

IN RE: PETITIONS FOR SPECIAL HEARING	*	BEFORE THE
AND VARIANCE		
(7525 Belair Road)	*	OFFICE OF
14 th Election District		
6 th Council District	*	ADMINISTRATIVE HEARINGS
Richard Niehaus, <i>Legal Owners</i>		
Bruce Benkert, <i>Lessee</i>	*	FOR BALTIMORE COUNTY
Petitioners		
	*	Case No. 2014-0015-SPHA

* * * * *

OPINION AND ORDER

This matter comes before the Office of Administrative Hearings (OAH) for consideration of Petitions for Special Hearing and Variance filed by Lawrence E. Schmidt, Esquire, of Smith, Gildea & Schmidt, LLC, on behalf of Richard Niehaus, the legal owner and Bruce Benkert, Lessee. The Special Hearing was filed pursuant to §500.7 of the Baltimore County Zoning Regulations (“B.C.Z.R.”), to approve the grandfathered location of an existing Tattoo and Body Piercing Establishment at 7525 Belair Road. In the alternative, a Petition for Variance was filed pursuant to B.C.Z.R. §4B-102(B)(2) to permit a Tattoo and Body Piercing Establishment to be located less than 2,500 ft. from another Tattoo and/or Body Piercing Establishment. The subject property and requested relief is more fully depicted on the site plan that was marked and accepted into evidence as Petitioners’ Exhibit 1.

Appearing at the public hearing in support of the requests were Richard Niehaus, Chris Corey and Donald Hicks. Lawrence E. Schmidt, Esquire, of Smith, Gildea & Schmidt, LLC appeared and represented the Petitioners. The file reveals that the Petition was properly advertised and the site was properly posted as required by the Baltimore County Zoning Regulations. Dino LaFiandra, Esquire, appeared on behalf of Mr. and Mrs. Robert Smith, who own a tattoo establishment at 7554 Belair Road, and oppose the petitions. Carroll Pupa, a member of the community, attended the hearing and also opposed the petitions.

The only substantive Zoning Advisory Committee (ZAC) comment was received from the Department of Planning (DOP) recommending that the Special Hearing/Variance requests be denied.

As noted during the hearing, I do not believe the petition for Variance is appropriate in these circumstances, and that petition will be denied. This case presents a legal issue that is appropriately resolved as a petition for Special Hearing: is the owner of 7525 Belair Road entitled to use the property as a Tattoo establishment, pursuant to the law of nonconforming uses.

It also bears mentioning at the outset that the comments of the DOP and community are well founded. Indeed, the County Council has determined that the concentration of tattoo, massage and adult entertainment establishments has a deleterious impact upon communities. See Bill 29-98, preamble. And if the Petitioners' property enjoys nonconforming use status, it would frustrate the goals and purpose of the Council in enacting Bill 29-98 governing tattoo establishments. But that is a recognized pitfall of nonconforming uses, which the law disfavors. Grant v. City of Baltimore, 212 Md. 301, 307 (1957) (“nonconforming uses have been a problem since the inception of zoning”).

Indeed, the law contemplates that nonconforming uses will eventually cease, with the goal of preventing incompatible land uses. A nonconforming use can be extinguished in Baltimore County by abandonment or discontinuance of the use, which will be discussed below. B.C.Z.R. §104. In addition, the legislature frequently includes an “amortization” clause in new zoning laws, which grandfathers, for a reasonable period of time, a use that must then terminate. The County Council used such a clause when it enacted zoning regulations for state licensed medical clinics. In Bill 39-02, which withstood a federal court challenge, the Council permitted existing clinics to operate for 6 months before they would be required to comply with the new zoning law. At the other end of the spectrum, the Council enacted a 15 year amortization provision with

regard to nonconforming signs. B.C.Z.R. §450.8.D. But in the various Bills enacted by the Council concerning tattoo establishments (Bills 29-98, 46-06, 56-11) an amortization clause was not included, which means that the status could be lost only by abandonment, discontinuance of use or repeated County Code violations. B.C.Z.R. §§104.1 and 104.8.

The evidence in this case established that a tattoo business has been located at 7525 Belair Road since at least 1995. Indeed, the operator of the business sought Special Hearing relief in 1996 to establish the legality of the enterprise. The petition was denied by former Deputy Zoning Commissioner Kotroco and that decision was affirmed by the County Board of Appeals and Circuit Court. Petitioners' Exhibits 4-7. The Deputy Zoning Commissioner determined that tattoo establishments were not permitted at that time by right or special exception in Baltimore County.

