

BOARD OF APPEALS
for
MONTGOMERY COUNTY
Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
(240) 777-6600

Case No. A-5678

Case No. A-5679

**APPEALS OF LUXMANOR CITIZEN'S ASSOCIATION, INC., JERRY BLACK,
MARK M. SPRADLEY AND TIM D. ANDREADIS**

Case No. S-1887

PETITION OF POINDEXTER JOINT VENTURE

OPINION OF THE BOARD

(Hearing dates: January 30, 2002, March 27, 2002,
April 10, 2002, April 17, 2002)

(Effective date of Opinion: November 7, 2002)

Case No. A-5678 is an administrative appeal in which the appellants charge administrative error on the part of the Department of Permitting Services (DPS) in its August 29, 2001 issuance of a building permit to Old Georgetown Medical Building, LLC to construct a medical clinic operated under Special Exception S-1887.

Case No. A-5679 is an administrative appeal in which the appellants charge administrative error on the part of DPS in its letter of August 31, 2001 which withdrew a prior agency determination and determined that Special Exception S-1887 was valid and timely implemented under Section 59-A-4.53 of the Montgomery County Zoning Ordinance.

Case No. S-1887 is a request by Poindexter Joint Venture to transfer its special exception for a medical clinic to the current property owner, Old Georgetown Medical Building, LLC.

The Board consolidated the three proceedings, which pertained to the same property, and a public hearing was held pursuant to Section 59-A-4.3 of the Zoning Ordinance. Stanley Abrams, Esq. represented the property owner, who intervened in the proceedings, and Malcolm Spicer, Esq. represented Montgomery County, Maryland. William J. Chen, Jr., Esq., represented the appellants, Luxmanor Citizens Association (the Association) and adjoining property owners, Jerry Black, Mark M. Spradley, and Tim D. Andreadis, until April

- Poindexter executed agreements with contractors to do sediment control, stormwater management and concrete foundation and footing work.
- Poindexter installed tree protection measures.
- Poindexter installed a temporary construction entrance on Poindexter Lane by September 10, 1999.
- Poindexter attended preconstruction meetings on site with County inspectors.
- Poindexter conducted storm drain and utility stake outs.
- Poindexter re-graded and placed fill dirt on site to raise the grade elevation approximately 7 feet in order to install the storm water management pond.
- Poindexter received electrical permits, WSSC permits (February 2, 2000) and a permit from the State Highway Administration on December 15, 1999.
- Poindexter installed sediment control and storm water management facilities.
- Poindexter excavated for the footings and foundations.
- Poindexter installed the footings in late November, 1999.
- Poindexter installed concrete foundations and several rows of concrete block walls at the site prior to December 13, 1999, as evidenced by DPS wall checks on or about December 10, 1999.

5. Poindexter's contractor, Mervis Limited Partnership, applied to DPS for a building permit in February, 1999. However, DPS did not issue the construction permit until December 2, 1999 (Permit No. 992090078, expiring December 2, 2000).

6. Poindexter sold the subject property to Old Georgetown on or about May 12, 2000, but conducted various construction activities from December 13, 1999 until the property was sold in May, 2000, specifically:

- Poindexter dewatered the footing trenches.
- Poindexter relocated and installed the construction entrance from Poindexter Lane to Old Georgetown Road.
- Poindexter had the road entrance inspected by the State Highway Administration.
- Poindexter backfilled the trenches and tamped around the foundation walls.
- Poindexter obtained WSSC water and sewer connection permits.
- Poindexter removed dirt and the site and did addition re-grading at the site.
- Poindexter prepared further cost estimates.

- Poindexter notified contractors to proceed with plumbing and electrical ground work.
- Poindexter met with Old Georgetown to review building plans and plumbing changes.
- Poindexter prepared a budget for the interior work and planned for building materials, fixtures and equipment to be ordered.
- Poindexter conferred with a medical space planner.
- Poindexter solicited estimates and coordinated the removal of debris from the site.

7. After acquiring the property, Old Georgetown retained a new architect and construction manager, Thomas Flanagan. Between June, 2000 and November, 2000, Old Georgetown obtained prices from construction contractors, held meetings and discussions with lending institutions, obtained construction financing, negotiated with contractors and suppliers, and reviewed plans prepared by Mr. Flanagan and the medical space planner.

8. On or about November 15, 2000, DPS extended building permit number 99209078 at Mr. Flanagan's request until June 2, 2001. DPS also revised the name of the permittee to "Old Georgetown Medical Building, LLC" to reflect the change in ownership.

9. Old Georgetown was unable to complete the construction by June 2, 2001. Because the County Code allows only one extension of a building permit², Old Georgetown applied to DPS and obtained a new building permit on May 24, 2001 (Permit No. 244261). Plans filed to obtain the permit incorporated the design changes approved by the Board in its 1998 special exception modification; i.e. the building consisted of one story rather than two.

10. DPS issued a "stop work" order on or about July 18, 2001, which it explained in a meeting with Old Georgetown on July 25, was issued solely because building permit 244261 contained an incorrect property address.

11. DPS then wrote to Old Georgetown on August 3, 2001 that the initial building permit (No. 992090078) was invalid, claiming that the permittee had made no effort to continue to implement the special exception since December 1999.

