

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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Case No. A-6752

**APPEAL OF TIMOTHY J. SULLIVAN, JOAN ARDERY, AND WILLIAM AND
RHONDA AMOROSO**

OPINION OF THE BOARD

(Hearing held July 27, 2022)

(Effective Date of Opinion: September 7, 2022)

Case No. A-6752 is an administrative appeal filed May 19, 2022, by Timothy J. Sullivan, Joan Ardery, and William and Rhonda Amoroso (the "Appellants"). The Appellants charged error on the part of Montgomery County's Department of Permitting Services ("DPS") in the issuance of building permit number 912294 on September 16, 2020, and building permit notice posted on April 22, 2022. The Appellants alleged that the permit should have been denied because it was issued in violation of the Montgomery County Code and Montgomery County Zoning Ordinance (2014).¹

Building permit number 912294 was issued for the property at 9111 River Road, Potomac, Maryland, 20854 (the "Property"). See Exhibit 4(a). The owner of the Property is the Saint Andrew Romanian Orthodox Church. See Exhibit 4(a). At the prehearing conference on June 15, 2022, the Board granted the Saint Andrew Romanian Orthodox Church's request, through counsel Soo Lee-Cho, Esquire, to intervene in this matter (the "Intervenor").

Pursuant to section 59-7.6.1.C of the Zoning Ordinance, the Board scheduled a public hearing for July 27, 2022. Pursuant to sections 2A-7 and 2A-8 of the Montgomery County Code, and Board of Appeals' Rule of Procedure 3.2, the Intervenor filed a Motion for Summary Disposition to dismiss the administrative appeal on July 7, 2022. Montgomery County filed a response to the motion on July 14, 2022, and the Appellants, through counsel David W. Brown, Esquire, filed an opposition on July 19, 2022. The Board, pursuant to Board Rule 3.2.5, decided the Motion for Summary Disposition, the

¹ All references to the County's Zoning Ordinance refer to the 2014 Zoning Ordinance, unless indicated otherwise.

response, and the opposition thereto, at a motions hearing on July 27, 2022. David W. Brown, Esquire, appeared on behalf of the Appellants. Associate County Attorney Clifford L. Royalty represented Montgomery County. Soo Lee-Cho, Esquire, appeared on behalf of the Intervenor.

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

RECITATION OF FACTS

The Board finds, based on undisputed evidence in the record, that:

1. On September 16, 2020, DPS issued building permit number 912294 for the Property. See Exhibit 4(a). On April 22, 2022, the Intervenor posted a building permit notice on the Property. See Exhibit 4(b).²

2. The Property is located at Lot 34, Block 9 of the Bradley Farms Subdivision. See Exhibit 4(a).

MOTION FOR SUMMARY DISPOSITION—SUMMARY OF ARGUMENTS

1. Counsel for the Intervenor argued that the only issue remaining in this appeal is whether the rear lot line closest to the main building (the Northeastern Lot Line or the Amoroso Lot Line) is properly characterized as a side lot line or whether, as the Appellants argue, it should have been characterized as a rear lot line.³ She argued that during approval of the Preliminary Plan for the Property, Condition 13 of the Staff Report, which states that "the building footprints, building heights, on-site parking, site circulation, and sidewalks shown on the Preliminary Plan are illustrative" is a standard note that is included on all certified preliminary plans to afford flexibility for layout in development. See Exhibit 8, p. 26. Counsel argued that approval of the Preliminary Plan includes a detailed process of review to ensure that there are adequate public facilities, stormwater management, septic systems, etc. She explained that the Preliminary Plan's project description limits the size of the building on the Property to 9,023 square feet. See Exhibit 8, p. 28.

² Under § 8-25A of the County Code, "[i]f a permit is issued under Section 8-25 for new construction on vacant residentially or agriculturally zoned land, or construction of a building or structure that would affect the footprint or height of any existing structure located on residentially or agriculturally zoned land or that is exempt from and exceeds any applicable building height limit, the Director must promptly require the recipient to post on the lot a conspicuous sign describing the proposed construction, specifying the time limit to appeal the issuance of the permit to the Board of Appeals, and including any other information the Director requires..." At the time building permit number 912294 was issued, the Intervenor was not required to comply with this posting requirement.

