

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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Case No. A-6231

APPEAL OF MARGARET MCCANN AND STEPHEN POOR

OPINION OF THE BOARD

(Hearings held December 12, 2007 and March 26, 2008.
Matter decided at Worksession on April 16, 2008.
Effective Date of Opinion: August 13, 2008.)

Case No. A-6231 is an administrative appeal filed August 27, 2007, by Margaret McCann and Stephen Poor (the "Appellants"). The Appellants charge error on the part of Montgomery County's Department of Permitting Services ("DPS") in the issuance of Building Permit No. 460843, originally issued July 26, 2007, for the construction of a deck attached to the existing home on the property located at 32 Eastmoor Drive, Silver Spring, Maryland 20901 (the "Property"), in the R-60 zone. Specifically, the Appellants assert that DPS incorrectly issued the subject building permit, and that it should have been denied.

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 December 12, 2007. The hearing was continued on March 26, 2008. The matter was decided by the Board at a Worksession on April 16, 2008, after being held open for additional information regarding the average setback of the attached deck from the rear line and the origin of an annotation made during plan review.

The Appellants were represented by David W. Brown, Esquire, and Norman Knopf, Esquire, of Knopf & Brown. Moses M. Mongo and Doris N. Mongo, the owners of the subject Property and the holders of the Building Permit at issue in this case, intervened (the "Intervenors"), and appeared pro se. Assistant County Attorney Malcolm Spicer represented DPS.

Decision of the Board: Administrative appeal DENIED.

FINDINGS OF FACT

The Board finds by a preponderance of the evidence that:

1. The Property, known as 32 Eastmoor Drive in Silver Spring, is an R-60 zoned parcel identified as Lot 27, Block 31, in the Woodmoor subdivision.
2. On July 24, 2007, Intervenor Moses Mongo applied to DPS for a building permit to construct an attached deck at the subject Property. Building Permit No. 460843 was issued on July 26, 2007, for the requested deck.
3. On August 27, 2007, Appellant timely filed this appeal, charging error by DPS in its decision to issue Building Permit 460843.
4. Ms. Susan Scala-Demby, Zoning Manager for the Department of Permitting Services, testified on behalf of DPS. She testified that DPS issued Building Permit No. 460843 to Mr. Mongo for construction of a triangular-shaped, attached deck on the rear of the house. See Exhibits 5(a) and (b). Ms. Scala-Demby testified that the deck was not considered an accessory structure because it was attached to the house. She testified that DPS did not identify any development standards which would prevent the issuance of this permit.

In response to a Board question about the site plan for the new attached deck (Exhibit 5(b)), Ms. Scala-Demby testified that the rectangular area shown on the site plan to the left of the area for the attached deck was a free-standing deck. She testified that the free-standing deck was built pursuant to Building Permit 453574, which was issued May 16, 2007.¹ She testified that the DPS reviewer would have looked at all prior permits when issuing the permit in question, and that DPS knew that the rectangular area was a free-standing deck when it issued the permit for the attached deck. In response to another Board question, Ms. Scala-Demby testified that the notation on Exhibit 5(d), page 7, which says "DO NOT ATTACH TO ADJACENT DECK," would have been written by the building plan reviewer,² and that it indicates that the decks would not be connected. When asked why such a notation would have been added, she stated that there may be different setbacks required if the decks were attached.

Ms. Scala-Demby testified that she was familiar with the subject Property, and that the plat for the Property (Plat 2364) was recorded in 1949. See Exhibit 9. She testified that because the lot was platted in 1949, the 1941 Zoning Ordinance development standards applied to the construction of the deck. She testified that the deck met all of the requirements of the 1941 Ordinance, which she testified required an average rear yard setback of 20 feet, but not less than a 15 foot (rear) setback in any one place.³ See Exhibit 11, December 12 Tr. at page 17.

¹ Exhibit 10 contains the site plan submitted for permit 453574. It shows an 8' x 24' detached deck.