Then, in 1998, the first regulation to address the matter restricted such businesses to the MH zone, but at the same time the Council exempted from the law any tattoo establishment "in existence in a business or commercial zone for at least 12 months prior to" March 20, 1998. Bill 29-98, §6. The law originally grandfathered only such businesses that were "lawfully established" before enactment of Bill 29-98, although that language was removed, and such a business only needed to be "in existence" to enjoy the status. As a result of this change, the property at 7525 Belair Road became a nonconforming use even though - - as established by the Deputy Zoning Commissioner's ruling noted above - - it was not "lawfully established" at that time.

The business continued at the location from 1995-2005, at which time Mr. Benkert sold the business to Mr. Smith, who continued the tattoo business at the site until September 30, 2012. Petitioners' Exhibit 17. At that time, Mr. Smith relocated his business to a site approximately 530 feet from the former location. The new site, 7554 Belair Road, did not have the proper

zoning to operate a tattoo establishment, but the County Council enacted Bill 56-11, which exempted establishments (like Mr. Smith's) that relocated within 1,000 feet of its earlier location.

At this point in the chronology, the subject premises at 7525 Belair Road were vacant. The owner, Richard Niehaus, testified that he had several years prior consulted an attorney, who assured him that even if his tenant were to leave, he as owner enjoyed "a valuable nonconforming use for a Tattoo Parlor at your location." Petitioners' Exhibit 23. Mr. Niehaus testified that Mr. Smith actually vacated the subject premises in early October, 2012, and that within that same month he spoke by telephone to Mr. Benkert concerning Smith's departure and whether he (Benkert) would be interested in again operating a tattoo establishment at 7525 Belair Road. The witness stated that he undertook significant renovations to the property, and thereafter entered into a new lease with Mr. Benkert effective April 1, 2013. The tenant is again conducting a tattoo business at the property, and the petition for Special Hearing concerns the legality of that use.

Thus, the salient question is whether the nonconforming use status of 7525 that existed from the effective date of Bill 29-98 (March 20, 1998) until at least October 2012 when tenant Smith vacated the premises was lost due to abandonment, discontinuance of use or the relocation of the tenant to new quarters.

B.C.Z.R. §104.1 contemplates a "discontinuance of such nonconforming use for a period of one year or more." The evidence clearly established the tattoo use was discontinued for at most six (6) months (October 2012-April 2013). As such, the nonconforming use was not lost due to discontinued use.

The Protestants presented case law concerning abandonment of nonconforming uses, although it appears the more modern trend in Maryland law does not focus solely on intent to

abandon so much as the concurrence of two things: (1) an intent to abandon; and (2) some overt act or failure to act that carries the implication that the owner does not claim or retain any interest in the matter. Catonsville Nursing Home v. Loveman, 349 Md. 560, 581 (1998).

Here, the testimony established the owner began attempting to obtain a new operator for the business almost immediately after his tenant vacated in October 2012. Indeed, within a six month time frame significant renovations were completed and a new tattoo business had opened its doors at the site. I do not believe that on these facts abandonment can be found, especially considering that nonconforming uses, though disfavored, are vested rights entitled to constitutional protection. Trip Associates, Inc. v. City of Baltimore, 392 Md. 563, 573-74 (2006).

The only remaining issue then is whether Mr. Smith's October 2012 departure from the subject premises, and relocation to the new store at 7554 Belair Road, somehow terminated the nonconforming use status at 7525 Belair Road. An "established nonconforming use runs with the land, and hence a change in ownership will not destroy the right to continue the use." 8A McQuillin, The Law of Municipal Corp. §25.183.50. In addition, "a nonconforming use is not personal to the current owner or tenant, but attaches to the land itself." 83 Am. Jur. 2d, Zoning & Planning, §587. Thus, Mr. Smith's move to the new location, enabled by Bill 56-11, did not alter the legal status of the real property, located at 7525 Belair Road.

Pursuant to the advertisement, posting of the property, and public hearing, and after considering the testimony and evidence offered, I find that Petitioners' Special Hearing request should be granted.

THEREFORE, IT IS ORDERED this 25th day of September, 2013, by this Administrative Law Judge, that Petitioners' request for Special Hearing filed pursuant to § 500.7 of the Baltimore County Zoning Regulations ("B.C.Z.R."), to approve the grandfathered location

of an existing Tattoo and Body Piercing Establishment at 7525 Belair Road, be and is hereby GRANTED.

IT IS FURTHER ORDERED that Petitioners' Variance request pursuant to B.C.Z.R. §4B-102(B)(2) to permit a Tattoo and Body Piercing Establishment to be located less than 2,500 ft. from another Tattoo and/or Body Piercing Establishment, be and is hereby DENIED.

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

JEB/sln

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