

**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-6857

APPEAL OF BARKLIE ESTES AND NOVA SOLAR, INC.

RESOLUTION TO DENY REQUEST FOR REHEARING

(Worksession held June 26, 2024)

(Effective Date of Opinion: July 17, 2024)

Case No. A-6857 is an administrative appeal filed February 26, 2024, originally by Mark Von Keitz and Nova Solar, Inc. (the “Appellants”).¹ The Appellants charged error on the part of Montgomery County’s Department of Permitting Services (“DPS”) in their failure to “inspect, approve, and close Permits #B1051418 and #E1053137 upon their inspection on 01/11/2024.” See Exhibit 1(a). The Appellants further alleged that “DPS disapproved and failed to close the Permits and rejected our ensuing appeal on 01/25/2024.” See Exhibit 1(a). The subject property is Lot 16, Block 25, Kenwood Park Subdivision, located at 6245 Clearwood Road, Bethesda, in the R-90 Zone. (the “Property”). See Exhibit 1(a).

Pursuant to Section 59.7.6.1.C of the Zoning Ordinance,² the Board scheduled a hearing for May 8, 2024. Pursuant to Sections 2A-7 and 2A-8 of the County Code, and Board of Appeals’ Rule of Procedure 3.2, on March 21, 2024, the County filed a Motion to Dismiss or for Summary Disposition. See Exhibit 6(b). The Appellants filed a Motion to Dismiss or for Summary Judgment Brief in Opposition as well as a revised brief in opposition. See Exhibits 7(b) and 11. The Board, pursuant to Board Rules 3.2.1, 3.2.2, and 3.2.5, decided the Motion to Dismiss or for Summary Disposition and the Oppositions

¹ At a Worksession on April 17, 2024, the Board voted 4-1 (with Member Amit K. Sharma in opposition) to grant the motion to amend submitted by Mr. Von Keitz and Barklie Estes, in his capacity as President of Nova Solar, Inc., seeking to remove Mr. Von Keitz as an Appellant and add Mr. Estes as an Appellant. The Board noted that at that time it was not deciding whether Mr. Estes had standing as an Appellant in his individual capacity.

² All references to the Zoning Ordinance refer to the 2014 Ordinance, unless otherwise indicated.

thereto following a hearing on May 8, 2024.³ The Board voted at that time to grant the County's Motion to Dismiss or for Summary Disposition and to dismiss the administrative appeal. The Board issued a decision to that effect on June 5, 2024.

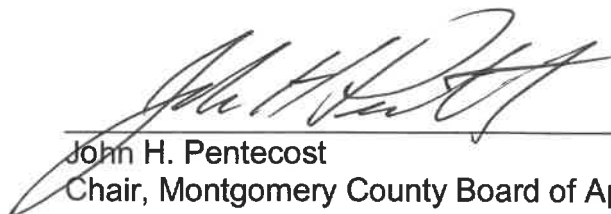
The Board received a timely Motion for Rehearing from the Appellants. The Appellants state that the Board relied on an outdated version of the County Code in dismissing the appeal, and assert that Bill 12-22, effective February 13, 2024, conferred jurisdiction over electrical permits to the Board. The Board received Opposition to this request from the County, correctly stating that the language the Appellants rely on was "bracketed" in that Bill and was never enacted. Finally, the Board received a Response to the County's Opposition from the Appellants, agreeing with the County's read of Bill 12-22, but continuing to seek a Rehearing on grounds that the bracketed text was not enacted because it had been deemed redundant in light of the appellate jurisdiction conferred on the Board by Sections 8-23 and 2-112(d) of the County Code.

The Board of Appeals considered the Appellants' requests, and the County's Opposition thereto, at a Worksession held on June 26, 2024. Associate County Attorney Elana Robison was present. The Board finds that its lack of jurisdiction over electrical permits and inspections pertaining to those permits was fully addressed in its June 5, 2024, Opinion, and that no rehearing is needed.

