

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
240-777-6600

www.montgomerycountymd.gov/content/council/boa/index.asp

Case No. A-6234

APPEAL OF KENNETH L. HANKIN

OPINION OF THE BOARD

(Hearing held January 16, 2008)
(Effective Date of Opinion: March 21, 2008)

Case No. A-6234 is an administrative appeal filed November 2, 2007, by Kenneth L. Hankin (the "Appellant"). The Appellant charges error on the part of the County's Department of Public Works and Transportation ("DPWT") in its October 3, 2007 issuance of an Invoice for a Transportation Management District Fee (the "Invoice")("TMD fee") for the property located at 12311 Parklawn Drive in Rockville, Maryland (the "Property"). Specifically, the Appellant asserts that DPWT misinterpreted Council Resolution 15-1481 and section 42A-29 of the Montgomery County Code.

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 16, 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. Clifford L. Royalty, Esquire, Chief of the Division of Zoning, Land Use, and Economic Development, represented the County. Anne C. Martin, Esquire, of Linowes and Blocher, appeared on behalf of the Appellant.

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 12311 Parklawn Drive in Rockville, Maryland 20852, is an I-4 zoned parcel, also identified as Lot 16, Block E.
2. On October 3, 2007, Arthur Holmes, Jr., Director of DPWT, sent correspondence and an Invoice for Transportation Management Fees for the subject Property to Kenneth L. Hankin and Rockville Land LLLP. See Exhibits 3(a) and (b).
3. Appellant filed this administrative appeal on November 2, 2007.

MOTION TO DISMISS—SUMMARY OF ARGUMENTS

4. Counsel for DPWT argues that the Board's authority to hear administrative appeals is derived exclusively from the Montgomery County Code, and that Section 2-112 of the Code identifies the Code sections under which an appeal may be taken to the Board. Counsel states that neither Chapter 42A, nor any section of Chapter 42A, is listed in Section 2-112. Counsel further states that Chapter 42A contains no language to permit or suggest that a decision or action of DPWT taken under that Chapter can be appealed to the Board. Instead, Counsel states that Chapter 42A provides that DPWT may enforce its provisions through the issuance of a civil citation.¹ Thus Counsel argues that the Board has no jurisdiction over this matter, and as a consequence, must dismiss it.

Counsel also argues that the October 3, 2007 Invoice is, at most, a reiteration of an earlier Invoice, which was sent on or about April 30, 2007, and as such, pursuant to *National Institutes of Health Federal Credit Union v. Hawk*, 47 Md. App. 189, 195, 422 A.2d 55, 59 (1980), is not a final, appealable determination or order.

5. Counsel for the Appellant argues that each piece of correspondence received by Appellant is a "reissuance" of the Invoice, and as such, can be appealed. Counsel states that Appellant filed this appeal as a precaution to make sure that all administrative remedies have been exhausted, and indicates that she does not anticipate that the Board will hear the appeal. Counsel argues that Section 59-A-4.11(c) of the Montgomery County Zoning Ordinance and Sections 2-112(d) and 2A-2(d) of the County Code confer broad jurisdiction on the Board, jurisdiction broad enough to encompass this appeal.

Appellant's Response to the County's Motion to Dismiss includes a Motion to Stay this action pending the outcome of an administrative mandamus action filed with the Circuit Court and pending issuance of any civil citation in connection with Appellant's failure to pay the requested TMD fees. In

¹ See Section 42A-30 of the County Code.

addition, Counsel requests, if the Board is inclined to dismiss this appeal, that it be dismissed without prejudice.

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 2-112(d) provides that “[t]he Board must hear and decide any other appeal authorized by law.”
3. 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.
4. 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 and vote on the Motions to Dismiss one day and then, if the Motions were not granted, would take up the balance of the case at a later date.

5. Section 59-A-4.11(c) of the Zoning Ordinance provides that the Board of Appeals may hear and decide “[a]ppeals from any refusal to issue a building or use-and-occupancy permit, or from any order or decision of the Department or the Commission, when passing upon an application for a

building or other permit, or by any other officer or body, under this chapter.”

6. Appellant in this case asserts that DPWT erred in issuing its October 3, 2007 letter and Invoice for a Transportation Management District fee owed in connection with the subject Property, contending that Section 42A-29 of the Montgomery County Code and Council Resolution 15-1481 were misinterpreted. Section 42A-29 of the County Code authorizes the Council, by resolution, to set TMD fees, as follows:

Sec. 42A-29. Transportation Management Fee.

(a) Authority.

(1) The Council may by resolution adopted under Section 2-57A² set the transportation management fee that the Department must annually charge, under the Alternative Review Procedures in the Growth Policy, an applicant for subdivision or optional method development approval in a district and each successor in interest.

(2) If the resolution creating a district authorizes the Department to charge a transportation management fee to any of the following persons, the Council may, by resolution adopted under Section 2-57A, set the fee that the Department must charge:

(A) an applicant for subdivision or optional method development in the district who is not subject to a transportation management fee under the Alternative Review Procedures in the Growth Policy and each successor in interest; and

(B) an owner of existing commercial and multi-unit residential property in the district.

(b) Use of revenue. The revenue generated by a transportation management fee must be used in the district in which the development or property subject to the fee is located to cover the cost of:

(1) administering the district, including review and monitoring of traffic mitigation plans under Section 42A-24 and traffic mitigation agreements under Section 42A-25; and

(2) any program implemented under Section 42A-23(b), including any vehicle or other equipment necessary to carry out the program.

