BOARD OF APPEALS
for
MONTGOMERY COUNTY

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Case No. A-6185

APPEAL OF CAROL ANN PLACEK

OPINION OF THE BOARD

(Hearings held February 28, March 14, May 2, and June 6, 2007)
(Effective Date of Opinion: October 30, 2007)

Case No. A-6185 is an administrative appeal filed November 9, 2006, by Carol Ann Placek (the "Appellant"). The Appellant charges error on the part of the County's Department of Permitting Services ("DPS") in revisions to Building Permit No. 423918, originally issued August 2, 2006, and revised on October 12, 2006, and November 6, 2006, for the construction of a two-story addition to the existing detached home on the property located at 10234 Parkwood Drive, Kensington, Maryland 20895 (the "Property"), in the R-60 zone. Specifically, the Appellant asserts that DPS incorrectly lifted two stop work orders issued in connection with this permit, arguing that the ensuing permit revisions do not correct the noticed problems.

Pursuant to Section 59-A-4.4 of the Montgomery County Zoning Ordinance, codified as Chapter 59 of the Montgomery County Code (the "Zoning Ordinance"), the Board held public hearings on the appeal on February 28, March 14, May 2, and June 6, 2007. The Appellant appeared pro se. 10237 Parkwood Drive LLC, owner of the subject Property, and Jodi Longo, Managing Member of 10237 Parkwood Drive LLC and the holder of the Building Permit at issue in this case, intervened in this case (collectively, the "Intervenors") and were represented by Rebecca Willens, Esquire and Steve Orens, Esquire. Assistant County Attorney Malcolm Spicer represented DPS.

Decision of the Board: Administrative appeal **granted**.

FINDING OF FACT

The Board finds by a preponderance of the evidence that:

1. The Property, known as 10234 Parkwood Drive in Kensington, is an R-60 zoned parcel identified as Lot 18, Block 4 in the Parkwood subdivision. The size of the Property is approximately 8,803 square feet.

2. On June 9, 2006, Intervenor Jodi Longo applied to DPS for a building permit to construct a two-story addition at the subject Property. Building Permit No. 423918 was issued on August 2, 2006, for the requested addition.

3. On October 9, 2006, the Appellant called DPS to complain about several aspects of the construction at the subject Property, alleging that the Intervenors had not properly displayed their building permit, that there was a port-a-potty on site which required permits, and that Intervenors needed to apply for a new construction permit (1) because it appeared that the addition was more than 100 percent larger than the footprint of the existing structure, and (2) because one of the two walls which needed to be maintained if the construction were to be permitted as an addition had come down and had visible studs. The Property was inspected on October 11, 2006 by DPS Inspector Mark Nauman. Mr. Nauman issued a stop work order/notice of violation for non-compliance with the spirit of the zone code, noting that it appeared that the existing footprint had at least been doubled in size and that the existing structural exterior walls had been demolished more than 50 percent, not allowing them to be utilized as the intact exterior walls of the finished project. On October 13, 2006, the case was closed after the permit holder reached agreement with DPS' zoning office and complied with permit revisions. See Exhibit 6, page 4.

   A second stop work order/notice of violation was issued November 2, 2006, following a complaint concerning the studs in the front wall and the overall square footage of the addition. This stop work order was lifted by DPS on November 6, 2006. See Exhibit 11 at page 6.

4. Building Permit No. 423918 was revised on October 12, 2006, to reflect the removal of the garage door and conversion of the proposed garage into a carport. This permit was again revised on November 6, 2006, as follows: "Revision submitted for structural/to meet 100% code on 11/6/06**revising front wall of garage 11 sq ft." See Exhibit 16(c).

5. The Appellant filed this appeal to the Board of Appeals on November 9, 2006, asserting that the stop work orders should not have been lifted, the October 12, 2006, and November 6, 2006, revisions to the Building Permit should not have been accepted, and that DPS should require the permit applicant (Intervenors) to reapply for a building permit as a new house and meet all associated requirements.
6. Ms. Susan Scala-Demby, Zoning Manager, testified on behalf of DPS. Ms. Scala-Demby testified that Building Permit No. 423918 was issued on August 2, 2006, for a two-story addition at the subject Property. Ms. Scala-Demby testified that she had reviewed the plans originally submitted for that permit under DPS' Code Interpretation Policy ZP0204. She testified that the square footage of the existing house is shown on the cover sheet of the original plans as 956 square feet, which included the projection on the front of the house for the chimney/fireplace. She testified that the plans show the addition as having a footprint of 955 square feet. See Exhibits 20 (full size version of Exhibit 16, page 6), and Exhibit 16(f) (page 27 of Exhibit 16 (ZP0204)).

Ms. Scala-Demby testified that for zoning purposes, DPS construes the "footprint" of a building to be the area of the building defined by exterior walls or any projection of an exterior wall not exempt from setback regulation. She testified that this definition was included in the 1997 guidance for additions, and has been consistently applied since that time.

Ms. Scala-Demby further testified that DPS reviewed the plans with respect to the retention of 50 percent of the existing first floor exterior walls, and that the plans show that the front wall, the left wall (as you face the property), and a small portion of the right wall were being retained. Ms. Scala-Demby testified that the plans reflected that work was being done to the front wall, including (starting from the left-hand side of the house and working toward the right) a new, smaller window opening where there had been a larger window, the demolition of the fireplace, a new doorway in approximately the same place where the old doorway had been, and a new window that is slightly larger than the old window. Compare Exhibits 21 and 22. Ms. Scala-Demby testified that these changes to the front wall are allowed under DPS' addition policy, and that the front wall and the full wall on the left side were counted as meeting the 50 percent wall retention requirement. In response to Board questions, she clarified that the front, left, and right walls were all exterior walls, and together support DPS' finding that at least 50 percent of the existing exterior walls, in linear feet, remain.

