BOARD OF APPEALS
for
MONTGOMERY COUNTY

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http://www.montgomerycountymd.gov/boa/

Case No. A-6898

APPEAL OF SEAN SEGAL, et al.

OPINION OF THE BOARD

(Motions hearing held January 29, 2025; Board decision rendered February 19, 2025)
(Effective Date of Opinion: March 28, 2025)

Case No. A-6898 is an administrative appeal filed November 5, 2024 by Sean Segal, Rose Safir, Niall Dempsey, Helen Brady, Margaret Reddy, John Muglia, and Jane Mabry (the "Appellants")[1]. The Appellants charged error on the part of Montgomery County's Department of Permitting Services ("DPS") in the issuance of a commercial building permit, No. 1065009, on October 7, 2024. The Appellants assert that the "[a]pplication for building permit should have been denied." See Exhibit 1.

Commercial building permit No. 1065009 was issued for the property at 9475 Georgia Avenue, Silver Spring, Maryland, 20910 in the CRT Zone (the "Property"). See Exhibit 3(a). The Appellants own the properties at: 9416 Woodland Drive, Silver Spring, Maryland 20910 (Appellant Segal); 9415 Woodland Drive, Silver Spring, Maryland 20910 (Appellant Safir); 9603 Dallas Avenue, Silver Spring, Maryland 20901 (Appellant Dempsey); 9306 Caroline Avenue, Silver Spring, Maryland 20901 (Appellant Brady); 1605 Flora Lane, Silver Spring, Maryland 20910 (Appellant Reddy); 9510 Columbia Boulevard, Silver Spring, Maryland 20910 (Appellant Muglia); and 14508 Homecrest Road # 521, Aspen Hill, Maryland 20906 (Appellant Mabry).

[1] Anita Miles, Elizabeth Cooke, Janie Druskin, and Victor Smith were also originally listed as Appellants. However, these parties never signed the Appeal Charging Error in Administrative Action or Determination form and were voluntarily dismissed by the Appellants' counsel as parties to the appeal prior to the motions hearing.

Pursuant to section 59-7.6.1.C of the Zoning Ordinance, the Board scheduled a public hearing for January 29, 2025. On November 21, 2024, Two Farms, Inc. d/b/a Royal Farms, the lessee of the Property, filed a Motion to Intervene (the "Intervener"). See Exhibit 4. The Board granted this request to intervene at the pre-hearing conference on December 11, 2024.

Pursuant to sections 2A-7 and 2A-8 of the County Code, and Board of Appeals' Rule of Procedure 3.2, the Intervener filed a Motion to Dismiss Certain Appellants on December 9, 2024. See Exhibit 6. The County filed a Motion to Dismiss or for Summary Disposition of the administrative appeal on December 31, 2024. See Exhibit 7. The Intervener filed a Line Joining the County's Motion to Dismiss or for Summary Disposition on January 9, 2025. See Exhibit 8. The Appellants filed an opposition on January 21, 2025. See Exhibit 9. The Board, pursuant to Board Rule 3.2.5, heard oral argument on the Motions to Dismiss or for Summary Disposition, and the opposition thereto, at the originally scheduled hearing date on January 29, 2025, and announced their decision at a Worksession on February 19, 2025. The Appellants were represented by James L. Parsons, Esquire. Elana Robison, Assistant County Attorney, represented Montgomery County. The Intervener was represented by Scott C. Wallace, Esquire.

Decision of the Board: County and Intervener'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. On October 7, 2024, DPS issued mercantile permit Nos. 1065009 and 1086890 for the Property. See Exhibits 3(a)-(b).

2. Permit No. 1065009 was issued for the exterior work at the Property, which is the construction of a masonry dumpster enclosure. See Exhibit 7.

3. Permit No. 1086890 was issued for the interior alterations at the Property. See Exhibit 7.

4. The subject Property is currently used for a filling station having four pumps including a two-bay service facility. A limited amount of convenience store items are also sold in the station.

MOTIONS TO DISMISS OR FOR SUMMARY DISPOSITION—SUMMARY OF ARGUMENTS

1. Counsel for the County, Ms. Robison, argued that this appeal involves the renovation of an existing gas station that currently contains a service station and a convenience store. She argued that the building permits DPS issued will keep the

convenience store and gas station use and create a Royal Farms at the Property.

