BOARD OF APPEALS
for
MONTGOMERY COUNTY

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Case No. A-6550

APPEAL OF LARRY J. AND SHARON J. CREWS

OPINION OF THE BOARD
(Hearing held May 2, 2018)
(Effective Date of Opinion: June 15, 2018)

Case No. A-6550 is an administrative appeal filed January 19, 2018 by Larry J. and Sharon J. Crews (the "Appellants"). The Appellants charge error on the part of the Montgomery County Department of Permitting Services ("DPS") in its denial of their application for a shed permit based on lot coverage. The subject Property is located at 812 Snider Lane, Silver Spring, Maryland (the "Property"), in the RE-1 zone. The RE-1 zone is a residential detached zone classification under 59-2.1.3.C.1 of the Zoning Ordinance.

Pursuant to section 59-7.6.1 of the Zoning Ordinance, the Board held a public hearing on May 2, 2018.[1] The Appellants appeared *pro se*. Associate County Attorney Charles L. Frederick represented Montgomery County. Mary Hemingway and Michele L. Albornoz, who were admitted to the proceeding as Intervenors at the pre-hearing conference on February 14, 2018, appeared *pro se*.

Decisions of the Board: DPS's Motion to Dismiss **DENIED;**
Intervenors' Motion to Strike **GRANTED;**
Administrative appeal **DENIED.**

Pursuant to the County Code, section 2A-8 and Board Rule 3.2, the County submitted a Motion to Dismiss the administrative appeal. The Appellants filed a Response to the County's Motion to Dismiss as well as a Revised Response to the County's Motion to Dismiss. The Board, pursuant to Board Rule 3.2.5, heard oral argument on the Motion for Summary Disposition at the commencement of the public hearing.

[1] The public hearing was originally scheduled for March 21, 2018 but had to be postponed because Montgomery County Public Schools and the Montgomery County government were closed on March 21, 2018 due to winter weather.

PRE-HEARING MOTIONS — SUMMARY OF ARGUMENTS

Mr. Frederick, on behalf of the County, argued that the Appellants had applied for a building permit for two sheds, No. 780917, and that application was denied by DPS on November 17, 2016. Mr. Frederick further argued that the current building permit application at issue in this appeal, No. 824343, is the exact same permit application as No. 780917 previously denied by DPS. He argued that, under *National Institute of Health Federal Credit Union v. Hawk*, 47 Md. App. 189 (1980), the Appellants cannot continue to file the same building application in order to extend the Board's jurisdiction over this matter. Mr. Frederick argued that the Appellants should have filed this administrative appeal in November of 2016, when the original building permit (No. 780917) was denied; because they did not, the Board lost jurisdiction over this matter.

The Appellants, in opposition, argued that DPS had advised them to file a variance request upon the denial of No. 780917, that they did file for a variance, and that the Board denied the variance request. The Appellants argued that this new application, No. 824343, is a new and different application because it changes the location of the two sheds. The Appellants argued that DPS had rejected another of their applications and did not assign that application a case number because it was a duplicate of No. 780917, but that for No. 824343, DPS accepted the application, assigned the case a number, and then denied issuance of the building permit. The Appellants argued that DPS advised them to submit a changed site plan and that they are permitted to submit another application for new structures at new locations.

The Board found that the Appellants had submitted revised plans for No. 824343 and that DPS accepted these revised filings and issued a denial of the requested building permit on January 7, 2018, which was properly and timely appealed to the Board. The Board further notes that the Appellants relied upon their interactions with DPS in submitting the revised application and should not be denied their right to a public hearing on their administrative appeal.

On a motion by Member Katherine Freeman, seconded by Member Stanley B. Boyd, with Chair John H. Pentecost, Vice Chair Edwin S. Rosado, and Member Bruce Goldensohn in agreement, the Board voted 5 to 0 to deny the County's Motion to Dismiss.

The Intervenors also sought to strike "Exhibit A", submitted in several versions by the Appellants, as irrelevant and immaterial to this administrative appeal. The Intervenors argued that the statements made in "Exhibit A" were false, misrepresentative, and defamatory. Originally marked Exhibit 14(c), the Intervenors argued this exhibit (also found as an attachment to Exhibit 19(b)) should be struck from the record pursuant to the Board's authority under section 2A-8(e) of the

County Code. The Appellants stated that they would not have a problem with striking "Exhibit A" and acknowledged that the document was submitted for background and was not directly relevant to this appeal.

