

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

751 Twinbrook Parkway
(Next to Meadow Hall Elementary School)
Rockville, MD 20851
240-777-6600

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

Case No. A-6665

APPEAL OF JOSHUA ZIMMERBERG AND TERESA JONES

OPINION OF THE BOARD

(Hearing held October 28, 2020.
Effective Date of Opinion: November 20, 2020.)

Case No. A-6665 is an administrative appeal filed July 22, 2020 by Joshua Zimmerberg and Teresa Jones (the "Appellants"). The Appellants charge error on the part of Montgomery County's Department of Permitting Services ("DPS") in the June 26, 2020 issuance of Building Permit No. 911404 to construct a single-family dwelling located at 6917 Granby Street, Bethesda (the "Property"). The subject Property is owned by Stephen G. Schultze, through his company, Spring Valley Builders, LLC. Mr. Schultze was permitted to intervene in this matter (the "Intervenor"). The Appellants reside at 6913 Granby Street, Bethesda.

The Appellants assert that Building Permit No. 911404 was issued in error because it allowed "[i]ncursion of building into minimum required setback area."

Pursuant to section 59-7.6.1.C of the Zoning Ordinance¹, the Board held a public hearing on October 28, 2020.² The Appellants were represented by William J. Chen, Jr., Esquire. Associate County Attorney Charles L. Frederick represented Montgomery County. The Intervenor appeared *pro se*.

Decision of the Board: Administrative appeal **DENIED**.

¹ All references to the Zoning Ordinance refer to the Montgomery County Zoning Ordinance (2014) unless otherwise indicated.

² Due to the COVID-19 pandemic, the public hearing was held remotely via Microsoft Teams.

FINDINGS OF FACT

The Board finds by a preponderance of the evidence that:

1. The Property, known as 6917 Granby Street in Bethesda, is a RE-90 zoned parcel identified as Lot 27, Block 4, Kenwood Park Subdivision.

2. On or about April 21, 2020, Spring Valley Builders, LLC applied to DPS for a residential building permit for a new house on the subject Property. See Exhibit 5, circle 5-13. On June 26, 2020, Building Permit No. 911404 was issued for the construction of a single-family dwelling on the Property. See Exhibit 5, circle 14.

3. On July 22, 2020, the Appellants timely filed an appeal charging error by DPS in its decision to issue Building Permit No. 911404. See Exhibit 1(b).

4. Mark Beall, Zoning Manager, Zoning and Site Plan Enforcement Division, DPS, testified that he has worked for DPS since 2001, has been reviewing zoning plans since 2006, and has been the Zoning Plan Review Manager since 2014. He testified that DPS is tasked with interpreting the County's Zoning Ordinance. Mr. Beall testified that, while he is not an architect, he spends all day, every day interpreting and applying the Zoning Ordinance and training other DPS employees on how to apply the Zoning Ordinance.

Mr. Beall testified that he is familiar with Building Permit No. 911404 and the Property. He testified that the residential building application for the Property was filed with DPS on April 21, 2020 and that building permit plans were submitted with the application. See Exhibit 5, circle 15-29. Mr. Beall testified that upon submission of this application it underwent zoning review by his office and was approved based on the plans submitted. He testified that the submitted plans complied with the Zoning Ordinance and that everything in the plans was approved.

Mr. Beall testified that the issue in this case is whether a building feature on the house is a bay window entitled to a limited exemption from the side setback. He testified that the definition of a "bay window" under the Zoning Ordinance is "[a] window, primarily made of glass, that projects from the wall of a building and forms an alcove of a room. It may have its foundation in the ground or be supported on corbels or otherwise. An oriel window is a type of bay window that is cantilevered (does not have its foundation in the ground.)" Mr. Beall testified that he was the Zoning Manager when the current 2014 Zoning Ordinance was enacted as well as when Zoning Text Amendment ("ZTA") 15-09 was adopted by Ordinance No. 18-08, which added the definition of a bay window to the Zoning Ordinance. Over objection from Mr. Chen, he testified that the definition of bay window was added to the Zoning Ordinance to clarify that a bay window may or may not include a

foundation and that, if the window includes a foundation, that foundation is exempt from setback requirements along with the bay window itself.

