

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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Case No. A-6831

APPEAL OF JOSEPH GOTHARD, ET AL.

OPINION OF THE BOARD

(Board discussion held November 8, 2023)
(Effective Date of Opinion: December 6, 2023)

Case No. A-6831 is an administrative appeal filed September 1, 2023, by Joseph and Kristina Gothard, Candice Clough, Danilo Molieri, Tomas and Monique Witz, and Curtis Lamoy (the "Appellants"). The Appellants charged error on the part of Montgomery County's Office of Zoning and Administrative Hearings ("OZAH") in the approval, by the Hearing Examiner, of a minor amendment in OZAH Case No. CU 20-02. Specifically, the Appellants "appeal the approval of OZAH Amendment issued 8-14-2023 and request withdrawal of approval for CU 20-02 conditional use and DPS Permits, until 100% compliance is achieved." See Exhibit 1.

CU 20-02 was issued for the property at 19105 Frederick Road, Gaithersburg, Maryland, 20880 (the "Property"). See Exhibits 5. The Appellants own the properties at: 19050 Wheatfield Drive (Appellants Gothard); 11302 Harvest Mill Lane (Appellant Clough); 19104 Wheatfield Drive (Appellant Molieri); 19101 Wheatfield Drive (Appellants Witz); and 19102 Wheatfield Drive (Appellant Lamoy). See Exhibit 1.

Pursuant to section 59-7.6.1.C of the Zoning Ordinance, the Board scheduled a public hearing for November 29, 2023. Pursuant to sections 2A-7 and 2A-8 of the County Code, and Board of Appeals' Rule of Procedure 3.2, on September 20, 2023 (received by the Board on October 31, 2023), the holder of CU 20-02, Frederick Road Senior 4% Owner, LLC (the "Applicant"), filed a Motion for Summary Disposition of the administrative appeal. See Exhibit 5. The Appellants filed a Motion in Opposition to Motion for Summary Disposition on October 31, 2023. See Exhibit 6. The Board, pursuant to Board Rules 3.2.1, 3.2.2, and 3.2.5, considered the Motion for Summary Disposition, and the opposition thereto, at the outset of the prehearing conference on November 8, 2023. Appellants Joseph and Kristina Gothard, along with other unidentified persons, attended

the prehearing conference, as did Jody S. Kline, Esquire, on behalf of the Applicant, Frederick Road Senior 4% Owner, LLC.

Decision of the Board: Frederick Road Senior 4% Owner, LLC's Motion for Summary Disposition **granted**;
Administrative appeal **dismissed**.

RECITATION OF FACTS

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

1. On July 1, 2020, OZAH approved a conditional use to operate an Independent Living Facility for Seniors with up to 111 dwelling units at the Property under Section 59-3.3.2.C of the County's Zoning Ordinance (2014).¹ See Exhibit 3, which includes the Order Approving Minor Amendment dated August 14, 2023. On September 14, 2022, OZAH transferred the conditional use to Frederick Road 4% Owner, LLC. See Exhibit 3.

2. On July 11, 2023, OZAH received a request for a minor amendment to the approved conditional use plan. The minor amendment was requested "in order to reconcile the plans in the Office of Zoning and Administrative Hearings' records with what will actually exist in the field as the result of changes necessitated by the Preliminary Plan of Subdivision and the building permit review process." See Exhibit 5, p. 2.

3. The minor amendment request included: 1) changes due to a preliminary plan requirement to create a Public Utility Easement ("PUE") which necessitated relocating the front driveway so it did not encroach on the PUE, relocating the sidewalk in front of the building, and relocating foundation landscaping; 2) replacement of one handicapped parking space; 3) modification to the stormwater management facility; 4) architectural modifications including reorganizing green roof planting beds, relocation of a trellis on the northern wing of the rooftop, and the extension of a window well on the courtyard façade. The Applicant also requested that the name of the conditional use holder be corrected from Frederick Road 4% Owner, LLC to Frederick Road Senior 4% Owner, LLC. See Exhibit 3.

4. On August 14, 2023, OZAH's Hearing Examiner granted the Applicant's request for an administrative modification to the conditional use, finding that most of the changes were driven by the location of the new PUE in front of the Property, that the proposed modifications to the stormwater management facilities did not create new adverse impacts, and that the changes to the rooftop have very little impact and can barely be seen. The Hearing Examiner further found that the proposed amendments do not change the intensity in operations previously approved and will have no additional impact on views and screening of the use. See Exhibit 3.

5. The Hearing Examiner's August 14, 2023 Order contained the following Notice: Under §59.7.3.1.K.2.b of the Zoning Ordinance, any party may object by requesting a

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

public hearing on the Hearing Examiner's action within 15 days after this decision is issued. The request for public hearing must be in writing and must specify the reason for the request and the nature of the objection or relief desired. If a request for a hearing is received, the Hearing Examiner must suspend her administrative approval and conduct a public hearing to consider whether the amendment is a major amendment or a minor amendment under the Zoning Ordinance. A minor amendment is one that does not "substantially changes the nature, character, or intensity of the conditional use or its effect on the immediate neighborhood." A major amendment is one that does substantially change the nature, character, or intensity of the conditional use on the immediate neighborhood. If the Hearing Examiner determines, after an objection, that the impacts will be major, then the application must be treated as a major amendment. A decision of the Hearing Examiner may be appealed based on the Hearing Examiner's record to the Board of Appeals. See Exhibit 3.

6. The Appellants appealed the Hearing Examiner's August 14, 2023 Order to the Board of Appeals on September 1, 2023. See Exhibit 1. The Appellants did not request a public hearing on the Hearing Examiner's Order.

