

IN RE: PETITIONS FOR SPECIAL HEARING	*	BEFORE THE
AND SPECIAL EXCEPTION		
W/S of Back River Neck Road, 207' S	*	OFFICE OF
of Pottery Farm Road		
15 th Election District	*	ADMINISTRATIVE HEARINGS
6 th Councilmanic District		
(810 Back River Neck Road)	*	FOR
Back River LLC, <i>Legal Owner</i>	*	BALTIMORE COUNTY
Sprint Nextel, <i>Contract Purchaser/Lessee</i>		
Petitioners	*	CASE NO. 2008-0531-SPHX

* * * * *

ORDER AND OPINION

This matter comes before the Office of Administrative Hearings (OAH) as Petitions for Special Hearing and Special Exception filed by Lawrence E. Schmidt, Esquire with Gildea & Schmidt, LLC, on behalf of the legal property owner, Back River LLC and the proposed contract purchaser, Sprint Nextel (the “Petitioners”). The Petitioners are requesting to Amend Special Hearing relief originally sought in May, 2008 pursuant to Section 500.7 of the Baltimore County Zoning Regulations (B.C.Z.R.) as follows:

1. To permit a non-density transfer and lot line adjustment between adjacent tracts of land,
2. To confirm that an existing cellular tower is in compliance with setback and all other applicable zoning regulations, and
3. For such other and further relief as may be deemed necessary by the Administrative Law Judge.

In addition, the Petition for Special Exception sought in May, 2008 is no longer required due to a re-zoning of the property. As such, this Order will consider only the Petition for Special Hearing. The subject property and requested relief is more fully described on the site plan that was marked and accepted into evidence as Petitioners’ Exhibit 6.

Appearing at the public hearing held for this case was Mitchell J. Kellman with Daft McCune Walker, Inc., the consulting firm that prepared the site plan. The Petitioners were represented by Lawrence E. Schmidt, Esquire. Also in attendance were Adam Rosenblatt, Esquire for Baltimore County and Carole Demilio for People's Counsel. The file reveals that the Petition was properly advertised and the site was properly posted as required by the Baltimore County Zoning Regulations.

The Zoning Advisory Committee (ZAC) comments were received and made a part of the file. There were no adverse comments from any of the County reviewing agencies.

Testimony and evidence offered revealed that the subject property is 4.916 acres (214,140 square feet) and is zoned ML/RC 20.

HISTORY

In Case No. 2002-0159-A, the property owner filed a Petition for Variance from certain setback requirements for a proposed cell tower. The case was originally heard by Zoning Commissioner Schmidt, then appealed to the Board of Appeals and ultimately to the Circuit Court for Baltimore County and Court of Special Appeals of Maryland. The Court of Special Appeals affirmed the denial of the requested Variances. Even so, the cell tower was erected on site and remains standing on the subject property.

Several years later, the property owner filed a second zoning application related to the property and cell tower. This application was assigned Case No. 2008-0531-SPHX and included both Petitions for Special Exception (to permit a cell tower in an RC zone) and Special Hearing (to permit a non-density transfer of land). Due to several reasons, Case No. 2008-0531-SPHX never went forward and a public hearing was never conducted. The case was never decided or resolved and was effectively "in limbo". According to an internal memorandum from then Deputy

Commissioner Thomas Bostwick dated August 21, 2008, the matter was postponed at the request of Baltimore County (Nancy West, Esquire, Assistant County Attorney). It was never rescheduled.

Now, this matter comes before the undersigned as an Amended Petition for Special Hearing. It includes the relief originally sought in the Petition for Special Hearing filed in Case No. 2008-0531-SPHX and also amends the Petition to include other appropriate relief. Moreover, the Petition for Special Exception was dismissed in open hearing as it is no longer required due to a re-zoning of the property.

