

DECISION

TALBOT COUNTY BOARD OF APPEALS

Appeal No. 20-1710

Pursuant to due notice, a public hearing was held by the Talbot County Board of Appeals (the Board) at the Wye Oak Room, Community Center, 10028 Ocean Gateway, Easton, Maryland 21601, beginning at 6:30 p.m. on October 26, 2020 on the Application of **Jonathan and Karen Glass, Ronald Christopher and Foam Works, LLC, agent** (collectively, the Applicant). The Applicant filed an Administrative Appeal of a decision by Brent Garner/Building Official, Manager Permits and Inspections, pursuant to *Talbot County Code* (the *Code*) § 190-54.6, Chapter 20, § 20-6 and Chapter 28 § 112-1, contending that Mr. Garner erred by requiring an independent third-party testing to be performed on all applications of DC315 and other thermal barriers. The property is located at 11283 Kitty's Corner Road, Cordova, MD 21625 and is located in the Agricultural Conservation (AC) Zone. The property owners are John and Karen Glass and the property is shown on Tax Map 11 grid 24 parcel 295, Lot 3.

Present at the hearing for the Board of Appeals were: Phillip Jones, Chairman, Frank Cavanaugh, Vice Chairman; members Louis Dorsey, Jr., Paul Shortall, and Zakary A Krebeck. Anne C. Ogletree served as attorney for the Board of Appeals. Miguel Salinas, Assistant Planning Officer and Maria Brophy, Planner II, were in attendance.

The Chairman inquired if all members had visited the site and received affirmative responses.

The following Board exhibits were then offered and admitted into evidence as indicated:

- Exhibit 1. Application for an Administrative Appeal with Attachment A;
- Exhibit 2. Checklist for Administrative Appeal;
- Exhibit 3. Notice of Intent to Participate;
- Exhibit 4. List of Witnesses to be Summoned;
- Exhibit 5. Tax Map (2 p.) with subject property highlighted;
- Exhibit 6. Notice of public hearing for Star Democrat;
- Exhibit 7. Newspaper Confirmation;

- Exhibit 8. Revised Agenda for Notice of Public Hearing with List of Adjacent Property Owners attached;
- Exhibit 9. Sign Maintenance Agreement/Sign Affidavit;
- Exhibit 10. Authorization Letter;
- Exhibit 11. Independent Procedures Disclosure and Acknowledgment Form;
- Exhibit 12. Black and White Aerial Photograph;
- Exhibit 13. Notice of Intent to Participate by Anthony Kupersmith, County Attorney, received 07/06/2020;
- Exhibit 14. Exhibit A— Letter from Bret Garner dated 03/03/2020;
- Exhibit 15. Exhibit B – Letter from Charles Wagoner, dated 11/24/2010;
- Exhibit 16. Exhibit C – Letter from J. Brian McDonald, dated 08/03/2016;
- Exhibit 17. Exhibit D – Letter from Brad Glazier dated 03/21/2020;
- Exhibit 18. Exhibit E – Email from Chris Corkell;
- Exhibit 19. Exhibit F -- ICC-ES Evaluation Report, ESR-3702, Revised June 2019;
- Exhibit 20. Certificate of Service received 04/03/2020
- Exhibit 21. Applicant's Prehearing Statement, received 06/19/2020;
- Exhibit 22. Subpoena returned served on Kevin Beck 07/27/2020;
- Exhibit 23. Request for Continuance, Talbot County, Maryland's Pre-Hearing Statement and Exhibit A;
- Exhibit 24. Additional Documents submitted by Applicant 09/11/2020 (collectively marked);
- Exhibit 25. Talbot County, Maryland's Supplement to Pre-Hearing Statement;
- Exhibit 26. Applicant's Request for Continuance;
- Exhibit 27. Applicant's Supplement to pre-Hearing Statement with exhibits;
- Exhibit 28. Exhibit F – Ronald Christopher, Applicator's Certification;
- Exhibit 29. Exhibit G – Steven R. Thorsell letter to Glazier dated 10/09/20;
- Exhibit 30. Exhibit H – Email from Brag Glazier dated 10/12/20;
- Exhibit 31. Exhibit I – Attachment to Glazier letter, Wet Film Measurement Info;
- Exhibit 32. Exhibit J – Ronald Christopher CV;
- Exhibit 33. Foam sample form Bret Garner.

The Applicant was represented by David Blitzer, Esq., 165 Log Canoe Circle, Ste. F, Stevensville, MD 21666; Talbot County, Maryland, (the County), appearing in support of the Building Official's decision, was represented by the County Attorney, Anthony Kupersmith, Esq.

