

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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

<http://www.montgomerycountymd.gov/boa/>

Case No. A-6574

APPEAL OF JOANNE FRADKIN

OPINION OF THE BOARD

(Hearing held September 5, 2018)
(Effective Date of Opinion: October 16, 2018)

Case No. A-6574 is an administrative appeal filed July 9, 2018, by Joanne Fradkin (the "Appellant"). Appellant charged error on the part of Montgomery County's Department of Permitting Services ("DPS") in the issuance of a fence permit, number 839068, on June 11, 2018. Appellant alleged that the "permit should not have been granted."

Permit number 839068 was issued for the property at 2919 Burtonhill Drive, Kensington, Maryland 20895 (the "Property"). See Exhibit 5(a), circle 4. Appellant resides at 2921 Burtonhill Drive. See Exhibit 1.

Pursuant to section 59-7.6.1.C of the Zoning Ordinance, the Board scheduled a public hearing for September 5, 2018. Pursuant to sections 2A-7 and 2A-8 of the County Code, and Board of Appeals' Rule of Procedure 3.2, the County filed a Motion to Dismiss and for Summary Disposition of the administrative appeal on July 25, 2018, and Appellant filed an Argument Against Motion to Dismiss on August 23, 2018. The Board, pursuant to Board Rule 3.2.5, decided the Motion to Dismiss and for Summary Disposition, and the opposition thereto, at the hearing after the close of oral arguments on September 5, 2018. Appellant appeared *pro se*. Associate County Attorney Charles L. Frederick represented Montgomery County. Davin Van Eyken, Esquire appeared on behalf of Sihan Gao, the owner of the Property who had been permitted to intervene in this administrative appeal (the "Intervenor")

Decision of the Board: County's Motion for Summary Disposition **granted**;
Administrative appeal **dismissed**.

RECITATION OF FACTS**The Board finds, based on undisputed evidence in the record, that:**

1. Aday Galindo, on behalf of Intervenor, filed an application with DPS on May 25, 2018 for a fence permit, number 839068. See Exhibit 5(a), circles 5-11.
2. On June 11, 2018, DPS issued fence permit number 839068 for the Property. See Exhibit 5(a), circle 4.

MOTION TO DISMISS AND FOR SUMMARY DISPOSITION—SUMMARY OF ARGUMENTS

1. Counsel for the County argued that Intervenor's contractor filed an application for a fence permit after the County received a complaint that a fence had been constructed on the Property and DPS determined that the fence was constructed without a permit. See Exhibit 5(a), circles 5-11. Counsel argued that fence permit application number 839068 showed that the residence on the Property was located ten feet from the property line, and that the fence was located 9 feet, 8 inches from the side lot line of this existing residence. See Exhibit 5(a), circles 5-11. Counsel for the County argued that the fence was built on the Property, not on Appellant's property.

Counsel for the County argued that the fence permit application further showed that the fence was 6 ½ feet high. Counsel argued that, pursuant to section 59-4.1.7.B.5.d.i of the Zoning Ordinance, a fence may encroach into any setback pursuant to section 59-6.4.3.C of the Zoning Ordinance. Counsel for the County argued that this fence complied with all requirements for the issuance of a fence permit, and therefore building permit number 839068 was properly issued for the construction of a fence on the Property.

2. Appellant argued that on May 3, 2018 she noticed that a fence was being erected on the Property. She argued that the highest level of the fence was erected first, and that the fence blocked her view of her street, where she has resided for 28 years.

Appellant argued that she called the County about the erection of the fence on May 3, 2018. Appellant argued that at that time a County employee told her that there was no fence permit issued for the erection of a fence on the Property and that someone from the County would come out and inspect the fence. Appellant argued that the following day, May 4, 2018, no one from the County had come to inspect and the fence on the Property was completed. She argued that she again called the County on May 4 and was told that it took 24 to 48 hours to process a complaint. Appellant argued that no one from the County ever got back to her, and that around May 16 she again called to determine the status of the fence. At that time, Appellant argued that she was told that the owner of the Property had ten days to take the fence down because he was in violation.

Appellant argued that on July 9, 2018 she again called the County and was told that a fence permit had been obtained for the fence on the Property. At that time, Appellant argued that a County employee told her she had two days to appeal the issuance of the fence permit.

She testified that she rushed to the Board's office and filed her appeal. Appellant argued that this appeal is about how the fence is affecting her.

Appellant argued that she had no other recourse but to file this appeal. She argued that she consulted an attorney and he would charge \$400 per hour with no guarantee of success, and that she is retired on a fixed income. She argued that while the erection of the fence may be legal, it was not right, and that she would not have purchased her home had the fence been in place. Appellant argued that the County Code and Zoning Ordinance should take into account the impact on the community.

