

IN RE: PETITION FOR SPECIAL HEARING	*	BEFORE THE
(19 Warren Park Dr)		
3 rd Election District	*	OFFICE OF ADMINISTRATIVE
2 nd Councilmanic District		
Milford Apartments I, LLC	*	HEARINGS FOR
Petitioner	*	BALTIMORE COUNTY
	*	CASE NO. 2013-0193-SPH

* * * * *

OPINION AND ORDER

This matter comes before the Office of Administrative Hearings (OAH) for Baltimore County as a Petition for Special Hearing filed by Timothy M. Kotroco, Esquire on behalf of Milford Apartments I, LLC, legal owner. The Petitioner is requesting Special Hearing relief pursuant to § 500.7 of the Baltimore County Zoning Regulations (B.C.Z.R.), as follows: (1) to permit a zoning subdivision as created by road network; (2) to permit an amendment to a final development plan; (3) to allow all permitted uses on the ML zoned land, and (4) to allow such other and further relief as the nature of the cause may require. The subject property and requested relief is more fully depicted on the site plan and amended site plan that were marked and accepted into evidence as Petitioner’s Exhibits 1 and 2.

Appearing at the public hearing held for this case was Richard E. Matz with Colbert, Matz & Rosenfelt, Inc., the engineering firm that prepared the site plan. Timothy M. Kotroco, Esquire with Whiteford, Taylor & Preston, LLP, appeared and represented the Petitioner. Citizens who attended and opposed the petition were Alan P. Zukerberg, President, Pikesville Communities Corporation, Mark Sapp (Vice President) and Bill Kaplan (board member) with Colonial Village Neighborhood Association, and Mike Pierce. The file reveals that the Petition was properly advertised and the site was properly posted (in fact, three [3] signs were posted) as required by the

Baltimore County Zoning Regulations. The Protestants complained that none of the signs was placed directly on the 1.3 acre parcel in question. But Maryland cases hold that when protestants are actually aware of and attend hearings on a disputed proposal, any alleged deficiencies in the notice will not negate the jurisdiction of the administrative tribunal. Landover Books, Inc. v. Prince George's Co., 81 Md. App. 54 (1989).

No substantive Zoning Advisory Committee (ZAC) comments were received from any County agency.

Testimony and evidence revealed that the subject property is approximately 11.55 acres and is split-zoned DR 16, DR 5.5 and ML. A large apartment complex was constructed on the property in the 1960s, and Petitioner's counsel believes the project was reviewed under the then-applicable process. In any event, neither the Petitioner nor Baltimore County could locate a copy of the approved plan for the site, which creates part of the difficulty in resolving the matter. Baltimore County in the 1980s exercised its powers of eminent domain and acquired a portion of Petitioner's property for the re-routing and construction of Milford Mill Road. Petitioner's Exhibit 4. This construction project greatly changed the area, and bisected the Petitioner's property. In the process, it also isolated (or "orphaned," as suggested by Petitioner's counsel) a small 1.3 acre parcel (known herein as Parcel 3), which is the subject of this case. It is this parcel of land that was rezoned to ML during the most recent Comprehensive Zoning Map Process (CZMP) process.

The first special hearing request is for a "zoning subdivision" created by the road network. I told the participants at the April 12, 2013 hearing that I was unfamiliar with this concept, and Petitioner submitted further briefing on the issue. See letter from John B. Gontrum, Esq., dated April 22, 2013. In that correspondence, Petitioner discusses the doctrine of "zoning merger," and

seems to be seeking a determination that these lots or parcels have not merged for zoning purposes. After reviewing the exhibits, I do not believe there is anything here that could merge. The property never consisted of discreet, undersized parcels, and that is the primary goal of the merger doctrine: to eliminate undersized parcels. While the site plan in the case refers to “Parcel One,” “Parcel Two” and “Parcel Three,” those are merely descriptive terms used by Petitioner’s engineer and it appears this 10+/- acre tract is comprised of just one parcel (for tax purposes, Parcel 409) which has never been subdivided. What exists is a split-zoned parcel, which means only that “one parcel of land is encumbered with two different zoning classifications.” Alviani v. Dixon, 365 Md. 95 (2001).

In these circumstances, I believe the Petitioner is entitled to use Parcel 3 for any of the purposes set forth in B.C.Z.R. § 253.1, or could seek special exception relief for the uses in B.C.Z.R. § 253.2. As I noted at the hearing, this represents a determination on an issue of zoning law only, and should not be construed to exempt the Petitioner from any otherwise applicable laws and regulations, including but not limited to the County’s development and planning regulations. “Zoning dictates what one can build on, or how one may use his property while subdivision or planning determines how the land is divided.” Remes v. Mont. Co., 387 Md. 52, 74 (2005). So on the portion zoned ML, the Petitioner can use the property for the purposes set forth in the ML regulations.

But this does not mean that the ML portion (approximately 1.3 acres) of the 10+/- acre overall tract is a separate “lot” for development or conveyancing purposes. As noted by the court of appeals, “subdivision regulations are utilized to create separate lots.” Friends of the Ridge v. BGE, 352 Md. 645, 650-51 (1999). The development of “Lot Three” will therefore need to be in compliance with County development laws and procedure, as set forth in Article 32, Title 4 of the

Baltimore County Code (B.C.C.), which is a matter entrusted to the County's Department of Permits, Approvals and Inspections (PAI).

