

**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-6765

APPEAL OF JOSEPH GOTHARD, ET AL.

OPINION OF THE BOARD

(Hearing held October 12, 2022)
(Effective Date of Opinion: November 4, 2022)

Case No. A-6765 is an administrative appeal filed July 18, 2022, by Joseph and Kristina Gothard, Jose Cabrera, Dan Lamoy, Tom and Monique Witz, and Feri and Saviz Fallahian (the "Appellants"). The Appellants charged error on the part of: 1) Montgomery County's Office of Zoning and Administrative Hearings ("OZAH") in the issuance of a conditional use, Case No. CU 20-02, on July 1, 2020; 2) Montgomery County's Department of Permitting Services ("DPS") in the issuance of a building permit, No. 955491, on May 12, 2022; and 3) DPS in the issuance of a sediment control permit, No. 287113, on April 26, 2022. The Appellants alleged that the conditional use and permits should "comply with all requirements for R90 zoning for 2 story homes, economic impact analysis and compatibility of the use with the surrounding area that provides that the two (2) 5 story buildings will not cause undue harm to the neighborhood." See Exhibit 1.

CU 20-02, building permit No. 955491, and sediment control permit No. 287113 were issued for the property at 19105 Frederick Road, Gaithersburg, Maryland, 20880 (the "Property"). See Exhibits 3; 5, ex. 1, 2. The Appellants own the properties at: 19050 Wheatfield Drive (Appellants Gothard); 19100 Wheatfield Drive (Appellant Cabrera); 19102 Wheatfield Drive (Appellant Lamoy); 19101 Wheatfield Drive (Appellants Witz); and 19201 Wheatfield Drive (Appellants Fallahian). See Exhibit 2.

Pursuant to section 59-7.6.1.C of the Zoning Ordinance, the Board scheduled a public hearing for October 12, 2022. On August 30, 2022, the then-holder of CU 20-02, Edmondson & Gallagher Property Services LLC ("E&G") and Frederick Road Senior 4% Owner, LLC, the owner of the Property, filed a Motion to Intervene, and the Board granted the request at their prehearing conference on September 7, 2022 ("Intervenor Owner")¹.

¹ Subsequent to the grant of the motion to intervene, OZAH transferred CU 20-02 to Frederick Road Senior 4% Owner, LLC. Therefore, that entity is now both the property owner and the conditional use holder and is the only Intervenor Owner. See Exhibit 19.

On September 21, 2020, the Board considered and denied the Appellants' motion to oppose the Intervenor Owner's request to intervene, filed on September 11, 2022. See Exhibit 10. Also on September 21, 2022, the Board granted Danilo Molieri's request to intervene in this matter ("Intervenor Molieri"). See Exhibit 11.

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 for Summary Disposition of the administrative appeal on August 22, 2022. See Exhibit 5. The Intervenor Owner filed a Motion for Summary Disposition on August 30, 2022. See Exhibit 7. The Appellants filed both a Cross-Motion in Opposition to Motion for Summary Disposition by Montgomery County Attorney and a Cross-Motion in Opposition to Motion for Summary Disposition from Intervenor (Intervenor Owner). See Exhibits 8, 15. All of these parties also filed supplemental motions. The Board, pursuant to Board Rule 3.2.5, decided the Motions for Summary Disposition, and the oppositions thereto, after the close of oral arguments on October 12, 2022.² Appellants Joseph and Kristina Gothard and Dan Lamoy appeared *pro se*. Clifford L. Royalty, Chief, Division of Zoning, Land Use, & Economic Development, represented Montgomery County. The Intervenor Owner was represented by Jody S. Kline, Esquire.

Decision of the Board: County and Intervenor Owners' Motions for Summary Disposition **granted**;
Administrative appeal **dismissed**.