On a motion by Chair John P. Pentecost, seconded by Member Stanley B. Boyd, with Vice Chair Edwin S. Rosado, Member Bruce Goldensohn, and Member Katherine Freeman in agreement, the Board voted 5 to 0 to strike "Exhibit A" and any reiteration of "Exhibit A" from the record.

FINDINGS OF FACT

The Board finds by a preponderance of the evidence that:

1. The Property is located at 812 Snider Lane, Silver Spring, Maryland 20905, and is zoned RE-1.

2. On January 19, 2018, DPS denied the Appellants' permit application for two sheds the Appellants had installed on the Property. See Exhibit 3. The reasoning for the denial was "the maximum footprint of all the accessory structures combined cannot equal more than 50% of the footprint of the principle structure allowed per Section 59.4.4.6.B.2.d." See Exhibit 3. DPS explained that all accessory structures on the Property equaled 142% of the footprint of the principal structure. See Exhibit 3.

3. On January 19, 2018, the Appellants timely filed this appeal to the Board of Appeals. See Exhibit 1.

4. Mark Beall, Zoning Manager, Division of Zoning & Site Plan Enforcement for DPS, testified that he has been in his position since June of 2014 and that he has been employed with DPS since September of 2001. He testified that in the course of his employment, he supervises building permit applications and interprets the Zoning Ordinance. Mr. Beall testified that he reviewed and denied the Appellants' building permit that is the subject of this administrative appeal. See Exhibit 3.

Mr. Beall testified that the Appellants had previously submitted a permit application and site plan for two sheds on the Property, No. 780917, and that application was denied by DPS on November 17, 2016. See Exhibit 11(b), circle 4-6. Mr. Beall testified that after DPS's review of No. 780917, he met with the Appellant Larry Crews and informed the Appellant Larry Crews that the two sheds were over the lot coverage allowed on the Property. He testified that he informed the Appellants in November of 2016 that DPS interprets "an accessory building" in the Zoning Ordinance as all of the accessory buildings combined. Therefore, he testified that all of the accessory buildings on the Property combined cannot have a

maximum footprint over 50% of the footprint of the main building. Mr. Beall testified that at that time, he informed the Appellant Larry Crews that he had three options: remove the sheds; file an administrative appeal; or apply for a variance. He testified that the Appellants elected to apply for a variance, which the Board denied.

Mr. Beall further testified that the current appeal concerns two canopy sheds on the Property and that the square footage of the sheds had not changed since 2016. He testified that all the accessory buildings on the Property still add up to 142% of the footprint of the main building. He testified that he reviewed permit application No. 824343 and issued the denial letter. See Exhibit 3. Mr. Beall testified that he calculated the square footage of the main building on the Property to be 1,176 square feet. He testified that the square footage of all the accessory buildings on the Property were: one storage shed, 840 square feet; one shed, 200 square feet; two canopy sheds that are the subject of this appeal, each 200 square feet; and three other buildings further to the rear of the Property, 130, 100, and 200 square feet, respectively. Mr. Beall testified that these accessory buildings combined to almost one and one-half times the size of the main building.

Mr. Beall testified that all the structures outlined above meet the Zoning Ordinance definition of an accessory structure. He testified that the principal use of the house on the Property, pursuant to the tax records, is residential, and that all other structures are accessory. He testified that, pursuant to section 59-3.7.4.A.1 of the Zoning Ordinance, an accessory structure is one that is subordinate to and on the same lot as the principal building, and that all these structures meet that standard.

Mr. Beall testified that under section 59-1.4.1.E of the Zoning Ordinance, "[t]he singular includes the plural and the plural includes the singular." He testified that this building permit denial is based on footnote d. of section 59-4.4.6.B.2 of the Zoning Ordinance, under which "[t]he maximum footprint of an accessory building on a lot where the main building is a detached house is 50% of the footprint of the main building or 600 square feet, whichever is greater." He testified that although the statute says "an accessory building," because the singular includes the plural, DPS interprets the Zoning Ordinance to mean all accessory buildings together must meet this 50% rule.

Mr. Beall testified that under the 2004 Zoning Ordinance, DPS interpreted this 50% rule to refer to each accessory building individually, not cumulatively. He testified that since the implementation of the 2014 Zoning Ordinance, which is the current version of the Ordinance, DPS has consistently interpreted the 50% rule to include all accessory buildings on the property.