Ms. Scala-Demby testified that Code Interpretation Policy ZP0204 was adopted to fix a problem with the prior addition policy which referred to two "adjacent" walls, and pursuant to which builders seeking to have their construction characterized as an addition would leave portions of walls or the corner of a building standing, but would demolish everything else. Ms. Scala-Demby testified that that was not the intent of an "addition," and that DPS added the 50 percent requirement because they wanted the length of the wall—not a portion of the wall—to remain. She explained that if a wall were 16 feet, then DPS wanted 16 feet of wall to remain, but that the wall could be altered. For example, a homeowner could put in new windows or a new door, even if that meant taking a slice of the wall out from the floor plates to the second floor, or could make other changes as long as he does not tear down all of the wall. A five foot window could be replaced with an 8 foot window. Ms. Scala-Demby agreed with a Board characterization that the term "in its entirety" refers to the requirement to preserve the structural integrity of the existing wall.

Ms. Scala-Demby testified that a plan revision was submitted which revised the area calculation with respect to the existing home to exclude the fireplace, and changed the square footage of the addition. See Exhibit 16(f) (pages 19-24 of Exhibit 16). See also Exhibit 23 (cover sheet from November 5, 2006 revised site plan). She testified that the dimensions of the garage were reduced from 22 feet by 11 feet, to 21.8 feet by 10.7 feet, which reduced the size of the addition. She testified that these numbers were verified by her staff. She further testified that her staff also verified the footprint of the existing house as being 946.92 square feet (excluding the fireplace/chimney), and the square footage of the addition as being 946.89 square feet (excluding the front porch). She testified that DPS

approved these revisions as being consistent with the addition policy on November 6, 2006.

Ms. Scala-Demby acknowledged on cross-examination that she had met with the Appellant on November 1, 2006, and that Appellant had provided her with footprint calculations based on the building plan dimensions (as opposed to the site plan dimensions). Ms. Scala-Demby further testified that she recalled sending Appellant an email confirming Appellant's footprint calculations and indicating that a stop work order would be issued and a new construction permit required. See Exhibit 13.

With respect to what can and cannot be done to an existing exterior wall, Ms. Scala-Demby clarified on cross-examination that if it's a framed wall, the framing cannot come down and be replaced with a new frame, but that the "skin" on the wall could be changed (e.g., change brick to siding). She testified that the subject Property had masonry construction, with furring strips. In response to a Board question asking, for a masonry house, whether the removal of a portion of an exterior wall all the way down to the slab, and all the way up to the underside of the joist for the second floor, would be considered to be the removal of the wall, Ms. Scala-Demby answered "no," indicating that that would be considered a modification to the wall (assuming the rest of the wall remained). She testified that in such a case, the entire wall be still be viewed as remaining for purposes of ZP0204. In response to further questions on re-cross examination, Ms. Scala-Demby testified that you can replace headers without taking out the entire wall, and that whether "demolish fireplace" on building plans indicates that the entire wall will be taken out depends on the type of fireplace. She testified that because the fireplace at the subject property was an outside fireplace, removal would create a hole in the wall.

In response to explicit Board questions asking whether, given the demolition shown in Exhibit 19(b), the front wall should be considered to remain in its entirety or should be considered a new wall, Ms. Scala-Demby testified that the work done to the front wall should be considered an alteration and that the wall would be considered to remain in its entirety. She explained that she believed the picture was misleading, that the area shown encompassed a chimney/fireplace and the original front door.[1] She went on to testify that because of the original brick and block construction, the chimney was built into the wall, and its removal resulted in the removal of that portion of the wall, which could then be worked up.

In response to Board questions regarding the studs visible in pictures of the house, Ms. Scala-Demby testified that the structural system remained brick, and that the studs were clearly inside of the brick wall. See Exhibit 19(e). She testified that such an arrangement would allow for the installation of drywall without having to attach it directly to the masonry, and would also allow for better insulation of the house than if furring strips had been nailed to the bricks.

[1] See Exhibit 11, page 18, showing width of chimney and proximity to the front door.

Ms. Scala-Demby further testified on cross-examination that the right side wall of the house was considered exterior, despite the garage/carport, because it was unconditioned, open space. She went on to say that exterior wall in this sense means an exterior wall of the finished first floor of the house.

When asked on cross-examination by counsel for the Intervenors if, in connection with the second stop work order, DPS had investigated the removal of wall studs in response to a complaint by the Appellant, Ms. Scala-Demby testified that Inspector Pete Hrycak had inspected the Property, and had reported to her that he found brick on block walls with furring strips, and that instead of using the existing furring strips, a studded wall was being used. See Exhibit 18 at page 44. This wall construction is confirmed by the structural plans, which describe the existing first floor exterior walls as brick on four inch block with furring and one-half gypsum board. See Exhibit 16 at page 13.

7. Ms. Jodi Longo testified on behalf of the Intervenors. She testified that she is a member of 10237 Parkwood Drive, LLC, which owns the subject Property. She testified that she submitted the building permit application for the subject Property as an individual, and that she intended to reside in the home.[2] She testified that she personally applied for both of the permit revisions at issue in this proceeding. She testified that when the original building permit was issued in August, 2006, she had passed the test given by the Maryland Home Improvement Commission, and had secured all the appropriate insurance policies, but that she did not receive her license until September of that year. She testified that she is currently a licensed home improvement contractor.

   Ms. Longo testified that the first stop work order was issued in October, and that it questioned whether there was sufficient retention of exterior walls. She testified that per the plans, along the front of the house on the first floor, she had enlarged the door and one window, made one window smaller, and removed the chimney. She testified that the wall where the chimney had been was replaced with structural two by fours, with exterior brick veneer. She testified that the brick and block construction had furring strips behind it to hold drywall, and so the new two by fours were also used to adhere the drywall.

   Ms. Longo testified that she was familiar with the DPS policy pertaining to additions and new construction. She testified that to qualify as an addition, she understood at least 50 percent of the existing wall structure must be retained. She testified that DPS told her that door and window openings could be changed, but that the foundation wall must be kept in place, with the same footprint as the existing wall. She testified that per the DPS guidance, you could not change the footprint of at least 50 percent of the exterior walls.

   Ms. Longo testified that in response to the first stop work order, and as a “super precaution,” on advice from DPS, they removed the garage door so that there would be no question regarding the retention of walls. She testified that this

[2] Ms. Longo testified that she had since changed her mind about residing in the home.

revision was voluntary (i.e., that it was not required for the lifting of the stop work order), that it was approved by DPS, and that the stop work order was lifted.

