

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 169

September Term, 2023

IN THE MATTER OF JOSEPH GOTHARD,
et al.

Wells, C.J.,
Ripken,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Ripken, J.

Filed: March 6, 2024

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

The Board of Appeals for Montgomery County (“the Board”) dismissed an administrative appeal filed by Joseph Gothard (“Gothard”) upon a finding that it was filed after the applicable deadlines set forth in the Montgomery County Code (“County Code”). In addition, the Board determined that, pursuant to the County Code, the Board lacked statutory jurisdiction to review one of the three agency decisions at issue. Gothard filed a petition for judicial review in the Circuit Court for Montgomery County. The circuit court affirmed the Board’s decision. This timely appeal followed. For the following reasons, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On February 12, 2020, a conditional use application was filed with the Montgomery County Office of Zoning and Administrative Hearings (“OZAH”).¹ The applicant sought approval to develop property, identified as 19105 N. Frederick Road, Gaithersburg (“Subject Property”), for use as an independent living facility for senior citizens. Gothard, who owns property adjacent to the Subject Property, participated in a public hearing on the application.²

¹ As it relates to governmental land use regulations, “conditional uses are permitted uses, so long as the conditions set out in the zoning ordinance are satisfied.” *Cnty. Com’rs of Queen Anne’s Cnty. v. Soaring Vistas Properties, Inc.*, 121 Md. App. 140, 154 (1998), *rev’d on other grounds* 356 Md. 660 (1999) (citing *Cromwell v. Ward*, 102 Md. App. 691, 699 n.5. (1995)).

² The hearing was held on May 11, 2020. Approximately 45 minutes after the hearing was adjourned, the hearing examiner was notified that Gothard had “tried to join the public hearing but had been unable to do so.” The hearing examiner reopened the public hearing to permit Gothard to testify. Prior to the second public hearing, Gothard submitted two letters to the hearing examiner that listed his concerns about the project. He then testified

On July 1, 2020, OZAH issued a written decision approving the conditional use application. The decision included a list of the parties to whom notification of the decision would be sent, which included Gothard. Also included was information regarding the 10-day right to appeal:

NOTICE OF RIGHT TO APPEAL

Any party of record may file a written request to appeal the Hearing Examiner’s Decision by requesting oral argument before the Board of Appeals, within 10 days issuance of the Hearing Examiner’s Report and Decision. . . . A person requesting an appeal, or opposing it, must send a copy of that request or opposition to the Hearing Examiner, the Board of Appeals, and all parties of record before the Hearing Examiner.

Additional procedures are specified in [Montgomery County] Zoning Ordinance §59.7.3.1.f.1[.]

The notice included the Board’s address, telephone number, and website, as well as information on how to file a request for oral argument.

On April 26, 2022, the Montgomery County Department of Permitting Services (“DPS”) issued a sediment control permit for the Subject Property. On May 12, 2022, DPS issued a building permit for the construction of a senior apartment building on the Subject Property.

On July 18, 2022, Gothard and his wife filed an administrative appeal with the Montgomery County Board of Appeals (“the Board”). They challenged the conditional use approval as well as the issuance of the sediment control and building permits. The appeal was consolidated with similar appeals filed by several other property owners.

at the second public hearing on May 21, 2020. Following the hearing, Gothard submitted additional questions regarding the proposed plans, which the hearing examiner answered.

Montgomery County (“the County”) filed a motion for summary disposition. The County asserted that the Board had no jurisdiction to hear the appeals because they had not been filed within the time limits set forth in the County Code. The County further asserted that the Board had no jurisdiction over the issuance of sediment control permits. The County requested that the appeals be dismissed. The title owner of the Subject Property, Frederick Road 4% Owner, LLC (“Frederick Road”), which had intervened in the proceedings before the Board, filed a motion for summary disposition on similar grounds.

On October 12, 2022 a hearing was held before the Board on the motions. The County argued that the appeals were an untimely attempt to relitigate approval of the conditional use application and could not be considered by the Board. Counsel for Frederick Road concurred with the County and maintained that the Board had no authority to extend the date for filing an appeal.

Gothard testified that he had “no record or recollection” of having received notification of the hearing examiner’s decision. Counsel for Frederick Road noted that Gothard had participated in the hearing, and, according to the written decision of the hearing examiner, had received notice of the decision.

