BOARD OF APPEALS
for
MONTGOMERY COUNTY

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Case No. A-6224

APPEAL OF CAROL ANN PLACEK

OPINION OF THE BOARD

(Hearing held January 9, 2008)
(Effective Date of Opinion: March 21, 2008)

Case No. A-6224 is an administrative appeal filed June 13, 2007, by Carol Ann Placek (the "Appellant"). The Appellant charges error on the part of the County's Department of Permitting Services ("DPS") in approving a final inspection of residential 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 issued final approval of this building permit (1) because the Board's decision in Case A-6185, which pertains to the same Property and which was pending at the time this appeal was filed, concluded that too much of the exterior wall of the existing house had been removed for this construction to be considered an addition, and (2) because the actual footprint of the construction exceeded that allowed by the County's addition policy as set forth in DPS Code Interpretation Policy ZP 0204.

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 a public hearing on the appeal on January 9, 2008. At the outset of the hearing, pursuant to its authority in Section 2A-8 of the Montgomery County Code, the Board heard oral argument on a preliminary Motion to Dismiss filed by the County. Assistant County Attorney Malcolm Spicer represented the County. Ms. Jodi Longo, the holder of the building permit at issue in this case and the Managing Member of the LLC that (formerly) owned the Property, was permitted to intervene in this matter (the "Intervenor"), and appeared pro se. Ms. Placek, the Appellant in this case, also appeared pro se.

Decision of the Board: Motion to Dismiss **granted**;
Administrative Appeal **dismissed**.

RECITATION OF FACTS

The Board finds, based on undisputed evidence in the record, 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.

2. Building Permit No. 423918 was issued to the Intervenor on August 2, 2006, for the construction of a two story addition at the subject Property. On May 15, 2007, this building permit was finaled by DPS.

3. Appellant filed this administrative appeal on June 13, 2007, asserting that DPS erred in finaling residential building permit number 423918, and asserting that in light of the Board's June 6, 2007, oral decision in Case A-6185 (written, "final" decision then pending), DPS should have revoked permit 423918 and required the permit applicant to apply for a new construction permit and meet all associated requirements.

MOTION TO DISMISS—SUMMARY OF ARGUMENTS

4. Counsel for DPS argued in his Motion to Dismiss that this appeal, while it purports to challenge the recording of the results of a final inspection of construction, is in fact a challenge to the issuance of the permit itself. He asserted that this appeal of the final inspection was not questioning whether the construction complied with the building code, but rather was challenging whether the scope of the construction permitted under this building permit should have been allowed in the first place—in other words, he asserted that this was an appeal to the original issuance of the permit. Because the permit in question was issued on August 2, 2006, and this appeal was not filed until June 13, 2007, Counsel argued that the appeal was not timely. Section 8-23(a) of the Montgomery County Code requires that appeals be filed within 30 days after a permit is issued. Counsel argued that this time limit is jurisdictional and mandatory, and that the Board has no jurisdiction over an appeal which is not timely filed, citing *National Institutes of Health Federal Credit Union v. Hawk*, 47 Md. App. 189, 422 A.2d 55 (1980), cert. denied, 289 Md. 738 (1981). Counsel stated that the final inspection, which was appealed, is one of several inspections that take place during construction.[1] Citing *United States Parcel Service Inc., et al. v. People's Counsel*, 336 Md. 569, 650 A.2d 226 (1994), Counsel argued that to allow an appeal of an inspection under a permit where there has been no appeal of the permit itself would allow an appellant to circumvent the statutory time limit for appeals. Counsel argued that if appeals were allowed to every inspection made pursuant to a building permit, an inequitable and chaotic condition would result, a result which was expressly rejected by the Court in *Hawk* and *UPS*.

[1] By way of example, during the hearing Counsel for DPS noted footing and foundation inspections and framing inspections. See Transcript at page 5.

Counsel for DPS also argued in his Motion that a final inspection is not an appealable decision or order as contemplated by section 8-23 of the County Code, citing *Meadows of Greenspring Homeowners Association, Inc. v. Foxleigh Enters., Inc.*, 133 Md. App. 510 (2000). Counsel asserted that Section 8-23 contemplates that there be an operative event or decision constituting a final administrative action from which an appeal can be taken. At the hearing, Counsel explained that a "final" inspection under a building permit is a recording of visual observations that take place during the course of an inspection of construction under the building code. He explained that these inspections are done by a building inspector, and that there is no zoning inspection undertaken in connection with this "final" inspection. He explained that despite its name, the final inspection is simply one of many inspections that take place during the course of construction. He stated that Section 59-A-3.21(a) of the County's Zoning Ordinance specifically provides that no certificate of occupancy is required for a single family dwelling or its accessory structures.