Ms. Longo testified that the second stop work order was issued in November to investigate the removal of wall studs and to see if the square footage of the addition exceeded 100 percent of the existing footprint. She testified that DPS Inspector Pete Hrycak inspected the Property and determined that they had retained more than 50 percent of their exterior walls, and that the square footage of the addition did not exceed the square footage allowed. She testified that he confirmed that there were no studs in the original front wall of the home. She testified that in an attempt to stem the stream of correspondence and complaints, and as hopeful new neighbors, she submitted another revision, this one to show that the size of the garage had been reduced by approximately 9 square feet.[3] She testified that this revision was not necessary for the lifting of the stop work order, that it was accepted by DPS, and that the stop work order was lifted.

8. Ms. Lynn Gallagher, the architect for the construction at the subject Property, testified on behalf on the Intervenors. She was accepted as an expert in residential architecture. She testified that she is familiar with the County's policy on additions versus new construction. See Exhibit 16(f). She testified that she began working on the subject Property with Ms. Longo in the spring of 2006. She testified that she wanted the construction to be an addition, so she designed it to be just slightly less than a 100 percent increase in terms of the footprint. She testified that the original house was rectangular, and that by leaving the front and left side walls, she met the 50 percent requirement. She testified that she also could have considered the right side wall an exterior wall, but that she didn't need to. She clarified later that she did consider this wall to be an exterior wall. In response to a Board question asking how a wall could be viewed as remaining in its entirety if a portion of it had been removed and replaced with a different structural system, Ms. Gallagher testified that a wall keeps the inside in, and the outside out, and that there is still a wall in the original plane. She continued by testifying that DPS policy has historically allowed changes to the window and door openings, and even changes to headers and materials.[4]

   When asked about her understanding of the requirement that at least 50 percent of the existing exterior walls, in their entirety (measured in linear feet) and comprising the footprint of the building, must remain as exterior walls meant, Ms. Gallagher testified that that referred to the need to keep half of the measurement in linear feet of the perimeter of the existing house. Ms. Gallagher also testified that she did not think that the removal of the garage door converted the garage into a carport.

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[3] Ms. Longo later testified that this had, in fact, occurred in two steps. She testified that the side wall had been constructed to give the garage a width of 10 feet 8 inches instead of 11 feet, as shown on the original plans. She further testified that after the issuance of the second stop work order, the front wall of the garage was moved back one and one-half inches

[4] On cross-examination, Ms. Gallagher clarified her belief that windows are considered part of the wall, and that windows can be changed under current DPS policy, unless the property is historic.

In response to a Board question asking why there was no separate demolition plan or demolition indicated on the existing floor plans that are in the record, Ms. Gallagher testified that she could have shown the demolition, but that she thought that that would have "muddied the waters," that she thought that what was going to happen was very conspicuous on the existing plan, and that she always finds it clearer to show an existing plan with some notes on the proposed plan, which she testified is what she did in this case.[5] She testified that if she were going to show demolition plans, she would have taken off the chimney with a little dash. When asked by the Board if, on Exhibit 21 (existing plan), she could have shown the chimney as a dashed line to show that it was being removed, Ms. Gallagher testified that she could have done it that way, but that she thought it was cleaner to do it the way she did it. See May 2 Tr. at pages 68-69.

Ms. Gallagher testified that the original composition of the front wall was brick on block, and that where changes were made, this was switched to brick veneer with studs. She testified that this change allowed for insulation, and was neater than brick on block with furring strips.

Ms. Gallagher testified that the cover sheet of the plans submitted with the original permit application note that the "fireplace [is] demolished" in the section regarding the finished house area. See Exhibit 20. She testified that the cover sheet from the second set of revised plans, under finished house area, cites a finished area of 3,653 square feet, with a parenthetical indicating that 12 square feet of fireplace had been demolished. Thus she testified that she had been consistent in using a 12 square foot measurement for the fireplace. She testified that the measurement came from standard fireplace dimensions, that she did not personally measure the fireplace. She testified that she did count the square footage of the fireplace in the square footage of the existing house when she filed the original plans. She stated that the October revision still counted the fireplace as part of the square footage of the existing home, but that the second (November) revision did not. She testified that she excluded the fireplace because she was told by Ms. Longo, who had talked with DPS that standard practice was to exclude the area of the fireplace.

Ms. Gallagher explained that the reason the cover sheets use decimal point measures, and the building plans use feet and inches, is that the cover sheet shows the survey, which is prepared by an engineer, whereas the plans are prepared by an architect. She testified that engineers measure using decimal points, and architects typically use feet and inches. She testified that the square footage of the existing home was reflected on her plan. She testified that the DPS zoning review worksheet measurements were substantially similar to her own. The DPS worksheet measurements show that the addition footprint is 946.89 square feet, and that the footprint of the existing house is 946.92 square feet, for a difference of 0.03 square feet. See Exhibit 16 at page 25. She stated that she has never been made aware of any tolerance that DPS might use is gauging the accuracy of these measurements.

[5] The proposed plans contain the note "demolish fireplace" where the fireplace was shown on the existing plans. See Exhibits 21 and 22. Both were submitted with the building permit application.

In response to a Board request that she determining the extent of the remaining block and brick masonry wall along the front of the house by counting the (8" standard) bricks, Ms. Gallagher marked Exhibit 30 with pink highlighter to show the linear dimension of the front wall that remains as a double sided masonry wall. See Exhibit 30.

On cross-examination, Ms. Gallagher testified that she had known Jodi Longo for approximately five years, after being hired to work on Ms. Longo's Homewood Parkway house. Counsel stipulated that Ms. Gallagher had done many plans over several years for Ms. Longo. She testified that she often calls DPS for interpretations of their policies, particularly if there has been a six-month gap between jobs, so that she can keep up to date on their interpretations. She testified that while she had marked "demo fireplace" on the plans, the contractor was responsible for deciding how that would be done. She testified that she had specified that a replacement header was to be the replacement for the structural support system. Similarly, she testified that when you enlarge a window opening, you probably need to replace the header with a larger header. She testified that she did not specify that studs would be used where the fireplace was, and that she has no knowledge of how far along a studding system was used. When asked if there was a "normal" difference between the footprint of the existing house and the footprint of additions she designs, Ms. Gallagher testified that the size of the addition varies according to what the client wants, and that if they want as much as they can get and still have it qualify as an addition, that is how she designs it. When asked what she had used Exhibit 18 for, Ms. Gallagher testified that she had prepared it and used it solely for talking with Ms. Longo. When asked when the revisions to the garage were made, Ms. Gallagher testified that she prepared the final plan revisions on November 5, but that prior to that submission, the garage wall had already been moved in four inches.