³ When this appeal was originally filed, the Appellants identified four issues that were the subject of this appeal. However, in the Appellants' opposition to the Motion for Summary Disposition, the Appellants clarified that, upon review of additional information, the only issue remaining in this appeal was the characterization of the Northeastern/Amoroso Lot Line as either a side lot line or a rear lot line.

Counsel for the Intervenor argued that the Appellants are arguing that a property line that was treated as a side lot line by the Planning Board and all reviewing agencies, and was ultimately approved as a side lot line in the Preliminary Plan, should instead be a rear lot line. She argued that the Staff Report for the Preliminary Plan also contains a final approved plan of the lot and that the Property is an odd-shaped property. See Exhibit 12(a). Counsel argued that the building on the Property is depicted in red, that the dark grey area is the parking lot, and that the light grey area with lines is the septic field, which constitutes a significant portion of the front of the Property. See Exhibit 12(a). She argued that she circled in blue the relevant dimensions identified in the Preliminary Plan, and that these two circled numbers are relevant because they are identified in the Staff Report's Preliminary Plan Data Table and Checklist (Table 1) as proposed side setback numbers. See Exhibit 12(b); Exhibit 13. Counsel noted that Condition 13 of the Staff Report states "[p]lease refer to the zoning data table for development standards such as setbacks, building restriction lines, building height, and lot coverage for each lot." See Exhibit 8, p. 26. She explained that this is also standard language in a Preliminary Plan.

Counsel for the Intervenor argued that a Preliminary Plan for an institutional use such as a church undergoes a rigorous review and the review includes a close look at compatibility and how far away adjacent properties are located. She argued that Table 1 includes setbacks that are proposed for approval by the Preliminary Plan, and then were approved under the Preliminary Plan. See Exhibit 13. Counsel argued that the Appellants' argument that because the record plat did not show setbacks, the Intervenor does not have to abide by them, is not true. She argued that the setbacks set out in the Preliminary Plan have the force of law and the Intervenor must abide by them.

Counsel for the Intervenor argued that the time to question the setbacks was at the time of the Preliminary Plan and that the building permit at issue in his appeal was issued pursuant to the Preliminary Plan. She questioned whether the Board has the authority to undue a setback approved under the Preliminary Plan and to change a line determined to be a side lot line at the time of the Preliminary Plan to now be a rear lot line. Counsel noted that the Board has seen situations where a common line is a rear lot line for one property and a side lot line for another, and the fact that the lot line at issue in this appeal is the rear lot line for one property does not mean that it is the rear lot line for the Property. She argued that while DPS makes a final determination on a building permit, that does not give DPS the authority to erase a Preliminary Plan determination.

Counsel for the Intervenor argued that dimensions of 188.6 feet and 25 feet on the final approved plan, circled in blue, correlate to the side setbacks on Table 1. Exhibit 12(b); Exhibit 13. She explained that Table 1 has a 17-foot minimum side setback and a 35-foot total side setback under the Zoning Ordinance development standard, but that in this case a 25-foot minimum side setback was approved, with a combined 205-foot total side setback. See Exhibit 13. Counsel explained that the 188.6 feet plus the 25 feet on the final approved plan exceeds the 205-foot total side setback because the Intervenor built in some flexibility for the final dimensions of the building, so long as the total is at least 205 feet. See Exhibit 12(b). She argued that 25 feet is the minimum for a side lot line on the Property and that the building permit complies with this requirement.

Counsel for the Intervenor argued that DPS reviewed the Preliminary Plan as part of the process and that the Development Review Committee includes representatives of all agencies of the County. She argued that DPS looked at the plan and issued an analysis, and that the only comment DPS had concerning the plan not meeting the Zoning Ordinance was that the parking lot was required to be 50 feet from the front property line. See Exhibit 14. Counsel argued that other than relocating the parking lot spaces, the dimensions have not changed from the initial plan to the Preliminary Plan to the building permit.