Finally, Counsel for DPS, citing *Bryniarski v. Montgomery County Board of Appeals*, 247 Md. 137, 230 A.2d 289 (1967), argued that the Appellant was not aggrieved by the results of the final inspection because she was not personally and specifically affected by the inspection in a way different from the general public.

In response to a question from the Board regarding what documentation a property owner received following a final home inspection, Counsel stated that he believed the owner would receive an initialed and dated sticker on their electric panel box. He stated that they do not receive a certificate.[2] Again, in response to a Board question asking how Counsel would respond to Appellant's assertion that the finaling of a building permit was functionally equivalent to the issuance of a certificate of use and occupancy, Counsel stated that the Zoning Ordinance specifically states that a certificate of use and occupancy is not required for a single family detached dwelling. See Section 59-A-3.21(a). Counsel stated that he believed that that provision may have been included to avoid the situation that exists in the commercial context which allows for an additional avenue of appeal.

5. Appellant asserted that Montgomery County Executive Regulation 24-04 (which generally adopts the 2003 International Residential Code) requires a final inspection prior to occupancy, and stated that that is why the requirement for a final inspection is included on the building permit. See Exhibit 19 at Section 57(10).

   Appellant asserted that there were really two issues at play in *Hawk.* Appellant argued that the first issue was whether an appeal would lie from a permit after the time period for the appeal had expired, where there had been no change in facts or alleged violations, and where the person was

[2] At this juncture, Appellant stated that there was a signed, approved inspection report.

attempting to use the administrative return letter as the basis for the appeal. Appellant acknowledged that the Court found against the person in that case on grounds that there is no right to appeal absent some action or permission. Appellant then stated that the second issue in *Hawk* had to do with whether a certificate of use and occupancy was properly appealed, and she explained that the Court held that the issuance of a certificate of use and occupancy was a final decision from which an appeal could be taken within the 30 day time frame.

Appellant argued that the *Foxleigh* case says that the question of whether something is a final and appealable decision is not based on the name or description of the decision, but rather on the essence of what the decision does. Appellant also cited *Art Wood Enters. v. Wiseburg Community Association, Inc.* (88 Md. App. 723, 596 A.2d 712 (1991)) for this proposition. She argued that DPS' "final" inspection is final in more than just name because under Executive Regulation 24-04, this inspection permits the building to be occupied. She stated that there are no further inspections. She asserted that the finaling of a residential building permit paralleled the issuance of a certificate of use and occupancy in the commercial sense, and argued that that is indeed the "essence" of the action.[3] After being asked again to relate this case to *Hawk*, Appellant asserted that the purpose of a use and occupancy certificate was first, to ensure that the work had been completed in accordance with the provisions of the approved permit, and second, to reaffirm that the use of the building is a valid use. Thus she concluded that at least one of the purposes of the certificate of use and occupancy (compliance with the permit) paralleled the purpose of a final inspection of a building permit, and that the two were functionally equivalent.

Appellant stated section 8-26(b) says that a permit is a license to proceed with work, but should not be construed as authority to violate, cancel or set aside any of the other provisions of Chapter 8. She stated that section 8-26(g) of the County Code makes clear that the issuance of a building permit by DPS does not affect an otherwise applicable zoning regulation (Chapter 59). In response to a Board question asking how Appellant could attack the finaling of the permit if the permit holder is on notice, from the time of the issuance of the permit, that they proceed at their own risk if they incur violations, and that they may be subject to enforcement proceedings as a result of those violations, Appellant asserted that the finaling of a permit means that conditions associated with that permit and the applicable zoning regulations have been satisfied, and that the County has finished its review for compliance.

[3] The Board Chair noted here that the Zoning Ordinance specifically exempts single family homes from having to obtain a certificate of use and occupancy. See Section 59-A-3.21(a) of the Zoning Ordinance.

CONCLUSIONS OF LAW

1. Section 2-112(c) of the Montgomery County Code provides the Board of Appeals with appellate jurisdiction over appeals taken under specified sections and chapters of the Montgomery County Code, including sections 2B-4, 4-13, 8-23, 15-18, 17-28, 18-7, 22-21, 23A-11, 24A-7, 25-23, 29-77, 39-4, 41-16, 44-25, 46-6, 47-7, 48-28, 49-16, 49-39A, 51-13, 51A-10, 54-27, and 58-6, and chapters 27A and 59.