Accordingly, on a motion by John H. Pentecost, Chair, seconded by Caryn Hines, with Richard Melnick, Vice Chair, Alan Sternstein, and Amit Sharma in agreement:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the record in Case No. A-6857 is re-opened to receive the above-referenced Motion for Rehearing, Response to Appellants' Motion for Rehearing, and Response to Appellants' Motion for Rehearing-Brief in Opposition; and

BE IT FURTHER RESOLVED by the Board of Appeals for Montgomery County, Maryland that the Appellants' request for a rehearing of this matter, as articulated in the Appellants' Motion for Rehearing and in the subsequently submitted Appellants' Response to Appellants' Motion for Rehearing-Brief in Opposition, is **denied**.



John H. Pentecost
Chair, Montgomery County Board of Appeals

³ At the pre-hearing conference on April 3, 2024, the Board voted to use the previously scheduled hearing date as a motions hearing.

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 17th day of July, 2024.

A handwritten signature in blue ink, appearing to read "Barbara Jay", is written over a horizontal line.

Barbara Jay
Executive Director

NOTE:

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. It is each party's responsibility to participate in the Circuit Court action to protect their respective interests. In short, as a party you have a right to protect your interests in this matter by participating in the Circuit Court proceedings, and this right is unaffected by any participation by the County.

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Case No. A-6857

APPEAL OF BARKLIE ESTES AND NOVA SOLAR, INC.

OPINION OF THE BOARD

(Board hearing held May 8, 2024)
(Effective Date of Opinion: June 5, 2024)

Case No. A-6857 is an administrative appeal filed February 26, 2024, originally by Mark Von Keitz and Nova Solar, Inc. (the “Appellants”).¹ The Appellants charged error on the part of Montgomery County’s Department of Permitting Services (“DPS”) in their failure to “inspect, approve, and close Permits #B1051418 and #E1053137 upon their inspection on 01/11/2024.” See Exhibit 1(a) The Appellants further alleged that “DPS disapproved and failed to close the Permits and rejected our ensuing appeal on 01/25/2024.” See Exhibit 1(a). The subject property is Lot 16, Block 25, Kenwood Park Subdivision, located at 6245 Clearwood Road, Bethesda, in the R-90 Zone. (the “Property”). See Exhibit 1(a).

Pursuant to section 59-7.6.1.C of the Zoning Ordinance², the Board scheduled a hearing for May 8, 2024. Pursuant to sections 2A-7 and 2A-8 of the County Code, and Board of Appeals’ Rule of Procedure 3.2, on March 21, 2024, the County filed a Motion to Dismiss or for Summary Disposition. See Exhibit 6(b). The Appellants filed a Motion to Dismiss or for Summary Judgment Brief in Opposition as well as a revised brief in opposition. See Exhibits 7(b), 11. The Board, pursuant to Board Rules 3.2.1, 3.2.2, and 3.2.5, decided the Motion to Dismiss or for Summary Disposition and the oppositions

¹ At a Work Session on April 17, 2024, the Board voted 4-1 (with Member Amit K. Sharma in opposition) to grant the motion to amend submitted by Mr. Von Keitz and Barklie Estes, in his capacity as President of Nova Solar, Inc., seeking to remove Mr. Von Keitz as an Appellant and add Mr. Estes as an Appellant. The Board noted that at that time it was not deciding whether Mr. Estes had standing as an Appellant in his individual capacity.

² All references to the Zoning Ordinance refer to the 2014 Ordinance, unless otherwise indicated.

thereto following a hearing on May 8, 2024.³ Elana M. Robison, Esq. appeared on behalf of the County. Mr. Estes appeared *pro se* and as President of Nova Solar, Inc.

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

RECITATION OF FACTS

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

1. On December 12, 2023, DPS issued Building Permit No. 1051418 to Nova Solar for the Property. See Exhibit 9, ex. A.

2. Also on December 12, 2023, DPS issued Electrical Permit No. 1053137 to Nova Solar for the Property. See Exhibit 9, ex. B.

3. DPS conducted a routine permit inspection of the Property on or about January 11, 2024 for Building Permit No. 1051418 and Electrical Permit No. 1053137 for the installation and connection of a rooftop solar system. The inspection failed because DPS found alleged deficiencies during the inspection. See Exhibit 6(a).

MOTION TO DISMISS OR FOR SUMMARY DISPOSITION – PRELIMINARY ISSUES

Standing of Mr. Estes Individually

At the outset of the hearing, the Board considered whether Mr. Estes had standing in his individual capacity to be a party in this appeal. Mr. Estes argued that he is the master electrician whose work is being challenged from the inspection at issue in this appeal. He argued that he is an applicant for the building and electrical permits, even though the permits were issued to Nova Solar, Inc. Mr. Estes argued that he is affected individually by the inspection failure and that he is the company officer and shareholder both addressing the failed inspection and who is financially damaged.

