

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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Case No. A-6117

**APPEAL OF MARY HEMINGWAY AND EDWARD PURICH
FOR CLOVERLY CIVIC ASSOCIATION**

OPINION OF THE BOARD

(Hearing held July 23, 2008)

(Effective Date of Opinion: November 7, 2008)

Case No. A-6117 is an administrative appeal filed by Mary Hemingway and Edward Purich (the "Appellants"). The Appellants charge error on the part of the County's Department of Permitting Services ("DPS") in the issuance of Building Permit No. 402806, dated November 11, 2005, for the construction of a residential accessory structure on the property located at 812 Snider Lane, Silver Spring, Maryland in the RE-1 zone (the "Property").

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 March 1, April 26, and May 24, 2006. In an Opinion dated September 21, 2006, the Board determined to grant the appeal, ordering the permit revoked.

Intervenors Larry Crews, the holder of the Building Permit at issue in this case, and his wife Sharon, whose mother owns the Property and who has a Power of Attorney to act on behalf of her mother, petitioned the Circuit Court for judicial review of the Board's decision. On April 6, 2007, the Circuit Court entered an Order setting aside the revocation of Building Permit 402806, and remanding the case to the Board. The Order instructed the Board to direct DPS to review additional evidence regarding the accessory structure in question, including its age, condition, and flooring, to determine if the building permit in question had been appropriately issued. The Order further instructed the Board to reconsider this building permit and any issues relating to it after DPS completed its review.

In its Resolution of June 8, 2007, the Board directed DPS to consider the items laid out in the remand Order of the Circuit Court, and to provide the Board with a written report of its findings. In a letter to the Board dated September 27, 2007, Mr. George Muste, Manager for DPS, enclosed a Memorandum Report giving an appraisal of the accessory structure from John L. Schneider, P.E. Counsel for the Appellants requested a non-evidentiary hearing to allow the parties to present their views on the proper disposition of this appeal. The Board heard oral argument regarding the proper

disposition of the appeal on March 12, 2008. At that time, the Board determined to have the parties brief and provide legal argument on the following issues: (1) whether the structure in question is a building or a trailer under the applicable code(s); (2) the extent to which State law preempts local regulation of structures such as the structure at issue in this appeal; (3) whether the existing use of this structure is consistent with its certification; and (4) the basis on which DPS accepted Mr. Schneider's report. The scope of the July 23, 2008, hearing was therefore limited to the proper disposition of the appeal, and legal argument on the issues set forth above.

The Appellants were represented by David Brown, Esquire, of Knopf and Brown. Intervenor Larry and Sharon Crews appeared pro se. Assistant County Attorney Malcolm Spicer represented DPS.

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

FINDINGS OF FACT

The Board hereby adopts the findings of fact set forth in the Board's September 21, 2006, Opinion regarding this matter, and incorporates such facts into this Opinion except to the extent contradicted or superseded by findings of fact made herein.

In addition to the findings made in its Opinion of September 21, 2006, the Board finds by a preponderance of the evidence that:

1. The Circuit Court, in its Order of April 2, 2007, remanded Board Case Number A-6117 to the Board, and ordered that the Board's revocation of Building Permit Number 402806 be set aside. The Court further ordered the Board to direct the County's Department of Permitting Services to review the additional evidence regarding the Crews' structure, including the age, the condition of the structure, and its flooring, to determine whether Building Permit Number 402806 was appropriately issued. Finally, the Court ordered the Board to reconsider Building Permit 402806 after the review by DPS, along with any other issues raised at the Board relating to that building permit.
2. On June 8, 2007, the Board issued a Resolution suspending the revocation of Building Permit 402806, and directing DPS to consider the age, the condition of the structure and the flooring to determine whether the building permit was appropriately issued, and to provide the Board with a written report of its findings.
3. On September 14, 2007, structural engineer John L. Schneider, P.E., who is licensed in the State of Maryland, sent a letter to DPS containing a structural appraisal of the Crews' structure. Mr. Schneider's appraisal report sets forth his professional opinion that the structure was well built, and remains structurally sound. It indicates that the structure was built in 1982. Mr. Schneider's report details his examination of the entire building (roof, walls, floor, and foundation framework). With respect to the floor, the report states in part that:

The subfloor is one and an eighth inch thick—the most heavy-duty plywood available. (Lowe's carries only up to ¾" and residential subfloors are often only ½" or 5/8".) The floor is supported every 16" (or less) from below by 2 x 6 floor joists running longitudinally. If not running along top a girder, these joists are supported at least every 4' by 8" steel members welded transversely between the four 12" steel girders running the length. Under the front end of the structure, insulation has been removed to expose the bottom of the subfloor. There it can be seen—solid and sturdy as it was 25 years ago.