On November 4, 2022, the Board issued an eight-page written opinion dismissing the appeal. The Board reasoned:

[T]here are no genuine issues of material fact to be resolved by the Board. The Board finds that the [conditional use approval] 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 [a] building permit . . . be

submitted to the Board within 30 days after the permit was issued, [which] in this case [was] on May 12, 20[2]2. 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 [approving the conditional use] and over 60 days after the issuance of [the] building permit [for the Subject Property].

* * *

Finally, the Board finds that it has no jurisdiction over the appeal of the issuance of a sediment control permit, which [is] governed by Chapter 19 of the County Code. . . . 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 [the] sediment control permit . . . for lack of jurisdiction.

Gothard filed a motion for reconsideration of the Board’s decision.³ The Board considered Gothard’s motion at a hearing on November 16, 2022. Gothard argued that he and his neighbors were not given proper notice of the impact that the construction of the independent living facility would have on the surrounding community. He asserted that there had been in a “significant reduction” in the value of his home, and he claimed that noise from the construction exceeded permissible limits. The chairman of the Board noted that Gothard had participated in the conditional use hearing, and that he had an opportunity to appeal the OZAH decision at that time. Gothard claimed that he never received notice of the hearing examiner’s decision. In a written decision, the Board denied the motion for reconsideration.

Gothard sought judicial review in the circuit court. Following a hearing, the court affirmed the decision of the Board.

³ The motion for reconsideration is not included in the record on appeal.

ISSUES PRESENTED FOR REVIEW

In his brief, Gothard poses 21 questions, many of which are outside of the scope of our review.⁴ The narrow issue before this Court is whether the Board erred as a matter of law in determining that it lacked jurisdiction to consider Gothard’s appeal from the decisions of OZAH and DPS and granting summary disposition on that basis. Because the only decision properly before this Court is the Board’s decision to dismiss the appeal as a matter of law, we do not consider any questions presented in Gothard’s brief that relate to the merits of the appeal, that is, whether the actions of OZAH and DPS complied with the law. Nor do we consider whether the Board erred in dismissing the administrative appeals of individuals who are not parties to this appeal.⁵

We have carefully reviewed each of the questions presented by Gothard, and have distilled three issues that are properly before this Court in the context of this appeal:

⁴ Gothard presented the following questions in his brief, some of which we have renumbered, but otherwise remain unaltered:

1. Was the Board of Appeals (BOA) decision correct to dismiss the appeal due to lack of jurisdiction, as not timely without evidence of compliance with Chapter 59, Section 59.7 requirements for Notification on the Day of Decision of OZAH Hearing Examiner’s (Examiner) report and decision?
2. Was BOA correct to ignore Section 59.7.3.1.F.1.c requiring the Examiner’s report and decision to be transmitted and available for review, on the day of issue, to allow any party of record or aggrieved party file a request for oral argument before BOA?
3. Was BOA correct to ignore that the Examiner was aware of NON complaint notification on 5-18-2020 but issued the decision on 7-1-2020 without testimony from the community surrounding 19105 Frederick Rd site? (See E. 27, E. 28 – residents identified on page 7-8).
4. Was BOA correct in ignoring the fact that Owner & County PREVENTED property owners to testify-become parties of record, and submit timely appeal by a combination of NON-Complaint Notification Lists & Sign, NO Notification on Day of Decisions?