Mr. Beall testified that Exhibit 5, circle 19 shows the building feature at issue in the lower right corner and that Exhibit 5, circle 17 is an overhead view of the house. He testified that in the zoning review for the Property, DPS determined that the building feature projected from the wall of the house. Mr. Beall testified that an alcove is the extension of the room into the building feature, that is, the bump out or extension of the room. He testified that Webster dictionary defines an alcove as "a small recessed section of a room"; that Cambridge English dictionary defines an alcove as "a small space in a room, formed by one part of a wall being further back than the parts on each side"; and that dictionary.com defines an alcove as "a recess or small room adjacent to or opening out of a room." Mr. Beall testified that synonyms for an alcove are a "nook" or a "bay." He testified that DPS determined the building feature formed an alcove of the office and of the garage and therefore met that aspect of the definition of a bay window in the Zoning Ordinance. See Exhibit 5, circle 17.

Mr. Beall testified that DPS looked at the foundation plan for the house to determine whether the foundation for the building feature was in the ground. See Exhibit 5, circle 22. He testified that DPS determined that the foundation was in the ground and was not supported by corbels. Mr. Beall testified that DPS calculates whether a bay window is primarily made of glass by looking at the entire bay window assembly, then removing from the calculation the joist and trusses because they are part of the structural component of the window. He testified that DPS also does not consider the sides of the window in calculating whether it is primarily made of glass; once removing from the calculation the joist, trusses, and sides, DPS considers the remaining face of the bay window. Mr. Beall testified that DPS looks at the front of the bay window and considers the square footage of the window on each floor, then divides that by the square footage of the window opening on each floor to come up with the percentage of glass. He testified that DPS looks for at least 50% of glass on each level for a finding that the window is primarily made of glass. Mr. Beall testified that this calculation is done using DPS's electronic plan review system, project docs. He testified that project docs has a scaling ability and hits the four points of the window to determine what the area is. Mr. Beall testified that DPS then does the calculation of the percentage that is glass.

Mr. Beall testified that Exhibit 5, circle 31 highlights the glass area DPS looks at to determine whether a bay window is primarily made of glass, and that DPS is looking at the window opening. He testified that Exhibit 5, circle 32 highlights the area DPS looks at for each floor, except that this highlighted area in the exhibit should be larger because it missed part of the joist. Mr. Beall testified that DPS came up with percentages of glass vs. building assembly and determined that the percentage of glass for this building feature was 50.2% for the lower window and 50.6% for the upper window. He testified that DPS therefore

determined that the building feature was primarily made of glass. Mr. Beall testified that DPS has been using this formula to calculate whether a window is primarily made of glass for 15-20 years.

Mr. Beall testified that the length of a bay window cannot comprise more than 50% of the linear footage of a façade of a house. He testified that the entire right wall of the house in this case is 55 feet long, and that there is only one bay window that is 10 feet wide. See Exhibit 5, circle 17. He testified that DPS determined the building feature was a bay window and that it met the side setback requirements in the Zoning Ordinance, which allows a maximum of a 3-foot encroachment into any setback for a bay window. Mr. Beall testified that only portions of this bay window protruded 2.1 feet into the upper and lower side setbacks. See Exhibit 5, circle 29. He testified that, as long as a building feature meets the Zoning Ordinance definition of a bay window, the building feature can be engineered any way. Mr. Beall testified that, looking from the inside of the house, the bay window in this case forms an alcove of a room, and that the nook is integral to the room.

In response to cross-examination by Mr. Chen, Mr. Beall testified that because of the plat record date, this R-90 zoned property can use one of two different side setbacks, and that one of the two that is allowable has a minimum side setback of 10 feet and a total setback of 21 feet. He testified that in this case the Intervenor decided to center the house and have a 10.5 setback on each side, as depicted on the County's wall check survey. See Exhibit 5, circle 29. Mr. Beall testified that the building feature at issue in this case protrudes 2.1 feet into the setback. See Exhibit 5, circle 29.

In response to further cross-examination by Mr. Chen, Mr. Beall testified that there is a grate under the building feature that further protrudes into the setback. See Exhibit 7, circle 48. He testified that this grate covers an opening that is considered a window well on the site plan, and that the window opens into the exercise room. Mr. Beall testified that the lower right side on the cellar level is the exercise room and that the alcove for the building feature is also part of the exercise room. See Exhibit 7, circle 17. He testified that DPS did not take calculations from this cellar level because cellars are exempt from setbacks under the Zoning Ordinance. Mr. Beall testified that the foundation goes into the cellar elevation and that the cellar extends under the bay window. He testified that the alcove at the cellar level is part of the floor level of the cellar.