Counsel for the Intervenor argued that the Preliminary Plan application was filed in 2010, the Staff Report was prepared 45-60 days from the date of filing, and the Planning Board final approval occurred in June of 2012. See Exhibit 8, ex. A. She noted the level of detail the Preliminary Plan review received, explaining that trees in red on Exhibit 12(d) are the trees to be removed, noting that one tree to be removed is along the property line because the building was going to be located too close to that tree. See Exhibit 12(d). Counsel explained that this detail in identifying what trees would be removed was based on the 25-foot side setback. See Exhibit 12(d).

In response to questions from the Board, Counsel for the Intervenor argued that the comment in the Staff Report that items shown on the Preliminary Plan are "illustrative" is not misleading; rather, it is intended for the applicant to have some flexibility in the field. See Exhibit 8, p. 26. She argued that an applicant can adjust the footprint of a building so long as it meets the setbacks. Counsel argued that if the side setback at issue in this case were treated as a rear setback, the building would have to be placed where the parking lot is, and it would not even fit there. She argued that the rear setback is 200 feet under the Preliminary Plan, and the Intervenor can not replace this 200-foot rear setback with the Zoning Ordinance standard of 35-feet for a rear setback. See Exhibit 13.

On redirect, Counsel for the Intervenor argued that in this case the Preliminary Plan is very contemporary; it was submitted in 2010 and reviewed in fine detail by the Planning Board. See Exhibit 8, ex. A. She argued that DPS is required to enforce the Preliminary Plan and must issue the building permit in conformance with the Preliminary Plan.

In response to questions from the Board, Counsel for the Intervenor argued that the Intervenor still believes that vested rights and estoppel, as outlined in the Intervenor's motion, apply in this case, but that the Intervenor's argument at the motions hearing seeks to focus the Board on what the Intervenor believes the core issue in this case is. See Exhibit 8. In the Intervenor's motion, Intervenor argued that "[b]ecause the Church has a vested right in its construction, DPS's subsequent decision to reverse its interpretation of Section 8-25A and require the site to be posted does not affect the Church's rights to continue under the previous interpretation of Section 8-25A, the approved Building Permit, and the Preliminary Plan." The Intervenor further argued that "Appellants are estopped because they voluntarily chose not to appeal the Preliminary Plan or Building Permit and the Church relied on the expiration of the appeal dates to begin construction

of the church building and has expended over \$1.2 million to date." Counsel argued that the Appellants were part of the Preliminary Plan review, which was exhaustive, that the building location was discussed with the community, and that the equity argument is that the Appellants are now at this late junction filing this appeal.

Counsel for the Intervenor argued that the footnote in Table 1 (which states that the setbacks in the Preliminary Plan are "[a]s determined by MCDPS at the time of building permits") enables the final linear distance to be determined at the time the building permit is issued. See Exhibit 13. She argued that this footnote applies to measurements, not to whether a lot line is a side or a rear lot line. Counsel argued that if the data in Table 1 has no meaning, there would be no need to have the data in the table. She argued that the Board must interpret the record to have meaning, and that the Board should not reinvent something that has already been determined.

2. Counsel for the County argued that the single legal issue in this case is whether DPS committed legal error in determining that there can only be one rear lot line for the Property. He argued that the County agrees with the Appellants that there can only be one front lot line for a property, and that that front lot line determines which lot line is the rear lot line. Counsel argued that DPS and the Planning Board have a clear reading of the law, that is, that there can only be one front lot line and one rear lot line. Counsel for the County argued that there is no showing of error in this case by DPS. He argued that if the Board thinks the law is debatable, deference is owed to DPS and the Planning Board's interpretation as bodies that are experts in interpreting and applying the Zoning Ordinance.

