

IN RE: PETITIONS FOR SPECIAL HEARING,	*	BEFORE THE
SPECIAL EXCEPTION & VARIANCE	*	OFFICE OF
(2027 York Road)	*	ADMINISTRATIVE HEARINGS
8 th Election District	*	FOR BALTIMORE COUNTY
3 rd Councilmanic District	*	Case No. 2013-0171-SPHXA
Michael R. Mardiney, Jr., M.D.,	*	
<i>Legal Owner</i>	*	
Tom Berhle, Entourage Development LLC,	*	
<i>Contract Purchaser/Lessee</i>	*	
Petitioner		

* * * * *

ORDER ON MOTIONS FOR RECONSIDERATION

The Petitioner filed a motion for reconsideration, along with a revised site plan, on or about March 28, 2013. The revised plan reflects the drive through lane for the restaurant, and the commercial dumpster, were relocated from the DR-zoned portion of the property to the BL zone fronting on York Road. As such, as Petitioner correctly noted in its motion, the sole deficiencies identified in the March 22, 2013 Order have been resolved, and those issues no longer stand as obstacles to plan approval.

The Office of People’s Counsel, however, also filed a motion for reconsideration, raising several legal issues that merit consideration. The first such issue is whether the proposed use is for a “drive-in” restaurant, in which case special exception relief is required. As noted in the original Order, in defining “drive-in restaurant” the Baltimore County Zoning Regulations (BCZR) requires that food and beverage be served, to a substantial extent, to diners in their cars. BCZR § 101.1. Mr. Behrle testified that the drive-in aspect of the business will generate 20% of the revenue, and based on that testimony I believe that this aspect of the operation is not “substantial.” The term is not defined in the BCZR, but is defined (in pertinent part) in Webster’s Third New International Dictionary as “being that specified to a large degree or in the main.”

It is true that the Petitioner filed this case seeking special exception relief for the operation of a “drive-in” restaurant, though I suspect that was done at the behest of County zoning officials. And it is also the case, as noted by Mr. Zimmerman, that the Sonic franchise calls itself “America’s Drive-In,” and prior zoning cases filed by Sonic have identified the use as a “drive-in” restaurant. But I do not think either of those points is dispositive; here, I am required to construe the language used in the BCZR, and I believe that the focus must be upon the meaning of “substantial.” In the end, a linguistic debate is not in the best interests of the citizens or the Petitioner. As such, I will consider the petition as filed.

Special Exception

In that regard, I believe I am obliged to grant the special exception, based upon controlling Maryland case law. A use permitted by special exception (here, a drive-in restaurant) is presumed under the law to be in the public interest, and to defeat such a petition, the protestants must establish that the inherent adverse effects associated with the use would be greater at the proposed location than at other similar zones throughout the County. People's Counsel for Baltimore County v. Loyola College in Md., 406 Md. 54 (2008). The court in Schultz stated the applicable test in this fashion:

We now hold that the appropriate standard to be used in determining whether a requested special exception use would have an adverse effect and, therefore, should be denied is whether there are facts and circumstances that show that the particular use proposed at the particular location proposed would have any adverse effects above and beyond those inherently associated with such a special exception use irrespective of its location within the zone. Schultz v. Pritts, 291 Md. 1, 22-23 (1981).

In this regard, several residents expressed concern with traffic safety and congestion, noise, trash and similar quality of life issues. But these are exactly the types of inherent adverse effects that the legislature was presumed to have anticipated when it allowed the drive-in

restaurant use by special exception. While I have no reason to doubt the testimony concerning the heavy volume of traffic at present at this location, it is worth noting that neither the State Highway Administration (which is responsible for motorists' safety along York Road) nor Baltimore County expressed any concern with this proposal. In fact, the Department of Planning "recommended approval" in a comment dated March 13, 2013. Also, the signalized intersection at York and Timonium Roads (about which several residents remarked concerning the heavy volume of traffic) is not deemed a "failing intersection" by State or County authorities.

In other words, most uses for which a special exception is required are regarded as "potentially troublesome because of noise, traffic, congestion" Montgomery County v. Butler, 417 Md. 271, 297 (2010). Any drive-in fast food restaurant will generate a large volume of traffic and noise, and thus those impacts are "inherent" in the use. A Sonic fast food franchise would generate the exact same volume of traffic and noise at any BL-zoned property as it would at the present site.