5. Was BOA correct in considering case precedence that are NOT valid for this case considering that in those cases petitioners were NOT prevented to testify, NOT prevented to appeal timely?
6. Were BOA and Circuit Court correct in dismissing the appeals from Jose & Rina Cabrera, Dan Lamoy, Tom & Monique Witz, Feri & Saviz Fallahian (Cabrera, Lamoy, Witz, Fallahian) without a valid legal basis?
7. Was the Circuit Court opinion and order correct to affirm the dismissal by BOA, based on “deference to agency fact finding & inferences, case precedence, opinions, orders” – aware that BOA findings were NOT supported by evidence, the Hearing Examiner’s report and decision included substantial errors?
- [8.] Did the Planning comply with Section 59.10.c OR err in certifying accuracy and completeness of the application for CU 20-02?
- [9.] Did the Planning err in NOT verifying completeness, with Notification List complaint with Chapter 59. Section 59.7.3.1.B.2 for Notification List; Section 59.7.3.1.F.1 for Notification requirements on the day of a decision; Section 59.10.c for disclosure of contributions in exchange of tax credits; Section 59.4.1.8.A building height & setback, encroachment on abutting properties in violation of property rights; Section 59.6.5.3.C.4 through 59.6.5.3.C.8. screening; Section 59.6.2.9?
- [10.] Did the Planning err in ignoring Section 59.7.3.1.E.1.g --Necessary Findings laws for Conditional Use regarding NO HARM, COMPATIBILITY?
- [11.] Did the Examiner’s report and decision comply with laws for conditional use, Section 59.7.3.1.E.1.g NO HARM, COMPATIBILITY?
- [12.] Did DPS Permits comply with laws by issuing permits for conditional use not compliant with Section 59.7.3.1.E.1.g NO HARM, COMPATIBILITY?
- [13.] Did DPS Permits and DEP Compliance comply with laws by NOT enforcing Section 59.7.3.1.E.1.g NO HARM, COMPATIBILITY, including vibration & noise in violation of Chapter 31B Noise Law hundreds of times/day?
- [14.] Did BOA and County Council (Council) authorities comply with laws for conditional use, Section 59.7.3.1.E.1.g NO HARM, COMPATIBILITY & compliance with Section 59.7.3.2 when violations and errors were discovered during construction?
- [15.] Were County agencies correct in approving and publishing reports that show encroachment by Owner LLC on abutting properties in violation of property rights laws?
- [16.] Did County agencies, Council, BOA comply with U.S. Const. amend. 14 requiring equal protection under the law?
- [17.] Were BOA & Circuit Court correct in dismissing the appeals from Cabrera, Lamoy, Witz, Fallahian denying equal protection? (without consideration of their standing, separate appeals).
- [18.] Were County agencies correct by approving & publishing reports that show encroachment by Owner LLC on abutting properties in violation of Maryland Const. Art. 19; U.S. Const. amend. 5, amend. 14?
- [19.] Did County agencies, Council, BOA comply with Maryland Const. Art. 19; U.S. Const. amend. 5 requiring due process?

1. Whether the Board erred in concluding that the appeal from the approval of the conditional use application was untimely.
2. Whether the Board erred in concluding that the appeal from the issuance of the building permit was untimely.
3. Whether the Board erred in concluding that it had no jurisdiction to review the issuance of the sediment control permit.

STANDARD OF REVIEW

In reviewing a circuit court decision on appeal from a decision of an administrative agency, such as a county board of appeals, this court “looks through the circuit court’s . . . decision[], although applying the same standards of review, and evaluates the decision of the agency.” *Anne Arundel Cnty. v. 808 Bestgate Realty, LLC*, 479 Md. 404, 419 (2022) (quoting *People’s Counsel for Baltimore Cty. v. Surina*, 400 Md. 662, 681 (2007)). “We review the agency’s decision in the light most favorable to it, and we presume it to be valid.” *Id.* (citing *Assateague Coastal Trust, Inc. v. Schwalbach*, 448 Md. 112, 124 (2016)). Our role is “limited to determining if there is substantial evidence in the record as a whole to support the agency’s findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law[.]” *People’s*

[20.] Did County agencies, Council, BOA comply with Maryland Const. Art. 19, Art. 23; U.S. Const. amend. 6 requiring speedy trial?

[21.] Did BOA’s and Court’s comply with Maryland Const. Art. 19, Art. 23; U.S. Const. amend. 6, enabling the Owner to complete two (5) story buildings, causing extended increased HARM & health hazards to property owners, families in residential communities?

⁵ The notice of appeal in this matter was filed on behalf of Gothard and several other individuals. On April 6, 2023, this Court issued an order that Gothard is the only proper appellant in this appeal.

Counsel, 400 Md. at 682 (quoting *Mombee TLC, Inc. v. Mayor and City Council of Balt.*, 165 Md. App. 42, 54 (2005)).

In this case, the agency decision at issue is the Board’s order granting summary disposition. Rule 3.2.2 of the Montgomery County Board of Appeals Rules of Procedure provides as follows:

Motion for summary disposition. Any party may file a motion to dismiss any issue in a case on the grounds that the application and other supporting documentation establish that there is no genuine issue of material fact to be resolved and that dismissal or other appropriate relief should be rendered as a matter of law.

“The legal standard for granting summary disposition is the same as that for granting summary judgment under Maryland Rule 2-501(a).” *Brawner Builders, Inc. v. State Highway Admin.*, 476 Md. 15, 31 (2021). “[S]ummary disposition is appropriate if there is no genuine issue of material fact[,] and [a] party is entitled to prevail as a matter of law.” *Id.* (internal quotation marks and citation omitted).