RECITATION OF FACTS

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

1. E&G filed an application for a conditional use for an Independent Living Facility for Seniors with up to 111 dwelling units on the Property under Section 59.3.3.2.C of the Zoning Ordinance on February 12, 2020. See Exhibit 3, which includes the Hearing Examiner's Report and Decision in OZAH Case No. CU 20-02, p. 3. Following a public hearing in which Appellant Joseph Gothard participated, OZAH granted, subject to 14 conditions, CU 20-02 on July 1, 2020. See Exhibit 3, OZAH Case No. CU 20-02, p. 48. The OZAH decision included a Notice of Right to Appeal and copied Appellant Joseph Gothard. See Exhibit 3, OZAH Case No. CU 20-02, p. 48-49. OZAH subsequently transferred CU 20-02 to the Intervenor Owner. See Exhibit 19.

2. On April 26, 2022, DPS issued sediment control permit No. 287113 for the Property. See Exhibit 5, ex. 2.

3. On May 12, 2022, DPS issued building permit No. 955491 for the Property. See Exhibit 5, ex. 1.

MOTIONS FOR SUMMARY DISPOSITION AND OPPOSITIONS—SUMMARY OF

² At the pre-hearing conference on September 7, 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. All hearings referenced were held virtually via Microsoft Teams due to the ongoing COVID-19 pandemic.

ARGUMENTS

1. Counsel for the County argued that the Board lacks jurisdiction to entertain this appeal. As a preliminary matter, he argued that an Appellant is someone who files a charging document, and that he objected to anyone who had not filed a charging document speaking during this motions hearing. Counsel further argued that there had been a lot of allegations in the Appellants' filings that are not based in fact and would be inadmissible in a court of law, including speculations about housing values and about conflicts of interest. He objected to these false allegations and noted that, were this a court case, he would move to strike these allegations.

Counsel for the County further argued that all of the items that have been appealed in this case are untimely. He argued that CU 20-02 was approved over two years ago, and argued in his motion that the Gothard Appellants were notified at the time the conditional use was approved of his appeal rights and failed to exercise them in a timely manner. See Exhibit 7. Counsel argued that both building permit No. 955491 and sediment control permit No. 287113 were issued over 30 days prior to the filing of this appeal, noting that the appeal of the issuance of a building permit must be made within 30 days after its issuance and that the Board has no jurisdiction over the issuance of a sediment control permit. He argued that there were public hearings and meetings held prior to the hearing on CU 20-02 which provided adequate time for people to get involved in that case. Counsel argued that the public was provided with the requisite notice about CU 20-02, and that Appellant Joseph Gothard was involved in the hearing before the Hearing Examiner for that case.

Counsel for the County further argued that the appeals in this case don't state a claim and don't cite to any law that has been violated. He argued that the appeals do not show that there was illegal error by the County, and that instead the appeals all relate to noise and construction on the Property. Counsel argued that the County understands that the construction is disruptive, but that the Board has no jurisdiction over noise or alleged drops in property value. He argued that senior living is allowed through a conditional use under the Zoning Ordinance in this zone, and noted that part of the complaints concern allowing senior living in the neighborhood, which is a decision of the District Council. Counsel argued that the Appellants are attempting to relitigate the approval of CU 20-02, and reiterated that the Board does not have jurisdiction over the matters the Appellants have complained about.

2. Counsel for the Intervenor Owner stated that the Intervenor Owner agrees with the County's arguments. He argued that in the Intervenor Owner's supplemental motion to dismiss, the Intervenor Owner focused on notice, posting, and advertising of all the processes that have been challenged in this administrative appeal. See Exhibit 19. Counsel noted that many Appellants said they never heard of the conditional use application before CU 20-02 was granted, and Counsel noted that very few of these property owners have property that abuts or confronts the Property. He argued that the mailing list for the conditional use always listed abutting and confronting property owners as well as civic associations that were required to be given notice under the Zoning Ordinance. Counsel argued that notice was provided to the Appellants Gothard and

Lamoy Appellant, but that a lot of the other Appellants are not abutting and confronting property owners and therefore were not entitled to notice.

Counsel for the Intervenor Owner argued that the County made a decision that the notice outlined above was adequate notice. He argued that the conditional use applicant in this case held a community meeting to discuss the conditional use even though a meeting was not required. Counsel argued that the applicant posted notice of the community meeting on Route 355 because that was the only place to post the notice, and also mailed notices to those required to receive notice of the application under applicable law, and no one showed up to the meeting. He argued that the applicant gave this mailing list to OZAH before the conditional use hearing and noted that there were five mailings made in conjunction with this conditional use application, which went beyond what the law required. In his supplemental motion, counsel noted that the Appellants Gothard, Lamoy, and Cabrera were all included in the notices sent by OZAH regarding CU 20-02. See Exhibit 19.