RTA Regulations

The next issue concerns whether or not the Residential Transition Area (RTA) regulations are applicable in this case. Counsel at the hearing on the motions for reconsideration presented arguments pro and con. Having considered the submissions, argument and the BCZR, I do not believe the RTA regulations are applicable in this case. At the outset, the Council's stated purpose (not often included in codified legislation) in adopting such regulations was to "assure that similar housing types are built adjacent to one another or that adequate buffers and screening are provided between dissimilar housing types." BCZR § 1B01.1.B.1.a.(2). There is no housing proposed to be constructed in this case, and thus I do not believe the RTA regulations are in any way applicable. As Maryland's highest court has noted, the overarching rule in

construing statutes is to “discern the legislative purpose, the ends to be accomplished, or the evils to be remedied by a particular provision.” Babre v. Pope, 402 Md. 157, 172 (2007). Applying the RTA regulations in this case would simply not further the Council’s stated purpose.

In addition, the RTA regulations provide that an RTA is generated when the “property to be developed is zoned D.R.” BCZR § 1B01.1.B.1.b. In this case, the only property being “developed” is the BL zoned portion. The DR zoned portion will remain a parking area, as has been the case for at least 40 years. While it is true the dumpster enclosure currently on the DR property will be dismantled, and the blacktop may be resurfaced, these activities would not constitute “development” as that term is defined in the Baltimore County Code (BCC). That statute provides as follows:

(p) *Development.* “Development” means:

- (1) The improvement of property for any purpose involving building;
- (2) The subdivision of property;
- (3) The combination of any two or more lots, tracts, or parcels of property for any purpose;
- (4) Subjecting property to the provisions of the Maryland Condominium Act;
or
- (5) The preparation of land for any of the purposes listed in this subsection.

BCC § 32-4-101(p).

The only remotely applicable aspect of that definition would be subsection (1), although the Petitioner will not be “building” anything on the DR zoned portion of the property. In this regard, the Code defines “building” as “a structure that is enclosed within exterior walls or firewalls for the shelter, support, or enclosure of persons, animals, or property of any kind.”

BCC § 32-4-101(g).

Mr. Zimmerman points out that the RTA law has been amended many times since it was first enacted in 1971, and that its scope has broadened. While that may be the case, the Council has never amended the provisions concerning the statute's scope and purpose, and I do not believe the RTA law was designed to buffer dwellings situated immediately adjacent to commercial zones. Instead, and as I noted at the hearing, the County landscape manual provides buffer and screening requirements for scenarios where a commercial use adjoins a residential zone, and it is these regulations, and not the RTA provisions, that are applicable here. The landscape manual (adopted by the County Council in Resolution 66-2000) expressly provides that its provisions are designed to "screen parking lots ... from adjacent residential uses or zones." Landscape Manual, p. 17. The manual also includes a photograph with a caption stating that "fences screen parking lots from adjacent residential areas." *Id.* at 19. The Petitioner has satisfied these landscaping and screening requirements, as indicated by the County's approval of its Final Landscape Plan on April 4, 2013. Petitioner's Exhibit 15.

I am also aware that on prior occasions zoning commissioners, county staff and litigants may have considered the RTA regulations to be applicable in such settings. Even so, the only reported Maryland cases to discuss these regulations do so in the setting of residential (not commercial) development, and I have not been directed to any administrative decisions wherein the scope and applicability of the RTA, as a threshold matter, was considered at length. In addition, both the Zoning Commissioner's Policy Manual (ZCPM) and the Comprehensive Manual of Development Policies (CMDP) discuss the RTA regulations only in the context of residential development. In fact, the CMDP (revised as of September 20, 2006) states that RTAs are "designed to buffer low density single-family, semi-detached and duplex dwellings from higher density housing types...." CMDP, p. 23. This was the Council's stated purpose in

enacting the law many years ago, and as recently as 2006 the Baltimore County Planning Board has confirmed this purpose, by its adoption of the revised CMDP. As such, based on the plain language of the statute (as quoted above) I do not believe the RTA regulations are applicable in this case.

Business Parking in Residential Zone

The next issue concerns the use of the DR-zoned property for business parking. Petitioner submitted (Exhibit No. 13) a 1971 special hearing case involving this property, wherein the zoning commissioner granted approval for business parking in the DR zoned portion of the property. According to the notes included with the file, 61 parking spaces were required for the fast food use, while 62 spaces were provided. Counsel for Petitioner argues that the use permit granted in the 1971 case is a “vested” right, such that it continues in perpetuity, regardless of whether the site has been vacant for many years. Mr. Zimmerman contends that over 40 years has elapsed since that decision was rendered, and that the use proposed is different from what it was in 1971, which should trigger review under current BCZR § 409.8, which contains the conditions and requirements for business parking in residential zones.