Procedural History

This case was initially filed on April 3, 2020 by Mr. Ronald Christopher. The application was subsequently amended to supply all of the required information. The Board's files reflect that a Certificate of Service showing service on the County and Mr. Garner, Exhibit 20, was received April 3, 2020. Due to governmental restrictions hearings were suspended for a short period until the lockdown was lifted. The Applicant's Pre-Hearing statement was filed June 14, 2020. The County filed its notice of intent to participate on July 6, 2020. The hearing originally scheduled for July 20, 2020 was rescheduled for August 3, 2020 to accommodate all parties.

On July 28, 2020 the County filed its pre-hearing statement, Exhibit 25. The statement included a request for continuance and motion to dismiss. The continuance was requested due to a death in Mr. Garner's immediate family that would make him unavailable. The motion to dismiss was predicated on the fact that the initial case filing was more than 30 days from the date of the action by the Building Official.

The Board met, as scheduled, on August 3, 2020. Mr. Kupersmith appeared on behalf of the County and explained the County's need for continuance. Mr. Christopher, then *pro se*, had no objection to a continuance. Mr. Kupersmith also explained that the building code, Chapter 28 of the *Code* anticipated a 'board of appeals' made up of building trades professionals, and that the County had no such board. He suggested that in lieu of that procedure, the County would be willing to employ a qualified mediator, retired Circuit Court Judge Sidney S. Campen, and see if the matter could be resolved by mediation. Mr. Christopher agreed to the proposal. The Board then granted the County's request for continuance and rescheduled the hearing for September 21, 2020.

Mediation with Judge Campen took place on September 18, 2020. It proved unsuccessful. On September 21, 2020, the date of the continued hearing, Mr. David Blitzer entered his appearance on behalf of Foam Works, and requested a continuance to familiarize himself with the matter. At the continued hearing he formally requested a continuance as he had just been employed to handle the matter. Mr. Kupersmith remarked that Foam Works had had several months in which to employ counsel, but conceded that Mr. Blitzer, newly hired, should have time in which to become familiar with the matter. He asked that the case be rescheduled as early as

possible. The Board agreed. It granted the continuance while requiring that all additional written material be presented within two (2) weeks. After the Board's schedule was consulted, the earliest hearing date available was October 26, 2020. All parties agreed to that date. The Board continued the merits hearing until October 26, 2020. Mr. Blitzer submitted a Supplement to the Foam Works pre-hearing statement with several additional exhibits (Exhibits 28-32).

The October 26 Hearing.

After ascertaining that all Board members had visited the property, the Chairman noted that the matter was a continuation of the hearing originally scheduled for August 3, 2020. He noted for the record that the Board had granted the two previous continuances for good cause. The matter is now set for a final determination. Since there were two opposing motions for dismissal filed, he invited Mr. Blitzer, attorney for the Applicant to proceed with his motion to dismiss for lack of jurisdiction¹.

Mr. Blitzer stated that the Board was without legal authority (or subject matter jurisdiction) to hear the appeal because of changes in state law, the adoption of the 2018 revisions to the building code. Those revisions have not yet been adopted in Talbot County. State law controls, therefore he believed that the changes mandated that the County Council enact legislation specifically authorizing the Board to hear building appeals under that version of the building code. Without that specific grant of authority, he argued that the Board could not hear or decide an appeal from the Building Official.

Mr. Kupersmith responded that the Board was authorized to hear all administrative appeals pursuant to the *Code* §20-3 A(3)(a), including appeals from Building Officials, and that broad grant of authority allowed the appeal in the Foam Works case. He noted that the County's version of the building code had been adopted by the County. It was enacted by legislation in 2006, and the County Council had not taken any action that would show they had intended to change that delegation of authority.

Mr. Jones then asked Mr. Kupersmith to present argument on the County's motion to dismiss. Mr. Kupersmith stated that the County's position was that Mr. Garner's action (his letter of clarification dated 03/03/2020 informing Foam Works of the new county policy) occurred on

¹ Mr. Blitzer 's Supplement to Foam Works' Pre-hearing Statement alleged that the Board did not have subject matter jurisdiction since the Council had not specifically granted the Board of Appeals the authority to hear appeals from the actions of the Building Official for decisions made under the 2018 version of the building code.

March 3, 2020, and the appeal was filed April 3, 2020. The filing was thirty one (31) days after the decision of the Building Official, and pursuant to *Code* § 20-6 B (2), was thus a late filing as administrative appeals were to be filed *within* thirty (30) days of the action causing the appeal. He stated this is a jurisdictional issue and that the Board could not consider the matter.