Ms. Robison argued that Chapter 50 of the County Code governs the subdivision of land reviewed and approved by the Montgomery County Planning Board of the Maryland-National Capital Park and Planning Commission ("MNCPPC"), and that this Chapter is not applicable in this case because it does not involve the subdivision of land. She argued that the MNCPPC considered this project and waived review because review did not fall within their purview. Ms. Robison argued that this project is not increasing the density beyond 10,000 square feet and that, accordingly, no site plan is required under § 59-7.3.4 of the Zoning Ordinance. Further, she argued that under § 59-7.7.1.A of the Zoning Ordinance, a structure such as the one at issue in this case that was existing on October 30, 2014 is conforming and may be continued, renovated, repaired, or reconstructed if the floor area, height, and footprint of the structure are not increased, which will not occur in this case. See Exhibit 7, ex. A.

Ms. Robison further argued that Section 2 of a Memorandum of Understanding ("MOU") between the County's Planning Board and DPS states that DPS will only send the Planning Board "new building" permits to review, and that the building permits in this case concern an existing structure, not a new building. See Exhibit 7, ex. B. Therefore, because § 50-3.2.B of the County Code, which the Appellants allege has been violated, only applies when MNCPPC review is required, and because no MNCPPC review is required in this case, there is no violation of Chapter 50. Ms. Robison argued that the retail/service establishment in this case is a permitted, not limited, use. In support of this argument, she argued that § 59-3.5.11.B.2.a of the Zoning Ordinance permits a retail/service establishment such as this one as a limited use provided that it satisfies certain standards, but only if a property in the CRT Zone such as this one "abuts or confronts a property zoned Agricultural, Rural Residential, or Residential Detached that is vacant or improved with an agricultural or residential use", noting in that case, that "site plan approval is required...." She argued that because this provision does not apply to the Property, the use in this case is a permitted, not a limited, use.

Ms. Robison argued that the use at the Property will be the continuation of a gas station and convenience store. She reiterated that under § 59-7.7.1.A of the Zoning Ordinance the gas station use is a legal nonconforming use on a CRT property that has been in use since 1953 as a gas station, so a new conditional use approval is not required. Ms. Robison argued that the gas station use is allowed to continue as long as it is not expanded. She argued that the Interveners plan to remove two gas pumps from the Property, so the use is actually being reduced, and that they are permitted to have vehicle repairs done at the Property as long as it is an incidental use. In her motion, Ms. Robison argued that under the 1954 Zoning Ordinance, when this use began, the Property was zoned C-2, and an automobile filing use was a permitted use on the Property. See Exhibit 7, p. 3.

Ms. Robison argued that DPS does not interpret § 59-7.7.2.D of the Zoning Ordinance to require a property owner to obtain a certification for an established nonconforming property. She argued that a determination that a property is

nonconforming is built into the permit review process and DPS conducts an analysis at that time. Ms. Robison argued that this section of the Zoning Ordinance applies when a property owner requires a nonconforming certification, for example, if there is a complaint about the use of the property or they need a certification for lending purposes. She argued that, even if a certification was required in this case, DPS was prepared to immediately issue one, but that it was unnecessary because DPS had already conducted an investigation of the Property.

Ms. Robison argued that a convenience store use is a permitted use for the CRT zone pursuant to § 59-3.1.6 of the Zoning Ordinance, provided that the store is under 5,000 square feet, which this proposal will be. She argued that under the chart outlined in this section of the Zoning Ordinance, no standards apply to this use, and that the Appellants are incorrectly trying to compare what is currently on the Property and what Royals Farms will be, despite the fact that it is allowed by right. In response to a Board question, Ms. Robison reiterated that a convenience store has always been a permitted use on the Property.

In rebuttal to the Appellants' arguments, Ms. Robison argued that the gas station use at the Property was permitted, that the existing repair shop was incidental to that use, and that Royal Farms is allowed to renovate the existing repair shop to continue that incidental use as long as they don't expand the shop, which is not what they are doing in this case. She argued that if the Interveners were proposing an expansion, that would be a different case, but that in this case a convenience store is permitted by right. Ms. Robison argued that nothing in this proposal triggers the conditional use standards and that this case does not require conditional use approval.

In response to further questions from the Board, Ms. Robison argued that the Interveners propose to eliminate two gas station bays at the Property and that vehicle service is already incidental to the gas station use. She argued that the gas station use is being continued without expansion and that the convenience store is allowed by right.

