

IN THE MATTER OF
STEVEN and JOANNE GALASSO - APPELLANTS
10903 – 10911 FALLS ROAD
LUTHERVILLE, MD 21093

RE: Appeal of Request for
Zoning Map Correction

* BEFORE THE
* BOARD OF APPEALS
* OF
* BALTIMORE COUNTY
* Case No. CBA- 13-029

* * * * *

OPINION

This case comes to the Board on appeal of a letter dated April 30, 2013 from the Director of the Department of Planning responding to Steven and Joanne Galasso's request for a zoning map correction for the property located at 10903-10911 Falls Rd., Lutherville, MD 21093 (the "Property").

A public hearing was held on November 6, 2013. The Galassos were represented by Cornelius J. Carmody, Esquire. The County was represented by Nancy West, Esquire, Assistant County Attorney. People's Counsel for Baltimore County, Peter Max Zimmerman, Esquire also participated in the hearing.

MOTION TO DISMISS

Prior to the hearing before this Board, People's Counsel filed a Pre-Hearing Memorandum as well as a Supplemental Pre-Hearing Memorandum. People's Counsel raised two (2) arguments: (1) that the doctrine of *res judicata* bars the case; and (2) that the zoning history for the Property demonstrates no drafting error. Likewise, the County filed Pre-Hearing Memorandum setting forth two (2) arguments: (1) that this Board did not have jurisdiction to hear the case because the County letter did not

constitute an appealable event; and (2) that the doctrine of *res judicata* bars the case. At the hearing before this Board, the County made a Motion to Dismiss the case. Argument of all Parties on the Motion to Dismiss was heard by the Board, immediately followed by a public deliberation on the record.

PRIOR ZONING LITIGATION

In considering the Motion to Dismiss, the Board reviewed the zoning history of the Property. In this appeal, the Galassos argue that the 1976 zoning map incorrectly classified the Property as RC5 rather than as 'commercial'. The Galassos contend that, in 1947, Zoning Commissioner Charles H. Doring issued an Order authorizing a change in use from "A" residential to "E" commercial (the "1947 Order"). The Galassos point out that the Petition number was '0793'. They add that the 1945 zoning map shows 'commercial zoning.' Further, the 1955 and 1971 zoning maps do not show the parcel lines for the Property but '0793' was marked on the map. Based on this information, they requested by letters dated January 17, 2013, February 20, 2013 and March 25, 2013 that the Planning Department correct the zoning map under Baltimore County Code §32-3-231 ("BCC").

On April 30, 2013, the Director of Planning, Andrea Van Arsdale, responded to the Galassos in a letter describing the zoning history (the "County Letter"). In the letter, she states that the zoning was reviewed during the 2004 Comprehensive Zoning Map Process (the "2004 CZMP") under Issue No. 2-058. Issue No. 2-058 refers to the request filed by William Edward Long, the property owner from whom the Galassos purchased the Property. The issue requested a change from RC5 to B.M. ('business-

manufacturing’). In addition, the Department of Planning filed Issue No. 2-858. The County Council reviewed the prior zoning maps referenced by the Galassos here and determined that the zoning should remain RC5.

The County letter further reiterated that this Board had previously addressed the Galassos “zoning error” argument in the following cases: *In the Matter of Application of Steven L. Galasso, et ux.*, Case No.: 07-205-SPH and *In the Matter of Steven and Joanne Galasso Specialty Automotive, L.L.C. and Automotive Emporium, Inc.*, Case No.: CBA 07-114. Finally, the County’s letter suggested that the Galassos could file for a zoning change during the next CZMP.

In the Pre-Hearing Memorandum, People’s Counsel describes all of the Galassos’ cases that have come before the Zoning Commissioner/Hearing Officer; before this Board; before the Circuit Court for Baltimore County; and before the Court of Special Appeals. We summarize those cases and the issues filed in the 2004 CZMP here because they are relevant to the Motion to Dismiss:

(1) 2002 Petition for Special Hearing. In 2002, William Long, along with the Galassos who, at that time, were leasing the Property from Mr. Long, filed a Petition for Special Hearing to request that they be permitted to operate an automotive service business as a non-conforming use. Their request was denied and a cease and desist order was issued by the Deputy Zoning Commissioner prohibiting the use as an automotive service/garage/body shop (the “2002 Cease and Desist Order”). Mr. Long and the Galassos filed a Motion to Reconsider but the Deputy Zoning Commissioner denied the request.

(2) 2004 CZMP. In 2003, William Long placed the property in issue in the 2004 CZMP requesting the zoning change from RC 5 to B.M. On September 3, 2004, the County Council, by passing Bill 83-04 on August 2, 2004 (copy of which is attached to the Pre-Hearing Memorandum of People's Counsel), decided to retain the RC5 zoning classification.

(3) 2004 Enforcement Action. On November 3, 2004, Hearing Officer Raymond S. Wisnom, Jr. issued an Order against the Galassos which confirmed and reinforced the 2002 Cease and Desist Order. The Galassos appealed the case to this Board wherein it was dismissed for procedural reasons. The Galassos appealed to the Circuit Court and then to the Court of Special Appeals who affirmed the dismissal for procedural reasons.