The site plan, legal description and other documents filed with the original petitions are all still relevant and applicable to this amended filing. The factual and procedural background of this complex case was set forth clearly and extensively in the unreported decision of the Court of Special Appeals (Exhibit 4). As such, it will not be repeated here. The present matter involves questions of law, and the facts underpinning those legal issues are either undisputed or irrelevant.

NON-DENSITY TRANSFER/LOT LINE ADJUSTMENT

During the course of this protracted dispute, Petitioners acquired two small parcels of RC-zoned land, as shown on Exhibit 6. Petitioners seek a non-density transfer of these small parcels (to the larger ML zoned parcel) and a lot line adjustment reflecting the new configuration of the tract.

As I noted at the hearing, the B.C.Z.R. and/or the Baltimore County Code (B.C.C.) provide no guidance concerning “non-density transfers.” The Zoning Commissioner’s Policy Manual (ZCPM) contains a brief reference (at p. 1A-3), but it involves RC zoned land, while the present scenario involves transferring RC parcels into a larger ML-zoned parcel. In addition, lot line adjustments are defined as “development” under the B.C.C., and are routinely handled as an

administrative matter by the Department of Permits, Approvals and Inspections (PAI). B.C.C. § 32-4-106(a)(1)(v) and (viii). As such, I will deny this aspect of the special hearing relief.

EXISTING CELLULAR TOWER

The more important aspect of the case concerns whether the cell tower at present complies with the B.C.Z.R. I do not believe it does, and will explain below the reasons for that conclusion. Before doing so, it seems appropriate to comment that this case illustrates the principle that “it is better to beg forgiveness than ask for permission.” The Petitioners were denied variance relief to construct the cell tower, and they appealed that issue all the way to the Court of Special Appeals, which affirmed the denial of relief. Even so, Petitioners constructed the tower, and it has been in service for nearly ten (10) years. The County sought to have the tower removed, but was unsuccessful. *See* Baltimore County Exhibit 1, p.3. In fact, the hearing officer in the code enforcement case found a zoning violation, but assessed only a \$9,200 civil penalty, which the Petitioners paid.

Petitioners retained new counsel thereafter, and they filed the current petition, arguing that the tower is in fact lawfully sited. Petitioners’ primary argument is that the regulation at issue was amended in 2002 (Bill 17-02) to provide that a “cell tower” shall be set back at least 200 feet from any other owner’s residential property line.” (emphasis added). The former regulation provided that the set back was 200’ from an adjoining “residential zone line.” (emphasis added). *See* Exhibit 8, p. 10. Petitioners contend that “residential zone” is a defined term in B.C.Z.R. § 101, while the newer phrasing – which became effective after the Zoning Commissioner’s decision in the original variance case, 02-159-A, *See* Exhibit 1 – of “residential property line” is not defined by the B.C.Z.R. Mr. Kellman, who was accepted as an expert in land use matters and the B.C.Z.R., opined that a “residential property line” exists only when the property in question is

improved with a dwelling. Mr. Kellman testified that there is no residentially used property within 200' of the cell tower, and as such, he opined that the tower was in compliance with B.C.Z.R. § 426.

In response to questions on cross examination, Mr. Kellman noted that he had not testified previously in a zoning matter involving this issue, and he conceded this was a “new theory.” While I do think Petitioners make a creative argument, I do not believe it withstands scrutiny. Distilled to its essence, the issue is one of statutory construction: does the language used in Bill 17-02 (“residential property line”) have a different meaning than the former regulation’s use of “residential zone line.” Both iterations use the word “residential,” and thus the distinction – if there is one – must turn on the meaning of “zone line” versus “property line.” And if the meanings are different, must a property be improved with a dwelling before it will have residential property lines?

