

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

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**Case No. A-6758
APPEAL OF ETHAN OSTROW AND JULIA LIVSHIN**

OPINION OF THE BOARD

(Hearing held September 14, 2022)
(Effective Date of Opinion: October 19, 2022)

Case No. A-6758 is an administrative appeal filed June 9, 2022, by Ethan Ostrow and Julia Livshin (the "Appellants"). The Appellants charged error on the part of Montgomery County's Department of Permitting Services ("DPS") in the issuance of a fence permit, number 956457, on April 8, 2022. The Appellants alleged that the "[f]ence is not located on applicant's property and does not comply with applicant's site plan." See Exhibit 1.

Fence permit number 956457 was issued for the property at 7910 Longridge Court, Cabin John, Maryland 20818 (the "Property"). See Exhibit 4. The Appellants own the property at 6532 79th Street, Cabin John, Maryland, which is a neighboring property. See Exhibit 1.

Pursuant to section 59-7.6.1.C of the Zoning Ordinance, the Board scheduled a public hearing for September 14, 2022. 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 19, 2022. The Board, pursuant to Board Rule 3.2.5, decided the Motion to Dismiss and for Summary Disposition, and any opposition thereto, after the close of oral arguments on September 14, 2022.¹ The Appellants were represented by Jody S. Kline, Esquire. Associate County Attorney Robert J. Birenbaum represented Montgomery County.

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

RECITATION OF FACTS

¹ At the pre-hearing conference on July 20, 2022, the Board elected to hold a motions hearing on the scheduled hearing date and to hold a hearing at a later date if the motions hearing did not dispose of the case. Both the July 20, 2022 pre-hearing conference and the September 14, 2022 motions hearing were held virtually via Microsoft Teams due to the ongoing COVID-19 pandemic.

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

1. Rachele Cherol (the "Applicant"), the owner of the Property, filed an application with DPS on June 15, 2021 for a fence permit. See Exhibit 4; Exhibit 6, p. 2. The plans submitted by the Applicant showed that the proposed installation of the fence would be located entirely on the Property. See Exhibit 6, ex. B.

2. On April 8, 2022, DPS issued fence permit number 956457 for the Property. See Exhibit 4.

MOTION TO DISMISS AND FOR SUMMARY DISPOSITION—SUMMARY OF ARGUMENTS

1. Counsel for the County argued that the Board lacks jurisdiction to entertain this appeal and, in the alternative, that summary disposition is appropriate in this case. He noted that the Appellants did not file a written opposition to his motion to dismiss and for summary disposition. Counsel argued that DPS issued fence permit number 956457 on April 8, 2022 which authorized the Applicant to construct a fence on the Property. See Exhibit 4. He argued that this fence permit was issued in conformance with plans submitted to DPS. Counsel argued that the plans showed a single section of fence proposed to be installed along and inside the Property. See Exhibit 5, ex. B.

Counsel for the County argued that the Appellants contend that fence permit number 956457 was issued in error. He argued that the basis of the Appellants' appeal is their contention that the Applicant installed a fence that encroaches on the Appellants' property and was not in conformance with the plans that were submitted to DPS. Counsel argued that the Appellants filed this appeal on June 9, 2022, 62 days after the fence permit was issued. See Exhibit 1. He argued that Section 8-23(a) of the Montgomery County Code requires that any person aggrieved by the issuance of a permit file an appeal with the Board within 30 days after the permit is issued. Counsel argued that because this appeal was not filed within 30 days after the permit was issued, the Board lacks jurisdiction to hear this appeal. He argued that the Appellants recognize in their appeal that it was filed untimely but ask the Board to toll the time for appeal to the time that the Appellants discovered the fence permit had been issued. See Exhibit 1.

Counsel for the County argued that the Appellants fault DPS with not informing them of issuance of the fence permit. See Exhibit 1. He argued that the "discovery rule" does not apply to jurisdictional questions, noting in his motion that "there is no flexibility in Section 8-23(a) of the County Code that would permit the utilization of the 'discovery rule' to authorize a belated appeal." See also *United Parcel Service v. People's Counsel*, 336 Md. 569, 579-580 (1992). Counsel further argued that there is no right to notice prior to the issuance of this fence permit. He argued that, while the Board may sympathize with the Appellants, DPS had no legal duty to apprise the Appellants of the issuance of fence permit number 956457, and the failure to do so does not extend the time to file this

appeal.