The County argued that the permit holder is Nova Solar, Inc. and not Mr. Estes in his individual capacity. Ms. Robison argued that Mr. Estes' work is not being challenged for incompetency but rather that the inspection failed based on a DPS interpretation of the electrical code. She argued that Mr. Estes is listed as a qualified agent of Nova Solar, Inc. and that he is under the umbrella of the company but that he is not personally aggrieved in this case.

On a motion by Vice Chair Richard Melnick, seconded by Member Caryn Hines, with Chair John H. Pentecost and Members Alan Sternstein and Amit K. Sharma in

³ At the pre-hearing conference on April 3, 2024, the Board voted to use the previously scheduled hearing date as a motions hearing.

agreement, the Board voted 5 to 0 in finding that the work at issue in this appeal was performed under Nova Solar, Inc. as the permit holder, that the individual aggrievement Mr. Estes raised, the competency of his work and potential consequences, was not an interest in the purview of its appellate jurisdiction over the issuance and denial of permits by DPS. Mr. Estes, therefore, did not have standing in his individual capacity.

Representation of Nova Solar, Inc. by Counsel

Mr. Estes next argued that he is the sole shareholder and officer of Nova Solar, Inc., which is an S corporation. He argued that section 2A-8(g) of the County Code provides that "*parties* have the right to be represented by *themselves* or by legal counsel (emphasis added), and that, therefore, he may represent the interests of his company before the Board.

The County argued that corporations are required to be represented by an attorney in administrative proceedings. Ms. Robison argued that while section 10-206 of the Business Occupations and Professions Article of the Annotated Code of Maryland lists exceptions where a corporate officer may represent a corporation in the Maryland district court, these exceptions do not apply to administrative proceedings before the Board.

On a motion by Member Alan Sternstein, seconded by Chair John H. Pentecost, with Member Caryn Hines in agreement and Vice Chair Richard Melnick and Member Amit K. Sharma in opposition, the Board found that, in the circumstances of this case, Nova Solar was effectively Mr. Estes's alter ego and ruled 3 to 2, therefore, that Nova Solar was a "party" allowed to represent "themselves" before the Board.

MOTION TO DISMISS OR FOR SUMMARY DISPOSITION — SUBJECT MATTER JURISDICTION

1. Counsel for the County argued that while issues pertaining to building permits are appealable to the Board under section 2-112 of the County Code, electrical permits, which are issued under Chapter 17 of the County Code, are not appealable to the Board. She argued that although the appeal lists both a building permit and an electrical permit, the substance of this appeal is the interpretation of the National Electrical Code ("NEC"), which is adopted under Chapter 17 of the County Code. Counsel argued that an electrical permit is a trade permit and that for the Board to find that it has jurisdiction over those permits would be granting jurisdiction over all trade permits, which the Board does not have, noting that the Board expressly has jurisdiction over fire permits. She argued that even if the Board considered the appeal of the building permit, section 8-23(a) of the County Code only provides the Board with appeals of a building permit by "[a]ny person aggrieved by the issuance, denial, renewal, amendment, suspension, or revocation of a permit..." and that a failure of an inspection does not fall within the purview of section 8-23(a).

In response to questions from the Board, Counsel for the County argued that the Board's jurisdiction is created by statute, and that an appeal of an electrical permit under

Chapter 17 of the County Code is not under the umbrella of a building permit. She reiterated that the Board does not have jurisdiction in this case.

2. Mr. Estes, on behalf of his corporation Appellant Nova Solar, Inc., argued that Chapter 8 of the County Code, which the Board has jurisdiction over, discusses electrical issues, and that Chapter 17 also refers to Chapter 8. He argued that these sections must be read together. Mr. Estes argued that the inspection of the building permit failed as well, and that the Board has jurisdiction over building permits.

In his opposition brief, Mr. Estes argued that "inspections are the quintessential permit amending activity." See Exhibit 11. Therefore, he argued that if the Board does not have jurisdiction over inspections, DPS could approve allegedly non-compliant plans and then fail them at inspection, effectively denying the permit holder the right to appeal. See Exhibit 11.