9. Mr. Mark Nauman testified at the request of the Appellant. Mr. Nauman is an Inspector III with DPS, in the Division of Building Construction, currently working in Complaints Investigation. He has worked for DPS for 11 years, and has been in his current position since October, 2006. He testified that he has issued about 400 stop work orders related to ZP0204 since that time.

   Mr. Nauman testified that his manager emailed him to investigate the complaint about the Property. He testified that when he went to the house, he observed that more than 50 percent of the existing exterior walls had been demolished, and that it appeared that the footprint of the existing house had at least doubled. Thus he testified he posted a stop work order and issued a notice of violation. He testified that he also took pictures which he forwarded to zoning. See Exhibit 18, pages 33-40. He testified that he shared his findings with Bobby Bell at DPS, sending him an email with photos, and with Susan Scala-Demby, but that he did not speak with Ms. Longo. See Exhibit 36 for email and photos.

   In testifying about the photos that he sent Mr. Bell, Mr. Nauman testified that he observed that while the front wall of the house had previously been a bearing wall to support the roof structure, that front wall had been demolished to the point that a new wall had to be built behind it to support the (new) second floor structure.

Mr. Nauman testified that the right wall of the house was enclosed behind a garage which had habitable space above it. He testified that this helped in his determination that more than 50 percent of the exterior walls were now in a demolished state and were unable to be used as exterior walls for the finished house.[6] He testified that this, coupled with the overall square footage which he had observed as being new, led him to place the stop work order and issue the notice of violation.

When asked to elaborate on the extent to which the front wall was compromised, Mr. Nauman testified that he had observed that a substantial portion of the front wall had been removed, and that according to the wording of ZP0204, the wall was supposed to remain intact and be utilized in its entirety as a finished wall. He stated that this had been a structural wall, and that because of the overall extent of its demolition, it was no longer capable of being a structural wall, and would require substantial rebuilding. In response to a Board question asking Mr. Nauman whether, if large openings were made in an existing wall to accommodate larger windows, he would view that wall as remaining, he testified that he would view the wall as remaining because the integrity of the wall was still there, and that he would consider the change to the wall a modification. Mr. Nauman testified that the chimney had been removed, along with the section of wall between the chimney and the left side window, and the section of wall between the chimney and the door (to the right of the chimney). He testified that the original window openings and door opening had been removed. He testified that in terms of structural elements, he saw a new wood stud wall behind the original structural masonry wall to support the second floor and roof load above it. See Exhibit 18, at pages 34 through 36. He further testified that he observed that the stud wall extended the full length of the front wall of the existing house, and that without this stud wall, the first floor front wall would not have remained a structural wall.

In response to Board questions concerning the first floor plans (Exhibit 30) and asking Mr. Nauman to walk the Board around the walls of the existing house, Mr. Nauman testified that he viewed the wall on the left side of the house to be an existing wall in its entirety. He testified that he considered three small portions of the front wall to be existing wall. He testified that he did not consider the wall on the right side of the house to be an existing wall because it was now covered under the new footprint of the garage and the habitable space above it. He testified that he did not consider the rear wall to be remaining, noting that it was now subsumed within the interior structure. He testified that the policy in his department is that a carport is open on three sides, and thus that the construction included a garage, regardless of whether or not the garage door was attached.

Mr. Nauman testified, when shown the October 12, 2006, building plans, that they state that the garage door was eliminated to maintain 50 percent exterior wall policy. He testified that they show new openings and headers for two windows,

[6] Mr. Nauman testified that his understanding of the wall retention requirement in ZP0204 was that the standard went beyond the walls that remained, and referred to walls which were intended to be utilized as part of the finished structure and remain as exterior walls.

and the fireplace being demolished. See Exhibit 30. He then testified that he did not review the plans, and that he typically begins his investigations in the field, only reviewing the plans if necessary. In looking at the photo at Exhibit 11, page 30, Mr. Nauman testified that it showed the fireplace had been demolished. He further testified that this photo showed that the wall was there, but that it had a hole in it.

Mr. Nauman testified that he determined that the footprint of the addition exceeded the footprint of the existing structure by pacing off the area, including the garage and the concrete footprint of the new construction.[7] He testified that in situations where the addition is large enough that he cannot clearly determine in the field whether it exceeds 100% of the existing house's area, he always errs on the side of caution by posting a stop work order and issuing a notice of violation, and placing the burden on the builder to prove otherwise. He testified that he was subsequently contacted by Ms. Longo, that he explained his findings to her, and that he told her that the remedy would be to apply for a building permit for a new structure. He testified that he subsequently learned from Bobby Bell that Ms. Longo had been allowed to proceed with the work based upon a revision that involved removing the garage door so that the space would be considered a carport and the interior wall an exterior wall. Thus DPS voided the notice of violation and lifted the stop work order. Mr. Nauman testified that he then spoke with Ms. Scala-Demby, and told her that he felt it was a mistake to lift the stop work order, and that this matter should be reviewed more carefully.

In response to Board questions, Mr. Nauman testified that he considered the building footprint to include anything that has a continuous foundation and continuous footing that would be considered permanent. Mr. Nauman explained that he would include a covered or enclosed porch that was built on a continuous concrete foundation and footing in the calculation of footprint, but that if the same covered porch were built on piers, he would not include it in the calculation of footprint. He clarified that the footprint and lot coverage calculations are not the same, explaining that roofed areas were counted towards lot coverage. In the instant case, Mr. Nauman testified that the garage would count as part of the footprint, presumably because of its continuous foundation, but also, as he indicated in response to another Board question, because there was permanent, occupied space above it.