Counsel for the County argued that the second part of the County's motion is the motion for summary disposition. He argued that, even if the Board were to have jurisdiction, which the County does not concede, the County is still entitled to summary disposition. Counsel argued that Section 8-25(a) of the County Code mandates that DPS issue a permit if the proposed work conforms to all requirements of law. He argued DPS does not have the discretion to deny a permit when, as here, the proposed work conforms to all requirements of law. Counsel argued that the fence permit application in this case shows that the fence would be located on the Property, and therefore DPS was required to issue the fence permit as a ministerial act. See Exhibit 5, ex. B. He argued that the Appellants' allegation that the fence was not placed in conformance with the application is irrelevant to the issuance of the permit.

Counsel for the County argued that the Appellants want to remove the fence, and that revocation of the permit would not accomplish that. He argued that whether DPS properly issued a permit for the fence is all that the Board can consider. Counsel argued that if the fence was not placed correctly, the Appellants have private remedies against the Applicant.

2. Counsel for the Appellants argued that the Appellants provided DPS with a survey that shows the fence is not located entirely on the Property and DPS ignored that survey when issuing fence permit number 956457. See Exhibit 3(a). He argued that DPS had all the information needed to make a proper decision in this case and failed to do so. Counsel argued that the Appellants filed this appeal late because they were misled by DPS. He argued that the Appellants were awaiting a call from DPS regarding the issuance of this permit, and the only reason they didn't file the appeal earlier is because they never received that call. He argued that the permit was either fraudulently issued or that the fence was improperly installed.

In response to questions from the Board, Counsel for the Appellants explained that the fence was installed without a fence permit. He stated that a complaint from the Appellants triggered a review and the fence permit application. Counsel argued DPS issued the permit based on the application submitted by the Applicant showing that the fence was only on the Property. See Exhibit 4. Counsel argued that DPS relied on information stating that the fence was solely on the Property when DPS knew that was not correct. He argued that DPS only had one survey to review in this case, the one provided by the Appellants.

In response to further questions from the Board, Counsel for the Appellants argued that, if this case went forward with a hearing, he would provide evidence from DPS employees stating that they would give weight to the Appellants' survey. He argued that DPS has no obligation to keep adjacent property owners up to date on the status of permit applications, but in this case DPS indicated that they would. Counsel for the Appellants argued that this misrepresentation from DPS is the reason the Appellants missed the appeal date. He argued that the Appellants happened to go on DPS's website and saw that this fence permit was issued. Counsel for the Appellants argued that the Appellants were assured that DPS would look at the survey they submitted and get back to them,

and the next thing the Appellants knew the permit had been issued. He argued that the Appellants had been left with a reasonable expectation that they would be aware of when the fence permit would be issued, if at all.

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 956457 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. 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.

7. 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.

8. The Board finds that there are no genuine issues of material fact to be resolved by the Board. The Board finds that Section 8-23(a) of the County Code requires that an appeal of the issuance of fence permit number 956457 be submitted to the Board within 30 days after the permit was issued. The Board further finds that it is undisputed that fence permit number 956457 was issued on April 8, 2022 and that this appeal was filed on June 9, 2022, 62 days after the issuance of the permit. The Board notes that the Court of Appeals has held that when an appeal to an appellate tribunal such as the Board is untimely, the Board has no authority to decide the case on its merits. *United Parcel Services v. People's Counsel*, 336 Md. 569 (1992). Further, the Board notes that Section 8-23(a) provides no flexibility to file belated appeals.

The Board further finds that there is no law that required DPS to notify the Appellants prior to the issuance of fence permit number 956457, and notes that the Appellants acknowledge that there is no legal requirement that they be notified prior to the issuance of the permit. Accordingly, the Board finds that even if DPS failed to notify the Appellants prior to the issuance of permit number 956457, DPS had no legal obligation to do so, and any failure to do so does not extend the time for the Appellants to file this appeal. Therefore, the Board finds that it lacks jurisdiction to hear this case, and the appeal must be dismissed.

9. The County's Motion to Dismiss and for Summary Disposition in Case A-6758 is granted, and the appeal in Case A-6758 is consequently **DISMISSED**.

On a motion by Chair John H. Pentecost, seconded by Member Roberto Pinero, with Vice Chair Richard Melnick and Member Caryn Hines in agreement, 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:

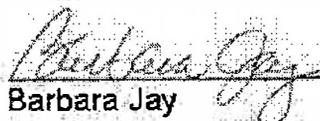
BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above be adopted as the Resolution required by law as its decision on the above-entitled petition.



John H. Pentecost
Chair, Montgomery County Board of Appeals

Entered in the Opinion Book

of the Board of Appeals for
Montgomery County, Maryland
this 19th day of October, 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).