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 17, which governs electrical 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. 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 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.

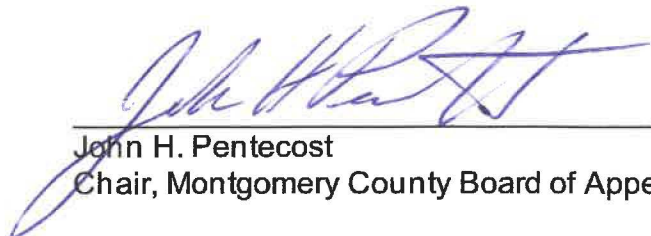
5. The Board finds that the basis for this appeal is the Appellant's allegations that following issuance of Building Permit No. 1051418 and Electrical Permit No. 1053137, the permits did not pass DPS inspections. The Board finds that the County Code does not provide the Board with jurisdiction over electrical permits issued under Chapter 17 of the County Code, and that the Board's 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 dismiss the appeal of Electrical Permit No. 1053137. See *United Parcel Service v. People's Counsel*, 336 Md. 569, 650 A.2d 226 (1992).-

The Board further finds that, while it does have jurisdiction over the issuance, denial, renewal, amendment, suspension, or revocation of a building permit, it does not have jurisdiction over an inspection following the issuance of a building permit. In support of this finding, the Board notes that section 8-23(a) of the County Code states that "[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." Therefore, it is clear that only the actions expressly listed in section 8-23(a) of the County Code are appealable, and the Board finds that, if the County Council, acting as the District Council, had intended to include "inspections" in the list of appealable actions, they would have done so. Therefore, the Board finds that it also lacks jurisdiction over the inspection following the issuance of Building Permit No. 1051418 for the Property.

6. The County's Motion to Dismiss or for Summary Disposition in Case A-6857 is granted, and the appeal in Case A-6857 is consequently **DISMISSED**.


On a motion by Chair John H. Pentecost, seconded by Vice Chair Richard Melnick, with Members Caryn Hines and Amit K. Sharma in agreement, and Member Alan Sternstein in opposition, the Board voted 4 to 1 to grant the County's Motion to Dismiss or for Summary Disposition and to dismiss the administrative appeal.

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 5th day of June, 2024.



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).

STATEMENT OF BOARD MEMBER ALAN B. STERNSTEIN

The Board, upon the County's motion, dismisses this appeal for want of the Board's jurisdiction. The appeal challenges the failure, upon inspection by the Department of Permitting Services ("DPS"), Appellants' work under an electrical permit DPS issued to Appellant Nova Solar, Inc. I have previously questioned what is at least the practice of the County in appeals before this Board to advance any seemingly plausible reason for why this Board lacks jurisdiction of the appeals before it. In two previous appeals, the Board rejected such doubtful arguments by the County that the Board lacked jurisdiction. See Concurring Statement of Board Member Sternstein, *In re Appeal of Rzeszut*, Case No. A-6794, at 1 & n.1 (May 21, 2023); Opinion of the Board, *In re Appeal of Faulkner*, No. A-6781 (denied Jan. 18, 2023). In this appeal, the Board this time uncritically indulges, rather than rejects, another such doubtful reason, denying Appellants administrative review of the challenged DPS action. I am writing separately, therefore, to disagree with this aspect of the Board's decision.¹

There is no dispute here that this Board may not exercise jurisdiction that it has not been granted. The question is whether it is reasonable, as a matter of law, to conclude that jurisdiction has been granted, bearing in mind, as set forth in the County's Administrative Procedure Act and pervasive federal and state laws like it, that it is the clearly "declared . . . policy of Montgomery County, Maryland, to provide for ensure the realization of administrative due process with respect to specified appeals and contested matters It is the intent of the County Council to protect those legal rights afforded to affected who utilize and are subject to the administrative hearing processes established by the laws and ordinances of Montgomery County." Mont. Co. Code § 2A-2.

The Board's decision rejecting jurisdiction rests on two grounds. First, the Board reasons that "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 17, which governs electrical permits." Opinion at 4. This is true, however, as the Board's decision suggests, only if the Board's jurisdiction, as it is particularly and explicitly set forth in the Code sections enumerated in Section 2-112(c), is the only grant of jurisdiction to the Board. It is not true, however, of Section 2-112(c).

