

REPORT OF INQUIRY

Office of the Inspector General

Allegations of Failure to Discharge Statutory Duties
by the Montgomery County Department of Permitting Services
Regarding Construction Work on the “Monty” Project

February 4, 2013



Montgomery County, Maryland
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Introduction

This report addresses a complaint the Office of Inspector General (OIG) received related to construction work on the “Monty” Project in Bethesda.

The Complaint:

An attorney for White Flint Express Realty Group, LLLP (White Flint) wrote to the OIG on Nov. 5, 2012, requesting an investigation into Department of Permitting Services (DPS) actions and inactions regarding Monty Project construction work. He alleged that the construction work caused cracks and other damage to White Flint’s buildings, which are on property adjacent to the Monty. He claimed that DPS did not properly enforce requirements that neighboring buildings not be damaged. He also claimed that DPS erroneously allowed work on the Monty to continue, even though the terms of a DPS order stopping certain work had not been met, and the owner of the Monty had misled DPS regarding access to White Flint property. White Flint representatives subsequently met with the OIG and presented evidence they believe supports their allegations of failure to discharge statutory duties by DPS related to the on-going construction of the Monty.

Objectives, Scope and Methodology

Our objectives in conducting this inquiry were limited to addressing those specific issues raised by White Flint that we interpreted as allegations appropriate for investigation by the OIG. We met with appropriate representatives from White Flint and interviewed DPS management and staff. We requested and analyzed evidence relevant to the issues raised, reviewed relevant laws and regulations, and visited the construction site. We did not examine or evaluate DPS policies and procedures. Each allegation and our related findings are detailed in the body of this report.

Our inquiry was conducted in November 2012 and December 2012 in accordance with the standards contained in the *Quality Standards for Investigations*, issued by the Council of the Inspectors General on Integrity and Efficiency (November 2011).

Background

The Monty is under construction at 4918 St. Elmo Avenue in Bethesda. It is planned to be a 17-story apartment building with a 4-level underground parking garage. It is owned by Bainbridge St. Elmo Bethesda Apartments, LLC (Bainbridge). White Flint owns adjacent property, including two one-story buildings at 4909 and 4905 Fairmont Avenue.¹

¹ We have been told by White Flint representatives and by DPS that White Flint also owns other buildings near the Monty, but any possible damage to them was not discussed in the complaint sent to the OIG.

In late 2011 and early 2012, White Flint informed DPS of damage to White Flint property. In early 2012, White Flint's architect emailed DPS information from White Flint's engineer about movement of the slab, the roof beams, and walls of White Flint property.

An engineering firm hired by Bainbridge, KCE Structural Engineers, P.C. (KCE), wrote to DPS on Jan. 27, 2012 that the White Flint "buildings are not in imminent danger of collapse, nor must the tenants or their visitors be removed due to safety concerns caused by the Monty construction." White Flint disputes this and claims to have told its tenants to vacate for safety reasons.

DPS acknowledges that there are cracks in the White Flint property.

On March 7, 2012, DPS wrote to Bainbridge requesting reports from a design professional, from engineers, and from an inspector. The letter stated that work associated with sheeting, shoring,² and excavation must stop until DPS reviewed the reports. Work to assure site stability or stability of the neighboring properties was allowed. DPS required a list of steps to be taken in order to ensure that no further movement would occur once excavation resumed.

KCE wrote on March 20, 2012 that "we see no danger of imminent collapse of the Fairmont building due to the excavation work at the Monty."

White Flint filed suit against Bainbridge on April 24, 2012.

On May 9, 2012, KCE wrote a letter to Bainbridge reporting on the sheeting and shoring design and construction, movement and visual monitoring, and remediation. DPS received the KCE letter on May 10, 2012 and considered it a response to DPS' March 7, 2012 letter. The KCE letter stated that it was the engineering firm's opinion and the opinion of other consultants that "the major movements to date in 4909-4905 Fairmont Avenue buildings were due to construction 'means and methods' ... [I]nconsistencies in the...calculations increased the vulnerability of the sheeting system and the supported elements to movement."