“It is well-settled that the propriety of granting a motion for summary disposition is a legal question which we review *de novo*.” *Id.* at 30-31. In other words, “[w]hen reviewing conclusions of law . . . no [] deference is given to the agency’s conclusion.” *808 Bestgate*, 479 Md. at 419 (citations omitted). “[A]lthough we often will give considerable weight to the agency’s experience in interpreting a statute that it administers, it is within our prerogative to determine whether an agency’s conclusions of law are correct, and to remedy the situation if found to be wrong.” *Id.* at 419-420 (quoting *John A. v. Board of Ed. for Howard Cnty.*, 400 Md. 363, 382 (2007)).

DISCUSSION

I. THE BOARD DID NOT ERR IN CONCLUDING THAT THE APPEAL FROM OZAH’S JULY 1, 2020, CONDITIONAL USE DECISION WAS TIME-BARRED.

Procedures related to the approval of an application for a conditional use of land in Montgomery County are set forth in Chapter 59 of the County Code. Upon receipt of a completed application for conditional use, the hearing examiner must schedule a public hearing. County Code sec. 59.7.3.1.C.1. The hearing examiner must send notice of the hearing date, along with information about the applicant and the proposed use, to certain entities and persons, including all abutting and confronting property owners. County Code sec. 59.7.5.2.E. The applicant must post signage on the property that contains information such as the proposed conditional use, the application number, and telephone number and website for the agency handling the application. County Code sec. 59.7.5.2.C.

On the day the hearing examiner’s report and opinion is issued, the hearing examiner must issue notice to the applicant and all parties of record that the report and decision has been issued and is available for review. County Code sec. 59.7.3.1.F.1.b and 59.7.5.2.F.1. The notice must provide the date the decision was made, a summary of the decision, a copy of the opinion or a website link to a copy, and the phone number, address, and website of the “applicable deciding body” (in this case, OZAH). County Code sec. 59.7.5.2.F.2. In addition, the “applicable deciding body” must post its decision on its website. County Code sec. 59.7.5.1.H.4.

Within 10 days after OZAH issues the hearing examiner’s report and decision, any party of record may appeal the decision by filing a written request to present oral argument

before the Board of Appeals. County Code. sec. 59.7.3.1.F.1.c.

The hearing examiner’s decision was issued on July 1, 2020. Therefore, the time to appeal expired on July 11, 2020. It is undisputed that Gothard filed his appeal on July 18, 2022, over two years later. As our Supreme Court has stated, where a statutory provision establishes a time for filing an appeal, and the appeal was not filed within the prescribed period, “the appellate tribunal ha[s] no authority to decide the case on the merits.” *United Parcel Serv., Inc. v. People’s Counsel for Balt. Cnty.*, 336 Md. 569, 580 (1994) (citing *Dabrowski v. Dondalski*, 320 Md. 392, 397–398 (1990); *Walbert v. Walbert*, 310 Md. 657, 662 (1987)). Accordingly, the Board did not err in granting summary disposition and dismissing the appeal from OZAH’s approval of the conditional use application without considering the merits.

Gothard contends that he was prevented from filing a timely appeal from the July 1, 2020 conditional use approval because he did not receive notice of the decision of OZAH on the day it was issued.⁶ He claims that the Board erred in dismissing the appeal he filed over two years later because there was no evidence that the requisite notice was provided.⁷ We do not agree.

⁶ It is not clear when Gothard received notice of the hearing examiner’s decision.

⁷ Gothard also asserts that OZAH and Frederick Road failed to give adequate notice of the hearing on the application for conditional use. Gothard apparently either received notice or otherwise knew about the hearing, as evidenced by his participation in the hearing. *See Rogers v. Eastport Yachting Center, LLC*, 408 Md. 722, 737 (2009) (“notification purposed to inform may be replaced by actual knowledge . . . especially . . . when the knowledge has been acted upon without reliance upon the notification’s absence or its defects.”) (quoting *Clark v. Wolman*, 243 Md. 597, 600 (1966)) (emphasis omitted). Whether or not third parties who were statutorily entitled to notice of the hearing received such notice is not