Mr. Nauman testified that when he issues a notice of violation, it specifies a remedy. He testified that where a building was found to have exceeded the limits for an addition, the remedy would be to apply for a permit for a new structure. The service request detail for this complaint about the subject Property references the need to apply for a building permit for a new structure, and gives a 30 day compliance period. It then indicates that as of October 13, 2006, the case was closed and that the customer had reached an agreement with zoning and complied with permit revisions. See Exhibit 18, at page 45.

[7] He later clarified that he did not take any actual physical measurements of the structure while he was there, other than to "pace it off."

On cross-examination, Mr. Nauman testified that the Building Construction Division, in which he works, is different from the Zoning Division. He testified that his work deals primarily with residential structures that are either existing, being modified, have been damaged by flood, fires, storm, or accidents, and with new homes that are being constructed. He testified that his purview deals with building, electrical and mechanical issues. He acknowledged that ZP0204 is a zoning policy, and that zoning issues are typically handled through the zoning department, but that in areas where it comes to building construction itself, zoning and construction cross paths. He testified that he forwarded his photos to Bobby Bell and Susan Scala-Demby because they would be the ones to deal with this zoning issue, and they would make the final determination as to what should happen with the notice of violation.

When asked on cross-examination whether ZP0204 refers to the structural components of or structural requirements for a wall, he testified that it did not. In response to questions regarding his statement that studs had been added to the front wall in order to support a second story, he testified that this house was originally one story, and that there was nothing in the Zoning Ordinance which prohibited adding a second story to a one-story house. On re-cross, he testified that he did not know if the studs were permanent, or if they were temporary, to support the wall until it could be restored to its structural state. He testified that the level of demolition of the first floor walls was such that they could not have supported the roof.

On cross-examination, with respect to his determination that the wall on the right side of the original house was not an exterior wall, he explained that because the footprint of the house extended beyond this wall (to serve as the floor of the garage/carport), the wall was now an interior wall. He went on to say that currently, this is a bearing wall supporting the load above it. He testified that the portion of the front wall that was exposed when the chimney was removed was an external wall because the chimney was outside of the thermal envelope, and was simply an appurtenance to the wall.

10. Mr. Gregory McClain, a Permitting Services Specialist II with DPS, testified at the request of the Appellant. Mr. McClain testified that he made the initial assessment as to whether there was enough information in the permit application and plans to take them in for review. He testified that the application was put into a bin, from which it could go to any number of reviewers, and that he did not make the assessment regarding footprint calculations or the extent to which the exterior walls were being demolished, for purposes of compliance with ZP0204, before the permit was issued for this Property. With respect to the October 12, 2006, permit revision, Mr. McClain testified that it appeared that the applicant had submitted revised plans to reflect some changes, but that he was not familiar with the extent of those changes. He testified that he was not involved in any meetings or decisions regarding this revision and whether it would be approved. He testified that he had never visited the site.

11. Mr. Bobby Bell, a Permitting Specialist II with DPS, testified at the request of the Appellant. He testified that he did the standard zoning review for this Property.

See Exhibit 18 at page 13. He testified that he received an email with pictures from Mr. Nauman following the issuance of the first stop work order, and that Mr. Nauman had visited his office to get his opinion of the pictures and findings. He testified that he told Mr. Nauman that he would need to study the matter and look at the plans and documentation to ensure he fully understood the scope of the work before making a decision. He testified that he spoke with Mr. Spicer, and reviewed the pictures. He testified that they discussed the condition of the remaining front wall, as well as the right (garage) wall. He testified that the real focus was on the front wall and that they decided that the front wall was in compliance with ZP0204 and counted towards the 50 percent retention requirement. He testified that as long as the wall remains in its linear length, ZP0204 does not preclude you from enlarging windows and relocating doors, nor does it preclude you from putting a load bearing wall or studding behind the existing wall to support a second story. In the instant case, Mr. Bell testified that some wall had been broken down to enlarge windows, the front door had been relocated, and the chimney had been eliminated. He testified that these actions are allowed. He testified that the wall does not have to remain a structural, bearing wall, and reiterated that you can put a wall behind the original wall for structural load bearing and still have an exterior wall. In response to a Board question, Mr. Bell testified that he disagreed with Mr. Nauman's interpretation of ZP0204, namely that if a wall remained undisturbed such that it was still a load bearing wall and was still structurally sound, it would be considered as remaining, and that that was not the practice of his division.

With respect to the permit revision relating to the garage, Mr. Bell testified that he had no involvement with the revision or the revision review. Mr. Bell testified that he did prepare the zoning worksheet at Exhibit 16, pages 25-26, relating to the size of the footprint and compliance with the 100 percent or less requirement. He testified that he used the architect's drawings for his calculations, and that he had converted the feet and inches measurements into decimals. He testified that the existing footprint before the revision was 946.92 square feet, and that the footprint for the proposed addition was 946.89 square feet. He testified that as a standard practice in the industry, most people only carry their decimal calculations to one place, but that he generally goes to two, to be more accurate.

12. Mr. Pete Hrycak, Permitting Services Inspector with DPS, testified at the request of the Appellant. He testified that he inspects and investigates land use complaints and development standards.[8] He testified that he is not involved with the initial review of permits. He testified that at the request of Ms. Scala-Demby, he had posted a stop work order at the subject Property for a zoning issue, possibly for the issue of two remaining walls. He testified that he did not evaluate the Property before posting the stop work order, but was following the directions of his supervisor. He testified that he had no subsequent involvement with the Property until the Appellant called and asked him to come out and inspect the property, and actually take measurements of the house under construction for use at these proceedings.

[8] In response to a Board question, Mr. Hrycak testified that he inspects map grids 30, 36, and 41 of the ADC map book for Montgomery County, which covers Wheaton, Silver Spring, Chevy Chase and Kensington.

CONCLUSIONS OF LAW

1. Section 8-23 of the Montgomery County Code authorizes any person aggrieved by the issuance, denial, renewal, or revocation of a permit or any other decision or order of DPS to appeal to the County Board of Appeals within 30 days after the permit is issued, denied, renewed, or revoked, or the order or decision is issued. Section 59-A-43(e) of the Zoning Ordinance provides that any appeal to the Board from an action taken by a department of the County government is to be considered *de novo*. The burden in this case is therefore upon the County to show that the stop work order was properly lifted.
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.

