

**ST. MARY'S COUNTY BOARD OF APPEALS
Before the Hearing Examiner**

In the Matter of the Appeal of
Robert C. Stuber, Jr. and Alice
Stuber from the Decision of the
Director of Planning to Decline
Revocation of a Permit

Case No. ZAAP 12-2102

The captioned matter was heard on April 24, 2014, before Hearing Examiner Jack G. Upton. The parties were Appellants Robert C. Stuber and Alice Stuber, and Respondents Francis P. Wheatley and Janet Lee Wheatley. The record of proceedings in the Department of Land Use & Growth Management was received, as was testimony and exhibits from the parties. The complete record is attached to this suggested order as Appendix 1.

STATEMENT OF FACTS

Appellants reside at 27122 Baptist Church Road, Mechanicsville, Maryland and have done so since 2005. Respondents live, and conduct a drywall business, on property at 27094 Baptist Church Road, Mechanicsville, Maryland, which property adjoins that of Appellants. Respondents' drywall business is conducted under a home occupation permit, a copy of which is contained in the record.

Appellants allege that Respondents are in violation of the conditions for a home occupation permit and have filed this appeal seeking a directive to the Planning Director to require compliance with the St. Mary's County Zoning Ordinance.

Mr. Stuber referred to a number of emails, all of which are in the record, documenting repeated requests for enforcement action by the Department of Land Use & Growth Management (LUGM). Those emails were largely directed to Mr. Phil Shire,

Director of LUGM, and were supplemented at the hearing by photographs, admitted as Appellants' Exhibit 3. In particular, Appellants allege that Respondents' business activity violated prohibitions in the zoning ordinance against excessive noise, dust pollution, outside storage of equipment, and use of more than two hundred square feet of space in connection with the home occupation. Appellants also allege that a fence constructed by Respondents was built for the purpose of concealing impermissible activity. Finally, Appellants allege that traffic at Respondents' site indicates that more than two employees report to work there and that construction materials are stored on site, both circumstances constituting violations of the zoning ordinance.

Respondent Mr. Wheatley testified that much of the equipment shown in Appellants' Exhibit 3 belonged to others and was in no way related to his business. He further testified that he had, in fact, received a notice from LUGM to remove a trash receptacle on site but that the notice was rescinded after he agreed to enclose it. He also acknowledged that on rare occasions he has placed construction debris in the trash container and also, on isolated occasions, he had construction supplies delivered to his property for transfer to a specific site.

Mr. Wheatley testified that inspectors from LUGM have visited his site and no violations have been cited. He also testified that the amount of space used in his home occupation was measured by the inspectors and found to be well within that permitted by law.

It should be noted that the testimony of both Appellants and Respondents, though given under oath, was uncorroborated and the reports of site inspections, contained in the record, were not addressed by either party. Appellants allege that inspection is

inadequate and that Respondents perceived lack of cooperation is an indication of unapproved activity. Respondents allege that inspections have been intrusive and that unscheduled inspections interfere with conducting ordinary business activity.

CONCLUSIONS OF LAW

Appellants are in the unenviable position of having to prove a negative. The case is in the nature of a mandamus action wherein Appellants are requesting that the Planning Director be directed to do his job, and must prove he has not done so. The Board of Appeals has no mandamus authority but is authorized to step into the shoes of the party whose action is being appealed. Thus, presumably, the Board of Appeals, considering the evidence, could assume the role of the Planning Director. That would then require that inspections be ordered, which has been done; that evidence be considered, which has been done; and require the Board to determine what enforcement, if any, to take. It would effectively make the Board of Appeals a zoning enforcement employee of the County. That is an outcome which is neither practical nor desirable.

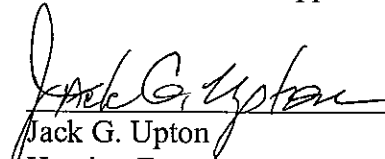
This case brings to mind the words of Rodney King. "Can't we all just get along?" Clearly Appellants are paying the price for Respondents' success. The increased hours, activity, and lighting are all factors affecting Appellants' quality of life. The evidence, however, did not reveal these factors to be violations of the zoning ordinance. On the other hand, Respondents have erected fencing, planted trees, and attempted to alter the schedule of their trash removal service to be a better neighbor.

It should be noted that counsel for Respondents submitted an opinion of the Maryland Court of Appeals, Falls Road Community Ass'n., Inc., et al vs. Baltimore County, Maryland, et al No. 39, September Term 2012 for the proposition that the Board

of Appeals has no authority in this case. That case addresses, inter alia, the judicial application of mandamus in an administrative proceeding and is not applicable, nor was it considered, in this case. In the event peaceful co-existence is not possible between the parties in this case perhaps that case will be revisited at a higher level as Appellants have exhausted their administrative remedies and are at liberty to seek judicial review.

PROPOSED ORDER

Upon consideration of the correspondence, documents, testimony and exhibits comprising the record in this case it is ordered that the Board of Appeals take no action.



Jack G. Upton 5/1/14
Hearing Examiner Date

APPENDIX 1

Certificate of Publication

Record of correspondence, documents, and application for appeal from the Department of Land Use & Growth Management

Applicants' Exhibit 1 – SDAT report and attached plat for Appellants' property

Applicants' Exhibit 2 – SDAT report for Respondents' property

Applicants' Exhibit 3 – Photographs (15)