12. DPS changed its position following meetings with Old Georgetown and its own legal counsel, and correspondence from Old Georgetown's counsel. DPS concluded, contrary to its August 3rd letter, that the permittee had, in fact, continued to implement the special exception. Accordingly, DPS issued a new permit dated August 29, 2001 (permit No. 257394) which expired on August 30,

²See, Section 8-25(b)(2) of the Code.

2002. Reginald Jetter, a division chief at DPS, wrote Mr. Flanagan on August 31, 2001 explaining that “after reviewing the facts and circumstances concerning the implementation of special exception No. S-1887, it is the decision of this Department that the special exception is valid and was timely implemented under Section 59-A-4.53 of the Montgomery County Ordinance.” Mr. Jetter further explained, “Construction was started under building permit No. 992090078 with the intent to complete and there was a good faith continuation of effort. A change of ownership of the subject property along with changes in the design (interior) of the building necessitated a delay in construction activity on site, but the effort to construct the building continued.”

13. Appeals were filed on September 26, 2001 challenging DPS’ issuance of the August 29 building permit to Old Georgetown (Case No. A-5678) and its August 31 letter determination regarding the validity of the special exception (Case No. A-5679). Through their counsel, appellants also objected to the transfer of Special Exception No. S-1887 to Old Georgetown Medical Building, LLC.

14. Appellants contend that:

a. The special exception became invalid under Section 59-4.53(b)(2) of the Zoning Ordinance on December 13, 1999 when permit 992090078 expired because “construction [was not] started within the period [ending on December 13, 1999].

b. Building permit No. 992090078 was invalid under Section 8-25(b)(1)(B) of the County Code because work at the project was suspended for 19 months, a period of time exceeding 6 months.

c. Building permit No. 9920978 was improperly issued under Section 59-A-3.12(b) of the Zoning Ordinance because the construction of a single-story building did not comply with the special exception terms and conditions set by the Board.

d. DPS acted arbitrarily and capriciously when it changed its position between August 3 and August 29, 2001, determining that the special exception was valid and timely implemented by Poindexter.

FINDINGS OF THE BOARD

1. The special exception is valid and was timely implemented under Section 59-A-4.53(b). This provision states: “A special exception is not valid after 24 months if the use is not established **or a building permit is not obtained and construction started within the period.**” (emphasis supplied). The time to implement the exception was extended until December 13, 1999. Poindexter obtained a building permit on December 2, 1999, within the implementation

period, and commenced numerous construction activities prior to December 13, 1999 (see, para. 4 of the Findings of Fact). See, also, *Pemberton v. Montgomery County*, 275 Md. 363 (1975) (construction started and special exception implemented under predecessor ordinance where owner had excavated trench for foundation and poured concrete after steel rod reinforcements were put in place). The Board agrees with the property owner's argument that the construction activities here paralleled, if not exceed, those performed in the *Pemberton* case.

2. Building permit 992090078 did not become invalid under Section 8-25(b)(1)(B) of the Montgomery County Code. While a permit may become invalid under this subsection if "the authorized work [under the permit] is suspended or abandoned for a period of 6 months", the Board is not persuaded that there was a cessation of construction activities at the site for any significant period of time, let alone a period of 6 months. [See, paragraphs 4 - 9 of the Findings of Fact].

3. Building permit 992090078, for the construction of a single-story building, was properly issued by DPS under Section 59-A-3.12(b) of the Zoning Ordinance which requires that the proposed construction under the permit comply with all terms and conditions of the special exception. Construction of a single-story building did not comply with the terms and conditions of the original special exception which was granted in 1991. However, it complied with the terms and conditions of the modified special exception (and revised site plan), which was approved by the Board in 1998. [See, paragraph 2 of the Findings of Fact].

4. The Board is not persuaded that DPS acted in an arbitrary and capricious manner when it changed its position in August, 2001. Nor is there any evidence that DPS was biased for or against the special exception holder or neighboring property owners. The evidence reflects that DPS made an error when it made its initial determination on August 3, 2001 that the special exception had not been implemented. After further review of the matter, including meetings with its counsel and counsel for the property owner, DPS revised its position and determined that sufficient construction activities had occurred at the site to qualify as "implementation" of the special exception under the Zoning Ordinance.

5. Based upon the change of ownership between Poindexter and Old Georgetown (see, paragraph 6 of the Findings of Fact), the Board grants the request to transfer the special exception to the successor owner, Old Georgetown Medical Building, LLC, in accordance with Section 59-G-1.3(c) of the Zoning Ordinance.

On a motion by Angelo M. Caputo, seconded by Louise L. Mayer, with Donna Baron, Allison Ishihara Fulz, and Donald H. Spence, Jr., Chairman, in agreement, the Board adopts 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.

Donald H. Spence, Jr.
Chairman, Montgomery County Board of

Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 7th day of November, 2002.

Katherine Freeman
Executive Secretary to the Board

NOTE:

Any request for rehearing or reconsideration of a decision on an administrative appeal must be filed within ten (10) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 2-A-10(f) of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any request for rehearing or reconsideration of a decision on a special exception or variance must be filed within fifteen (15) days after the date of the Opinion is mailed and entered in the Opinion Book (see Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

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.

