

IN THE MATTER OF
SOUTHWEST ENTERPRISES, INC.
5647 SOUTHWESTERN BOULEVARD

13TH ELECTION DISTRICT
1ST COUNCILMANIC DISTRICT

* BEFORE THE
* COUNTY BOARD OF APPEALS
* OF
* BALTIMORE COUNTY
* Case No. CBA-10-029

* * * * *

OPINION

This case comes to the Baltimore County Board of Appeals on an appeal of Southwest Enterprises, Inc., (herein referred to as 'Appellant') from an action of the Baltimore County Building Engineer ordering that the building located at 5648 Southwestern Boulevard in Baltimore County, be closed to the public. This action was taken as a result of a decision of the Code Enforcement Hearing Officer" issued on March 24, 2010 relative to Civil Citation No. 71757, wherein the Hearing Officer ordered that the case be referred to the Baltimore County Building Engineer and that the building should be ordered closed to the public until such time as a new Use and Occupancy Permit is issued. The Board conducted an expedited open hearing on April 1, 2010. Howard J. Schulman, Esquire, appeared, representing the Appellant/Legal Owner. Paul Mayhew, Assistant County Attorney, appeared on behalf of Baltimore County. The parties had the opportunity to present witnesses, testimony and evidence in support of their positions. No briefs were filed with the Board.

FACTS

The Hearing Officer issued a detailed fifteen (15) page Opinion with respect to this matter. In her decision, the Hearing Officer found that the Appellant was operating its retail store on a Use and Occupancy Permit issued on January 17, 1996 for a daycare facility with 12

children, 3 employees and 6 parking spaces. On October 17, 2007, Appellant obtained a County Building Permit for "interior alterations to existing retail space," but apparently did not apply for or obtain a Use and Occupancy Permit for retail use or for the other uses in effect in the property. She stated that the Respondent's change of use of the property without obtaining a new Use and Occupancy Permit violates County law. The County Building Code requires "Any owner or authorized agent who intends to... change the occupancy of a building or structure... shall first make application to the building official and obtain the required permit ." *Building Code of Baltimore County, ICC International Building Code 2006, Section 105.1.*

Section W. of the Hearing Officer's Opinion stated:

"Because compliance is the goal of code enforcement, This Final Order will impose "[r]easonable conditions as to the time and manner of correction," in addition to imposing a civil penalty. See BCC Section 3-6-207. Because of the clear violations of the zoning regulations and the building code, this Order will refer this case to the County Building Engineer with a recommendation that the Use and Occupancy certificate for this property be revoked, and that Respondent be required to apply for and receive a certificate for Change of Occupancy before allowing this building to be used or accessed by the public, with all permit requirements confirmed by inspection, pursuant to Building Code of Baltimore County, ICC International Building Code 2006, Section 110.4 (Revocation) ("The building official is authorized to, in writing, suspend or revoke a certificate of occupancy or completion issued under the provisions of

this code... where it is determined that the building or structure or portion thereof is in violation of any ordinance or regulation or any of the provisions of this code.") and pursuant to Building Code of Baltimore County, ICC International Building Code 2006, Section 105.4 (Validity of permit) ("The building official is also authorized to prevent occupancy or use of a structure where in violation of this code or of any other ordinances of this jurisdiction.").

In addition, the Hearing Officer stated in her Order:

"IT IS FURTHER ORDERED that this case be referred to the Baltimore County Building Engineer with a recommendation that the Use and Occupancy Permit for this property should be REVOKED, and that the building should be ordered closed to the public until such time as a new Use and Occupancy Permit for a lawful and permitted use is issued by Baltimore County, with all permits requirements confirmed by inspection."

TESTIMONY AND EVIDENCE

Donald Brand, the County Building Engineer testified in the matter and stated that Section 110.4 of the International Building Code, has been adopted by Baltimore County as the authority to revoke the Certificate of Occupancy for the business. Section 110.4. Revocation states:

"The building official is authorized to, in writing, suspend or revoke a Certificate of Occupancy or completion issued under the provision of this Code wherever the Certificate is issued in error, or on

the basis of incorrect information supplied, or where it is determined that the building or structure or portion thereof is in violation of any ordinance or regulation or any of the provisions of this Code."

Mr. Brand testified that upon receipt of the Hearing Officer's decision, he prepared a letter to the Appellant, dated March 25, 2010, in which he indicated that Baltimore County was revoking the Use and Occupancy Permit for the property at 5648 Southwestern Boulevard, pursuant to Section 105.62 of the *Building Code of Baltimore County and Section 110.4 of the International Building Code, 2006 Edition*. The letter also stated that the occupancy of the building for any use shall cease immediately until a Use and Occupancy Permit is issued compatible for its current and legally sanctioned use or uses. Mr. Brand stated that if a building is operating without a Use and Occupancy Permit under the International Building Code, it is deemed unsafe and it would be shut down. Mr. Brand testified that he could only recall one possible instance in 1996 when he may have shut down a business, although he issues stop work orders all the time.