2. Section 2A-2(d) of the Montgomery County Code provides that the provisions in Chapter 2A govern appeals and petitions charging error in the grant or denial of any permit or license or from any order of any department or agency of the County government, exclusive of variances and special exceptions, appealable to the County Board of Appeals, as set forth in Section 2-112, Article V, Chapter 2, as amended, or the Montgomery County Zoning Ordinance or any other law, ordinance or regulation providing for an appeal to said board from an adverse governmental action.

3. 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, a Motion to Dismiss was filed by Montgomery County. Board Rule 3.2 specifically confers on the Board the ability to grant Motions to Dismiss for lack of jurisdiction (Rule 3.2.1) and in cases where there is no genuine issue of material fact and dismissal should be rendered as a matter of law. (Rule 3.2.2).

   Because granting of the Motions to Dismiss would eliminate the need for further proceedings (and the attendant preparation for those proceedings), the Board in this case took the unusual step of bifurcating this hearing such that the Board would hear oral argument on and would vote on the Motions to Dismiss one day and then, if the Motions were not granted, would take up the balance of the case during a second day of hearings.

4. Section 8-23(a) of the County Code provides that "[a]ny person aggrieved by the issuance, denial, renewal, or revocation of a permit or any other decision or order of the Department under this Chapter may 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."

5. Sections 8-26(b) and 8-26(g) of the County Code ("Compliance with Code") provide for compliance with Chapter 8 and Chapter 59 (the Zoning Ordinance) of the County Code, as follows:

   (b) *Compliance with code*. The permit shall be a license to proceed with the work and shall not be construed as authority to violate, cancel or set aside any of the provisions of this chapter except as specifically

stipulated by legally granted waivers or modifications as described in the application. 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.

(g) *Compliance with zoning regulations*. The building or structure must comply with all applicable zoning regulations, including all conditions and development standards attached to a site plan approved under Chapter 59. The issuance of a permit by the Department for the building or structure does not affect an otherwise applicable zoning regulation.

6. Section 8-22 of the County Code ("Violations") provides DPS with the following enforcement authority:

(a) *Notice of violation*. The director shall serve a notice or order on the person responsible for the erection, construction, alteration, extension, repair, use or occupancy of a building or structure in violation of the provisions of this chapter or any other applicable federal, state or local law or regulation or in violation of a detail statement or a plan approved there under or in violation of a permit or certificate issued under the provisions of this chapter; and such order shall direct the discontinuance of the illegal action or condition and the abatement of the violation.

(b) *Prosecution of violation*. If the violation cited in the notice or order is not abated within the period set forth in said notice or order, the director may institute the appropriate proceeding at law or in equity to restrain, correct or abate such violation or to require the removal or termination of the unlawful use of the building or structure in violation of the provisions of this chapter or of the order or direction made pursuant thereto.

(c) *Violation penalties*. Any person who violates a provision of this chapter or fails to comply with any of the requirements thereof or who erects, constructs, alters or repairs a building or structure in violation of an approved plan or who refuses, ignores or violates an order of the director or a condition of permit or certificate issued under the provisions of this chapter shall be subject to punishment for a class A violation as set forth in section 1-19 of chapter 1 of the County Code. Each day a violation continues to exist shall constitute a separate offense.

7. Section 59-A-3.21 of the Zoning Ordinance ("Use and Occupancy Permits; Generally") provides that (emphasis added):

A use-and-occupancy permit certifying compliance with this Chapter must be issued by the Director before any building, structure, or land can be used or can be converted, wholly or in part, from one use to another. However, **a use-and-occupancy permit is not required for:**

(a) **A building used exclusively as a one-family, detached dwelling or for uses incidental to the residential use.** A registered home occupation or a no-impact home occupation is deemed to be incidental to the residential use. A registered home health practitioner's office is not incidental; it requires a use-and-occupancy permit unless it is subject to the exemption provisions of Section 59-A-6.1(d)(9). The use-and-occupancy permit cannot be issued unless the practitioner has signed the Affidavit of Compliance required by Section 59-A-3.42.

(b) Land or buildings used exclusively for agricultural purposes.

(c) A use for which a valid occupancy permit was issued and not revoked immediately prior to June 1, 1958.

(d) A child day care facility for up to 8 children.

(e) A transitory use.

8. The "Charging Document" in this case asserts that DPS erred in approving the final inspection of residential building permit 423918 because it was issued as an addition permit where a new construction permit should have been required. Appellant indicates on the Charging Document that section 59-A-5.33 of the Zoning Ordinance ("Established Building Line") and that Zoning Code Interpretation ZP0204 ("Additions"), issued pursuant to section 59-A-5.33, were misinterpreted by DPS. Appellant states two reasons for her appeal on the Charging Document: first, that in accordance with the Board's decision in related case A-6185, too much of the exterior wall had been removed for the construction to be classified as an addition under ZP0204, and second, that the actual footprint of the building exceeds that allowed for an addition under ZP0204. See Exhibit 1.