Mr. Blitzer agreed the filing was made thirty one (31) days after the action by Mr. Garner but reminded the Board that shortly after the decision by Mr. Garner the State Government mandated lockdown, and that some consideration should be given to the unusual circumstances.

Mr. Kupersmith also pointed out that the circumstances in this appeal were unusual for a second reason. Generally, appeals are property related. This appeal concerns proper application and testing of intumescent materials, not anything related to the property listed in the application, and he questioned Foam Works' standing to prosecute the appeal.

Mr. Blitzer responded that the Building Official's written decision had contained a notice that an appeal could be made to the Board, and this was the reason Mr. Christopher had filed an appeal.

After hearing arguments on both motions the Board decided to hold both motions *sub curia* and proceed to take evidence on the merits of the case.

Each side presented one witness. Mr. Blitzer called Mr. Ronald Christopher, 202 Walnut Street, Ridgely, MD 21660, the owner of Foam Works, LLC. He is a DC315 certified applicator, Exhibit 28, and has been in the building trades for about thirty (30) years. He explained that DC315 is a coating that is sprayed on to cover sprayed foam insulation. DC315 is not a flame preventative, but is designed to slow the spread of fire so that occupants have the opportunity to escape a building that is on fire. He explained that DC315 is applied by spraying and that the application may be uneven. The product is designed to be applied that way, and will spread up to a thousand times its original area when heated. The thickness of the application is measured to determine if the minimum thickness is achieved. DC315 requires a minimum thickness of 9 mil. He explained there is a danger that if applied too thickly it will char and break off rather than function as designed.

On the job Mr. Christopher uses a wet film test to determine if the appropriate thickness has been applied to the surface. This test is one of three approved in bulletin AC456 which establishes the baseline for effectiveness of the product. He explained that the test was conducted on a 'medallion' which is attached to the area where the application is to be made. Mr.

Christopher believed that the application was proper if the average measurement on the medallion was at least the minimum required. His complaint was that Mr. Garner refused to allow him to use the approved test to measure the application.

Mr. Kupersmith asked if the tests measured the minimum application. The Applicant responded that the test he employed, the wet film test, measured the average application, and was an approved method of ensuring proper protection for the occupants pursuant to AC456, the baseline document. He added that use of a third party test (such as the dry film test or slit sample test) would raise the cost of the application and delay completion of the construction project while waiting for the product to cure to obtain results. He was also concerned that failing to use an approved test for DC315 applications would result in his company and possibly the county being held responsible for fire losses. Mr. Christopher stated that he was not objecting to third-party testing as a method of ensuring proper application, but pointed out that he was using one of the three tests recommended by the literature. The test he employed was not destructive, and could be reviewed as the product was being applied so the incorrect application could be corrected and not delay further construction. He noted that the slit sample test recommended required a sample cut from the surface on which the application had been made after the coating had cured, while the dry film test (also conducted on a medallion) could not be measured until the product cured.

Mr. Brent Garner, Building Official, Talbot County, Department of Planning and Codes 215 Bay Street, Easton, Maryland 21601 was the County's only witness. Mr. Garner informed the Board of his experience in the building trades. He has been in his current position for approximately two (2) years. When he first encountered intumescent coatings he realized that he did not have a way to inspect them. He and his staff began researching the problem and contacted various sources at the ICC (International Code Council)² to understand the properties of the materials he was encountering. He estimated that he and the staff had more than sixty (60) hours in researching the product. He also reached out to the Town of Easton to ask what they were doing to test the product. Easton required a third-party test, performed by extracting a sample of the application and sending it to a lab to be measured. As the Building Official he believed that a third party test should be required for all DC315 applications.

² The ICC creates model codes and standards for building safety, evaluation, accreditation and certification.

Mr. Garner agreed that the test employed by Foam Works was an approved test for the product when applied to a flat surface, but did not believe the wet film medallion test could be accurate on undulating surfaces encountered in the field. He provided a sample of the hardened foam (Exhibit 33) showing its irregular nature. Mr. Garner felt that the validity of the wet film test also relied heavily on the measurement skill of each applicator and that the public would not be adequately protected without a third-party application. He remarked that until 'recently' the applicators had not been providing either wet or dry film test medallions for his inspection. Early tests showed the applicators were not achieving the minimum required thicknesses.

He explained that everyone was aware and no one was contesting that he, as the Building Official, had the authority to require third-party testing, and after researching proper application and the available tests he had determined that public safety required a third-party test. Talbot County uses a core sample test collected by an approved agency and then measured by an independent laboratory. The Town of Easton also uses this test. Interestingly, it is not a test mentioned in the literature.