Having reviewed Petitioner’s Exhibit 13, including the additional materials submitted by Mr. Zimmerman at the April 8 hearing, I am inclined to agree with Petitioner that it enjoys a vested right to continue business parking in the DR portion of the property. While the use here is somewhat different than the use in 1971, it is nonetheless business parking in a residential zone that is at issue in both instances. The plat in the Exhibit shows that the DR zoned portion of the property was configured in 1971 as it is at present, and though the parking spaces may have been laid out or configured differently, a smaller number of spaces is being proposed now than was the case in 1971.

In O'Donnell v. Bassler, 289 Md. 501 (1981), the court of appeals recognized that a lawfully issued use permit (no one contends the permit issued in 1971 was unlawful in any respect) can give rise to vested rights. And it is the generally applicable rule that a “use permit is a protected property right that is perpetual in nature and runs with the land.” Upper Minnetonka Yacht Club v. City of Shorewood, 770 N.W.2d 184 (Minn. 2009). A use permit for commercial parking in a residential zone is akin to the grant of special exception relief; indeed, the regulations specifically incorporate special exception standards (BCZR § 502.1) in processing such an application. BCZR § 409.8B.1.e.(4). And Maryland courts have held that the grant of a special exception is a vested, constitutionally protected, right. *See, e.g., Powell v. Calvert County*, 368 Md. 400 (2002).

Here, nothing in the BCZR or in the 1971 Order and Opinion restricted the duration of the permit, and as such I believe the Petitioner—assuming it purchases the property—will be the beneficiary of the use permit for commercial parking in a residential zone at the subject property. “In Maryland, when title is transferred, it takes with it all the encumbrances and burdens that attach to title; but it also takes with it all the benefits and rights inherent in ownership.” Richard Roeser v. Anne Arundel Co., 368 Md. 294, 319 (2002).

Modified Parking Plan

The final issue concerns the special hearing request for a “modified parking plan.” As noted by Mr. Zimmerman, this request is governed by BCZR § 409.12, which requires a showing of “undue hardship.” According to Maryland case law, this is the standard applicable in “use variance” cases. Montgomery County v. Rotwein, 169 Md App. 716, 729 (2006). A use variance would allow, for example, a commercial use in a residential zone. Id. Here, the Petitioner is not seeking a use variance, and I do not believe the strict standard set forth in

Anderson v. Town of Chesapeake Beach, 22 Md. App. 28, 38 (1974) and similar cases is applicable here. Instead, I believe the term is used in a more generic sense, similar to its use in BCZR § 415A.3, which permits a modified plan for storage of recreational vehicles if “undue hardship” would result from application of the regulations.

In the context of this case, the Petitioner would experience an “undue hardship” if the parking regulations set forth in BCZR § 409 were strictly enforced. The deficiencies identified (i.e., a 5' wide walk aisle through the drive-in lane, 20' drive aisle instead of the required 22' at the origination point of the drive through lane) are, in the scheme of things, relatively minor. And if those deficiencies prevented the Petitioner from completing the project and revitalizing a long vacant and moribund lot along a prominent and busy commercial corridor, it would experience an undue hardship.

THEREFORE, IT IS ORDERED this 16th day of April, by the Administrative Law Judge that the Motion for Reconsideration filed by Petitioner, be and is hereby GRANTED, and that the Motion for Reconsideration filed by the Office of People’s Counsel, be and is hereby DENIED;

IT IS FURTHER ORDERED that the Petition for Special Exception to operate a drive-through restaurant in a BL zone, be and is hereby GRANTED.

IT IS FURTHER ORDERED that Petitioner for Variance relief from RTA buffer and setback requirements, be and is hereby DISMISSED as unnecessary.

IT IS FURTHER ORDERED that the Petition for Special Hearing to confirm that business parking in a residential zone is permitted under the relief granted in Case No. 1971-0269-SPH, be and is hereby GRANTED.

IT IS FURTHER ORDERED that the Petition for Special Hearing to approve a modified parking plan, be and is hereby GRANTED.

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

Signed _____
JOHN E. BEVERUNGEN
Administrative Law Judge
for Baltimore County

JEB:dlw