Motion for Summary Disposition

3. Under Section 2A-8 of the Montgomery 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 the hearing. In the instant matter, because granting of the Motions to Dismiss would eliminate the need for further proceedings (and the attendant preparation for those proceedings), the Board took the unusual step of bifurcating this hearing such that the Board would hear oral argument on and would vote on the Joint Motion for Summary Disposition one day and then, if the Motion was not granted, would take up the balance of the case during a second day of hearings.

4. Board Rule 3.2.2 specifically provides for Motions for Summary Disposition. Rule 3.2.2 permits any party to file a motion to dismiss any issue in a case on the grounds that the application and other supporting documentation establish that there is no genuine issue of material fact to be resolved and that dismissal or other appropriate relief should be rendered as a matter of law.

5. As a preliminary matter, the County and the Intervenors filed a Joint Motion for Summary Disposition pursuant to Board Rule 3.2.2. Counsel for the Intervenors and the County argued that each of Appellant's causes of action failed to assert a genuine issue of material fact, and that the matter should therefore be dismissed as a matter of law. They asserted that Building Permit 423918 had been fully and properly vetted by DPS prior to its issuance in August, and was not appealed. They asserted that it was this originally issued permit, and not subsequent revisions to it, which constituted a final decision of DPS. They noted that the original permit was not appealed. They argued that the revisions to this permit were elective on the part of the Intervenors, that they in fact reduced the size of

the construction, and that under sections 8-24(h) and 8-26(b) of the Montgomery County Code, DPS has no authority to reject such revisions, which are deemed part of the original application. Thus they argued that the revisions to the permit upon which DPS lifted its stop work order were not final, appealable decisions for the purpose of appeal under sections 8-23 or 59-A-4.3 of the Code, citing *National Institutes of Health Federal Credit Union v. Hawk*, 47 Md. App. 189, 195-96, 422 A.2d 55, 58-59 (1980). Finally, they argued that Appellant, who lives six houses away from the subject Property, was not aggrieved by the permit revisions, since her property does not adjoin or confront the subject Property, since she does not live within sight or sound of the Property, and since the revisions actually reduced the scope of the construction permitted under the original (unchallenged) permit, and thus did not harm her personal or property rights.

6. The Appellant filed a Response to the Joint Motion for Summary Disposition. She argued that the stop work orders were issued only after inspections of the Property by DPS, and that the permit revisions were necessary to attempt to comply with DPS' Code Interpretation Policy ZP0204 regarding additions. In particular, the Appellant alleged that the permit revisions were made in an attempt to meet the requirement that at least 50% of the existing first floor exterior walls, in their entirety (measured in linear feet) remain as exterior walls, and the requirement that the construction must not, at the time of application, exceed the existing footprint by more than 100%. She asserted that the key factual issue in this case is whether one or both limits that distinguish an addition from new construction were exceeded, and thus whether this construction should have been allowed under an addition permit, or whether a new construction permit should have been required. She argued that when DPS lifted the stop work orders, they essentially issued a final administrative decision that the permit would be considered to be an addition rather than new construction, and asserted that that determination could not have been made with certainty in this case until construction has progressed to the point where exterior wall removal and alteration was complete, and the building footprint was built. The Appellant differentiated the instant case from *Hawk* by noting that in the instant case, DPS issued two official stop work orders for violating permit conditions after investigation by DPS inspectors or management. Thus she argues that subsequent to the issuance of the original permit, DPS undertook official actions which affirmed violations of the permit conditions. Unlike the case in *Hawk*, in this case Appellant argues that the facts surrounding the original permit had changed.

   With respect to standing, as a general matter, the Appellant notes that the requirements for administrative standing in Maryland are not very strict. She states that she lives six houses, or approximately 250 feet, from the subject Property, that she walks and drives by it every day, and that she sees the back of it from the Rock Creek Park bike trail. She notes concern about what is being built, loss of trees, compliance with the Zoning Ordinance, and safety and crowding issues. She states that the requirements of the Zoning Ordinance are declared to be the minimum requirements for the protection of health, morals,

safety and general welfare of the public,[9] and that any member of the public is thus aggrieved if the minimum standards are not enforced. More specifically, Appellant states that contrary to the assertions of the Intervenor and County, she does live within sight or sound of the subject Property, since she can see the back of the subject house from her family room windows, deck and back yard, due to the extent of the projection of the new construction toward the rear of the Property. Appellant further states that the new construction will add to impermeable surface area, and cause additional runoff to flow from the higher elevation of the subject Property down the street to the storm drain in front of her house, which she states is located at the lowest point directly downhill from the subject Property. In addition, she states that a storm drainage channel runs parallel to her house, and that part of her house is in a flood plain which will be affected by the runoff from the development at the subject Property. See Exhibits 7 and 8. Finally, the Appellant asserts that she is aggrieved because this construction is being treated as an addition rather than new construction, since if it were treated as new construction, the construction would need to meet greater setbacks and would be required to have fire sprinklers, which would reduce the risk of fire spreading from the subject Property to Appellant's property, along the woods that back to both.[10]

7. The Board found that the Appellant was aggrieved and had standing to pursue this appeal, based on where she lives. An adjoining, confronting or nearby property owner is deemed, *prima facie*, to be specially damaged and, therefore, a person aggrieved. See, e.g., *Bryniarski v. Montgomery County Board Of Appeals,* 247 Md. 137, 145; 230 A.2d 289, 294 (1967).

