

IN RE: <b>PETITION FOR SPECIAL HEARING</b>	*	BEFORE THE
<b>(17318 Falls Road)</b>		
5 <sup>th</sup> Election District	*	OFFICE OF
3 <sup>rd</sup> Council District		
Michael P. Smith, Per. Rep.	*	ADMINISTRATIVE HEARINGS
(Estate of Myles R. McComas)		
<i>Legal Owner</i>	*	FOR BALTIMORE COUNTY
Petitioner	*	<b>Case No. 2015-0208-SPH</b>

\* \* \* \* \*

**OPINION AND ORDER**

This matter comes before the Office of Administrative Hearings (OAH) for consideration of a Petition for Special Hearing filed on behalf of Michael P. Smith, Personal Rep. (Estate of Myles R. McComas) legal owner (“Petitioner”). The Special Hearing was filed pursuant to § 500.7 of the Baltimore County Zoning Regulations (“B.C.Z.R.”) to confirm the prior and proposed inter-family subdivision and non-density transfer of a parcel zoned R.C.2/BL-CR and to confirm the rights of subdivision (density) associated therewith.

Appearing at the public hearing in support of the requests was surveyor Ken Wells, whose firm prepared the site plan. Lawrence E. Schmidt, Esquire, represented the Petitioner. A neighbor (Mr. Jung) attended the hearing to obtain further details regarding the request. The Petition was advertised and posted as required by the Baltimore County Zoning Regulations. A substantive Zoning Advisory Committee (ZAC) comment was received from the Department of Planning (DOP), and will be discussed below.

The great majority of the property in this case is zoned R.C.2. As in similar cases of this nature, determining the subdivision and density rights for such parcels is a bit like completing a jigsaw puzzle. To make such a determination requires a detailed examination of various

conveyances throughout the years, with particular emphasis on the status of things as of 1979. It was then the County first adopted area and density regulations for the R.C.2 zone.

The chronology in this case begins in or about 1888, when John Hale acquired by deed approximately 53+/- acres of land in northern Baltimore County (Pet. Ex. 3), situated near what is now the intersection of Falls and Mount Carmel Roads. Between 1891 and 1919, Hale conveyed 4 parcels (see deeds, Pet. Ex. Nos. 4-7) comprising about 12+/- acres of the original tract. In or about 1965, following John Hale's death, his son Clarence became owner of the property. In that same year, Clarence Hale deeded (Ex. 8) approximately 40 acres of the tract to Myles and Rachel McComas. In 1970, (Ex. 9) the Baltimore County Board of Education acquired by condemnation approximately 10 acres of the tract. That was the status of things as of November 1979, the starting point for analyzing density rights associated with R.C.-2 land.

In 1987 and 1988, Myles and Rachel McComas conveyed (Ex. Nos. 10A & 10B) to their son (Myles Jr.) and daughter in-law about 9.25+/- acres of the property. This was followed in 1989 by a conveyance (Ex. 11) to the same grantees of an approximate 1.7+/- acre parcel of land. A single family dwelling was constructed on the larger parcel, and a driveway providing access to the home was constructed across the 1.7 acre parcel. These parcels were conveyed by deed, not through a subdivision process. One of the transfers for which approval is sought herein is the "non-density" transfer of the 1.7 acre parcel to the 9.25 acre parcel improved with the dwelling, to create a single parcel. The DOP does not oppose this request.

Myles McComas Sr. died in 2014, and his will (Ex. No. 12) grants a portion of the remaining land (on the west side of Falls Road) to his grandchildren, and the remaining portion (east of Falls Road) to his son Michael McComas. The Petition was filed in this case to determine the development rights associated with the property as it presently exists.

As it turns out, the pivotal issue that requires resolution is whether a 1927 acquisition by the State Roads Commission (SRC) (See plat, Ex. 2) had the effect of dividing the property into two parcels. At or about that time, the SRC acquired the necessary “right of way and land” shown on the plat to construct the road shown thereon; i.e., Falls Road. The SRC was established in 1908 to create a system of highways throughout the state, and it was “given authority to acquire by purchase or condemnation all property needed” for that purpose. Murphy v. State Roads Comm’n., 159 Md. 7 (1930). A later case noted the agency could acquire property also by gift, agreement, grant or purchase. Dunne v. State Roads Comm’n., 162 Md. 274 (1932).

Had this acquisition by the SRC (now SHA) taken place after 1990, it seems clear that the B.C.Z.R. would answer the inquiry in the negative. The Regulations provide that “[i]n cases where land in single ownership is crossed by existing or proposed roads, rights-of-way or easements, the portions of land on either side of the road, right-of-way or easement shall not be considered separate parcels for the purpose of calculating the number of lots of record.” B.C.Z.R. §1A01.3.B.1.