The KCE letter stated that KCE asked the construction company to take certain measures to provide additional support and advised the construction company to suspend construction activities within a certain distance of 4909 Fairmont Avenue. The KCE letter stated that plans had been revised and submitted to DPS. The KCE letter was signed and sealed by an engineer licensed to practice in Maryland.

DPS determined that the required reports were provided in response to the March 7, 2012 letter. DPS permitted all phases of work to resume by July 9, 2012. White Flint has continued to complain to DPS about damage. On Nov. 9, 2012, the Director of DPS wrote that excavation was essentially complete, footings were being poured, and concrete foundation work was underway.

² The OSHA Technical Manual Section V: Chapter 2 states that "Shoring is the provision of a support system for trench faces used to prevent movement of soil, underground utilities, roadways, and foundations. Shoring or shielding is used when the location or depth of the cut makes sloping back to the maximum allowable slope impractical. Shoring systems consist of posts, wales, struts, and sheeting."

Representatives of White Flint, including an architect, an engineer, and an attorney, met with the OIG on Nov. 13, 2012. They showed us photos of cracks in White Flint buildings and told us of damage to flooring. They stated that the White Flint buildings were unsafe and in danger of collapse.

We met on Nov. 16, 2012 with the Director of DPS and two DPS staff members. The Director told us that DPS reviewed the revised plans and concluded that the White Flint buildings are not in danger of collapse.

The Director stated that in DPS' opinion, the revised plans met DPS' requirements. The Director stated that prohibiting further construction work was neither in the public interest, nor in the interest of White Flint.

Allegations

Allegation 1: DPS improperly permitted the continuation of work on the project.

White Flint representatives are of the opinion that the terms of the March 7 letter from DPS were not met, so DPS should not have allowed work to resume.

The DPS Director and the Division Chief told us that the conditions of the March 7 letter had been met when the Director allowed work to resume and that they continue to be met. The Division Chief showed us the plans, bearing engineer seals and signatures, submitted in response to the March 7 letter. The Director told us that the White Flint properties had been bracketed and braced, to prevent collapse. The Director also provided the May 9, 2012 KCE letter to us, stating DPS received it in response to the March 7 DPS letter.

County Code §8-14 provides that the International Building Code is the basic County building code. Section 3307 of the International Building Code provides that adjoining public and private property shall be protected from damage during construction.

Montgomery County Code §8-20(a) states that

“whenever the director determines that work on a building or structure is being prosecuted in violation of this chapter [Chapter 8 Buildings]..., including those conditions upon which the permit has been issued or in a manner which threatens the safety, health, and welfare of the public, the director may order the work to be immediately stopped.”

This section gives the Director the discretion to determine whether or not to stop work.

Montgomery County Code §8-12(c) states that

“The Director must make all the required inspections or may accept reports of inspection by authoritative and recognized services or individuals, and all reports of those inspections must be in writing and certified by a responsible officer of the authoritative service or by the responsible individual.”

Montgomery County Code §8-26(b) states that

“The issuance of a permit shall not prevent the department from thereafter requiring a correction of errors in plans or in construction or of violations of this chapter and all other applicable laws or ordinances specifically referring thereto. Certification by a certified engineer that the plans and specifications are in compliance with this chapter shall be accepted by the director as prima facie evidence that all the requirements of this chapter have been met unless he discovers otherwise.”

Under these sections, the Director of DPS may accept certified reports of inspection and certified engineering plans as evidence that the requirements of Montgomery Code Chapter 8 have been met.

The Director told us that sending the March 7 letter was in exercise of DPS’ duties under the Code. The Director told us that a DPS inspector has been at the Monty site almost every day, for a total of over 100 inspections, and the inspector showed us his photographs and notes from his inspections. DPS maintains that its review process was neither flawed nor contrary to law.

We see no indication that DPS did not follow the County Code governing this situation.

Allegation 2: DPS unlawfully delegated review and approval authority of the plan and its implementation to the owner of the Monty.

The November 5, 2012 letter from White Flint’s attorney to the OIG alleged that DPS “unlawfully delegated review and approval authority of the plan and critical elements of its implementation to Bainbridge.”