In response to questions from the Board, Appellant argued that Exhibit 6(a), circle 5 depicts her fence, and that the new fence on the Property is attached to her fence. She argued that this new fence could be attached to her fence and still been on Intervenor's property. Appellant argued that she was subpoenaed by Intervenor to appear for a deposition in this case, and that she did not understand the purpose of the deposition. See Exhibit 6(a), circle 7.

3. Mr. Van Eyken, counsel for Intervenor, argued that there has been a history of conflict between Appellant and Intervenor that is not relevant to this appeal. He argued that he was not part of the decision to subpoena Appellant.

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 number 839068 was properly issued.

5. Section 8-25(a) of the County Code provides that DPS "must examine or cause to be examined each application for a building permit or an amendment to a permit within a reasonable time after the application is filed. If the application or the plans do not conform to all requirements of this Chapter, the Director must reject the application in writing and specify the reasons for rejecting it. If the proposed work conforms to all requirements of this Chapter and all other applicable laws and regulations, the Director must issue a permit for the work as soon as practicable."

6. Section 59-4.1.7.B.5.d.i of the Zoning Ordinance provides that any fence or wall may encroach into any setback under section 59-6.4.3.C of the Zoning Ordinance.

7. Section 59-6.4.3.C of the Zoning Ordinance provides:

Fences and Walls

1. Measurement of Height

Fence or wall height is measured from the lowest level of the grade under the fence or abutting a wall.

2. Height and Placement

a. A fence, wall other than retaining wall, terrace, structure, shrubbery, planting, or other visual obstruction on a corner lot in a Residential zone can be a maximum height of 3 feet above the curb level for a distance of 15 feet from the intersection of the front and side street lines.

b. A deer fence on a corner lot in a Residential zone must not be located closer to the street than the face of the building.

c. A wall or fence must not be located within any required drainage, utility or similar easement, unless approved by the agency with jurisdiction over the easement.

3. Exemptions from Building Line and Setbacks

Building line and setback requirements do not apply to:

a. deer fencing:

i. in an Agricultural or Rural Residential zone; or

ii. behind the front building line for property in a non-Agricultural or non-Rural Residential zone unless the property adjoins a national historical park.

b. a retaining wall where changes in street grade, width, or alignment have made such structures necessary;

c. any other wall or fence that is not on a property abutting a national historic park and is:

i. 6.5 feet or less in height when not abutting a Commercial/Residential, Employment, or Industrial zone; or

ii. 8 feet or less in height when located in a Residential zone and the fence abuts a Commercial/Residential, Employment, or Industrial zone;

d. a rustic fence on a property abutting a national historical park;

- e. any boundary fence behind the front building line, if the property is located within 100 feet of a parking lot in a national historical park; and
- f. deer fencing and any other fence that is 8 feet or less in height, if the property is farmed and agriculturally assessed.

8. Under section 2A-8 of the 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 or prior to the hearing. Board Rule 3.2 specifically confers on the Board the ability to grant motions to dismiss for summary disposition 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). Under Board Rule 3.2.2, the Board may, on its own motion, consider summary disposition or other appropriate relief.

9. Under Board Rule 3.2.4, the Board has the discretion to hear oral argument on a motion to dismiss, and under Board Rule 3.2.5, the Board must decide the motion after the close of oral argument or at a worksession.

10. The Board finds that there are no genuine issues of material fact to be resolved by the Board. The Board finds that there is no dispute that building permit number 839068 complies with all requirements of the County Code and the Zoning Ordinance, including the developmental requirements for height and placement found in section 59-6.4.3.C of the Zoning Ordinance. The Board finds, based upon the uncontested evidence, that the fence is 6 ½ feet tall and is located on the Property, and thus complies with section 59-6.4.3.C.3 of the Zoning Ordinance. Because building permit number 839068 complies with all requisite laws, the Board further finds that DPS was required to issue the building permit under section 8-25(a) of the County Code as a matter of law.

11. The County's Motion to Dismiss and for Summary Disposition in Case A-6574 is granted, and the appeal in Case A-6574 is consequently **DISMISSED**.

On a motion by Chair John H. Pentecost, seconded by Member Bruce Goldensohn, with Vice Chair Edwin S. Rosado and Member Stanley B. Boyd in agreement, and Member Katherine Freeman necessarily absent, the Board voted 4 to 0 to grant the County's Motion to Dismiss and for Summary Disposition and to dismiss the administrative 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 16th day of October, 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).