And if the fence may be treated as both, then when the fence is treated as the guard required for the wall, are the wall and fence really together one accessory structure, subject to setback requirements, as Appellant argues, particularly when the Intervenor originally proposed to build the fence on top of the wall?

Finally, and most importantly, according to the applicable definition, a structure is not accessory provided it "is incidental to the . . . use of the land." Code Section 3.7.4.A.1. Although size and location affect whether a structure is incidental, so also does how the structure affects the land. The retaining wall is not just a simple wall. It is indisputable that it raises the difference between the grade of Intervenor's lot and Appellant's adjacent lot from zero to 6.5 feet, effecting a major change in the use of the Intervenor's land. Accordingly, but for DPS's application of Section 3.7.4.A.1, the retaining wall itself, even without any guard, is not only an accessory structure but also a structure that was required, pursuant to Section 4.4.9.b.2.c, to be moved two feet back from Appellant's property for every two feet its length exceeding 24 feet. It also bears noting that this major land use change first presented itself when the Building Permit was issued, another reason the Board has jurisdiction of this appeal.

Although the de novo standard of review permits the Board to conclude that DPS has erred as a matter of law in its application of zoning regulations, it is, as an established principle of administrative law, appropriate to give deference to DPS in matters of doubt and within its knowledge and experience. *McCullough v. Wittner*, 314 Md. 602, 612, 552 A.2d 881, 886 (1989) ("The interpretation of a statute by those officials charged with administering the statute is . . . entitled to weight."). It is that deference that leads me, the newest member of this Board and despite my 48 years of legal practice, to concur, not without reservation, only in the Board's alternative decision that the wall and fence are not an accessory structure.

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).

[4] The County's counsel acknowledged during the hearing that she had no legal decision supporting the DPS position that the very short separation here was sufficient to consider the wall and fence separate structures, rather than an accessory structure (Tr. 63:11-17).