Although it was discussed in oral argument before the Board, inexplicably the Board overlooks Section 2-112(d), which provides that "[t]he Board must hear and decide any other appeal authorized by law." Although this section does not create jurisdiction that does not otherwise exist, it does counsel, as does the stated intention of the Administrative Procedure Act, that on questions of jurisdiction, a parsimonious analysis of the applicable ordinances is

¹ I agree with the Board's decision insofar as it finds that Appellant Estes is authorized to present argument before the Board on behalf of Appellant Nova Solar, Inc., an S Chapter corporation of which he is the sole shareholder and officer.

misplaced and inappropriate. Indeed, the Administrative Procedure Act councils looking beyond Section 2-112, stating that it is applicable to “[a]ppeals and petitions charging error in the grant or denial of any permit or from any order of any department or agency of the County government . . . appealable to the County Board of Appeals, as set forth in Section 2-112 . . . or any other law, ordinance or regulation providing for an appeal to said board from an adverse governmental action.” Mont. Co. Code § 2A-2(d) (emphasis added).²

The Board’s decision argues, as did the County Counsel in the hearing on the motion to dismiss, that because Chapter 8 of the Code, concerning the DPS generally, expressly provides for appeals to the Board in Section 8-23, while Chapter 17, concerning only electrical permits, does not, the Board does not have jurisdiction of challenges to DPS’s administration of electrical permits. The County Counsel also noted during the hearing that, in contrast to Chapter 17, Chapter 22 of the Code, which concerns fire safety permits, licenses and certifications, specifically provides for Board review of DPS administration of these authorizations. This is, however, a neglectful and unduly truncated, if not misleading, reading of these provisions.

In particular, Chapter 22, unlike Chapter 17, contains extensive provisions for the administration of the permits, licenses and certifications it authorizes. *See, e.g.*, Mont. Co. Code §§ 22-7, -10, -16, -23. By contrast, Chapter 17’s provisions contain, at best, very limited provisions related to administration. Instead, Chapter 17 broadly provides, “This Chapter is administered and enforced by the Department of Permitting Services,” Mont. Co. Code § 17-4.³ It is Chapter 8, therefore, that contains the comprehensive provisions for DPS administration of permits authorized not just in Chapter 8 but also in Chapter 17, including the grant of Board jurisdiction to review the administration of Chapter 17 electrical permits.⁴ In other words, Chapter 17 electrical permits are “the issuance . . . of a permit . . . under this Chapter,” within

² *See also* Md. Code Ann., Local Government, § 10-305(b)(2) (“The county board of appeals may have original jurisdiction or jurisdiction to review the action of an administrative officer or unit of county government over matters arising under any law, ordinance, or regulation of the county council that concerns . . . the issuance, renewal, denial, revocation, suspension, annulment, or modification of any license, permit, approval, exemption, waiver, certificate, registration, or other form of permission or of any adjudicatory order. . .”).

³ The same is true of Chapter 34, which contains very limited provisions for water and gas plumbing permits and, instead, provides, “This Chapter is administered by the Director of Permitting Services.” Mont. Co. Code § 34-13(a).

⁴ Apparently, at some earlier time, Chapter 17 did contain more extensive administrative provisions. Tellingly, however, in 2022, amendments to Chapter 17 extensively pared its provisions, when the licensing of electricians became a Maryland state, not Montgomery County, responsibility. It was at this time that the Council deleted the provision in Chapter 17 providing for Board review of “the issuance, denial, renewal, amendment, suspension, or revocation of a permit . . . under this Chapter [17],” leaving Section 17-4 and, thereby, the administration of Chapter 17 permits through the administrative provisions in Chapter 8. *See* 2022 L.M.C., ch. 32, §1 (emphasis added).

the meaning of the Board jurisdictional grant in Chapter 8 and, specifically, Section 8-23(a). Indeed, the terms of Chapter 8 comprehend DPS administration of electrical installations. Section 8-2 defines “service equipment” to include “electrical . . . equipment, including . . . wiring, fixtures and other accessories, which provide . . . lighting . . . and . . . facilities essential for . . . habitable occupancy” Section 8-4 then prohibits the installation of service equipment, including “electric wiring” without DPS authorization.⁵