   As evidenced by the Charging Document, Appellant in this case is challenging the finaling of this building permit on grounds that it did not comply with the Zoning Ordinance,[4] specifically Zoning Code Interpretation policy ZP0204 and underlying section 59-A-5.33 of the Zoning Ordinance. The Board accepts the unrefuted statement by counsel for DPS that the "final" inspection of a building permit is one of many inspections, like the footing and foundation and framing inspections, which are undertaken to determine the compliance of the construction with the building code. Similarly, the Board accepts the undisputed statement of counsel that this final inspection does not involve a zoning inspection. The Board notes that

[4] This is confirmed by Appellant's testimony: "[T]he area I appealed on the permit is something that would change the type of permit that was required because it was the footprint issue that effected [sic] the zoning regulation (presumably "which") was determined what type of permit was required." See Transcript at page 30.

Montgomery County Executive Regulation 24-04 confirms the correctness of both of these statements. See Exhibit 19. [5] The Board thus finds that the May 15, 2007, "final" inspection of building permit 423918 establishes neither compliance nor a failure to comply with section 59-A-5.33 of the Zoning Ordinance and related Code Interpretation ZP0204. The Board finds that the May 15 "final" inspection of this building permit is but one of a number of inspections intended to confirm that the construction allowed by the permit meets the applicable building codes. Thus the Board finds that the May 15 inspection does not constitute a decision affecting the rights of the permit holder to undertake this construction—that that decision was made on August 2, 2006, when the permit was issued and the right to proceed with construction was established.

Maryland courts have previously addressed the types of decisions that constitute events or decisions from which appeals can be taken. In *United Parcel Service, Inc. v. People's Counsel for Baltimore County*, 336 Md. 569, 650 A.2d 226 (1994), the Maryland Court of Appeals explained what constituted an appealable decision for purposes of Article 25A, Section 5(U) of the Annotated Code of Maryland.[6] In the *United Parcel Service* case, neighboring landowners appealed from the zoning commissioner's letter responding to their objection to his previous approval of a building permit application. In his letter, the commissioner explained and defended his prior decision to approve the building permit. The Court reasoned that an appealable event must be a final administrative decision, order or determination. The Court held that the commissioner's response letter was not an "approval" or "permission," but merely the reaffirmation of his prior approval or decision.[7] The Court reasoned that the words of the State law "obviously refer to an operative event which determines whether the

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[5] Section 57 of Montgomery County Executive Regulation 24-04, which adopts the 2003 International Building, Residential, Mechanical, Fuel-Gas, and Energy Conservation Codes, sets forth a list of required inspections for all buildings and structures, including sign, footings, foundation/parging, concrete slab-on-ground floor, wall check, masonry fireplace/flue, factory-built fireplace/flue, framing ("close-in"), well and septic systems, final, and re-inspection. As indicated by the title and summary of this Executive Regulation, it addresses construction and not zoning matters, and thus confirms the assertion made by counsel for DPS that the "final" inspection is an inspection for building code compliance, not zoning compliance.

[6] The Board finds that the Court's reasoning in this regard is applicable to the instant case even though as a technical matter, the Board's authority to hear appeals is derived from Article 28 of the Annotated Code, section 8-110(a)(4), which states that the "decisions of the administrative office or agency in Montgomery County shall be subject to an appeal to either the board of appeals or other administrative body as may be designated by the district council. In either county, the appeal shall follow that procedure which may from time to time be determined by the district council."

[7] The Board notes that the Court in the *UPS* case relied heavily on the *Hawk* decision, which was a Montgomery County case. In considering an appeal under Section 59-A-4.3 of the Montgomery County Zoning Ordinance, the Court in *Hawk* applied similar reasoning, and quoted with approval an underlying Hearing Examiner report, which had concluded that "The `decision' which is the subject of [the] Appeals . . . is not a final administrative decision, order or determination. It is at most a reiteration or reaffirmation of the final administrative decision or order of the department granting the original Use and Occupancy Certificate." *National Institutes of Health Federal Credit Union v. Hawk*, 47 Md. App. 189, 195, 422 A.2d 55, 58-59 (1980) *cert. denied* 289 Md. 738 (1981).