But this provision was enacted in 1990, and would therefore not be applicable in determining the legal effect of an acquisition dating to 1927. In an analogous case, the court in Lovinger v. Lane County, 138 P.3d 51 (Or. 2006) held that a nearly identical regulation was not applicable when it was enacted 30 years after the road in question was constructed. The relevant question then becomes: did the County Council enact this provision to codify existing law/practice, or was the law enacted to change the practice as it then existed.

There seems to be no definitive answer as to what the rule or practice was in 1990 regarding whether a road or easement would bifurcate parcels of land. Counsel noted that prior to that time zoning commissioners had issued conflicting rulings on the question of whether a road or right of

way would divide a parcel for zoning/development purposes. And there does not appear to be any Maryland appellate case law on point, although counsel noted that in an unreported opinion (known as Gudeman), the court of special appeals held that a public road did not divide the tract into separate parcels for development purposes.

Based on out-of-state case law, it seems as if a transfer of a fee simple interest to create a road would have the effect of dividing the parcel. This type of conveyance, as an incident of basic real property law, would create “separate ownership” and therefore noncontiguous parcels. Lovinger, 138 P3d. at 54-56. Here, based on the exhibit submitted (Ex. No. 2), it is unclear exactly what interest was acquired by the SRC in 1927. In these circumstances, I cannot assume the state acquired a fee simple interest, as opposed to a “right-of-way” or easement for travel. This conclusion is buttressed by a common law doctrine pertaining to rural roads (such as Falls Road in the vicinity of the subject property) which provides that unless stated to the contrary, the government acquires only an easement for travel. Turner v. WSSC, 221 Md. 494, 498-500 (1960).

In light of the above, I believe the tract of land in 1979 (approximately 30+/- acres) was a single parcel, even though bisected by Falls Road. Though the 1987-89 conveyances to Myles McComas Jr. and his wife arguably established 2 separate “lots of record,” the 1989 conveyance involved a “non-density” parcel, and the DOP did not oppose the request that the two parcels be combined into a single “lot of record” for the single family dwelling and driveway providing access to the home. That lot will be approximately 11 +/- acres, which (according to the devolution of title chart on the site plan) will leave a remaining parcel of approximately 18.8+/- acres.

The remaining portion of land is bisected by Falls Road, and state tax records show the tract east of Falls Road is 7 acres and categorized as agricultural, while the tract on the west side of Falls Road, categorized as commercial (given the existence of a small country store on the

commercially-zoned portion of the land) is 8 acres. Petitioner's Ex. Nos. 13A & 13B. The tax records indicate the remaining property is 15+/- acres, while the site plan puts the figure at 18.8+/- acres. No explanation was provided for the discrepancy, though the significant number of conveyances through the years no doubt played a role.

The DOP indicated in its ZAC comment that Petitioner has no further subdivision rights, since the existing house at 17318 Falls Road would constitute the second lot permitted by B.C.Z.R. §1A01.3. I disagree, because the house in question, which Mr. Jung stated was uninhabited and in very poor condition, is situated within the BL-CR zone, not the R.C.2 zone. The aforementioned regulation applies only to "a lot of record lying within an R.C.2 zone." As such, I believe Petitioner has one further subdivision right on the remaining portion of land. In light of the DOP's comment regarding the prime agricultural soils in the area, I believe the additional dwelling (assuming one is constructed) should be erected on the west side of Falls Road, so that the property on the east side of the road (categorized and taxed by the state as "agricultural") can remain "vacant land" as shown on the site plan. This will provide a large, unimproved parcel for agricultural purposes, which are to be favored and fostered in the R.C.2 zone. B.C.Z.R. §1A01.

THEREFORE, IT IS ORDERED this 15<sup>th</sup> day of May, 2015, by this Administrative Law Judge, that the Petition for Special Hearing pursuant to § 500.7 of the Baltimore County Zoning Regulations ("B.C.Z.R") to confirm the rights of subdivision (density) associated with the subject property, in accordance with the terms of the foregoing Opinion, be and is hereby GRANTED.

IT IS FURTHER ORDERED Petitioner shall be permitted to combine (by way of a non-density transfer) the 1.7 acre parcel identified herein with the 9.25 acre parcel to create a single lot of record of 11+/- acres.

IT IS FURTHER ORDERED Petitioner shall have one further right of subdivision (i.e., available density to construct one single-family dwelling) on the remaining land situated on the west side of Falls Road, identified on the site plan (Ex. No. 1) as “#17318 Tax ID No. 0513001050.”

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/sln