In response to further cross-examination by Mr. Chen, Mr. Beall testified that the Zoning Ordinance definition of a bay window says that the window includes foundation. He testified that the intent of including foundation in this definition was, if the bay window has a setback exemption, then the foundation under the bay window also has that exemption. Mr. Beall testified that any building or structure must be located at or behind the setback line under the

Zoning Ordinance except those listed in section 59-4.1.7.B.5 of the Zoning Ordinance.

In response to further cross-examination by Mr. Chen, Mr. Beall testified that DPS only uses the façade of the building feature to calculate the percentage made of glass. He testified that DPS does not use the side walls in the calculation because they are part of the structural portion of the building feature.

In response to questions from the Board, Mr. Beall testified that bay windows and box bays look the same. He testified that DPS's guidance on Zoning exemptions that differentiated bay windows from box bays was erroneously transferred from DPS's old website to their new website, does not reflect how DPS has looked at these two types of windows for the past 20 years, and has since been removed from the website. See Exhibit 7, circle 38.

In response to further questions from the Board, Mr. Beall testified that in making the determination as to whether a window is "primarily made of glass," DPS looks to the amount of glass on the face of the window. He testified that if that amount had come out to 49% in this case, DPS would have denied zoning review and sent the plans back to the architect to either confirm the percentage of glass or redesign the building feature.

5. Appellant Jones testified that she resides at 6913 Granby Street with her husband, Appellant Zimmerberg. She testified that she is an Endocrinologist with the National Institutes of Health and that she is not an architect. Appellant Jones testified that she filed this appeal because the right side of the house on the Property has the building feature encroachment into the side setback that faces her house.

Appellant Jones testified that she took all the pictures in Exhibit 7, circle 39-54, and that they are labeled with a date to indicate when they were taken. She testified that these pictures accurately depict what each alleges to show, and that she added red rectangles to two of the pictures (circle 43 and circle 45) for emphasis to show the building feature at issue in this case.

Appellant Jones testified that the building feature does not meet the definition of a bay window in the Zoning Ordinance, which is written in plain language. Over objection from the County, she testified that the building feature includes foundation and an egress window/grate and extends from the floor of the cellar, up through the first and second floors, and into the roof area. See Exhibit 7, circle 45 (building feature outlined in red rectangle). Appellant Jones testified that her house is off to the left in Exhibit 7, circle 45, and that she only objects to the right-side bay window. She testified that she agrees with the County's position that the setback areas are 21 total feet and that the building feature extends into the setback 2.1 feet.

Appellant Jones testified that the Intervenor began construction without a permit on June 22, 2020, and that the demolition permit was not issued until June 26, 2020. See Exhibit 7, circle 39-40. She testified that the County put a stop work order on the construction. Appellant Jones testified that because the Intervenor was not following the rules and due to her concern over the closeness of the excavation to her property, she filed this appeal.

Appellant Jones testified that the definition of a bay window is a window made of glass on all sides and that projects from the wall, not one that is part of the wall itself. She provided an example of a bay window from DPS's website that fits this definition. See Exhibit 7, circle 37. Appellant Jones testified that the building feature at issue in this case is not primarily made of glass; it is two sets of windows with no windows on the lateral side. See Exhibit 7, circle 45. She testified that near the bottom of this building feature is an electrical box and a grate, and that this building feature does not meet the legal definition of bay window. Appellant Jones testified that this window is not primarily made of glass... See Exhibit 7, circle 46. She testified that nothing in the Zoning Ordinance says that DPS should exclude the joist and trusses in their calculation because they are structural features.

Appellant Jones testified that the plans the Intervenor submitted for the building feature contained errors. See Exhibit 7, circle 22. She testified that the plans depict a one-story bay section when the window is actually two stories and extends into the foundation. See Exhibit 7, circle 22. Appellant Jones testified that the top of the building feature has a roof overhang of 1 foot, 4 inches and that the window is not a projection of the wall, it is the wall. She testified that there are three discrepancies in the approved plans and what was built on the Property: 1. the right-side elevation plans do not show the lower level window. See Exhibit 7, circle 20; 2. the plans show the electrical box was supposed to be behind the bay window when it actually sits on the window. See Exhibit 7, circle 28; and 3. the plans show a roof overhang of 5 inches. See Exhibit 7, circle 21. Appellant Jones testified the roof overhang is actually no different than the rest of the house, 1 foot, 4 inches. See Exhibit 7, circle 49.