Some particulars of the steel girder framework have already been detailed above. Two 12" I-beams run the 60' length 100" apart. Thirty inches out from these central beams the 12" perimeter beams run the length and across the ends. Fore and aft of the 3 axels' attachment to the central I-beams, sections of 12" I-beam are welded all the way across, side to side. Every 4' or less, 8" cross members are welded between the lengthwise 12" beams to support the 2 x 6 joists and flooring.

Inspection of the steel beam framework reveals only inconsequential surface rust. Close inspection of the area surrounding the 1.5" perimeter frame deflection reveals no cracks, broken welds, or anything else that would compromise the essential structural integrity of this building's undergirding framework, or the support, stability and strength of its superstructure.

Mr. Schneider's report concludes, referring to the federal Manufactured Home Construction and Safety Standards ("HUD Code," 24 CFR 3280), that "[w]hen the originally specified and authorized work of blocking, leveling, and anchoring this structure on its concrete piers is completed, my client's building will exceed all standards for the designated, permitted use of his building." See Exhibit 55.

4. In a letter to the Board dated September 27, 2007, Mr. George Muste, DPS Manager, stated that as directed by the Board, DPS had investigated to see if Building Permit 402806 was appropriately issued. The letter stated that DPS had reviewed the engineering report signed and sealed by John L. Schneider, a professional engineer licensed in the State of Maryland, regarding the condition of the modular building permitted under Building Permit 402806. The letter concluded that the modular building met the requirements for issuing the building permit, including the condition of the structure's floor, and that Building Permit Number 402806 was appropriately issued. See Exhibit 55.

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-4.3(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 building permit was properly issued.

2. Section 2A-11 of the Montgomery County Code (“Judicial review”) authorizes any party aggrieved by a final decision in a case governed by the County’s Administrative Procedures Act to appeal the decision to the Circuit Court for Montgomery County, Maryland, in accord with the provisions of the Maryland Rules of Procedure governing administrative appeals. That section goes on to give the Circuit Court the power to affirm, reverse or modify the decision or remand the case for further proceedings as justice may require.
3. Section 59-A-2.1 of the Zoning Ordinance defines “building” and “trailer” as follows:

Building: A structure having one or more stories and a roof, designed primarily for the shelter, support or enclosure of persons, animals or property of any kind.

Trailer (including automobile trailer): Any vehicle or structure, except a device exclusively used upon stationary rails or tracks, mounted on wheels for use on highways and streets; propelled or drawn on its own or other motor power; and designed and constructed to provide living or sleeping quarters for one or more persons or for the conduct of a business, profession, trade or occupation or for use as selling or advertising device. A trailer is not an accessory building except when used for construction offices or real estate sales in accordance with the definition of accessory uses. A recreational vehicle as defined in this chapter is not a trailer.

4. Section 8-12(c) of the Montgomery County Code (“Duties and responsibilities; Inspections”) authorizes the Director of DPS to accept reports of inspection by recognized services or individuals, stating in relevant part that “[t]he 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...” (emphasis added).
5. Section 12-303 of the Public Safety Article, Annotated Code of Maryland, makes clear that with respect to industrialized buildings and manufactured homes, local land use requirements, building setback requirements, side and rear yard requirements, site development and property line requirements, zoning requirements and uniform fire control regulations are reserved to the local government.
6. Section 12-309(b) of the Public Safety Article, Annotated Code of Maryland, states that “an industrialized building that bears an insignia provided by the Department [of Housing and Community Development] is acceptable in all localities of the State: (1) to comply with the requirements of this subtitle; and (2) to meet the requirements of safety to life, health, and property required by a law or ordinance of a local governing body of the State without further investigation or

inspection by the local governing body if the industrialized building is erected or installed in accordance with the conditions of the certification.” As confirmed by the State Attorney General in 75 Op. Atty. Gen. 308, 310 (1990), the State certification supersedes any conflicting local building code requirements. See Exhibit 64(a).