² Section 2-57A, Fees and Charges, states the following:

“All fees, charges, and fares for any transportation or transportation-related service or product provided by the Department must be set by Council resolution adopted after a public hearing and approved by the Executive, unless any law expressly requires a different process. If the Executive disapproves a resolution within 10 days after it is adopted and the Council readopts it by a vote of six Council members, or if the Executive does not act within 10 days after the Council adopts it, the resolution takes effect.”

- (c) Rate. The rate of a transportation management fee must be set to produce not more than an amount of revenue substantially equal to the:
 - (1) portion of the cost of administering the district, including the review and monitoring of traffic mitigation plans under Section 42A-24 and traffic mitigation agreements under Section 42A-25, reasonably attributable to the transportation effects of the development or property subject to the fee; and
 - (2) portion of the cost of any program implemented under Section 42A-23(b), including any vehicle or other equipment necessary to carry out the program, reasonably attributable to the transportation effects of the development or property subject to the fee.
- (d) Method. A transportation management fee may be assessed on:
 - (1) the gross floor area, the maximum or actual number of employees, or the average number of customers, visitors, or patients, in a nonresidential building;
 - (2) the number of dwelling units, or the gross floor area, in a residential building;
 - (3) the number of parking spaces associated with a building; or
 - (4) any other measurement reasonably related to transportation use by occupants of, employees located in, or visitors to a particular development or property.
- (e) Variation. The transportation management fee and the basis on which it is assessed may vary from one district to another and one building category or land use category to another.

Council Resolution 15-1481 sets the TMD fees, as required by Section 42A-29.

7. As stated in *National Institutes of Health Federal Credit Union v. Hawk* (47 Md. App. 189; 196, 422 A.2d 55 (1980)), “[a]n appeal requires authorization by statute regardless of the persons or agencies involved in the controversy. Consequently, where a specific remedy and procedure for appeal are provided by statute, they must scrupulously be followed.” [internal citations omitted]

The Board finds that it has no statutory authorization to hear an appeal taken from an action taken under Chapter 42A. In reaching this conclusion, the Board finds that Section 2-112(c) of the County Code, which lists those Chapters and Sections of the Code over which the Board of Appeals has appellate jurisdiction, does not expressly list Chapter 42A or any section(s) of that Chapter, and thus does not confer on the Board appellate jurisdiction over actions taken pursuant to Chapter 42A. Similarly, the body of Chapter 42A does not include any sections which confer appellate jurisdiction on the Board of Appeals; and thus Section 2-112(d) of the County Code, which provides that “[t]he Board must hear

and decide any other appeal authorized by law,” does not provide a basis for the Board to hear appeals from actions taken under Chapter 42A.

The Board reaches this same conclusion in reviewing the Board’s authority under Section 59-A-4.11(c) of the Zoning Ordinance, which provides that the Board of Appeals may hear and decide “[a]ppeals from any refusal to issue a building or use-and-occupancy permit, or from any order or decision of the Department or the Commission, when passing upon an application for a building or other permit, or by any other officer or body, under this chapter.” The Board in this case is not being asked to review a building or use and occupancy permit, nor is it being asked to review an order or decision by the Maryland-National Capital Park and Planning Commission (“Commission”) or DPS (“Department”), or any other officer or body, made in connection with the application for a building or other permit under the Zoning Ordinance (Chapter 59). Appellants in this case are requesting review of an action taken pursuant to Chapter 42A, and that review falls outside of the jurisdiction conferred on the Board by Section 59-A-4.11(c).

In addition, the Board finds that a specific remedy for violation of Section 42A-29 is set forth in Section 42A-30, and that that remedy is not an appeal to the Board:

“The Department [of Public Works and Transportation] must enforce this Article.³ An employer that does not submit a traffic mitigation plan or provide survey data within 30 days after a second notice has committed a class C violation. An owner who does not submit a traffic mitigation plan within 30 days after a second notice has committed a class C violation. A party to a traffic mitigation agreement under Section 42A-26 who does not comply with the agreement within 30 days after notice has committed a class A violation.”

Finally, the Board finds that it lacks jurisdiction to review actions taken pursuant to Council Resolution 15-1481, required by Section 42A-29, for substantially the same reasons. Neither Section 2-112 of the County Code nor Section 59-A-4.11(c) of the Zoning Ordinance confers on the Board appellate jurisdiction over Council Resolutions. The Appellant has not identified any authority that would suggest that the Board has such jurisdiction, and the Board concludes that it is without jurisdiction to consider an appeal of Council Resolution 15-1481.

9. Having concluded that the Board does not have jurisdiction to hear this appeal, the Board does not address the County’s argument that the October 3, 2007, correspondence is not a final, appealable determination. In addition, having concluded that this appeal must be dismissed for lack of jurisdiction, the Board does not address Appellant’s Motion for Stay, as the Board has no authority to order a stay in a matter over which it lacks jurisdiction.

³ “Article” refers to Article II of Chapter 42A. Section 42A-29 is in Article II.

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. For the reasons stated in this Opinion and pursuant to the Board's authority under section 2A-8(h) to rule upon motions, the Board grants the County's Motion to Dismiss the instant matter.
11. The Motion to Dismiss in Case A-6234 is granted, and the appeal in Case A-6234 is consequently **DISMISSED** without prejudice.

On a motion by Member Wendell M. Holloway, seconded by Vice Chair Catherine G. Titus, 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.