Appellant Jones testified that the grate on the building feature encroaches an additional 25 inches into the setback. See Exhibit 7, circle 47. She testified that a cellar is not included in the list of allowable encroachments into a setback. Appellant Jones testified that Exhibit 7, circle 42 shows how close this building feature is to her home.

In response to cross-examination by Mr. Frederick, Appellant Jones testified that she had not filed an injunction or request for a stay for the issuance of Building Permit No. 911404. She testified that the total projection of the building feature is 2 feet, 6 inches, including the roof overhang, less than the 3 feet allowed for a bay window, and acknowledged that she had some complaints about what was actually built, not what was approved to be built.

In response to further cross-examination by Mr. Frederick, Appellant Jones testified that Exhibit 7, circle 37 was an example and not the only style of a bay window. She testified that the window in that exhibit does not look like something a person could walk into that would be an alcove. Appellant Jones acknowledged that the Intervenor had obtained a demolition permit but stated that he started work before he received it, and that DPS issued a stop work order when they were notified work had begun without the permit.

In response to questions from the Board, Appellant Jones testified that cellars are not allowed in the part of the area of encroachment. She testified that the house that was previously on the Property was completely destroyed. Appellant Jones testified that windows do not have electrical boxes on them, and that this building features is not a bay window, it is a window on the frame of the house.

6. Sylvia Deye testified that she is an architect with Robson Forensic, which has offices all over the United States, and that her office is located in Lancaster, Pennsylvania. She testified that she has a Bachelor of Science in Architecture and a Master of Architecture from the University of Illinois, Urbana-Champaign. Ms. Deye testified that she has been a licensed architect for 25 years.

Ms. Deye testified that a Rough Framer is someone who builds houses predominately with framing. She testified that she has worked as a Rough Framer and built two-story houses with basements. Ms. Deye testified that she has experience presenting many types of projects to Zoning Hearing Boards, including residential houses, schools, and banks. She testified that the projects she has presented typically have involved exemptions to building codes. Ms. Deye testified that she has provided the Board with her curriculum vitae. See Exhibit 7, circle 55-60. She testified that she has also provided the Board with a list of proceedings wherein she has been recognized as an expert witness in architecture. See Exhibit 7, circle 61.

In response to voir dire questions by Mr. Frederick, Ms. Deye testified that she has taken classes in engineering and in designing buildings to meet International Construction Code requirements. She testified that construction codes have evolved over the years, and that when she was in college the codes were not international and differed throughout the states, but now they are more international. Ms. Deye testified that she is trained in international construction codes but also in all local and municipal codes based on training, education, and experience. She testified that some states do adopt international building codes but also create their own.

In response to further voir dire questions by Mr. Frederick, Ms. Deye testified that zoning codes differ throughout counties and that she conducts

research within the local codes. She testified that the International Residential Code is one component for the construction of a building, and that code does not include a definition of a bay window. Ms. Deye testified that in this case she is relying on the Montgomery County Zoning definition of a bay window as well as industry standards. She testified that where the two are in conflict she describes what she sees and presents that to clients.

In response to further voir dire questions by Mr. Frederick, Ms. Deye testified that the design of a bay window is up to the imagination of the architect; however, it does have descriptors and must be designed within the local code. She testified that all six cases wherein she has appeared as an architectural expert in Maryland have involved tort claims except the *Foye* case, which did not involve zoning. See Exhibit 7, circle 61. Ms. Deye testified that *Wallace v. The City of Baltimore* involved a bicycle accident and concerned property maintenance at the Promenade in Baltimore. See Exhibit 7, circle 61. She testified that *Kelley v. Enclave Holding, LLC, et al.*, the only Montgomery County case wherein she has appeared as an expert, involved a slip and fall and did not involve zoning. Ms. Deye testified that she has looked at the Montgomery County Zoning Ordinance for other cases in the past but that she was not sure whether this was her first case involving the definition of a bay window.

In response to further voir dire questions by Mr. Frederick, Ms. Deye testified that she is not sure whether her continuing education has included zoning. See Exhibit 7, circle 58-60. She testified that she has never been employed in the State of Maryland.