Michael Mohler, Deputy Director, Code Enforcement, Department of Permits and Development Management also testified on behalf of the County. He stated that he saw a first draft of Mr. Brand's letter on March 24, 2010 and saw a final draft late in the afternoon of March 24, 2010. He stated that he had nothing to do with the drafting of the letter. Mr. Mohler stated that on March 24, 2010 when he saw the final draft of the letter, he knew that he would be going out the next day to shut down the business. Mr. Mohler stated that he took the copy of the letter and he and Clarence Raynor, Code Enforcement Inspection Officer, went to the property arriving at approximately 10:00 a.m. Mr. Mohler had made arrangements for six (6) to eight (8) Police Officers to be present at that time.

He and two Police Officers entered building and told the employees that they were not allowed to conduct business on the premises with customers after he closed the operation. He did not tell them what would happen, but suggested that they could carry-on any business that they may have had, but could not serve any customers after his notification. Mr. Mohler then stated he placed a placard on the business. (Appellant's Exhibit 3) This stated that the building was closed to the public until a Use and Occupancy Permit was issued by Baltimore County under Section 110 of the Baltimore County Building Code. The Notice was signed by Mike Mohler. Mr. Mohler also stated that he gave a copy of Mr. Brand's letter to the employees and he left his name, title and telephone number on the back of the envelope since he did not have a business card with him.

The Code Enforcement Officer, Mr. Raynor, also testified and confirmed Mr. Mohler's testimony with respect to the closing of the business.

DECISION

The County Code provides for enforcement of the Building Code by County Officials in Section 3-6-201, which states:

§ 3-6-201. COUNTY AUTHORITY IN GENERAL.

"(a) *Authority of Code Official.* In addition to any other remedy authorized by law, the county or the Code Official may enforce and seek correction of a violation as provided in this title.

(b) *Authority of Director.*

(1) In addition to any other remedy authorized by law, the county or the Director may enforce and seek correction of a violation as provided in this title.

(2) The Director may not enforce and seek correction of a violation of a code.

Section 3-6-202. Equitable Relief in general it states:

§ 3-6-202. EQUITABLE RELIEF.

"(a) *Authority.* The county, the Director, or the Code Official may:

- (1) Maintain an action in a court of competent jurisdiction for an injunction; or
- (2) File a petition for equitable relief in the District Court.

(b) *Nature of the relief.* The county, the Director, or the Code Official may request the court to:

- (1) Enjoin a violation;
- (2) Require the restoration of a property, to the extent possible, to its condition before the violation, including removal of the source of the violation; and
- (3) Order other relief as may be appropriate to remedy a violation."

Ellsworth Bryan, Chief, Fire Protection Engineer for Baltimore County testified on behalf of the Appellant. Chief Bryan stated that he had never been to the property. If a fire inspection was done on an annual basis and that if the property did not pass, the Fire Department would issue a Correction Notice. He stated that the property had to have a Fire Inspection Notice before being able to open the business.

Section 14-2-105 entitled Equitable Relief, Baltimore County Fire Protection states:

"(a) *In general.* In addition to any other remedy authorized by law, the county may maintain an action in a court of competent jurisdiction for an injunction:

- (1) Enjoining a violation of this article or a provision of the Fire Prevention Code; and
- (2) Requiring the restoration of a property, to the extent possible, to its condition before the violation, including removal of the source of the violation."

Even under the Fire Code, the Fire Department is required to go to a Court of competent jurisdiction in order to obtain an injunction to shut down a business.

Section 21-2-106 of the *Baltimore County Code* (BCC) with respect to Adult Entertainment business(s) calls for civil enforcement. It states as follows:

"The Director may enforce the provisions of this title through injunctive proceedings, action for specific performance, or any other appropriate legal or equitable proceeding."

The standard of review to be applied by this Board in the case is set out in § 1-7(g)(6) of the Code. The Board can only reverse or modify the final Order if a finding, conclusion, or decision of the Code Official: (i) exceeds the statutory authority or jurisdiction of the Code Official; (ii) results from an unlawful procedure; (iii) is affected by any other error of law; (iv) is unsupported by competent, material and substantial evidence in light of the entire record as submitted; or (v) is arbitrary or capricious.

The Hearing Officer ordered that the case be referred to the Baltimore County Building Engineer with a recommendation that the Use and Occupancy Permit for the building should be revoked and that the building should be ordered closed to the public until such time as a new Use and Occupancy Permit for a lawful and permitted use is issued. At that point, the Building

Engineer should have contacted the County Attorney to institute an action under Section 3-6-202 of the *Baltimore County Code*. By ordering the business closed, Building Engineer exceeded his authority under *Baltimore County Code* § 3-6-202.

Therefore, the Board will order that the closing of the business at 5648 Southwestern Boulevard be REVOKED until such time as proper injunctive relief is obtained by the County.


ORDER

THEREFORE, IT IS THIS 9th day of April, 2010 by the Board of Appeals of Baltimore County, hereby

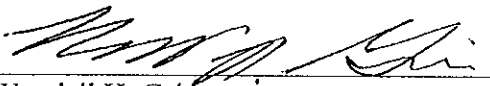
ORDERED that the Order of the Building Engineer of Baltimore County closing the business at 5648 Southwestern Boulevard in Baltimore County to the public be REVOKED.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the Maryland Rules.

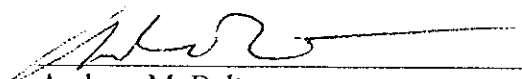
**BOARD OF APPEALS
OF BALTIMORE COUNTY**



Lawrence S. Wescott, Chairman



Wendell H. Grier



Andrew M. Belt