² On cross-examination, Ms. Scala-Demby indicated that she did not make that notation on the plans, and that she did not know who did. At the request of the Board, Counsel for DPS sent a letter dated 4/8/08 to the Board, which indicated that the notation in question was made by Russell Gordon.

³ Counsel for DPS stated that Section 50-B-3.1 of the Zoning Ordinance allows an exemption for projections, regardless of the Zoning Ordinance that is used to set the minimum yard requirements. This was accepted by

On cross-examination, Ms. Scala-Demby stated that she did not know if, when this permit was issued, a calculation of the average rear setback had been done. When opposing counsel suggested that because the 1941 Zoning Ordinance included a general exception that allowed unenclosed porches to extend 9 feet into the front yard, but was silent with respect to such projections to the rear, that it should be construed to prohibit such projections to the rear, Ms. Scala-Demby disagreed and stated that DPS didn't do it that way. She testified that DPS uses current Zoning Ordinance standards when addressing accessory structures. Opposing counsel then stated that it was his clients' position that the 1941 Zoning Ordinance requirements did not apply to the deck, and that if the current Zoning Ordinance was to be considered, the deck would have to meet an average rear yard setback of 11 feet.⁴ Opposing counsel argued that the attached deck meets that setback, but that because he views the attached deck as integrated with the freestanding deck, the two decks taken together would violate the setback requirements. See December 12 Tr. at pages 34-35.

5. Mr. Stephen Poor, Appellant, testified that he lives behind the subject Property at 103 Lynnmoor Drive, and that his rear yard abuts the rear yard of the Property. He testified that there is a two-story addition on the rear of the subject Property,⁵ and that the decks are accessed through French doors in the addition. He testified that the new, attached deck is really a third deck, testifying that the house originally had a small, triangular deck that was built at the same level as the French doors in the addition. He testified that the deck built pursuant to Building Permit 453574 (the deck referred to by DPS as the "freestanding deck" and that will be referred to in Mr. Poor's testimony as the "accessory deck") is 6 feet from his property line. He testified that he did not believe there were any steps from the decks to the yard, but that there may have been at one point.

Mr. Poor testified that when anyone is on the accessory deck, because of its elevation, it feels as though they are in his (Poor's) house, especially in the bathroom and bedroom. He testified that the accessory deck also peers into their patio and backyard, which they use frequently. He presented photographs depicting the view of the accessory deck from his property. See Exhibit 8.

Mr. Poor testified that the attached deck started out as a "build-in" to the accessory deck, with one set of framing. When asked by the Board if construction of the accessory deck and attached deck was simultaneous, Mr. Poor testified that the construction of the decks has been a series of builds and tear-downs. He testified that the accessory deck was built first, and that for a period of time there was an open triangular area between it and the house. He testified that he had complained to DPS that the accessory deck was unsafe and not compliant with the Building Code, and that stop work orders were issued until corrections were made. He testified that he had complained again when he saw the build out of the attached deck being completed by attaching it to the framing of the

opposing counsel—see footnote 4.

⁴ This was calculated by taking the 20 foot average rear setback found in the 1941 Zoning Ordinance and applying the 9 foot allowance for projections set forth in Section 59-B-3.1(a) of the current Zoning Ordinance. Because the Board ultimately found that the attached and freestanding decks were separate structures, the setback issue with respect to the attached deck is not germane to the Board's determination.

⁵ The addition extends towards the rear from the northeast corner on the back of the original home. See Exhibit 5(b).

accessory deck, resulting in a single deck at one point in time. He testified that he met with Susan Scala-Demby and Robin Ferro at DPS to try to get information and drawings pertaining to the deck(s), and that he told them that the attached and accessory deck were in fact one big deck. He testified that after he complained, he heard sawing, and that the headers for the attached and accessory decks were then 1 or 2 inches apart, and the accessory and attached decks were separated into two structures, very close to each other.⁶ He stated that the railing goes all the way around except for one area, which appears to have been left for stairs. He testified that the two decks are used and function as a single structure.