Counsel for the Intervenor Owner further argued that the Appellants Gothard received notice and participated in the OZAH hearing on CU 20-02; he noted that OZAH even scheduled an additional hearing because the Appellant Joseph Gothard was not able to access the website for the hearings on the first day. Counsel argued that OZAH issued a 48-page report granting CU 20-02, and that the last page and half of the report provides information on how to appeal the issuance of CU 20-02. He argued that, while both the Hearing Examiner's report and a summary of the report contained information on how to appeal CU 20-02 to either the Board or the circuit court, both of which the Appellants Gothard received, no Appellants appealed the decision to the Board or to the circuit court.

Counsel for the Intervenor Owner argued that when permits are issued for a property, the permit holder does not have to inform anyone about what is going on at the property; when a permit is issued, it is kept and posted at the property so that people know about it. He argued that there was no notice, posting, or procedural defect that occurred with the issuance of the building or sediment control permits in this case, and that no one had complained about their issuance.

Counsel for the Intervenor Owner argued that he has a 66-page document submitted by the Appellants that is nothing more than emails sent by the Appellant Joseph Gothard dating back to June 2022 through the morning of this hearing. He argued that he knows the Board wants to give people a process to be heard. However, he argued that there were late filings in this case and that there are no extenuating circumstances to extend filing dates.

In response to questions from the Board, Counsel for the Intervenor Owner explained that Park and Planning gives mailing addresses to the conditional use applicants. He argued that the Appellants needed to appeal CU 20-02 to the Board by July 10, 2020, and to appeal CU 20-02 to the circuit court by August 1, 2020. Counsel argued that the Appellant Gothards were on the mailing list given to OZAH, which sent notice of the conditional use application and scheduling of the hearing on the application; he stated that the preliminary plan of subdivision was also noticed.

In response to further questions from the Board, Counsel for the Intervenor Owner stated that there is a construction trailer on the Property with a board outside where any permits are posted. He argued that the Department of Environmental Protection ("DEP") has received communications from Appellant Joseph Gothard, has made site visits to the Property, and has conducted noise readings, but did not find noise on the Property exceeds the acceptable level under the County's Noise Ordinance.

3. The Appellant Joseph Gothard argued that activity on the property included zero participation from impacted homeowners and that relevant information was not provided to impacted homeowners. He argued that the Intervenor Owner has been knowingly breaking laws since 2020 and that the CU 20-02 report, under section three, erroneously found that the grant of the conditional use would cause no undue harm. Appellant Joseph Gothard argued that property values have been impacted by the grant of CU 20-02, and that several real estate agents came by and gave original Comparative Market Analyses ("CMA"s), but that now impacted homeowners cannot get a new CMA and their best option is to sell their property at less than 60% of market value to an investor.

Appellant Joseph Gothard argued that, under the noise laws, noise above 75 decibels ("dba") potentially causes permeant hearing loss. He argued that the construction on the Property has caused him ringing of the ears and has caused stress to him and his wife, who works three nights per week and cannot sleep or rest due to the noise. Appellant Joseph Gothard argued that there is no compatibility between the building on the Property and the neighborhood. He argued that he does not recall receiving notification about the conditional use, and that the Hearing Examiner's report contains false statements under findings of fact and conclusions of law. Appellant Joseph Gothard argued that most of his neighbors became aware of the senior living facility when the construction noise began on the Property.

Appellant Joseph Gothard argued that the County has a legal obligation to serve the public, to ensure Zoning Ordinance compliance based on accurate, complete information, and to ensure no harm to adjacent properties. He argued that the Intervenor Owner also needs to provide accurate information to the County. Appellant Joseph Gothard argued that all harm was preventable from the outset, from the granting of zoning to the Planning Board to permits.