It makes perfect sense to provide, within the particular regulations that govern procedures for the exercise of administrative power, the means for independent review of that exercise, as Chapter 8 does, not just for the permits that it authorizes but also for the permits that Chapter 17 authorizes. It makes no sense for the same regulations governing the administration of building, electrical and plumbing permits, to construe the authorization for independent Board review in those regulations as limited to only review of building permits.⁶ Section 8-23 provides for Board review “of a permit” that DPS administers, not review only “of a building permit” that it administers. Sensibly, too, one would not expect to find Board review authorization in the substantive laws and regulations that establish the standards by which permits, licenses and certifications are to be issued. It makes perfect sense to find Board review authorization in the administrative laws and regulations that govern the issuance, suspension, revocation, etc. of permits. In short, by virtue of Chapter 17’s invoking the DPS administration provisions of Chapter 8 for the issuance of the permits that Chapter 17 authorizes, Section 17-4 through Section 8-23 plainly and expressly provides for this Board’s review of DPS administration of electrical permits. It is that simple.

The second reason the Board gives for rejecting jurisdiction is its view that, even assuming there is Board jurisdiction of this appeal under Section 8-23, the DPS action challenged in this appeal does not constitute the suspension or revocation of a permit, within the meaning of that section’s provision for Board review of “the issuance, denial, renewal, amendment, suspension, or revocation of a permit.” Specifically, the Board reasons that there was no suspension or revocation of Appellants’ permits because Appellants’ work merely failed DPS electrical inspection, and DPS refused, therefore, to close the electrical permit and building permit with which DPS associated the electrical permit.

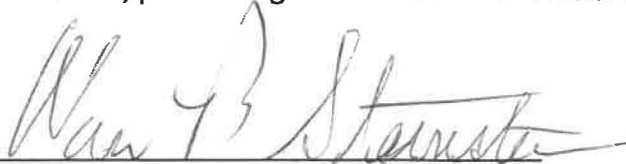
Fundamentally, however, a permit is an official authorization to perform some action, in this case, installation and energizing the electrical wiring and other electrical components for a

⁵ Notably, DPS treats electrical permits as related to building permits, for, as the Board’s decision indicates, Opinion at 2, and as Appellants advised during the motions hearing, DPS declined to close not only the electrical permit at issue here but also the building permit with which the electrical permit was associated, on account of its finding a violation of the electrical code.

⁶ There is no apparent difference between the nature of electrical permits and the nature of building permits that would justify a difference in Board jurisdiction to review them, and the County offers none. Indeed, in at least one instance, the Board reviewed DPS’s denial of an electrical permit. See *Carter v. Montgomery Cty.*, No. 61 (Md. App. filed Apr. 30, 2020).

solar panel. An agency determination that the action thereafter performed under the permit fails to satisfy certain standards, resulting in disapproval of that work, is effectively a suspension or revocation of the permit, for the consequences of that determination, if it is unlawful, are the same as the consequences of a revocation or suspension. The work is disallowed as much as it would be had it been performed without a permit. It is arbitrary for the Board not to so view DPS's allegedly unlawful determination and not to view that determination, therefore, as within the Board's appellate jurisdiction. To be sure, in most cases involving highly technical matters, such as electrical or building code requirements, the determination of the administrative agency involved as to code compliance is to be indulged and is presumably lawful, and anyone challenging such a determination must make a strong showing, in order to prevail. See *Carter v. Montgomery Cty.*, No. 61 (Md. App. filed Apr. 30, 2020) (electrical code) (unreported decision), citing *Adventist Health Care, Inc. v. Maryland Health Care Comm'n*, 392 Md. 103, 119 (2006); *Board of Physician Quality Assur. v. Banks*, 354 Md. 59, 68-69 (1999); *Haigley v. Dep't of Health & Mental Hygiene*, 128 Md. App. 194, 216-17 (1999).⁷ That does not mean, however, that the agency's determination can never be unlawful or that the Board may never pass on the legality of a Board determination. See Opinion of the Board, *In re Appeal of Rzeszut*, *supra* (examining whether DPS interpretation and application of building code requirements was lawful).