MOTION FOR SUMMARY DISPOSITION AND OPPOSITION—SUMMARY OF ARGUMENTS

1. Counsel for the Applicant argued, in his Motion for Summary Disposition, that the Appellants filed their objection to the Hearing Examiner's Order with the wrong agency. See Exhibit 5. Counsel argued that an objection to the approval of a minor modification of a conditional use by a Hearing Examiner should be filed with OZAH under section 59.7.3.1.K.2.b of the Zoning Ordinance. Counsel noted that the minor amendment process for a conditional use enables the Hearing Examiner to approve simple changes to an approved conditional use without a formal advertised public hearing (which is what occurred in this case) and that, after approval, an objection can be filed with the agency, OZAH, which can then act on the request for a public hearing.

Counsel further argued in his motion that the Hearing Examiner's August 14, 2023 Order listed the five changes to the plans for the conditional use and then analyzed each of these changes to determine whether they substantially changed the nature, character, or intensity of the use. See Exhibit 5. Counsel argued that the Appellants did not state the nature of their objection to any of these proposed amendments in their appeal, but rather seek to revoke approval for CU 20-02, an issue which the Appellants previously unsuccessfully appealed to the Board and the Circuit Court.

3. The Appellants argued in their opposition motion that the Board has jurisdiction over noncompliance of conditional uses. See Exhibit 6. The Appellants argued that OZAH failed to properly notify neighbors about the August 14, 2023 Order and that the Applicant improperly completed work before the OZAH Order was issued. The Appellants argued that the Applicant continues to be in noncompliance with a wide range of issues, outlined in their opposition. See Exhibit 6.

CONCLUSIONS OF LAW

1. Section 59.7.3.1.K.2.b of the Zoning Ordinance provides that “[w]hen a minor amendment is granted, the Board of Appeals or Hearing Examiner must send a copy of the resolution or decision, as applicable, to the applicant, the Board of Appeals or Hearing Examiner, as appropriate, the Planning Board, DPS, the Department of Finance, all parties entitled to notice at the time of the original filing, and current abutting and confronting property owners. Except for an amendment for a Telecommunications Tower, the resolution or decision, as applicable, must state that any party may request a public hearing on the Board of Appeals’ or Hearing Examiner’s action within 15 days after the resolution or decision is issued. The request for public hearing must be in writing, and must specify the reason for the request and the nature of the objection or relief desired. If a request for a hearing is received, the deciding body must suspend its administrative amendment and conduct a public hearing to consider whether the amendment substantially changes the nature, character, or intensity of the conditional use or its effect on the immediate neighborhood. If the Board of Appeals or Hearing Examiner determines that such impacts are likely, then the amendment application must be treated as a major amendment application. A decision of the Hearing Examiner may be appealed on the basis of the Hearing Examiner’s record to the Board of Appeals. Any amendment to a Telecommunications Tower is also a minor amendment.”

2. 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 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.

3. Under Board Rule 3.2.1, any party may at any time move to dismiss any issue in a case on the grounds that the Board lacks jurisdiction.

4. The Board finds that there are no genuine issues of material fact to be resolved by the Board. The Board finds that it has no jurisdiction over this appeal. In so finding, the Board looks to section 59.7.3.1.K.2.b of the Zoning Ordinance, which provides that, when a Hearing Examiner administratively grants a minor amendment, a party may file a request for a public hearing within 15 days after the order is issued, and the deciding body (in this case the Hearing Examiner) must suspend its administrative amendment and conduct a public hearing. The Board finds that it is undisputed that the Hearing Examiner was the deciding body on this administrative amendment and that the Appellants did not request a public hearing with the Hearing Examiner, but rather filed an administrative appeal with the Board. The Board finds that its appellate authority, as set forth in this section, is over those decisions of the Hearing Examiner that are made following a public

hearing before the Hearing Examiner, and not over the Hearing Examiner's initial minor modification decisions.

The Board finds that its jurisdiction is created and limited by statute. *Holy Cross Hospital, Inc. v. Health Svcs. Cost Review Comm'n*, 283 Md. 677, 683, 383 A.2d 181 (1978). The Board does not have the authority to decide matters for which it has not been granted jurisdiction by statute. As noted in the preceding paragraph, the Board does not have appellate authority over the Hearing Examiner's minor modification decisions that have not been through the public hearing process. Therefore, the Board must dismiss the appeal of the Hearing Examiner's Order dated August 14, 2023 for lack of jurisdiction because the Appellants failed to follow the proper legal requirements, that is, to request a public hearing before the Hearing Examiner on this amendment.²

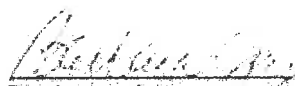
5. The Applicant's Motion for Summary Disposition in Case A-6831 is granted, and the appeal in Case A-6831 is consequently **DISMISSED**.

On a motion by Chair John H. Pentecost, seconded by Vice Chair Richard Melnick, with Members Caryn Hines, Laura Seminario-Thornton, and Alan Sternstein in agreement, the Board voted 5 to 0 to grant the Applicant's Motion 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 6th day of December, 2023.


Barbara Jay
Executive Director

² The Board further notes that, even if the Board had jurisdiction over this appeal, the Appellants failed to set out the reason for the request and the nature of the objection or relief desired as to the August 14, 2023 minor amendment. Rather, the Appellants' appeal focuses on noncompliance and the underlying grant of CU 20-02, an issue which was previously appealed and dismissed by the Board.

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).