On cross-examination by the Appellants, Mr. Beall testified that the 2004 Zoning Ordinance contained definitions for a front and a rear yard. He testified that

the Ordinance stated that no more than 20% of the rear yard could be covered by an accessory building or structure. Mr. Beall testified that this requirement was deleted from the 2014 Zoning Ordinance. He testified that if the term "an accessory building" is not considered to be cumulative under the 2014 Zoning Ordinance, then an entire yard could be covered with accessory buildings, in which case the use would become storage, which is not permitted in the RE-1 zone. Mr. Beall summarized that, under the 2014 zoning re-write, DPS's interpretation of "an accessory building" became cumulative for all accessory structures. He testified that since 2014, DPS has denied numerous permits based on this cumulative interpretation of the 50% rule.

On further cross-examination by the Appellants, Mr. Beall acknowledged that he had suggested the Appellants change their application after the 2016 permit denial and reapply. In response to Board questions, Mr. Beall testified that he suggested the Appellants re-submit their permit application in case they made changes so that the permit could be approved, and if not, then so that they could appeal the denial.

On cross-examination by Intervenor Hemingway, Mr. Beall testified that under the 2004 Zoning Ordinance, an accessory building or structure could not occupy more than 20% of the rear yard, but that in 2014 that footnote, found in section 59-C-1.326(a) of the 2004 Zoning Ordinance, was deleted. He testified that the 2014 Zoning Ordinance does not contain this language.

5. The Appellants submitted Exhibit 20 and acknowledged that they were not disputing any facts in this case. Appellant Sharon Crews argued that the term "an accessory building" in section 59-4.4.6.B.2.d of the Zoning Ordinance should be given its ordinary, plain meaning and that DPS should not add or delete language to what the Ordinance says. She argued that the words used in the Zoning Ordinance are important.

Appellant Sharon Crews argued that DPS's interpretation of "an accessory building" as including the plural is a forced interpretation of the Zoning Ordinance. She argued that the use of the singular to include the plural should be utilized only when the result is reasonable, and that there are situations where there is a substantive difference between the singular and the plural. Appellant Sharon Crews argued that if a word that is listed as singular will be interpreted as plural, there should be a definition section or a form of clarification within the Ordinance as well. She argued that the Zoning Ordinance contains many definitions and explanations, but that section 59-4.4.6.B.2.d does not have an explanation why "an accessory building" would be considered plural.

Appellant Sharon Crews further argued that the Zoning Ordinance says nothing about adding or combining accessory structures. She argued that the

context of where section 59-4.4.6.B.2.d is placed within the Zoning Ordinance does not help ascertain whether the term "an accessory building" should be singular or plural. Appellant Sharon Crews argued that the legislative history of changes to the Zoning Ordinance in 2006 through 2008 do not mention that "an accessory building" is meant to be cumulative. She argued that, in the RE-1 zone, all buildings on a property, including accessory structures, can be up to 15% of the lot coverage, and that the main building and accessory structures on the Property meet this requirement.

Appellant Sharon Crews argued that statutory interpretation must follow common sense. She argued that from 2006-2014 DPS interpreted "an accessory building" as not cumulative, and that starting in 2014 the interpretation changed to cumulative. She argued that people should not have to guess at the meaning of terms in the Zoning Ordinance. Appellant Sharon Crews argued that statutory interpretation should look to legislative intent regardless of the consequences.

In response to questions from the Board, the Appellants testified that the items in the accessory structures are all incidental to the residential use, including gardening equipment, business equipment, and items for other hobbies. The Appellants testified that the storage areas are needed because the main house is small, but that they are meant to be temporary and plan to get rid of the accessory structures in the future.

6. Intervenor Hemingway argued that section 59-4.4.6.B.2.d says "an accessory building," not "one accessory building," and that the two are not the same. She argued that the Board's Opinion in the Appeal of Raymond S. and Beth G. Wittig, included with the Appellants' pre-hearing submission, was decided in April of 2014, prior to the enactment of the 2014 Zoning Ordinance (which was adopted May 4, 2014 and effective October 30, 2014). See Exhibit 19(a), circle 106-122. Therefore, the DPS's interpretation of the term "an accessory building" in that Opinion is based on the 2004 Zoning Ordinance, not the 2014 Zoning Ordinance.