2. Counsel for the Intervener argued that seven of the Appellants lack standing under § 8-23(a) of the County Code to file this appeal because they are not aggrieved by the issuance of these building permits.[2] He argued that these Appellants do not reside near the Property and will not be affected by the proposed changes. Mr. Wallace argued that long-standing precedent, as outlined in his motion, supports his argument that these Appellants are not sufficiently aggrieved to file this appeal. See Exhibit 6. He argued that to be sufficiently aggrieved, an appellant must show that an action adversely affected their interest that was personal and not shared by the general public.

Mr. Wallace argued that in *Ray v. Mayor & City Council of Baltimore*, 430 Md. 74 (2013), the now-Supreme Court of Maryland found that without sufficient proximity to a property, a person lacks general standing. He argued that the Court had

[2] These Appellants were: Margaret Reddy, John Muglia, Janie Druskin, Victor Smith, Niall Dempsey, Helen Brady, Elizabeth Cocke, and Jane Mabry. See Exhibit 6. Janie Druskin, Victor Smith, and Elizabeth Cocke, as noted previously, were later voluntarily dismissed by the Appellants.

found that .4 miles as well as three blocks had not been considered sufficient proximity to be considered aggrieved, and that an appellant must be within sight or sound range to have standing.

Mr. Wallace discussed the residences of the seven Appellants he argued did not have standing, as outlined in his Motion to Dismiss Certain Appellants. See Exhibit 6. He acknowledged that even if the Board granted his motion, the case would still leave three Appellants: Sean Segal, Rose Safir, and Anita Miles. The Board questioned whether it needed to address the standing issue at all if they did not dismiss this appeal for the reasons unrelated to standing that Ms. Robison argued in support of the appeal. The Board noted that if they dismiss the appeal as to certain Appellants, three others would still have standing, allowing the appeal to proceed. Therefore, the Board proposed to defer decision of Intervenor's Motion to Dismiss Certain Appellants, pending its decision on Appellants' dispositive motion.

Mr. Wallace next argued that the concept of a fueling station along with a convenience store is well-accepted in the County as a permitted use, and that the fueling station pumps would require a special exception (now called a conditional use) only if they were a new use and not an accepted nonconforming use already in existence. He argued that by removing two pumps, the Interveners were decreasing the use. Mr. Wallace argued that the one improvement proposed on the Property was an enclosure for a dumpster, which he argued would make the Property more attractive to the neighbors. He argued that the proposed change would alter a permitted nonconformity into one of conformity. He argued that complaints about traffic patterns due to the proposed change were invalid, noting that the current convenience store was permitted to fry chicken in the same manner Royal Farms planned to.

3. Counsel for the Appellants argued that there is a different standard for standing before an administrative agency than for a petition for judicial review in court. He argued that there is a low standard for standing in this case, which the Appellants have met, and that this standard only requires that they be interested persons under § 8-23 of the County Code. Mr. Parsons also argued that the Appellants only need one appellant with standing to proceed with this case.

Mr. Parsons argued that the elimination of the repair bays and the expansion of the convenience store part of the building constitute a "drastic enlargement and extension" of the original nonconforming structure. See Exhibit 10. He argued that these changes constitute a new and unlawful use at the Property, citing *National Institute of Health Federal Credit Union v. Hawk*, 47 Md. App. 189, 200 (1980). Mr. Parsons argued that nonconforming uses are not favored, and argued that the Board must consider the four factors outlined in *McKemy v. Baltimore Co.*, 39 Md. App. 257, 385 (1978): 1) to what extent does the current use reflect the nature and character of the original nonconforming use; 2) is the use a different use; 3) does the use have a different effect on the neighborhood; and 4) is the use a drastic enlargement or extension of the original nonconforming use. He reiterated his arguments from his opposition submission, summarizing that the current gas station use would become an intensive convenience

store use. See Exhibit 9, p. 6-8.

Mr. Parsons argued that, pursuant to the building plans, parts of the cinder block walls of the convenience store would remain, but it will not be the same use when converted to a Royal Farms. He argued that there is a difference between providing oil changes and selling fried chicken. Mr. Parsons referred to the opinion of a traffic expert, John A. Nawn, and argued that this opinion found that the proposed Royal Farms would increase traffic by over 25%. See Exhibit 3(i). He argued that the new use would have 18 proposed parking spaces, which he felt was insufficient, and the insufficient number of spaces would create overflow in the neighborhood.

Mr. Parsons reiterated his concerns about the impact on the neighborhood, arguing that the Royal Farms would create safety risks, an increase in the amount of garbage and unpleasant smells, vermin, more lighting, and more noise. He argued that this proposal was an extension of the original nonconforming use and would more than double the size of the convenience store. He argued that fuel sales were going to double, and that the proposal would change the business model at the Property.

