

IN RE: PETITION FOR VARIANCE
(6200 Glen Falls Road)

Richard M. Folio,
Petitioner

4th Election District
3rd Councilmanic District

* BEFORE THE
* BOARD OF APPEALS
* FOR
* BALTIMORE COUNTY
* CASE NO. 2014-0185-A

* * * * *

OPINION AND ORDER TO STAY PROCEEDINGS

This matter comes before the County Board of Appeals (“the Board”) as an appeal of the Opinion and Order, as well as the subsequent final Order on Motion for Reconsideration, issued by Administrative Law Judge (“ALJ”) John E. Beverungen. In his initial Opinion and Order dated May 23, 2014, ALJ Beverungen denied a petition for area variances requested by Petitioner, Richard M. Folio, owner of the subject property at 6200 Glen Falls Road. By Order on Motion for Reconsideration, ALJ Beverungen revised his decision on June 30, 2014 and granted the requested variances, with restrictions. A timely appeal to this Board was filed by Donna Ward, a neighbor of the subject property.

The Board scheduled and convened the *de novo* appeal hearing on October 16, 2014. Appearing at the public hearing was Petitioner, Richard M. Folio. He was represented by Lawrence E. Schmidt, Esquire and Smith, Gildea & Schmidt, LLC. Also appearing was Peter Max Zimmerman, Esquire, People’s Counsel of Baltimore County. Several residents of the surrounding locale also appeared in opposition to the variance request. These neighbors included George Neubeck, Donna Ward, Paul Joyce, C. Robert Holtz, Vicki Locklear, and Frank Valentine.

At the onset of the hearing, counsel jointly moved that the Board stay these proceedings and require the Baltimore County Planning Director or her designee to perform their review function prescribed legislatively for specified zoning and development petitions in the R.C. 8 (Environmental Enhancement) Zone, including zoning variances. The Board will grant that Motion and, for reasons as stated below, will stay these proceedings, instruct the Planning Director to perform within 45 days the legislatively prescribed review function, and retain jurisdiction to reconvene these proceedings after that is done.

The parties represented and agree as follows. The Folio property is a 3.001 acre property zoned R.C. 8 with frontage on Glen Falls Road in rural northwestern Baltimore County. People's Counsel CBA Ex. No. 3. The boundary between Baltimore County and Carroll County is but a short distance away to the west. The property is improved with a single-family detached dwelling, in which Petitioner and his children reside. The property also has a number of other accessory uses and structures, including a swimming pool, tennis/basketball court, shed and attached garage. There is also a turf soccer pitch (field) laid out in the rear of the property.

The variances are for a proposed new 2-story detached garage/pool house building. This is to be constructed and located in front of the swimming pool and to the side and partially in front of the dwelling. Therefore, Petitioner requested variances to allow the structure to be in the front/side yard in lieu of the required rear yard (BCZR § 400.1) and with a height of 24 feet, in lieu of the maximum permitted 15 feet (BCZR § 400.3). As noted, ALJ Beverungen initially denied the variances but, upon reconsideration, granted them with conditions.

The preliminary Motion for Stay made by the parties here relates to the current zoning classification of the property (i.e. R.C. 8) and the applicable regulations. By legislative act of the Baltimore County Council during the 2008 Comprehensive Zoning Map Process ("CZMP"), the property was in an area rezoned from R.C. 4 (Watershed Protection) to R.C. 8. Bill 87-08, Issue 3-077. People's Counsel CBA Ex. No. 4.

Prior to this rezoning and at the time of subdivision approval, the subject property was zoned R.C. 4. The subject property was originally part of a larger tract of land encompassing approximately 26.6 acres known as the Plummer property. In 1989, the then owners of the Plummer property proposed a residential subdivision of this tract. Under the then applicable R.C. 4 Zone regulations, there was proposed a subdivision which created five building lots, plus a non-buildable one-acre parcel of land designated as Parcel B. The Folio lot (3.001 acres) was designated as Lot 1. As shown in the recorded subdivision plat (Pet. ALJ Exh. No. 2), the County Review Group (CRG), then the approving authority, approved the plan for development in 1989, followed by a refinement in 1991. The five lots ultimately were built out and developed accordingly. Mr. Folio has owned his property since 1998.