7. Mr. Frederick stated that the County's Planning Board wanted to eliminate the words "yard" and "rear yard" when enacting the 2014 Zoning Ordinance, which is why the requirement that only 20% of the rear yard could be covered by an accessory building or structure was not included in the 2014 Zoning Ordinance. Mr. Frederick stated that when the 2014 Zoning Ordinance was enacted, and the 20% limitation was omitted, DPS re-analyzed the definition of "an accessory building" along with the rule of interpretation that the singular is plural. He stated that DPS has consistently applied the plural definition to "an accessory building" under the 2014 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 section 8-23.

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. Section 8-23(a) of the County Code provides that "[a]ny person aggrieved by the issuance, denial, renewal, amendment, suspension, or revocation of a permit, or the issuance or revocation of a stop work order, under this Chapter may appeal to the County Board of Appeals within 30 days after the permit is issued, denied, renewed, amended, suspended, or revoked or the stop work order is issued or revoked. A person may not appeal any other order of the Department, and may not appeal an amendment of a permit if the amendment does not make a material change to the original permit. A person must not contest the validity of the original permit in an appeal of an amendment or a stop work order."

4. Section 59-7.6.1.C.3 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 Building Permit No. 824343 was properly denied.

5. Section 2-42B(a)(2)(A) of the County Code makes DPS responsible for "administering, interpreting, and enforcing the zoning law and other land use laws and regulations."

6. An "accessory structure" is defined in section 59-3.7.4.A.1 of the Zoning Ordinance as "a structure subordinate to and located on the same lot as a principal building, the use of which is incidental to the use of the principal building or to the use of the land."

7. Under section 59-4.4.6.A of the Zoning Ordinance, "[t]he intent of the RE-1 zone is to provide designated areas of the County for large-lot residential uses. The predominant use is residential in a detached house." Under section 59-4.4.6.B.2.d, "the maximum footprint of an accessory building on a lot where the main

building is a detached house is 50% of the footprint of the main building or 600 square feet, whichever is greater."

8. Section 1.4.1.E of the Zoning Ordinance, "Rules of Interpretation," states that "[t]he singular includes the plural and the plural includes the singular."

9. Section 59-C-1.326(a)(1) of the 2004 Zoning Ordinance provides that an accessory building or structure "must be located in a rear yard and must not occupy more than 20 percent of that rear yard."

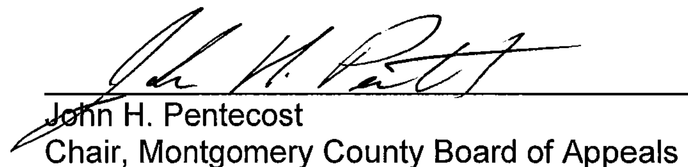
10. The Board finds, based on the testimony and the evidence of record, that the two structures on the Property are accessory structures under the Zoning Ordinance. The Board further finds that under the Zoning Ordinance's rules of interpretation, the singular includes the plural, so that the use of the term "an accessory building" in section 59-4.4.6.B.2.d of the Zoning Ordinance can include all accessory structures or buildings on the Property. The Board finds that the purpose of section 59-4.4.6.B.2.d of the Zoning Ordinance is to place a restriction on the size of accessory structures vs. the main structure on a property, and that DPS is correct to interpret the term "an accessory building" as cumulative of all accessory buildings on the Property.

11. Based on the foregoing, the Board finds that DPS has met its burden of demonstrating by a preponderance of the evidence that Permit No. 824343 was properly denied, and that the appeal should be denied.

The appeal in Case A-6550 is **DENIED**.

On a motion by Chair John H. Pentecost, seconded by Member Stanley B. Boyd, with Vice Chair Edwin S. Rosado and Member Katherine Freeman in agreement, and with Member Bruce Goldensohn necessarily absent, the Board voted 4 to 0 to deny the appeal and adopt the following Resolution:

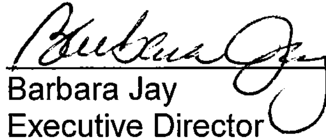
BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above be adopted as the Resolution required by law as its decision on the above entitled petition.



John H. Pentecost
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for

Montgomery County, Maryland
this 15th day of June, 2018.



Barbara Jay
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).