7. The Board finds that the structure for which Building Permit 402806 was issued meets the definition of “building” set forth in section 59-A-2.1 of the Zoning Ordinance insofar as it is a structure with a roof, designed primarily for the shelter, support or enclosure of persons or property. The Board further finds that this structure does not meet the definition of “trailer” set forth in that same section, since it is not “for use on highways and streets,” despite its having wheels for occasional transport from one location to another.¹ The Board reiterates its previous findings that based upon undisputed evidence and testimony of record, the building at issue was constructed in 1982 and, as evidenced by the State certification letter and testimony of record, met the building code requirements applicable at the time of its manufacture.²

As a result of its State certification, the Board finds that pursuant to Md. PUBLIC SAFETY Code Ann. Section 12-309(b), the building in question is not subject to County building code requirements, which are superseded by the State certification, and thus County inquiry into the structural integrity of the building is precluded. The Board notes that pursuant to Md. PUBLIC SAFETY Code Ann. Section 12-303, the building is subject to the setback requirements imposed by the County’s Zoning Ordinance. The Board reiterates the finding it made in its original Opinion that based on the testimony of Ms. Susan Scala-Demby and on Exhibits in the record, notably the site plan filed at Exhibit 12.4, the building meets the applicable setback requirements set forth in Section 59-C-1.326 of the Zoning Ordinance.³

¹ The Board notes that these findings were implicit in its September 21, 2006, Opinion, and are consistent with the testimony of Ms. Susan Scala-Demby, Zoning Manager for DPS, who testified that the Intervenor’s structure met the Zoning Ordinance definition of “building” because it was “a structure having one or more stories and a roof, designed primarily for the shelter, support or enclosure of persons, animals, or property of any kind.” Ms. Scala-Demby testified that she had been inside of the structure, and had noted that it had doors, windows, a floor and a ceiling. Finally, she had testified that most modular or industrialized buildings are transported to their destinations on wheels, that she was aware that this structure had been transported to the Property on wheels, and that the building permit required the removal of the wheels. She testified that the wheels did not make the structure a “trailer” because a trailer, by definition, is mounted on wheels for use on highways and streets, but the wheels on this structure were only to be used to transport it to the Property, after which time the structure had to be placed on piers. The Board finds this testimony credible.

² Ms. Scala-Demby testified that, as evidenced by the October 28, 2005 letter (Exhibits 7 and 12.7), the structure was a Maryland-approved industrialized building with certification number 18114. She testified that she had personally verified that the certification number on the Intervenor’s structure matched the number on the letter. The revised DHCD letter (revised for date correction) states that the approval of this unit was based on inspection and certification of the unit by PFS Corporation at the time of manufacture. See Exhibit 17. Again, the Board finds this testimony credible.

³ Ms. Scala-Demby testified at the original hearing that the building had been located in accordance with the development standards for accessory structures in the RE-1 zone. She testified that the side yard setback requirement was 15 feet, and the Intervenor’s structure was located 25.5 feet from the side lot line. She testified that the required setback from the street line was 80 feet, and that the revised site plan (Exhibit 12.4) shows that the structure is located 92.5 feet from the front (street) line. She testified that Mr. Rusey, a DPS inspector, had gone to the Property and had verified that the structure was in the correct location. This testimony was not disputed, and the Board finds it credible.

Despite State law which makes clear that issues of structural soundness are determined by the State when the building is certified, without further investigation or inspection by the locality, the Board notes that the Circuit Court, in its remand Order, required DPS to review additional evidence concerning the structural soundness of this building in reassessing whether or not Building Permit No. 402806 was correctly issued. DPS received this additional evidence in the form of an inspection report from John L. Schneider, P.E., which found no “age-related deterioration or accident damage that appreciably compromises its [the industrialized building’s] original structural integrity,” and expressed Mr. Schneider’s professional opinion that once installation of this building on concrete piers is completed as specified, the building will exceed all standards for its permitted use. See Exhibit 55. The Board accepts that this evidence indicates that the structure is sound. Pursuant to Section 8-12(c) of the County Code, the Board finds that DPS was entitled to rely on the inspection report of Mr. Schneider in reaching its conclusions that the building met the requirements for issuing the building permit, and that Building Permit Number 402806 was appropriately issued.

8. Based on the foregoing, the Board finds that DPS has met its burden of demonstrating by a preponderance of the evidence that Building Permit No. 402806 was properly issued. The Board agrees with this conclusion.
9. The appeal in Case A-6117 is **DENIED**.

On a motion by Vice Chairman Catherine G. Titus, seconded by Member David K. Perdue, with Chairman Allison I. Fultz in agreement and Member Wendell M. Holloway necessarily absent and not participating, the Board voted 3 to 0 to deny 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 7th day of November, 2008.

Katherine Freeman
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).