Mr. Blitzer asked if an average thickness of 9 mil. was sufficient for the application. Mr. Garner felt that AC456 required a uniform minimum thickness on all surfaces, therefore the average was not satisfactory, although Mr. Garner admitted that averaging had been used in the baseline tests to determine the functional minimum thickness.

Findings of Fact and Conclusions of Law

Case law has addressed the matter of late filed appeals to a Board of Appeals. In *Fallston Meadows Community Association, Inc. v. The Board of Child Care of the Baltimore Annual Conference of the United Methodist Church*, 122 Md. App. 683, 716 A. 2d 344 (1997) a community association objected to a decision by Ms. Holdredge, the Director of Harford County's department of planning and zoning. The decision approved a preliminary subdivision and site plan for a juvenile group home. Ms. Holdredge 'wore two hats' acting as head of department in approving subdivision and site plan preliminary matters and also acting as zoning administrator. Each 'position' had a different set of rules. The community association failed to determine the position she was filling when the action was taken.

Uncertain as to how to proceed, the community association filed both a direct appeal to the Circuit Court and an appeal to the Board of Appeals. The relevant provisions of the county's ordinance required that the direct appeal be filed within thirty (30) days of the Director's action

while the appeal to the Board of Appeals had to be filed within twenty (20) days of the Zoning Administrator's decision.

After determining that Ms. Holdredge was acting in her capacity as Director of the department, and thus the site plan decision was not appealable to the Board of Appeals the court explained that even if the Board had been the appropriate appellate body, the appeal was not timely filed. The action of the Director occurred on March 4, 1996, and the appeal was filed on March 25, 2021 days later.

Counsel for the community association argued that court time established by the Maryland Rule 1-203(a) allowed the filing, as the time would not begin to run until the day following the act or event, March 5, and therefore the filing was timely. The Court of Special Appeals referred to Maryland Rule 1-101(a) explaining that Boards of Appeal are not courts:

It is well established that a County Board of Appeals is neither "a court of competent jurisdiction nor judicial tribunal". [internal citation omitted] Accordingly, the Board of Appeals is not subject to the dictates of the Maryland Rules. Rather, the time prescribed for filing appeals is governed by the local regulations.... Absent any language indicating an intent to extend the time period for weekends, holidays, or mailings, we interpret this to mean twenty calendar days. *Id.* at 698.

Precisely the same situation manifests in the facts before this Board. *Code* § 20-6 B (2) provides:

(2) Time for Filing. Applications for Administrative Appeals shall be filed within 30 days of the date of final order, requirement, decision, or determination unless separate legislation establishes a different period.

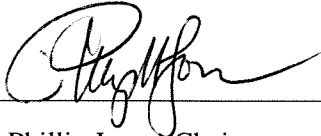
In the instant case Mr. Blitzer candidly admitted that the application was filed 31 days after Mr. Garner's written decision. The Board has no alternative but to dismiss the appeal for failure to timely file.

For the reasons set out above, Mr. Cavanaugh made a motion that the appeal be dismissed for failure to timely file. Mr. Dorsey seconded the motion. There being no further discussion, the Chairman called for a vote. As the hearing was in part virtual, Mr. Jones polled the Board members. Mr. Dorsey, Mr. Cavanaugh, Mr. Shortall, Mr. Krebeck and Mr. Jones, the Chairman each voted in favor of the motion. The motion passed with a vote of five in favor, zero opposed.

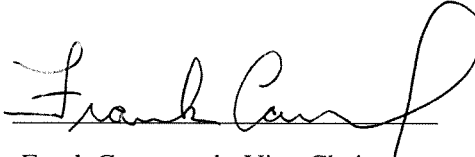
HAVING MADE THE FOREGOING FINDINGS OF FACT AND LAW, IT IS, BY THE TALBOT COUNTY BOARD OF APPEALS, ORDERED THAT THE ADMINISTRATIVE APPEAL BE DISMISSED.

GIVEN OVER OUR HANDS, this 23rd day of February, 2021.

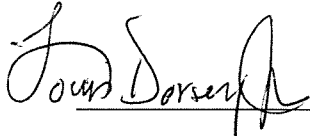
TALBOT COUNTY BOARD OF APPEALS



Phillip Jones, Chairman



Frank Cavanaugh, Vice-Chairman



Louis Dorsey, Jr., Member



Paul Shortall, Member



Zakary A. Krebeck, Member