On response to cross-examination by Mr. Mongo, asking how Mr. Poor how many times he had called the County about the subject Property, Mr. Poor testified that "it may be in the three digits." March 26 Tr. p. 51. When asked how many appeals he had filed, Mr. Poor stated that this was the first one.

6. Ms. Margaret McCann, Appellant and wife of Stephen Poor, testified that she had filed an appeal in 2004 when Mr. Mongo had constructed his addition, but that she had later withdrawn it. Ms. McCann reiterated the testimony of her husband that the attached and accessory decks function as a single structure, and that they look right into the bedroom, bathroom, and kitchen of her house. She testified that the deck is huge, and that the noise from the deck hovers over her backyard. She testified that they had difficulty getting plans for the deck from DPS.

7. Mr. Moses Mongo, Intervenor, testified that he had submitted plans and applied for a permit to construct the freestanding/accessory deck, and that DPS had given him a permit prior to the start of construction. He testified that he built the deck, and that DPS had inspected and approved it (footings, framing, etc.). He testified that one month later, he applied for a permit for an additional deck (the attached deck). He testified that DPS also inspected and approved the footings and framing of that deck. He testified that the two decks were not planned together. He testified that he had tried to "play by the rules of the County," and that whatever he and his wife have done, they have followed the law. He stated that they made plans, presented them to DPS, paid the relevant fees, and called for necessary inspections. He testified that they made corrections when instructed to do so by DPS.

He testified that the DPS plan reviewer had added the notation on Exhibit 5(d), that the attached deck was not to be attached to the adjacent deck. He testified that he did not see the plan reviewer make the notation, but that it was made after he gave the plans to the plan reviewer, while he waited. He introduced photographs showing the distance between the Poor/McCann house and the fence. See Exhibits 19(a), (b) and (c). He testified that his freestanding/accessory deck is six feet from the fence. See Exhibit 20.

⁶ After the conclusion of Mr. Mongo's testimony, Mr. Poor was recalled to reconfirm his testimony regarding the sawing and separation of the decks. He testified at the time that he saw Mr. Mongo with a skill saw cut the floor joists for the two decks, which he testified were at one point attached, so that separate headers could be added to support the most recent deck independent of the freestanding/accessory deck.

In response to questions from the Board, Mr. Mongo testified that the plans submitted for Building Permit 460843 do not show that the attached deck was to be attached at any point to the freestanding/accessory deck, and that, as it exists today, the attached deck is not attached at any point to the freestanding/accessory deck. He further testified that Exhibit 18 shows that the railing around the two decks is not connected, and pointed out the end poles, one holding the railing for the freestanding deck, and the other holding the railing for the attached deck. He testified that the poles are close to one another, but are not attached together. He testified that the separation distance between the decks is about an inch or two. Finally, he testified that neither the building permit for the attached deck nor the building permit for the freestanding/accessory deck had ever been denied.

In response to cross-examination by opposing counsel, Mr. Mongo testified that you can now go from the French doors to the accessory deck just by walking on the attached deck. He testified that he did have to make some corrections on the attached deck as a result of DPS inspections, but that the corrections did not result in the issuance of a new building permit. When asked what the sawing that Mr. Poor had testified to was, Mr. Mongo testified that it was pole separation. He testified that he had constructed the freestanding and attached decks separately so that they were an inch or two apart without the necessity for cutting any wood that connected the two. He testified that there is no railing between the attached and freestanding/accessory decks, and that the County requires only external railing (for security). He testified that the decks are constructed at the same level.

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*.

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. The Appellants in this case challenged the issuance of building permit 460843 on grounds that it permitted construction of an attached deck which would be "functionally integrated" with an existing detached deck, effectively converting the two decks into a single, attached deck which violates the setback requirements. The Board notes that the building permit for the freestanding deck was not appealed and is not at issue in this appeal.