   In determining to deny the Motion for Summary Disposition, the Board went on to distinguish the facts of this case from the facts in *Hawk,* as follows: In *Hawk*, the Court found that an agency director's written denial of requests to revoke a previously-issued use and occupancy permit did not constitute a final administrative decision, order, or determination, but rather that it was, at most, a reaffirmation of a final administrative decision. The Court indicated that if it were to find otherwise, all an appellant would have to do to preserve a continuing right of appeal would be to maintain a continuing stream of correspondence, dialogues, and requests with the appropriate authorities on even the most minute issues of contention. *Hawk*, 47 Md. App. at 195-196. In the instant case, unlike *Hawk*, the Board finds that the permit violations that gave rise to the issuance of the stop work orders, and led to the subsequent permit revisions (if the facts are viewed in the light most favorable to the Appellant), go straight to the heart of DPS' determination that this construction was in fact an addition and not new construction. These permit revisions arguably impacted the continuing validity of the original building permit, and the Board finds that it is this interim change in facts that differentiates this case from *Hawk*. Under the standards applicable to Motions for Summary Disposition, because Appellant disputes DPS' resolution of

[9] See Section 59-A-2.2(b) of the Zoning Ordinance.

[10] With respect to the alleged "requirement" that this home have fire sprinklers, Counsel for DPS explained that the sprinkler requirement does not apply to renovations, but only to totally new construction (i.e., construction undertaken from the ground up), and that it would not have applied to this renovation, even if it were termed "new construction" by DPS for permitting purposes. See June 6 Tr. at pages 77-78.

these facts, the Board concluded that the motion for summary disposition must be denied. *Livesay v. Baltimore County*, 384 Md. 1, 10, 862 A.2d 33, 38 (2004). On a motion by Vice Chair Donna Barron, seconded by Member Caryn L. Hines, with Chair Allison I. Fultz and Member Wendell Holloway in agreement, and Member Catherine Titus in opposition, the Board voted 4-1 to deny the Joint Motion for Summary Disposition.

Substance of Appeal

8. The Board finds, based on the testimony and evidence of record, that even though the square footage of the footprint of the addition is exceedingly close to the square footage of the footprint of the existing home, it is smaller than the square footage for the footprint of the existing house. Ms. Scala-Demby testified that the square footage of the existing house is shown on the cover sheet of the original plans as 956 square feet, which included the projection on the front of the house for the chimney/fireplace, and that the plans show the addition as having a footprint of 955 square feet. See Exhibits 20 (full size version of Exhibit 16, page 6), and Exhibit 16(f) (page 27 of Exhibit 16 (ZP0204)). With respect to the revised plans dated November 5, 2006, Ms. Scala-Demby testified that her staff had verified the footprint of the existing house as being 946.92 square feet (excluding the fireplace/chimney), and the square footage of the addition as being 946.89 square feet (excluding the front porch). See Exhibit 16(f) (pages 19-24 of Exhibit 16). Ms. Gallagher testified that she designed the footprint of the addition to be just smaller than the footprint of the existing house, and that the DPS worksheet measurements show that the addition footprint is 946.89 square feet, and that the footprint of the existing house is 946.92 square feet, for a difference of 0.03 square feet. See Exhibit 16 at page 25. Mr. McClain testified that he had prepared the DPS worksheet referred to by Ms. Gallagher, and that he had done these calculations.

   The only testimony to suggest that the addition may be larger than the existing house came from Mr. Nauman, who testified that he had reached that conclusion after “pacing off” the two measurements prior to issuing the stop work order. Mr. Nauman later clarified that he did not take actual measurements in connection with the issuance of this order, and that he always errs on the side of caution in issuing stop work orders. The Board does not find this testimony regarding Mr. Nauman’s rough calculation convincing in light of the actual calculations placed into evidence, and in light of Mr. Nauman’s admission that he errs on the side of caution in these matters.

   Although the area of the addition would have hit the 100 percent threshold had the addition and existing square footage figures been rounded to one decimal place rather than two, the Board further finds that the language in DPS Code Interpretation Policy ZP0204 regarding the square footage of the footprint of an addition is clear on its face, and sets a bright line test at 100 percent, stating that the construction must not exceed the existing footprint by more than 100 percent. Thus in light of the Board’s finding that the footprint of the construction at the subject Property does not exceed the footprint of the existing house, by however small the margin, the Board finds that the construction meets the requirements of

ZP0204 with respect to the size of the footprint, and that this aspect of this appeal must be denied.

9. DPS Code Interpretation Policy ZP0204 also requires that "[a]t least 50 percent of the existing exterior first floor walls, in their entirety, (measured in linear feet) and comprising the footprint of the existing building" must remain as exterior walls. The Board finds, as evidenced by consistent testimony from DPS zoning officials, that the wall on the right side of the house, between the garage and the first floor living space, is an exterior wall, should be treated as remaining in its entirety, and should be counted towards the 50 percent requirement in ZP0204. Indeed, Ms. Scala-Demby testified that the right side wall of the house was considered exterior, despite the garage/carport, because it separated the conditioned living space of the house from the unconditioned space of the garage. She went on to explain that "exterior wall" in this sense means an exterior wall of the finished first floor of the house.

   Similarly, the Board finds that unchallenged and consistent testimony and evidence of record indicates that the exterior wall on the left hand side of the house is remaining in its entirety, and should be counted towards the 50 percent requirement. In addition, the Board finds that the plans show and testimony indicates that the rear wall of the original house was incorporated as an interior wall of the renovated house, and could not be counted towards the 50 percent requirement. Given that the plans show that the front and rear walls of the existing, rectangular house were longer than the side walls, and given testimony which indicates that walls are counted in their entirety (they're either all in, or they're all out), the Board concludes that in order to meet the 50 percent wall retention requirement of DPS Code Interpretation Policy ZP0204, the front wall would need to be found to remain in its entirety. See Exhibit 16(b) at page 8.[11]

   Despite language which refers to existing walls remaining "in their entirety" in linear feet for purposes of ZP0204's 50 percent requirement, DPS officials consistently testified that their interpretation of ZP0204 allows changes to the openings in the wall for windows and doors, and the Board accepts this as the policy of DPS. The Board finds that the record contains numerous photographs which show that the changes made to the front wall of the subject Property went beyond changing windows and doors, to the removal of large portions of this front wall in their entirety. See Exhibit 18(a) at pages 34-36, and at page 38; Exhibits 19(a)-(c), and (e). Indeed, the Board finds that these pictures show that the original front wall, between the window on the left hand side of the house (as you face it from the road) and the front door, was completely removed. See Exhibit 19(b). In reviewing the plans of record, the Board finds that the extent of this demolition was not clearly shown on and was not apparent from the construction plans submitted with the original application, nor was it apparent from the plan revisions dated 10/12/06 or 11/05/06. Similarly, the Board finds that none of the