In response to questions from the Board, Ms. Deye testified that she conducts research to prepare for a case and that her opinion in this case is based on her training, experience, and education. The Board accepted Ms. Deye as an expert in architecture.

Following voir dire, Ms. Deye testified that she has reviewed the Zoning Ordinance, the plans submitted for Building Permit No. 911404, and the exhibits filed in this case. She testified that the areas that have been referred to as a bay window are outlined in red in Exhibit 7, circle 43 and 45, and that the construction drawings are inconsistent concerning these windows; some drawings include the windows, and some do not.

Ms. Deye testified that, in her opinion, the building feature at issue in this case is an appendage of the building that is stand-alone. She testified that it is not a building feature but instead is a bump out of the building and that the building structurally relies on the bump outs. See Exhibit 7, circle 43, 45. She testified that the walls of the building feature are part of the structure of the new building and dependent on it. Ms. Deye testified that if the building feature were to become damaged, it would affect the entire house.

Ms. Deye testified that part of the bump out has a headroom of greater than 7 feet, 6 inches for the basement. She testified that the two-story bump out extends from the roof line down to the basement floor elevation of the new dwelling.

Ms. Deye testified that an alcove is historically a window seat. She testified that a bay window provides an alcove into a space, but an alcove does not need a bay window, it could be a windowless bay box. Ms. Deye testified that in this case the alcove is an extension of the floor area.

Ms. Deye testified that foundation is typically built three feet below the frost level. She testified that this building feature does not have foundation; it is a floor built on top of another floor. Ms. Deye testified that there are discrepancies in how the footprint of this new house is described. She testified that Exhibit 7, circle 15 shows the lower level footprint of the house.

Ms. Deye testified that, under the Montgomery County Code, gross floor area includes a basement floor space with a ceiling that is greater than 6 feet, 7 inches. She testified that under the Zoning Ordinance the bottom floor of this house is a basement, not a cellar. Ms. Deye testified that habitable space has to be included in the gross floor area, and that this opinion is collaborated in the County Code and in the County's tax code. She testified that cellars are excluded from habitable area.

Over objections from the County that Ms. Deye was not offered as an expert in zoning, Ms. Deye testified that because both basements and cellars are included as a portion of the building, in this case the lower level of the house is part of the habitable building area. She testified that the lower level has to comply with the Zoning Ordinance. Ms. Deye testified that the Zoning Ordinance does not allow a basement to exceed building setbacks. She testified that the wall area of the building feature exceeds the setback by 2.1 feet and that the roof overhang exceeds the setback an additional 1.4 feet, for a total that is more than the allowable 3-foot encroachment.

Ms. Deye testified that a structural shear wall is a diaphragm that helps with wrapping, and that the side wall of this bay window is solid without windows. She testified that this side wall is a structural component of the building and is beyond an appendage. Over objections from the County, Ms. Deye testified that, in her opinion, the building feature at issue in this appeal is not a bay window. She testified that the building feature is a bump out, that it is an additional square footage of floor area that has windows and extends more than one story. Ms. Deye testified that the building feature is not an appendage and is not a stand-alone feature.

Ms. Deye testified that appendages can be easily removed if there is a fire. She testified that setbacks are designed for fire safety, and that when an

appendage, such as a porch, catch fire they can be removed without damaging the rest of the structure. Ms. Deye testified that a bump out is part of the structure and can't be easily removed.

In response to cross-examination by Mr. Frederick, Ms. Deye testified that the 1.4-foot roof overhang occurred during actual construction and was not what was approved under Building Permit No. 911404. She testified that the International Building Code recognizes construction of buildings right next to each other. Ms. Deye testified that in this case there is no indication that an easement is needed.

In response to further cross-examination by Mr. Frederick, Ms. Deye testified that the Zoning Ordinance definition of a bay window does not include the word appendage. She testified that an oriel window is predominately all glass. Ms. Deye testified that the definition of a cellar in the Zoning Ordinance does not include a limitation that it has to be uninhabitable space. She testified that the Zoning Ordinance definition of Gross Floor Area includes as item 1. a basement. Ms. Deye testified that calculation of a basement as part of the gross floor area is very important for residential properties.