Mr. Parsons argued that § 50.3.2.B of the County Code applies to this case because the existing building on the Property crosses a lot line. He argued that none of the exemptions outlined in § 50.3.3 of the County Code from this requirement apply in this case, and that the only way the exemptions could apply were if the lot was subdivided. Mr. Parsons argued that this project should be reviewed as a conditional use and that the site plans should be reviewed. He argued that he agrees with the opposition that this proposed use is not a limited use but argued that the standards for a conditional use should nevertheless be examined in allowing this change.

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 50-3.2.B of the County Code (Record Plat Required), provides that "[a] building permit may only be issued for a building located on a lot or parcel shown on a plat recorded in the County Land Records or on a parcel exempt from recording requirements under Subsection 3.3.B, and in a manner that does not result in the building or structure crossing a lot line."

5. Section 59-3.5.11.B.2.a.iii of the Zoning Ordinance states that "[i]n the CRT, GR, and NR zones, if the subject lot abuts or confronts a property zoned Agricultural, Rural Residential, or Residential Detached that is vacant or improved with an agricultural or residential use, site plan approval is required under Section 7.3.4."

6. Under Section 59-7.7.1., Exemptions, of the Zoning Ordinance:

A. Existing Structure, Site Design, or Use on October 30, 2014

1. Structure and Site Design

A legal structure or site design existing on October 30, 2014 that does not meet the zoning standards on or after October 30, 2014 is conforming and may be continued, renovated, repaired, or reconstructed if the floor area, height, and footprint of the structure are not increased, except as provided for in Section 7.7.1.C for structures in Commercial/Residential, Employment, or Industrial zones, or Section 7.7.1.D.5 for structures in Residential Detached zones.

2. Use

a. Except for a Registered Living Unit, any use that was conforming or not nonconforming on October 29, 2014 and that would otherwise be made nonconforming by the application of zoning on October 30, 2014 is conforming, but may not expand.

b. Any allowed use, up to the density limits established by the current zoning, may be located in a building or structure deemed conforming under Section 7.7.1.A.1.

7. 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.

8. 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.

9. The Board finds that the proposal to eliminate two pumps is actually a deintensification of the gas station itself and, therefore, a permitted continuation of a lawful non-conformity. It also finds that the renovation to add a Royal Farms store is a convenience store use that the Zoning Ordinance specifically permits on the Property, regardless of the gas station's presence. In support of this finding, the Board finds that the proposed use of the Property continues its use as a gas station, which has operated on this property since 1953 in the CRT Zone. While a new conditional use would be required for this gas station under the current Zoning Ordinance, the Board finds that a new conditional use is not required in this case, because pursuant to § 59-7.7.1.A.2 of the Zoning Ordinance, "any use that was conforming or not nonconforming on October 29, 2014 and that would otherwise be made nonconforming by the application of zoning on October 30, 2014 is conforming, but may not expand." The Board finds that under the 1954 Zoning Ordinance, when this use began, the Property was zoned C-2, and an automobile filing use was permitted on the Property.

Further, the Board finds that the gas station use on the Property will not expand. In support of this finding, the Board notes that the project will remove two of the pumps currently used at the Property. Although gasoline sales may increase because of increased traffic to the property that the Royal Farms store will cause, that is not an increase in use caused by the gas station facilities themselves or a palpable impact of a kind that concerns the Zoning Ordinance. The Board further finds that a convenience store up to 5,000 square feet is permitted by right in the CRT Zone under the § 59-3.1.6 of the Zoning Ordinance, and that therefore the Royal Farms convenience store proposed by these building permits is permitted without the requirement of any additional approvals from the Board. Finally, the Board agrees with the County's arguments that Chapter 50 does not apply to this appeal. Having dismissed the appeal for all Appellants on the merits with these findings, the Board does not reach a decision on the standing of certain Appellants, finding that argument moot.

The Board finds that there are no genuine issues of material fact to be resolved by the Board. Therefore, the Board orders that the appeal must be dismissed.

10. The County and Intervener's Motions to Dismiss and/or for Summary Disposition in Case A-6898 are granted, and the appeal in Case A-6898 is consequently **DISMISSED**.

On a motion by Member Alan Sternstein, seconded by Vice Chair Richard Melnick, with Members Amit K. Sharma and Don Silverstein in agreement and Chair Caryn L. Hines opposed, the Board voted 4 to 1 to grant the County and Intervenor's' Motions to Dismiss and/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.

Caryn Hines
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 28th day of March, 2025.

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).