On redirect, counsel for the County questioned what Exhibit 14, submitted by the Appellants, was, and reiterated that the plain language of the Zoning Ordinance says that the rear lot line is "the lot line." He argued that DPS read the Zoning Ordinance correctly in this case and applied the lot lines the same way the Planning Board did; there is no showing of error. Counsel argued that there is one front and one rear lot line on the Property, and all the rest are side lot lines. He argued that for an oddly configured lot, DPS makes a judgment call, and in this case did not commit a clear legal error in determining the rear and side lot lines.

3. Mr. Brown, counsel for the Appellants, argued that the Intervenor's Motion for Summary Disposition contained arguments about vested rights and estoppel, and that there is no merit to either argument. First, he argued that rights are not vested until there is a final judgment that the building permit at issue in this case is valid. Mr. Brown further argued that, under *Marzullo v. Kahl*, 366 Md. 158, 783 A.2d 169 (2001), vested rights apply when there is a change in a regulation; here, there has been a change in DPS's enforcement to require a building permit sign in this case, but there has been no change in the actual regulation since 1998.

Counsel for the Appellants argued that the estoppel argument also fails because neither the Preliminary Plan nor the Forest Conservation Plan make a final determination on setbacks. He argued that the Preliminary Plan states that the location of buildings are

illustrative, and if an applicant is allowed to move where a building can be built, they can necessarily move the setbacks. See Exhibit 8, p. 26. Counsel argued that the actual building constructed in this case has a very different footprint than the one that was originally proposed. He argued that the record plat of the Property is not what is in the Preliminary Plan. See Exhibit 10(a)(iii). Counsel argued that the Building Restriction Line ("BRL") in the Forest Conservation Plan does not determine setbacks. See Exhibit 7, p. 17. He argued that there is no estoppel in this case because the Appellants did not engage in any wrongful or unconscientious acts that the Intervenor relied upon. *Schinnerer v. Maryland Ins. Admin.*, 147 Md. App. 474, 809 A.2d 709 (2002).

Counsel for the Appellants argued that the real complaint in this case is the failure to post the building permit notice on the Property at the time of the issuance of the building permit, and that if the County is not estopped from exercising this right 18 months later, than the Appellants are also not estopped. He argued that the only action that the Appellants undertook was, once they retained counsel, they found that building permit number 912294 was valid and questioned why it had not been posted. Counsel argued that the church was relying on DPS, not on an action by the Appellants, to the church's detriment. He argued that the Appellants have done nothing to harm the church but to exercise their appeal rights when given the opportunity. Counsel argued that the permit was automatically suspended because the posting requirements in the County Code apply to commercial buildings on residential property, and the posting was not done. He argued that the Intervenor chose to go through with building even though the permit was suspended pursuant to the County Code.

Counsel for the Appellants argued that the Preliminary Plan Data Table and Checklist includes a footnote that states that the setbacks are "[a]s determined MCDPS at the time of building permit." See Exhibit 13. He argued that the issue of whether the Northeastern Lot line was a side or a rear lot line was never litigated at the Preliminary Plan stage, the record plat does not dictate what the lot lines are, and that here DPS was wrong in determining that a rear lot line was a side lot line. Counsel argued that the Appellants agree that there is one front lot line, and that it is the lot line along River Road. He argued that the lot lines connecting to the front lot line are the side lot lines, and that the other lot lines are both generally parallel to the front lot line, and therefore are both rear lot lines. See Exhibit 12(a).

Counsel for the Appellants argued that when you compare the angle of the two lot lines in the back of the Property (the Northern lot line and the Northeastern lot line) both are parallel to the front lot line, and therefore both are rear lot lines under the Zoning Ordinance. See Exhibit 10(a)(iii). He argued that for both lot lines, there is a less than 45-degree angle from the front lot line, which is the typical tipping line between parallel and perpendicular lines. See Exhibit 10(a)(iii). Counsel argued that he was familiar with an assisted living facility in the County which had two rear lot lines that were generally parallel and a third lot line that was more perpendicular but connected the two lot lines. See Exhibit 15. He argued that this illustrates that the interpretation that there is one rear lot line is not supported by practice.