A “zone line” is a boundary that separates land into different zoning classifications. These lines are drawn by governmental authorities, who have the “power to alter zone lines from time to time” when in the public’s interest. *Offutt v. Baltimore County*, 204 Md. 551, 557 (1954). Zone lines need not be coextensive with a “property line.” Indeed, in land use matters one frequently encounters “split-zoned” properties, as with the property owned here by Petitioners. A “property line” is a boundary establishing the limits of land owned by any particular person. Neither of these terms is defined in Webster’s Dictionary (See B.C.Z.R. § 101.1) or Black’s Law Dictionary, for that matter. When a term is not defined in a statute, or dictionary, principles of statutory construction dictate that it be given its “ordinarily understood” meaning. *Comptroller v. J/Port, Inc.*, 184 Md. App. 608, 632 (2009).

Thus, as noted above, the terms “property line” and “zoning line” do refer to different things, but here it is a distinction without a difference, because the tower is not set back 200' from either the RC 20 “zone line” or the “property line” of the parcel owned by Theodore Julio (Tax Account #1516150500). Even so, Petitioners’ expert testified that “residential property line” as now appears in B.C.Z.R. § 426.A.1 means that the property is in fact improved with a dwelling, i.e., residentially used. But in numerous instances, the County Council has imposed certain property restrictions when a “residentially used” property is at issue or in the vicinity. See, e.g., B.C.Z.R. §§ 204.4.C.4; 220.1.B; 230.1.A.4; 404.2; 415A.2; 424.1.C; 432A.1.C.1. And it has distinguished that term from a “residentially zoned” property. Id. As such, if the County Council had intended the 200' cell tower setback to apply only to “residentially used” property, it would have said as much. But it did not use that terminology in B.C.Z.R. § 426.A.1, and I do not believe it is appropriate to engraft such language onto the regulation as written.

RES JUDICATA

At the hearing, Baltimore County contended that the merits of the case should not be reached, because the Petition is barred by res judicata. Having reviewed the post-hearing submissions, I am inclined to agree.

As noted in the County’s memorandum (pp. 2-3), the Bill (17-02) in question became effective on May 5, 2002. While this was subsequent to the Zoning Commissioner’s January 4, 2002 Order in Case No. 02-159-A, the legislation was effective well before the de novo hearing concluded in the Board of Appeals on January 21, 2003. Thus, it is obvious that Petitioners could have (though they in fact did not) made the argument now advanced in the Petition for Special Hearing back in 2003 while the underlying case was being heard by the Board of Appeals. It may be, as argued by the Petitioners, that the original variance petition could not be amended during

the course of the “appellate” proceedings, but nothing would have precluded Petitioners from filing a new Petition for Special Hearing after the effective date of Bill 17-02, and then perhaps having the matters consolidated at the Board of Appeals upon appeal of the Zoning Commissioner’s Order on the petition for special hearing.

In these circumstances, the doctrine of res judicata (which is applicable to quasi-judicial administrative proceedings, such as those before the Baltimore County Board of Appeals) is applicable. That doctrine bars relitigation of claims that were, or could have been litigated in an earlier proceeding between the parties. *Seminary Galleria, LLC v. Dulaney Valley Improv. Ass’n.*, 192 Md. App. 719, 734-37 (2010). As such, the doctrine of res judicata bars the Petitioners from obtaining special hearing relief in this case.

Pursuant to the advertisement, posting of the property, and public hearing on this Petition, and for the reasons set forth above, the special hearing relief requested shall be DENIED. The Special Exception request originally filed in Case No. 2008-0531-SPHX was dismissed in open hearing as it is no longer required due to a re-zoning of the property, and is dismissed as moot.

THEREFORE, IT IS ORDERED this 2nd day of August, 2012 by the Administrative Law Judge for Baltimore County, that the Petition for Special Hearing seeking relief pursuant to Section 500.7 of the Baltimore County Zoning Regulations (B.C.Z.R.) as follows:

1. To permit a non-density transfer and lot line adjustment between adjacent tracts of land, and
2. To confirm that an existing cellular tower is in compliance with setback and all other applicable zoning regulations,

be and is hereby DENIED.

Any appeal of this decision must be made within thirty (30) days of the date of this Order.

JEB:dlw

Signed
JOHN E. BEVERUNGEN
Administrative Law Judge
for Baltimore County