4. The Board finds, based on the testimony and evidence of record, that the attached deck, built pursuant to building permit 460843, is not connected to the freestanding deck. Mr. Mongo testified that the two decks are separated by an inch or two, that they were not planned together, that they were permitted separately, and that they were never connected. Mr. Poor testified that the decks had been connected, but that they had been (and currently are) sawed apart, and that “now it’s two structures that which [sic], actually they are very close to each other.” See March 26 Tr. at page 40. Despite the inconsistent testimony regarding whether the decks had ever been connected, the testimony is consistent that at present, the decks are not physically joined and are two separate structures, however small the separation. Mr. Mongo’s testimony and photographic evidence shows that the decks are bounded by separate railings with different end posts. See Exhibit 18, March 26 Tr. at page 84. There is no dispute amongst the parties that the attached deck, considered on its own, meets the setback requirements of the Zoning Ordinance,⁷ and the Board so finds. See December 12 Tr. at page 17, Exhibit 10, and the 4/8/08 letter from Counsel for DPS to Board Chairman Fultz, confirming that the attached deck complies with the average rear setback. Indeed, Appellants did not challenge the attached deck on those grounds.⁸

Having found that the attached deck is physically separated from the freestanding deck, and given that all testimony and evidence of record indicates that this deck, considered on its own, meets the relevant setback requirements, and there being no other matters in dispute, the Board concludes that DPS properly issued building permit 460843. The Board does not accept Appellants’ argument that the attached and freestanding decks were “functionally integrated.” The Zoning Ordinance does not establish a minimum separation distance below which physically separate structures will be considered to be a single structure. Indeed, Appellants’ counsel admits this. See March 26 Tr. at page 113. The Board views the fact that these structures are physically separated, notwithstanding the extent of that separation, as a bright line establishing that the attached deck and the accessory structure (freestanding deck) are separate structures for the purposes of the setbacks required by the Zoning Ordinance.

⁷ Section 59-B-3.1(a) permits open steps and stoops, exterior stairways, terraces, and porches to extend into any minimum front or rear yard not more than 9 feet. Under the 1941 Zoning Ordinance, the required rear yard setback was an average of 20 feet, at no point no less than 15 feet. Applying the 9 foot allowance, the attached deck could reduce the rear setback to an average of 11 feet, no less than 6 feet. The evidence in this case shows that at its closest, the attached deck is approximately 16.4 feet from the rear line. See Exhibit 10. Ms. Scala-Demby testified that the attached deck met the required setbacks, and that testimony was not challenged. See Dec. 12 Tr. at page 17. At the request of the Board, Counsel for DPS submitted a letter to the Board, dated 4/8/08, which calculated the average rear yard setback for the attached deck as 23.72 feet to the first floor, and 23.25 feet to the second floor. Just as the 16.4 foot measurement exceeds the 15 foot minimum setback without invoking the additional 9 foot allowance for projections, so these measurements also exceed the 20 foot average minimum setback allowed without taking into account the 9 foot allowance for projections that Counsel for DPS and Counsel for the Appellants both agree is permitted by Section 59-B-3.1(a).

⁸ See December 12 Tr. at pages 34-35 (“Mr. Brown: ‘It’s not our position that the attached deck violates the 1941 ordinance. That’s not why we came here today. We are here today because we believe the attached deck violates the 9-foot requirement in the current law. When [sic] you take into account the fact that the attached deck and the unattached deck are functionally integrated and one in the same thing. That’s why we’re here.’”).

4. 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. 460843 was properly issued.

The appeal in Case A-6231 is **DENIED**.

On a motion by Member David Perdue, seconded by Member Catherine G. Titus, with Chair Allison I. Fultz and Members Wendell M. Holloway and Caryn L. Hines in agreement, the Board voted 5 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 13th day of August, 2008.

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 accordance with the Maryland Rules of Procedure (see Section 2-114 of the County Code).