In response to further cross-examination by Mr. Frederick, Ms. Deye testified that basement is a defined term under the Zoning Ordinance. She testified that the definition of a basement does not include a height limitation, and that a height limitation of 7 feet 6 inches is outlined in the tax code for tax purposes. Section 52-39 of the County Code. Ms. Deye testified that the Zoning Ordinance definition of basement does not adopt Chapter 52 of the County Code. She testified that the Zoning Ordinance is a subcategory of the County Code, so the Zoning Ordinance adopts all terms in the County Code.

In response to further cross-examination by Mr. Frederick, Ms. Deye testified that section 52-39 of the County Code begins "[i]n this Article the following terms have the following meanings" and that the Article referred to is "Development Impact Tax for Transportation Improvements." She testified that section 1.4.2 of the Zoning Ordinance, "Specific Terms and Phrases Defined," states "[i]n this Chapter, terms that are not specifically defined have their ordinary meaning..." Ms. Deye testified that the definition of Gross Floor Area in the Zoning Ordinance includes a height limitation in listed items 3. and 4., and that because all of the listed items under Gross Floor Area (1-8) are separated by commas, the limitations listed in each numbered item applies to all numbered items.

In response to further cross-examination by Mr. Frederick, Ms. Deye testified that a bay window is an appendage of a building. She testified that the exception allowing a bay window to encroach into a setback also includes porches and steps, which are appendages of a building, not items that hold up a building. Ms. Deye testified that the right side of the house is an exterior wall, and that the

portion that is the bump out extends out from the rest of the wall. See Exhibit 5, circle 17.

In response to further cross-examination by Mr. Frederick, Ms. Deye testified that an alcove is not defined in the International Residential Code or in the Zoning Ordinance. She testified that the Residential Code defines how high a ceiling should be to be habitable space. Ms. Deye testified that in this case the bump out contributes to habitable space on all three floors and that the building feature is part of the rooms on each floor.

In response to further cross-examination by Mr. Frederick, Ms. Deye testified that she does not recall who first contacted her to testify in this case but she believes she was first contacted a few weeks ago. She testified that she has spoken with Appellant Jones and Mr. Chen about this case, and that she was provided with the complaint, drawings, photographs, and the items presented in the Appellants' filing. Ms. Deye testified that she understood that the issue in this case was whether the building feature was a bay window and that she reached her decision after reviewing all the documents previously mentioned. She testified that her time is being billed by the hour and that she does not know how many hours she has spent because she has not issued any bills. Ms. Deye estimated she has spent between 5-10 hours on this case and testified that she is being paid for her time, not for her opinions.

In response to further cross-examination by Mr. Frederick, Ms. Deye testified that she has never designed a building in Montgomery County and that she has been before Zoning and Planning Boards throughout the United States, but not in Montgomery County. She testified that she does not recall whether she has ever testified on zoning issues. Ms. Deye testified that she provided information for and reviewed her statement included in Appellants' submission, and that she agrees with all the contents of that statement. See Exhibit 7, circle 62-63. She testified that she was not aware that the word "yard" was eliminated from the Zoning Ordinance in 2014, and that the term used throughout the Zoning Ordinance is "side setback," not "sideyard setback" as used in her statement. See Exhibit 7, circle 62.

In response to further cross-examination by Mr. Frederick, Ms. Deye testified that her statement characterizes the lower level as a basement. See Exhibit 7, circle 62. She testified that there is a discrepancy in the Zoning Ordinance between a basement and a cellar, but that the tax code defines this lower level as a basement. Ms. Deye testified that the lower level is a basement/cellar.

7. The Intervenor testified that the small window in the exercise room is for natural light, not for ingress/egress. See Exhibit 7, circle 48. He testified that the County had lost his bond check and it took an additional three days for him to receive his permit due to the COVID-19 pandemic. He testified that he had the

permit approved but had not yet received the physical permit when he began work on the Property.

The Intervenor testified that he relies on Montgomery County to tell him what passes zoning requirements. He testified that he has built a lot of these bay windows since the new Zoning Ordinance was enacted in 2014. The Intervenor testified that prior to the definition of a bay window being added to the Zoning Ordinance, he attended a number of meetings concerning downsizing homes, and that the intent of the definition was to allow bay windows 10 feet in width or less to project 3 feet into any setback with a foundation.