In private litigation practice, which has been the most substantial portion of this Board member's legal career, it is a common and accepted practice for lawyers defending clients to challenge jurisdiction in judicial and administrative proceedings involving their clients. It is, to be sure, also a legitimate practice by governments in defending such proceedings against them and their subparts. A private person's privilege to challenge official action and protections for that ability, however, are fundamental to a free society. They are enshrined in the Due Process Clause of the United States Constitution and in similar provisions in state constitutions. Similar to the discretion to prevent abuse that criminal prosecutors are expected to exercise before bringing the weight of criminal proceedings to bear on a person, even in cases where it would not be unlawful to do so, so, too, should there be some discretion exercised by government in challenging, on any ground, however insubstantial, proceedings for the review of official action.



Alan B. Sternstein

Member, Montgomery County Board of Appeals

⁷ Although *Carter* is an unreported the decision, the County is a party to the case and, therefore, bound by it, and, in any case, it is doubtful that the County would disagree with the propositions of law for which *Carter* is cited here, propositions for which reported decisions are cited.

**STATEMENT OF VICE-CHAIR RICHARD H. MELNICK AND
MEMBER AMIT K. SHARMA**

We, Richard H. Melnick and Amit K. Sharma, submit this joint statement to note that we disagree with the majority (3-to-2) vote of this Board of Appeals, which found "that in the circumstances of this case," Mr. Estes could represent Nova Solar, Inc., despite the fact Mr. Estes is not an attorney.

Nova Solar, Inc., is an S-corporation entity by whom Mr. Estes was employed to provide architectural services, and for which he was the sole shareholder and officer. The majority relied on Montgomery County Code, § 2A-8 (g), which states: "parties have the right to be represented by themselves or by legal counsel." Montg. Co. Code, § 2A-8 (g). In doing so, it declared Mr. Estes the "alter-ego" of Nova Solar, Inc., or vice-versa, so that he was the same "party" as the corporation, notwithstanding the fact Mr. Estes established that separate entity/ "person" to afford himself certain tax and liability protections, under applicable law.

The majority's interpretation of the above-mentioned County statute, to permit Mr. Estes, a non-attorney, to represent the corporation, is incorrect, as a matter of law. This is because permitting a non-attorney to represent the corporation directly conflicts with applicable Maryland law that establishes the requirements for the authorized practice of law by an individual who represents a corporation. Specifically, the Maryland Business Occupations and Professions Article, at Section 10-206, provides:

- (a) Except as otherwise provided by law, before an individual may practice law in the State, the individual shall:
 - (1) be admitted to the Bar; and
 - (2) meet any requirement that the Court of Appeals may set by rule.

Section 10-206 (b) then discusses several scenarios to which the attorney requirement does not apply; however, none of those exceptions to the attorney mandate are relevant to an individual appearing before an administrative agency, in general, or the Board of Appeals, in particular. The provision closest to the circumstances in this case is subsection (b)(4), which allows "an officer of a corporation, [or] an employee designated by an officer of a corporation, . . . [to] appear . . . on behalf of the corporation, . . . in [certain types of] civil action[s] in the District Court of Maryland," none of which applies to the circumstances of this case.

Sections 10-206 (d)(1) & (d) (2), allow an individual to give legal advice to a corporation in this State only if : "(i) employed by the corporation; and (ii) admitted to the bar of any other state." The individual then: "(i) is subject to disciplinary proceedings [under] the Maryland Rules . . . ; and, (ii) may not appear before a unit of the State government or of a political subdivision unless a court grants . . . a special admission . . ." A non-attorney is not subject to the safeguards contemplated by the legislature in this section.

No provision in Section 10-206, or any other applicable law, permits Mr. Estes, a non-attorney, to represent a corporation before the Board of Appeals, or another unit of the State government or of a political subdivision in this State. Montgomery County Code, § 2A-8 (g) does not, and must not, permit that which Maryland law, at Section 10-206, expressly prohibits, namely- the practice of law by a non-attorney in representing a corporation before a County administrative agency. See *City of Baltimore v. Sitnick & Firey*, 254 Md. 303, 255 A.2d 376 (1969).

Consistent with this dissenting opinion, the Office of the County Attorney has provided guidance on this issue, stating that only an attorney may provide legal representation to a corporation in a matter before the Board of Appeals.



Richard H. Melnick, Vice Chair
Montgomery County Board of Appeals



Amit K. Sharma, Member
Montgomery County Board of Appeals