As stated above, Montgomery County Code §8-12(c) states that “The Director...may accept reports of inspection by authoritative and recognized services or individuals.”

Also as stated above, Montgomery County Code §8-26(b) states that “Certification by a certified engineer that the plans and specifications are in compliance with this chapter shall be accepted by the director as prima facie evidence that all the requirements of this chapter have been met unless he discovers otherwise.”

We see no indication that DPS did not follow the County Code governing this situation. As Bainbridge has submitted documents with engineering certifications, DPS was entitled to accept them under the law. DPS took reasonable steps to investigate: it performed over 100 inspections, requested and received reports from engineers, and it encouraged White Flint to allow access. DPS reasonably concluded that it would not reject the certified plans under §8-26(b). We find that DPS did not unlawfully delegate review and approval authority.

Allegation 3: DPS made an incomplete investigation, because the Monty’s consultants falsely advised DPS that they were denied access to White Flint property.

White Flint representatives told us that the full extent of the damage that was done to White Flint property could not be seen and reported to DPS, because Bainbridge’s representatives falsely told DPS that White Flint did not allow access to White Flint’s property.

The May 9 KCE letter states that White Flint denied Bainbridge's representatives access to White Flint's property. In the complaint received by the OIG, one of White Flint's attorneys quotes counsel for Bainbridge's construction company as having written that, "notwithstanding certain statements made in correspondence from KCE Structural Engineers ... [the construction company] is not aware of the owner of White Flint Buildings at 4905 and 4909 Fairmont Avenue currently preventing or denying access to the building after February 26, 2012." White Flint representatives told us that if Bainbridge had called them to ask for access, it would have been granted.

The Director of DPS provided us with a "Waiver and Release" form from White Flint's attorney, which Bainbridge's representatives were required to sign before entering White Flint property. The form stated that nearby construction had damaged the White Flint property and that there were associated risks and dangers to people on the property. The Director told us on Nov. 16, 2012 that it would not be surprising that a party in litigation would not want to sign such a statement. The Director also told us that Bainbridge's engineers had requested access to drill down underneath the White Flint buildings, but that White Flint had not granted it.

The White Flint attorney sending the waiver also wrote that access would only be allowed, if White Flint were first provided with an insurance certificate naming White Flint as an insured. In a June 13 email from DPS to White Flint's architect, DPS' Chief of the Division of Building Construction wrote that, "we think that access to the permittee and its consultants would be helpful" and "we requested the permittee to contact the White Flint property owner and request access."

DPS is aware of the access dispute at this point. We see no indication that DPS has acted outside its discretion or has violated the County Code.

Allegation 4: No valid Traffic Control Plan exists and DPS has been allowing Bainbridge to violate the law regarding construction work in the right-of-way.

A permit must be obtained from DPS before performing work from the right-of-way. County Code §§49-10 and 49-11 prohibit construction work in the right-of-way without a permit from DPS and a Traffic Control Plan approved by the Department of Transportation. Bainbridge's Traffic Control Plan for construction staging on St. Elmo Ave. and Fairmont Ave. was approved on August 11, 2011, and DPS issued a permit.

White Flint representatives have alleged that the traffic control plan for the Monty construction expired, as it states that the work duration along Fairmont Avenue will be 8 months. Since the plan was approved in August of 2011, eight months from the date of approval would have been April 2012.

However, a Nov. 8, 2012 email from the DPS Manager of Right of Way Plan Review and Inspection states that the 8 months' duration is an estimated time, but the traffic control plan is valid for the duration of a construction permit, including extensions.

The Director of DPS provided copies of citations DPS has issued for illegal activity in the right of way related to the Monty construction.

We see no indication that DPS has not met its responsibilities related to right of way activities.

Conclusion

We found no evidence that would substantiate the allegations made in this complaint against DPS. We draw no conclusions about whether or to what extent the Monty construction has damaged White Flint property. Accordingly, no further investigation by the OIG and no recommendation or follow-up action is required.

Chief Administrative Officer's Response

The Chief Administrative Officer and the Director of DPS had an opportunity to comment on the draft report, but advised us they had no comments and provided no formal response to the report.