> applicant will have a license or permit, and the conditions or scope of that license or permit ….” The court found that the operative event occurred when the building permit was approved and issued, not when the commissioner sent his explanatory letter. “If this were not the case an inequitable, if not chaotic, condition would exist. All that an appellant would be required to do to preserve a continuing right of appeal would be to maintain a continuing stream of correspondence, dialogue, and requests…with appropriate departmental authorities even on the most minute issues of contention with the ability to pursue a myriad of appeals ad infinitum.” 336 Md. at 584, *quoting National Institutes of Health Federal Credit Union v. Hawk*, 47 Md. App. 189, 422 A.2d 55, 58-59 (1980) *cert. denied* 289 Md. 738 (1981).

As stated above, the Board’s authority is limited to the review of some “operative event” – that is, the affirmative approval or denial of some permit or other form of permission. The rights of the permit holder (the Intervenor in this case) to proceed with construction under building permit 423918 were conferred at the time that this permit was approved and issued, not at the time of the final inspection. The Board thus finds that the final inspection simply confirmed that the construction allowed by the permit satisfied the requirements of the applicable building codes, and as such did not confer any additional rights, approvals, or permission on the permit holder, and was not an “operative event.”

The Board is not persuaded by Appellant’s argument that, per Montgomery County Executive Regulation 24-04, the final inspection conveys a “right” to occupy the dwelling, and thus is the functional equivalent of a certificate of use and occupancy. While section 57, paragraph 10 of Executive Regulation 24-04 indicates that a final inspection must be requested and approved before a building can be used or occupied, it also states that a contract owner can waive the requirement for a final inspection, and that if an owner refuses access for a final inspection within a reasonable amount of time after a house is completed, DPS can close the permit file, but that doing so does not relieve the owner from any obligation to comply with applicable codes. There is no sanction set forth for occupancy in advance of or without a final inspection, and, under the County Code, the Board notes that the ability to occupy the premises does not sanction or ratify any zoning or other violations that might exist—any such violations would remain and would be subject to enforcement action by DPS. See section 8-22 of the County Code. In addition, section 59-A-3.21(a) specifically exempts single family dwellings from the requirement to obtain a use and occupancy permit. There is no similar exemption from the final inspection requirement. If one were to construe the final inspection under a building permit as the functional equivalent of the issuance of a certificate of use and occupancy, the Board notes that there would be no need for a certificate of use and occupancy, and yet the Code requires such a certificate “before any building, structure, or land can be used or can be converted, wholly or in part, from one use to another,” except as specified in section 59-A-3.21. Viewed from the opposite perspective, in the single family residential context, if a final inspection under a building permit were considered to be the same thing as the issuance of a use and occupancy permit, it would obviate

the need for the express exemption from the use and occupancy permit requirements that is carved out for single family residences in section 59-A-3.21(a). When the Board construes two provisions that involve the same subject matter, a harmonious interpretation is strongly favored. See *Dep't. of Public Safety & Corr. Servs. v. Beard*, 142 Md. App. 283, 302, 790 A.2d 57, *cert. denied*, 369 Md. 180, 798 A.2d 552 (2002) (citation omitted). The Board concludes that the only harmonious construction of these varying provisions is one that recognizes that a final inspection and the issuance of a certificate of use and occupancy are not functionally equivalent. To conclude that they are the same would render them redundant and, with respect to exemptions, inconsistent. The Court in *Hawk* confirmed these differences, indicating that DPS is required to review an application for a use and occupancy permit for more than mere compliance with the originally approved building permit; rather, that DPS must review the application for compliance with all zoning, building, fire safety, and other applicable County laws. See *National Institutes of Health Federal Credit Union v. Hawk*, 47 Md. App., 189, 198, 422 A.2d 55, 60 (1980).

9. Having found that a final inspection under a building permit is not an appealable decision, the Board does not address the County's arguments that the appeal was not timely and that Appellant is not aggrieved.

10. Pursuant to section 2A-8(i)(5) of the Montgomery County Code, the Board began the hearing by disposing of all outstanding preliminary motions and preliminary matters. Pursuant to this section and the Board's authority under section 2A-8(h) to rule upon motions, the Board grants DPS' Motions to Dismiss the instant matter.

11. The Motion to Dismiss in Case A-6224 is granted, and the appeal in Case A-6224 is consequently **DISMISSED**.

On a motion by Vice Chair Catherine G. Titus, seconded by Member Wendell M. Holloway, with Chair Allison I. Fultz and Member Caryn L. Hines in agreement, and Member David Perdue necessarily not participating, the Board voted 4 to 0 to grant the Motion to Dismiss and thus to dismiss the appeal, and adopted 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 21st day of March, 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. It is each party's responsibility to participate in the Circuit Court action to protect their respective interests. In short, as a party you have a right to protect your interests in this matter by participating in the Circuit Court proceedings, and this right is unaffected by any participation by the County.