Although the R.C. 4 and R.C. 8 zones are both "resource conservation" zones, they are regulated separately and have different use and development standards. The regulations governing the R.C. 8 zone came into being via legislative act of the Baltimore County Council in

Bill 76-2004, People's Counsel CBA Ex. No. 5. They are set forth in BCZR § 1A09.1 through § 1A09.8. (People's Counsel CBA Ex. No. 6). The R.C. 4 regulations are codified in BCZR § 1A03.1 through 1A03.8.

The R.C. 8 zone is an "environmental enhancement" zone and is applied to rural areas of the county where there are viable historic, cultural, recreational and environmental resources. Limited development is allowed in the zone by right, including single-family dwellings and accessory structures. Significantly, BCZR § 1A09.4 provides, in part, that before any variance can be approved "the Director of Planning or the Director's designee must certify in a written finding that the . . . variance is consistent with the spirit and intent of these regulations." If the Planning Director finds "... any deviation from this section or the standards and guidelines cited above," (in the introduction to BCZR Sec. 1A09.4), then the proposal must meet one of three enumerated criteria to qualify for certification. BCZR Sec. 1A09.4.1, 2, 3.

For the sake of completeness, BCZR Sec. 1A09.4.A states,

"BCZR 1A09.4 Plans and Permits : All development must be in accordance with this section and the standards and guidelines for "rural preservation" and "scenic views" adopted pursuant to this section, and published as part of the Comprehensive Manual of Development Policies.

A. Before the approval of any concept plan, development plan, limited exemption, special exception plan or variance, the Director of Planning or the Director's designee must certify in a written finding that the plan, exemption or variance is consistent with the spirit and intent of these regulations. To support the finding, the Director shall require information such as building elevations, building cross sections or view shed analyses pursuant to Sections 32-4-223 and 32-4-224 of the Baltimore County Code. The Director shall certify that any deviation from this section or the standards and guidelines cited above was necessary to:

1. Meet another standard or guideline;
2. Comply with environmental regulations or otherwise protect resources; or
3. Achieve the best possible site design based on the goals in Section 1A09.1.B.

As noted by the parties, no such written finding, determination, or certification has been authored by the Director of Planning. To the contrary, the parties explained that the Director of Planning, via her staff, opined that no such certification is required.

On May 14, 2014, the day before the ALJ hearing, as stated in an e-mail from then area planner in reply to Petitioner Folio's counsel's request for review, the Office of Planning took

the position that because the subdivision was approved when the property was zoned R.C. 4, the R.C. 8 requirements do not apply in this case. (People's Counsel CBA Ex. No. 7).

Obviously, neither People's Counsel nor Petitioner could compel the Department of Planning to prepare a certification at that time. Indeed, People's Counsel was not copied on the e-mail. The case proceeded before ALJ Beverungen as if the R.C. 4 Zone applied.

After Donna Ward filed her appeal, People's Counsel reviewed in detail the record and found, in his opinion, that there is no legal basis for the Planning Department's substitution of the R.C. 4 Zone for the R.C. 8 Zone. He communicated his view to counsel for Petitioner Folio, Mr. Schmidt, and to Donna Ward. Consistent with his original view, counsel for Petitioner agreed with People's Counsel. This led to the joint motion to stay the present proceedings.

The bottom line is that the Board currently has no written finding, determination, or certification by the Planning Director to consider when it deliberates on the variances. Upon review of the applicable law, the Board agrees with the parties that such is required.

At the Board hearing, Petitioner and Peoples' Counsel explained why, notwithstanding the Planning Director's opinion, the R.C. 8 zone and its requirements do apply to this case. It is well settled law in Maryland that zoning laws are to be applied *retroactively* absent a legislative requirement to the contrary. As noted by the Court of Appeals in Layton v. Howard County Board of Appeals 339 Md. 36, 65 (2007), "in land use and zoning cases, the law shall be applied as it is in effect at the time of argument."