The Intervenor testified that at least 1,000 bay windows have been approved in the County. He testified that this building fixture protrudes 2.1 feet over the setback and only 1.4 feet in the back. The Intervenor testified that he could have made the window 30% bigger. He testified that he does not understand why he is being singled out because he has done everything to comply with the law and has had everything approved by the County. The Intervenor testified that a County inspector came out three times to inspect the bay window, and that it passed inspection every time. He testified that this appeal has caused him great financial harm and stress.

In response to questions from Mr. Chen, the Intervenor testified that this is the first time that he has had a building permit appealed in 40 years. He testified that he didn't know that building permits could be appealed prior to this case, but now he is aware of the appeal process.

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. 911404 was properly issued.

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. Section 1.4.2 of the Zoning Ordinance, Specific Terms and Phrases Defined, states: “In this Chapter, terms that are not specifically defined have their ordinary meaning. The following words and phrases have the meanings indicated.” The section then goes on to define the following terms:

Basement: The portion of a building below the first floor joists of which at least half of its clear ceiling height is above the average elevation of the finished grade along the perimeter of the building.

Bay Window: A window, primarily made of glass, that projects from the wall of a building and forms an alcove of a room. It may have its foundation in the ground or be supported on corbels or otherwise. An oriel window is a type of bay window that is cantilevered (does not have its foundation in the ground).

Cellar: The portion of a building below the first floor joists of which at least half of the clear ceiling height is below the average elevation of the finished grade along the perimeter of the building.

Gross Floor Area (GFA): The sum of the gross horizontal areas of all floors of all buildings on a tract, measured from exterior faces of exterior walls and from the center line of walls separating buildings. Gross floor area includes:

1. basements;
2. elevator shafts and stairwells at each floor;
3. floor space used for mechanical equipment with structural headroom of 6 feet, 6 inches or more, except as exempted in the LSC and Industrial zones;
4. floor space in an attic with structural headroom of 6 feet, 6 inches or more (regardless of whether a floor has been installed); and
5. interior balconies and mezzanines.

Gross floor area does not include:

1. mechanical equipment on rooftops;
2. cellars;

3. unenclosed steps, balconies, and porches;
4. parking;
5. floor area for publicly owned or operated uses or arts and entertainment uses provided as a public benefit under the optional method of development;
6. interior balconies and mezzanines for common, non-leasable area in a regional shopping center;
7. in the LSC and Industrial zones, floor space used for mechanical equipment; and
8. any floor space exclusively used for mechanical equipment for any Medical/Scientific Manufacturing and Production use.

7. Sections 4.1.7.B.1 and 5. of the Zoning Ordinance, Measurement and Exceptions, state (emphasis added on section 4.1.7.B.5.a.viii):

B. Placement

1. Structure Setbacks

a. Defined

A structure setback is the minimum distance that a principal building or accessory structure must be located from a specified lot line or right-of-way.

b. Measurement of Setbacks

There are front, side street, side, and rear setbacks. Through lots have 2 front setbacks. A lot abutting an alley is not a through lot.

- i. The front setback is measured from the front lot line to a structure.
- ii. The side street setback is measured from the side street lot line to a structure.
- iii. The side setback is measured from the side interior lot line to a structure.
- iv. The rear setback is measured from the rear lot line to a structure.

5. Setback Encroachments

Any building or structure must be located at or behind the required building setback line, except:

a. Building Features

- i. Any unenclosed porch, deck, terrace, steps, or stoop may project a maximum of 3 feet into any side setback, or any side street setback of less than 25 feet and may project a maximum of 9 feet into any front setback, rear setback, or any side street setback where the side street setback is a minimum of 25 feet. This encroachment includes an unenclosed roofed porch or terrace.
- ii. Any roofed and unenclosed steps or stoop may project a maximum of 3 feet into any side setback, or any side street setback of less than 25 feet and may project a maximum of 9 feet into any front setback, rear setback, or any side street setback where the side street setback is a minimum of 25 feet. Any roof covering unenclosed steps or a stoop may project a maximum of 3 feet into any setback.
- iii. An unenclosed balcony may project a maximum of 6 feet into a required setback, if such projection is a minimum of 2 feet from the vertical plane of any lot line.

iv. A sill, leader, belt course, or similar ornamental feature may project a maximum of 6 inches into any setback. Where a wall is located on a lot line, any such projection may extend across a lot line under Chapter 50 (Section 50-20).

v. A chimney or flue as part of a detached house, duplex, or townhouse may project a maximum of 2 feet into any setback.