“With regard to the agency’s factual findings, we do not disturb the agency’s decision if those findings are supported by substantial evidence.” *McClure v. Montgomery County Planning Bd.*, 220 Md. App. 369, 380 (2014) (citation omitted). “If the facts in the record allow reasoning minds to reach the same determination as the agency, then the determination is based on substantial evidence, and the [reviewing] court has no power to reject that conclusion.” *Maryland Real Estate Comm. v. Garceau*, 234 Md. App. 324, 349 (2017) (citations, brackets, and internal quotation marks omitted). “A reviewing court may, and should, examine any inference, drawn by an agency, of the existence of a fact not shown by direct proof, to see if that inference reasonably follows from other facts which are shown by direct proof.” *Travers v. Balt. Police Dep’t*, 115 Md. App. 395, 420 (1997) (quoting *Comm’r, Balt. City Police Dep’t v. Cason*, 34 Md. App. 487, 508 (1977)). “If it does, even though the agency might reasonably have drawn a different inference, the court has no power to disagree with the fact so inferred.” *Id.* (quoting *Cason*, 34 Md. App. at 508).

The record before the Board included the hearing examiner’s report and decision, which indicated that notification of the decision was to be sent to a list of parties, including Gothard. Although there was no direct evidence of when or whether the notice was actually sent, a reasoning mind could nonetheless conclude that, although Gothard claimed otherwise, he was sent timely notice of the hearing examiner’s decision. *See Gigeous v. Eastern Corr. Inst.*, 363 Md. 481, 497 (2001) (“not only is it the province of the agency to

relevant to the issue before us, which is whether Gothard’s appeal from the hearing examiner’s decision was timely.

resolve conflicting evidence, but where inconsistent inferences from the same evidence can be drawn, it is for the agency to draw the inferences.”) (quoting *Balt. Lutheran High Sch. Ass’n, Inc. v. Emp. Sec. Admin.*, 302 Md. 649, 662-63 (1985)). Hence we find no error in the Board’s conclusion that the appeal from OZAH’s July 1, 2020 conditional use decision was time-barred.

II. THE BOARD DID NOT ERR IN CONCLUDING THAT THE APPEAL FROM THE ISSUANCE OF THE BUILDING PERMIT WAS TIME-BARRED.

Building permits are governed by Chapter 8 of the County Code. Section 8-23 of the County Code provides, in relevant part:

[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.*

(emphasis added). It is undisputed that Gothard’s appeal from the issuance of the building permit at the Subject Property was filed more than 30 days after the permit was issued. Consequently, the Board had no authority to consider the merits of the appeal. *See United Parcel, supra*, 336 Md. at 580. The Board did not err in dismissing the appeal.⁸

⁸ To the extent that Gothard contends that he was prevented from filing a timely appeal from the building permit because he did not receive notice of the issuance of the building permit, the Supreme Court of Maryland has previously noted that the Montgomery County Code does not require that abutting or neighboring property owners be notified of the issuance a building permit. *Evans v. Burruss*, 401 Md. 586, 595 (2007), *cert. denied*, 552 U.S. 1187 (2008). It does not appear nor has it been cited that the County Code has changed in that regard since *Evans* was decided. Where notice of the issuance of a building permit is not required by constitution or statute, failure to give such notice “is not, normally, a denial of due process, nor is it the deprivation of any of the bundle of rights incident to the ownership of private property.” *Id.* at 605 (footnote omitted).

III. THE BOARD DID NOT ERR IN DETERMINING THAT IT LACKED JURISDICTION TO REVIEW THE ISSUANCE OF THE SEDIMENT CONTROL PERMIT

The jurisdiction of the Board is governed by Section 2-112 of the County Code. Subsection (c) of that provision limits the Board’s appellate jurisdiction to appeals from decisions rendered under specific sections of the County Code. As the Board noted, the issuance of sediment control permits is governed by Chapter 19 of the County Code. Section 2-112(c) of the County Code does not confer jurisdiction on the Board to hear and review appeals taken pursuant to Chapter 19. Accordingly, the Board did not err in dismissing the appeal from the sediment control permit for lack of jurisdiction.

CONCLUSION

In sum, the Board did not err in granting summary disposition and dismissing the administrative appeal. The appeal from the conditional use approval was filed outside of the time prescribed for doing so, and the Board had no authority to extend the time to appeal. Similarly, Board properly dismissed the appeal from the issuance of the building permits as untimely. Finally, the Board did not err in concluding that it lacked jurisdiction to hear and decide the appeal from the issuance of the sediment control permit.

**JUDGMENT OF THE CIRCUIT COURT
FOR MONTGOMERY COUNTY
AFFIRMED. COSTS TO BE PAID BY
APPELLANT.**