Appellant Joseph Gothard argued that homeowners are entitled to be notified, and noted that the Seneca Park North homeowners association was not listed in any of the documents or any of the lists when they should have received notification. He questioned whether he received the CU 20-02 mailing of July 1, 2020, and argued that he cannot read a permit posted on the Property from any public area. Appellant Joseph Gothard argued that the construction noise on the Property is over 90 or 100 dba, not 60 to 70 dba as reported by DEP. He shared a chart with the Board showing decibels, and explained that he has taken hundreds of measurements showing noise in excess of 100 dba. Appellant Joseph Gothard argued that it is a miscarriage of justice for the Board to dismiss this appeal.

4. Appellant Kristina Gothard argued that she is unable to sleep due to noise and

vibrations from equipment on the Property. She played a recording of noise heard from inside her home.

5. Appellant Lamoy questioned who informs homeowners of these proceedings, and argued that 500 letters should have gone out outlining the proposed conditional use on the Property. He argued that the project sits on top of a hill and can be seen from miles away, and explained that the parking lot is one story higher than his home. Appellant Lamoy argued that this is a five-story building, not a four-story building as indicated on the building permit, and there is no mention of a fence on the Property. He argued that the senior living facility has caused his home value to depreciate, and he questioned when the Zoning laws changed to allow this facility in a residential neighborhood. Appellant Lamoy argued that he did not know about this facility until he saw surveyors in the yard. He argued that the County does not follow its own land use laws.

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. That section does not provide the Board of Appeals with appellate jurisdiction over Chapter 19, which governs sediment control permits.

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 59.7.3.1.F.1.c of the Zoning Ordinance (2014) provides that [a]ny party of record may appeal the Hearing Examiner’s decision by filing a written request to present oral argument before the Board of Appeals within 10 days after the Office of Zoning and Administrative Hearings issues the Hearing Examiner’s report and decision. The filing of such a request transfers jurisdiction over the matter while on appeal from the Hearing Examiner to the Board of Appeals.

5. 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 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.

6. 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.

7. The Board finds that there are no genuine issues of material fact to be resolved by the Board. The Board finds that the Hearing Examiner's decision in CU 20-02 must be appealed to the Board by filing a written request to present oral argument before the Board within 10 days after OZAH issues the Hearing Examiner's report and decision, which in this case was issued on July 1, 2020. The Board further finds that Section 8-23(a) of the County Code requires that an appeal of the issuance of building permit number 955491 be submitted to the Board within 30 days after the permit was issued, in this case on May 12, 2012. The Board finds that it is undisputed that this appeal was filed on July 18, 2022, over two years after the Hearing Examiner's report and decision in CU 20-02 and over 60 days after the issuance of building permit number 955491. 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 59.7.3.1.F.1.c of the Zoning Ordinance (2014) and Section 8-23(a) of the County Code provide no flexibility to file belated appeals, and find that all notice requirements were met prior to the granting of CU 20-02, as outlined in Exhibit 19.

Finally, the Board finds that it has no jurisdiction over the appeal of the issuance of a sediment control permit, which are governed by Chapter 19 of the County Code. The Board finds that its jurisdiction is created and limited by statute. *Holy Cross Hospital, Inc. v. Health Svcs. Cost Review Comm'n*, 283 Md. 677, 683, 383 A.2d 181 (1978). Because the Board does not have the authority to decide matters for which it has not been granted jurisdiction by statute, the Board must also dismiss the appeal of sediment control permit number 287113 for lack of jurisdiction. See *United Parcel Service v. People's Counsel*, 336 Md. 569, 650 A.2d 226 (1992).

Therefore, the Board finds that it lacks jurisdiction to hear this case, and the appeal must be dismissed.

8. The County and Intervenor Owners' Motions for Summary Disposition in Case A-6765 are granted, and the appeal in Case A-6765 is consequently **DISMISSED**.

On a motion by Chair John H. Pentecost, seconded by Vice Chair Richard Melnick, with Member Caryn Hines and Member Roberto Pinero in agreement, the Board voted 4 to 0

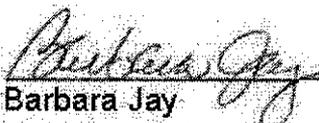
to grant the County and Intervenor Owners' Motions for Summary Disposition and to dismiss the administrative appeal and adopt the following Resolution:

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 4th day of November, 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).