When the zoning classification or regulations applicable to a property change, they apply retroactively unless the new zoning legislation explicitly narrows its impact, has a grandfather clause, or affects vested rights. Accordingly, a relevant change in zoning law ordinarily applies to pending cases. Banner v. Home Sales Company D 201 Md. 425, 428 (1953); Lake Falls Ass'n v. Board of Zoning Appeals of Baltimore County 210 Md. 561, 565 (1956); Yorkdale Corp. v. Powell 237 Md. 121 (1964); Grasslands Plantation v. Frizz King Enterprises 410 Md. 191, 217-28 (2009); Maryland Reclamation Assoc. v. Harford County 414 Md. 1, 44-45 (2010); and McHale v. DCW Dutchship Island 415 Md. 145, 159-71 (2010). The Court of Appeals wrote long ago in Banner,

"The zoning contested in this case before the Court has been superseded by the [legislative] zoning authorities." 201 Md. at 428.

The Court quoted Banner in Lake Falls Ass'n, carried it forward in the oft-quoted Yorkdale case, and has adhered to this principle ever since.

Nevertheless, the May 14 Planning staff (Bialek, J.) e-mail stated,

“This subdivision was created under RC 4 zoning therefore, pursuant to Section 103.1 of the BCZR, there is no need for the DOP to issue a finding.”

It is this e-mail which triggered the issue as to choice of zone, so to speak.

BCZR Sec. 103.1 was originally enacted as part of the 1955 Baltimore County Zoning Regulations (People’s Counsel Ex. No. 8). It contains substantially the same language today. This section states, in pertinent part (People’s Counsel CBA Ex. No. 9):

“Section 103 – Application of Zoning Regulations

103.1 – These Regulations shall apply as of the date of their adoption but the provisions pertaining to use, height, area and density of population shall not apply to any development, subdivision or parcel of land, the preliminary plan for which was originally submitted to the then Baltimore County Planning Commission, now Planning Board, and approved or tentatively approved (including any approval made subject to any condition or conditions) under the then existing official procedure in Baltimore County, prior to the adoption of these Regulations. The zoning regulations applicable to any such development, subdivision or parcel of land as aforesaid shall be the zoning regulations in effect at the time such plan, as aforesaid, was originally submitted to the Baltimore County Planning Commission.”

It thus contains certain grandfathering language that provides that the regulations shall not apply to development which was originally submitted and approved by the County Planning Commission (now Planning Board). BCZR §103.1 further states that such development shall be governed by the regulations then in effect. Similar language appears elsewhere in the BCZR. For example, BCZR § 1B02.3 provides for certain previously existing standards to be applied to existing residential development in the D.R. zone.

The Baltimore County Planning Commission was the institution which reviewed and approved subdivision plans prior to the 1956 adoption of the Baltimore County Charter. BCZR Sec. 103.1 was a transitional provision to grandfather subdivisions approved by the Commission under the previous 1945 zoning regulations, some of which subdivisions likely were still in various stages. It was not intended to control subdivisions filed and reviewed in future generations by newly created institutions (Planning Board, CRG, Hearing Officer). It was not intended to freeze the zoning governing a plan approved by the CRG in 1989, 34 years later.

Indeed, if BCZR 103.1 had that scope, then every new residential zoning case would require an inquiry into the zone in place when the subdivision was created and also the particular zoning regulations of the zone at that time. This is not done, and it would be unreasonable to do so. BCZR Sec. 103.1 does not have the expansive scope given here by the Planning Director.

Accordingly, we conclude that the general rule of law is applicable; that is, that the current R.C. 8 regulations apply to the requested variances, notwithstanding that the property was “developed” when zoned RC 4. Therefore, we find the Planning Director or her designee must review the petition, make a finding and determination and consistency, and issue a certification in accordance with BCZR § 1A09.4.A before this Board can consider this case.

We also note BCZR § 1A09.4.C provides that the certification can be independently appealed to the Board “by any person aggrieved by the finding.” In this case, one of the parties (Mr. Folio or the opposing neighbors/People’s Counsel) may feel aggrieved by the finding and/or certification from the Planning Director either that the proposed variances are consistent or not with the spirit and intent of the R.C. 8 regulations.