vi. A chimney or flue as part of an apartment may project a maximum of 4 feet into any setback, if such extension remains a minimum of 2 feet from the vertical plane of any lot line.

vii. Any building eave, cornice, or light shelf may project a maximum of 2 1/2 feet into any setback, if such extension remains a minimum of 2 feet from the vertical plane of any lot line. Where a wall is located on a lot line, any such projection may extend across a lot line under Chapter 50 (Section 50-20).

viii. Any bay window, oriel, entrance, vestibule, or balcony, 10 feet in width or less, may project a maximum of 3 feet into any setback. The total length of all bay windows and oriels on a building façade is a maximum of 50% of the linear footage of the façade.

ix. Any unenclosed fire escape or outside stairway may project a maximum of 5 feet into any side street, side, or rear setback.

8. Article IV of the County Code governs Development Impact Tax for Transportation Improvements. Under that Article, section 52-39, Definitions, states:

In this Article the following terms have the following meanings:

Gross floor area means the sum of the gross horizontal area of the several floors of a building or structure measured from the exterior faces of the exterior walls or from the center line of party walls. In a covered but unenclosed area, such as a set of gasoline pumps or a drive-through area, gross floor area means the covered area. Gross floor area does not include:

- (1) basement or attic areas with a headroom of less than 7 feet 6 inches;
- (2) areas devoted to unenclosed mechanical, heating, air conditioning, or ventilating equipment;
- (3) parking structures; or
- (4) accessory structures to a residential building.

9. The Board finds, based on the testimony of Mr. Beall and the documents provided, in particular the building construction plans at Exhibit 5, circle 15-29, that the building feature³ at issue in this case meets the Zoning Ordinance definition of a bay window. In so finding, the Board finds that the building feature is a window

³ Based on Appellants' pre-hearing submission, which references Appellant Jones' "objections to the part of that construction that is a purported 'Bay Window' that faces her property and impermissibly projects into the mandated zoning setback area" and Appellant Jones' testimony at the hearing that her only concern is the right side bay window, the Board found this appeal only concerned the bay window that encroaches into the right side setback. See Exhibit 7, circle 6.

and that, based on the calculation used by DPS and the testimony of Mr. Beall, that the window is 50.2% and 50.6% glass on the façade of the building and therefore is primarily made of glass. The Board further finds that the building feature projects from the wall of the house and forms an alcove of a room, the office. Further, the Board finds that the building feature has its foundation in the ground, which is authorized under the Zoning Ordinance definition of a bay window. Finally, the Board finds that DPS is responsible for administering, interpreting, and enforcing the zoning law and, based again on Mr. Beall's testimony, that DPS has consistently interpreted the Zoning Ordinance to find these types of building features are bay windows. Thus, the Board finds that the building feature is a bay window under the Zoning Ordinance.

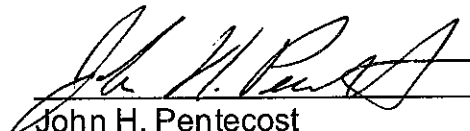
The Board further finds that the entire right wall of the house in this case is 55 feet long, and that there is only one bay window on the house that is 10 feet wide. The Board thus finds that the width of the bay window is not more than 10 feet and that the total length of the bay window is not more than 50% of the linear footage of the façade. Further, the Board finds that the bay window does not project more than 3 feet into the side setback. Thus, the Board finds that the bay window is exempt from the setback encroachments under section 59-4.1.7.B.5.a.viii of the Zoning Ordinance. Therefore, the Board finds that Building Permit No. 911404 was properly issued to allow the bay window to encroach less than 3 feet into any setback.

10. 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. 911404 was properly issued, and that the appeal should be denied.

The appeal in Case A-6665 is **DENIED**.

On a motion by Chair John H. Pentecost, seconded by Member Katherine Freeman, with Member Richard Melnick in agreement and with Vice Chair Bruce Goldensohn and Member Mary Gonzales in opposition, the Board voted 3 to 2 to deny the appeal and adopt the following Resolution:

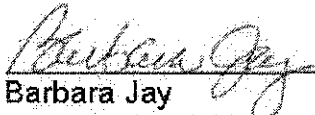
BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above be adopted as the Resolution required by law as its decision on the above entitled petition.



John H. Pentecost
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for

Montgomery County, Maryland
this 20th day of November, 2020.


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).