Counsel for the Appellants argued that the Appellants have not demanded that construction on the Property be taken down. He argued that the Appellants seek a ruling that the rear lot line is composed of two lot lines, then a determination whether further construction should adhere with the rear lot line requirements even if the church building is allowed to stand. Counsel argued this case should be heard on the merits, not on a motions hearing.

In response to questions from the Board, Counsel for the Appellants argued that he interprets the footnote in the Preliminary Plan Data Table and Checklist as providing DPS with the primary authority to determine setbacks at the time the building permit is applied for, and the appeal process brings the issue back to the Board. See Exhibit 13. He argued that if the Zoning Ordinance only permitted one rear lot line, then it would say that every other lot line is a side lot line, rather than say that the side lot line is a lot line that is "adjoining or generally perpendicular to the front lot line."

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 and the Intervenor to show that building permit number 876201 was properly issued.

5. Section 8-25A(a) of the County Code provides:

Sec. 8-25A. Permits affecting certain residential properties; public notice.

If a permit is issued under Section 8-25 for new construction on vacant residentially or agriculturally zoned land, or construction of a building or structure that would affect the footprint or height of any existing structure located on residentially or agriculturally zoned land or that is exempt from and exceeds any applicable building height limit, the Director must promptly require the recipient to post on the lot a conspicuous sign describing the proposed construction, specifying the time limit to appeal the issuance of the permit to the Board of Appeals, and including any other information the Director requires. The sign must conform to design, content, size, and location requirements set by regulation under Section 8-13(a).

6. Section 59-1.4.2 of the Zoning Ordinance, which governs definitions, defines the following:

Lot Line, Front: A lot line abutting a right-of-way or common open space. On a corner lot, the owner must elect which lot line is the front lot line.

Lot Line, Rear: The lot line generally opposite or parallel to the front lot line, except in a through lot. If the rear lot line is less than 10 feet long or the lot comes to a point at the rear, such rear lot line is assumed to be a line not less than 10 feet long lying wholly within the lot, parallel to the front lot line, or in the case of a curved front lot line, parallel to the chord of the arc of such front lot line.

Lot Line, Side: A lot line adjoining or generally perpendicular to the front lot line and abutting another lot line or common open space.

7. 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 after oral argument on the motions 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.

8. Under Board Rule 3.2.5, the Board must decide the motion after the close of oral argument or at a worksession.


9. The Board finds that there are no genuine issues of material fact to be resolved by the Board. The Board finds, based upon the uncontested evidence, that DPS is charged with "administering, interpreting, and enforcing the zoning law..." under section 2-42B(a)(2)(A) of the County Code, that the parties all agree that DPS has the authority to set rear lot lines, and that the Planning Board and DPS set the rear lot line for the Property. The Board further finds that DPS's administrative practice, upon interpretation of the Zoning Ordinance, is to allow for one rear lot line, and that DPS properly found that

the Northern lot line was more generally opposite to the front lot line and that this lot line met the definition for the rear lot line under the Zoning Ordinance. Further, the Board finds that it owes a degree of deference to DPS's position, whose task it is to interpret the Zoning Ordinance. *People's Counsel for Baltimore County v. Surina*, 400 Md. 662, 682-83, 929 A.2d 899, 911 (2007). The agency properly exercised its discretion in interpreting the property lines in this case. It did so in a manner that a reasonable person could reasonably have reached the same conclusion in identifying the rear property line as the property line most parallel to the front property line. The Board accordingly finds that DPS did not commit legal error in determining the rear lot line on the Property to be only the Northern lot line.

10. The Intervenor's Motion for Summary Disposition in Case A-6752 is granted, and the appeal in Case A-6752 is consequently **DISMISSED**.

On a motion by Chair John H. Pentecost, seconded by Vice Chair Richard Melnick, with Member Roberto Pinero in agreement and Member Caryn Hines opposed, the Board voted 3 to 1 to grant the Intervenor's Motion 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 7th day of September, 2022.



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).