Under the present circumstances, we do not believe that a separate appeal of that certification is required. Because of the unusual posture of this case, in the interest of justice and efficiency, the Board shall retain jurisdiction.

In this regard, we note the provisions of BCZR § 501.4 and our holding in the recent matter, *In Re: Lutherville*, Case No. 14-009. In that case we observed that the Board can employ such technical, expert or other assistance as in its judgment may be required to determine a question before it. The Board may also, on its own authority, subpoena witnesses. (See Board’s Rules of Practice and Procedure, Rule 5) Under this authority, the Board will therefore stay the proceedings in the instant case. Although retaining its jurisdiction in this matter, the Board hereby directs that a copy of this Opinion and Order be forwarded to the Planning Director, with instructions that that Office transmit to the Board the findings, determination, and/or certification required under BCZR § 1A09.4.A within forty five (45) days hereof. Upon receipt of that transmission, the Board shall reschedule this case for further proceedings, including a reconvening of the public hearing. At that hearing, the parties can address and the Board will consider all issues concerning this matter, including both the Planning Director’s certification, as well as the underlying variance. In other words, the stay shall not prejudice the right of any party

to challenge the Planning Director's finding, determination, or certification in the same manner as they could on a direct *de novo* appeal.

ORDER

THEREFORE, IT IS THIS 15th day of December, 2014 by the County Board of Appeals for Baltimore County

ORDERED, that this case be and is hereby STAYED and that a copy of this Order be forwarded to the Department of Planning in accordance with the provisions herein; and

ORDERED, that the Planning Director or her designee prepare and submit to the Board a written finding, determination, and certification as required in BCZR § 1A09.4.A within forty five (45) days of the date of this Order; and

ORDERED, that upon transmittal of that certification to the Board by the Planning Director as described herein, the Board shall thereafter schedule this matter for further proceedings (including a reconvening of the public hearing) as may be required, with no further action to be taken on this Ruling until such time as the Board's final decision is issued; and

ORDERED, that the Board hereby retains jurisdiction, that it is not necessary for any party aggrieved or dissatisfied by the Planning Director's finding, conclusion, or certification to file an appeal, and that any party may raise issues or challenge the Planning Director's determination upon the resumption of Board proceedings.

(SIGNATURES ON FOLLOWING PAGE)

THE COUNTY BOARD OF APPEALS FOR
BALTIMORE COUNTY, by



Andrew M. Belt, Chair

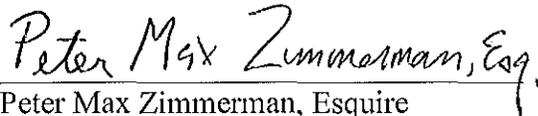


Maureen E. Murphy



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AGREED AS TO SUBSTANCE AND FORM:



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December 15, 2014

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RE: *In the Matter of: Richard M. Folio, Petitioner*
Case No.: 14-185-A

Dear Counsel:

Enclosed please find a copy of the Order issued this date by the Board of Appeals of Baltimore County in the above subject matter.

Pursuant to the enclosed, this Order is not a final decision of the Board of Appeals for Baltimore County and does not constitute an appealable event at this time. This matter will be held open on the Board's docket until such time as a final opinion can be issued.

Should you have any questions, please do not hesitate to contact us.

Very truly yours,

A handwritten signature in cursive script that reads "Sunny Cannington".

Krysundra "Sunny" Cannington
Administrator

KLC/tam
Enclosure
Multiple Original Cover Letter

c: Richard M. Folio
S. Glenn Elseroad
Frank and Donna Valentine
George Neubeck/Hanover Road Association, Inc.
Paul E. Joyce/Hanover Road Association, Inc.
Office of People's Counsel
Lawrence M. Stahl, Managing Administrative Law Judge
Arnold Jablon, Director/PAI
Andrea Van Arsdale, Director/Department of Planning
Nancy West, Assistant County Attorney/Office of Law
Michael Field, County Attorney/Office of Law

Donna Ward
Vicki Locklear
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