[11] The two side walls are each 25 feet, 10 inches in length (51 feet, 8 inches total). The original exterior wall perimeter measures 125 feet, which means that if only the side walls were considered to "remain in their entirety," then only 41 percent of the walls would remain. ZP0204 requires that at least 50 percent of the exterior walls remain.

plans on file clearly show the extent of existing front wall that is to remain, or that which will be newly constructed/rebuilt. See Exhibits 22, 24 and 30. Furthermore, the Board finds that a comparison of the plans for the existing house with the construction plans submitted does not reveal the full extent of the contemplated demolition.[12] The Board finds that this lack of clarity in the plans could have caused a DPS official reviewing the plans to reasonably believe that incremental changes were being made to the window and door openings, and that the firebox was being demolished and filled in, and thus to conclude that the wall was being maintained as an exterior wall for the purposes of ZP0204. See Exhibits 21, 22, 24, and 30. The Board finds that the extent of actual demolition to the front wall of the house (and the resultant extent of front wall remaining) was not apparent from any of the plans, and indeed was not apparent until the physical demolition took place on site. At that point, stop work orders were issued which called into question the extent of front wall retention for the purposes of compliance with ZP0204. The Board finds that, as shown by the photographs in the record, the demolition that occurred on site involved the removal of entire sections of wall—not just the changing of windows and doors. As a result of the extent of this demolition—demolition which again was not obvious from any of the plans filed with this permit—the Board finds that the front wall can no longer be counted as remaining in its entirety for purposes of the 50 percent wall retention requirement of ZP0204. Given the necessity that the front wall be counted as remaining if this construction were to be considered to meet the 50 percent wall retention requirement, as discussed above, the Board concludes that the stop work orders should not have been lifted.

The Board is not persuaded by testimony from the Intervenor's architect and DPS that the plans showed the changes made to the front wall, nor are they persuaded by DPS testimony that those changes should be considered an alteration of the wall, and thus that the wall should be considered to remain in its entirety and counted towards the 50 percent requirement. As noted above, the Board concludes, after reviewing the plans and plan revisions that the extent of proposed demolition was not clear, that the actual demolition exceeded that allowed under ZP0204, and consequently that the stop work orders should not have been lifted. The burden in this case was on DPS to show that the stop work orders were correctly lifted. In *Angelini v. Harford County*, 144 Md. App. 369, 798 A.2d 26 (2002), the Maryland Court of Special Appeals described the distinction between the burdens of production and persuasion:

> "To satisfy the burden of production is not remotely to satisfy the burden of persuasion. … It is never the case that the Board must be either 1) persuaded by the appellant to act or 2) persuaded by the opponents not to act. … There is only one burden of persuasion and it points in only one direction. … The tribunal that needs to be persuaded may always conclude, 'We have heard what the applicant had to say and we have heard nothing to the contrary, but we are still unpersuaded.' Generally speaking, property owners are not

[12] A separate demolition plan, or the depiction of proposed demolition with dashed lines, would have made the extent of the demolition clear to the plan reviewer.

> entitled to zoning changes automatically just because nobody opposes them." *Id*., at 376-377.

The Board in this case is not persuaded that the stop work orders were correctly lifted.

Second Motion to Dismiss

10. After the Board had voted orally to grant this appeal, but before it had issued its written Opinion, the County filed a Motion to Dismiss, arguing that while the appeal purports to challenge the lifting of a stop work order, it is actually an appeal to the original permit, that it was filed more than 30 days after the original permit was issued, and thus that it should be dismissed as untimely. The County cites *Hawk, supra,* in support of its assertion that the time limit for the filing of appeals is mandatory, and that the Board has no jurisdiction to hear an appeal that is not timely filed. In addition, again citing to *Hawk* and *UPS v. People's Counsel*, 336 Md. 569, 650 A.2d 226 (1994), the County notes that the Appellant cannot maintain a continuing stream of correspondence regarding decisions previously made so as to maintain a continuing right of appeal. Finally, the County notes that the house has been sold, and so argues that this appeal should be dismissed as moot.

    Appellant responded with a letter requesting additional time to respond in writing. She argues that the County's request for dismissal was heard at the outset of these proceedings, and that any attempt to raise this as a new issue should be viewed as an untimely request for reconsideration. She also debates the County's assertion that the appeal should be dismissed as moot because the Property has been sold, stating that the building exists, and that effective relief can be granted.

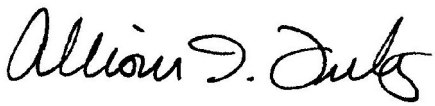
    The Board considered the County's Motion at its October 17, 2007, Worksession. The Board found that the County's Motion re-recites arguments that the Board had ruled on in denying the Joint Motion for Summary Disposition. The Board further found that the fact that the Property had been sold had no bearing on their decision and that the effect of the Board's decision in this appeal would relate back to the lifting of the stop work orders. On a motion by Member Caryn Hines, seconded by Member Catherine Titus, with Chair Allison Fultz, Vice Chair Donna Barron, and Member Wendell Holloway in agreement, the Board voted 5-0 to deny the County's Motion to Dismiss.

11. Based on the foregoing, the Board finds that DPS has not met its burden of demonstrating by a preponderance of the evidence that the challenged stop work orders, to the extent that they relate to the retention of existing exterior walls in connection with Building Permit No. 423918, were properly lifted, and thus finds that the lifting of those stop work orders, insofar as they concern the retention of existing exterior walls at the subject Property for the purpose of compliance with ZP0204, should be reversed, and that the stop work orders should be reinstated for that limited purpose.

The appeal in Case A-6185 is **GRANTED**.

On a motion by Vice Chair Donna L. Barron, seconded by Member Caryn L. Hines, with Chair Allison I. Fultz and Members Wendell M. Holloway and Catherine G. Titus in agreement, the Board voted 5 to 0 to grant the 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.



Allison Ishihara Fultz
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 30th day of October, 2007.

_____
Katherine Freeman
Executive Secretary to 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 accaccordance with the Maryland Rules of Procedure (see Section 2-114 of the County Code).