In researching the issues involved in this case, I discovered that courts in Pennsylvania and New York recognize what is known as a "de facto" subdivision. Riverwatch Condo. Ass'n. v. Restoration Dev. Corp., 980 A.2d 674 (Pa. 2009); Northern Dutchess Club v. Town of Rhinebeck, 814 N.Y.S. 2d 691 (2006). In Rhinebeck, the Town's policy was that when a public road divides a parcel of land, a de facto subdivision has occurred. Id. at 693. I was unable to locate a Maryland case recognizing this doctrine, although in its development regulations St. Mary's County specifies that county or state roads function as "parcel dividers," that create separate "parcels of record." St. Mary's Co. v. Potomac River Ass'n., 113 Md. App. 580, 585 n.5 (1997). In addition, the County Board of Appeals (CBA) recently deliberated in a case where the CBA will apparently hold that a BGE power line which bisects a property located at 21257 Baker School House Road effects a subdivision of the overall parcel. Thus, it is unclear at this juncture whether Maryland law would deem a "de facto subdivision" to have occurred when the County in the condemnation case took title to reconfigured Milford Mill Road.

The second request is to amend the "final development plan." As I noted at the hearing, this nomenclature was adopted after the construction of this apartment project; and even if the terminology was applicable, a "final" plan for the project has not been located or introduced at the hearing. As such, I cannot permit an amendment to a plan I have not seen, and to that extent this aspect of the request is denied. The Petitioner did submit a zoning site plan (Petitioner's Exhibit 1) and a redlined site plan (Petitioner's Exhibit 2) showing existing site conditions, and those plans were admitted as exhibits and are included within the record of this case. Those plans were prepared by a licensed engineer (Richard Matz) and can therefore serve as the basis for the relief

in this case, and will also serve a useful role going forward in the event the original plan for the apartment project is not located.

The final request seeks to “allow all permitted uses on the M.L. zoned land.” Section 500.7 of the B.C.Z.R. has been interpreted to be akin to a declaratory judgment provision, and in that regard this would seem an appropriate inquiry. Antwerpen v. Balto. Co., 163 Md. App. 194, 209 (2005) (“request for special hearing is, in legal effect, a request for a declaratory judgment”). During the 2012 CZMP cycle, the County Council rezoned “parcel 3” from D.R. 5.5 to ML. The Council is presumed to have done so with full knowledge of the existing laws and conditions applicable to the property. Mr. Zuckerberg noted the community was aware of and opposed the rezoning request, but was unsuccessful. As discussed earlier in this Opinion, I believe the Developer is entitled to use “Parcel 3” for any of the lawful purposes set forth in the ML zoning regulations.

The final matter that merits consideration is the April 11, 2013 letter submitted by the Office of People’s Counsel. Protestant’s Exhibit 2. The first issue raised in that correspondence is the lack of a development plan, which was noted earlier. Mr. Zimmerman suggests Parcel 3 may have originally provided a green space buffer of sorts for both the apartment tenants and adjacent Colonial Village residents. While that may have been the case in the 1960s - 70s, it is certainly not the case following the construction of Milford Mill Road. As the photos (Petitioner’s Exhibits 9 – 11) show, the topography of the area was radically changed by the roadway construction, and adjacent properties are now zoned industrial, including a large trucking facility best seen in the aerial photo submitted by Protestants. (Protestants’ Exhibit 1). As seen on that photo, Parcel 3 is simply not a buffer of any sort for the apartments or Colonial Village residents.

Mr. Zimmerman's letter also asks whether the rezoning of Parcel 3 "renders inapplicable ... BCZR Section 1B01.3," pertaining to amendment of residential development plans. Article 1B of the B.C.Z.R concerns "density residential zones," and Parcel 3 is no longer a residential zone. The regulations pertaining to amendment of residential development plans (§1B01.3) are designed to encourage disclosure of development plans to prospective residents and to prevent developers from making "inappropriate changes" to such plans. B.C.Z.R. §1B01.3.A.1. For example, these regulations are designed to protect existing residents who purchased a single-family dwelling in a community of such homes from a developer later changing plans and constructing townhouses in that same community. That concern is simply not present here, and I therefore do not believe the process set forth in B.C.Z.R. § 1B01.3 is applicable. Parcel 3 was rezoned in 2012 through a legislative process and it is that recently-enacted legislation that controls the use of this parcel.

Pursuant to the advertisement, posting of the property, and public hearing, and after considering the testimony and evidence offered, I find that Petitioner's Special Hearing request should be GRANTED in part and DENIED in part.

THEREFORE, IT IS ORDERED, this 6th day of May, 2013 by the Administrative Law Judge for Baltimore County, that the Petition for Special Hearing pursuant to § 500.7 of the Baltimore County Zoning Regulations (B.C.Z.R.), to: (1) permit a zoning subdivision as created by road network, and to (2) allow all permitted uses on the ML zoned land; be and is hereby GRANTED.

IT IS FURTHER ORDERED that the Petition for Special Hearing pursuant to § 500.7 of the B.C.Z.R., to permit an amendment to a final development plan, be and is hereby DENIED.

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