(4) Galasso v. Baltimore County, No. 2136, Sept. Term 2005; filed Oct 23, 2006.

The County filed a complaint in the Circuit Court for Baltimore County requesting that the fine associated with the 2002 Cease and Desist Order be reduced to judgment. The County requested summary judgment and the Circuit Court granted the same. On appeal, the Court of Special Appeals affirmed the Circuit Court decision.

(5) Galasso v. Kotroko, No. 609, Sept. Term, 2006, filed Aug. 21, 2007.

In June of 2004, the County filed a complaint for injunctive relief to prohibit the Galassos from operating the automotive service business. On July 15, 2005, the County and the Galassos entered into a Consent Judgment in which the Galassos agreed not to engage in any commercial activities as a service garage, body shop; repair, painting or mechanical work; and/or as a drop off/transfer point (the "2005 Consent Judgment").

However, the Galassos did not stop operating the business and as a result, the County filed for contempt of the 2005 Consent Judgment. The Circuit Court agreed that the Galassos were in contempt. The Court of Special Appeals affirmed that decision.

- (6) Galasso v. Baltimore County, No. 1647, Sept. Term, 2006,
filed June 21, 2007.

In March of 2005, the County filed another complaint to reduce a fine associated with a contempt order to judgment. The Circuit Court granted that judgment. When the Galassos appealed to the Court of Special Appeals, the appellate court dismissed the appeal on the basis that the Galassos had raised similar issues in the first appellate case.

- (7) Steven Galasso v. Baltimore County, No. 286, Sept. Term, 2009,
filed July 9, 2010.

A. Case No.: 06-042:

In 2006 and 2007, the County issued more zoning enforcement citations against the Galassos and their business as well as more civil penalties. In Case No.: 06-042, on May 29, 2007, this Board found that the Code Enforcement Hearing Officer's reduction of the amount of civil penalties was "arbitrary and capricious" and we reinstated all of the civil penalties initially set forth in the citations.

B. Case No.: 07-114.

On June 14, 2007, in Case No.: 07-114, this Board affirmed the decision of the Code Enforcement Hearing Officer that the Galassos were in violation of the 2002 Cease and Desist Order. In their Amended Petition for Appeal in that case, the Galassos first raised the argument that the Property is "rightfully zoned commercial" in accordance with the 1947 Order. On May 30, 2007, at the hearing before this Board, the Galassos

presented evidence that in 2003, Mr. Long had filed an application for a reclassification of the Property from RC5 to B.M. emphasizing that the Property was approved for Zone "E" commercial in the 1947 Order.

In our June 14, 2007 Opinion, we said that the evidence presented at that time was that Mr. Long, in his letter to the Department of Planning and Zoning, argued that each of the zoning maps since the 1947 Order had failed to mark his Property as being located in a commercial zone. The evidence presented revealed that it was Mr. Long who first requested a zoning map correction.

We further wrote in our Opinion that Mr. Long's request proceeded through the 2004 CZMP, that the CZMP process was the proper avenue to request such change, and that the County Council denied the request, thus retaining the RC5 zoning by passing Bill No. 83-04 on August 2, 2004. We stated that the Galassos would need to file a new request in the 2008 CZMP to effect a zoning change. For the reasons we provided, we concluded in that Opinion that the Galassos' zoning map error argument had "no merit."

C. Case No.: 07-205.

On August 7, 2007, in Case No. 07-205 this Board next heard a Petition for Special Hearing filed by the County seeking to terminate the non-conforming use of the property. In our Opinion dated September 28, 2007, we described the evidence produced by the Galassos at that hearing. We wrote that the Galassos produced the testimony of Carroll Long and William Long with respect to their "attempt to correct what they perceived as a zoning error to the property." On cross examination, the evidence provided through William Long's testimony was the same evidence that was

produced by the Galassos at the May 30, 2007 hearing *ie*: that he had applied for a reclassification of the zoning from RC5 to B.M. in the 2004 CZMP.

In that case, this Board heard for a second time that the application for rezoning was denied by the County Council. We noted that that Galassos never filed a petition for cycle zoning under the BCC. In our September 28, 2007 Opinion, we repeated that we previously addressed the issue presented by the Galassos in our June 14, 2007 Opinion as to the zoning map error and we found that the argument had no merit.

In finding that the Galassos were in violation of the zoning regulations by expanding the nonconforming use and that the use should be terminated, in our September 28, 2007 Opinion, we emphasized again that the issue of a zoning of the Property as being commercial “has been litigated, and the Galassos’ position has been found to be invalid.” At that time, we further commented: “Mr. William Long moved to change the zoning. It is up to the County Council to determine the zoning for that property, and they have given due consideration and found that the property should be zoned R.C.5.”

On appeal, the Court of Special Appeals heard the Galassos’ argument that the Property should have been classified as ‘commercial’ as a result of the 1947 Order. The Court found that the Galassos had waived this issue because they failed to specifically reserve the right, in the 2005 Consent Order, to pursue the issue of whether the property was zoned commercial at a later date. The Court stated that “ By entering into the 2005 Consent Judgment, [the Galassos], for all practical purposes, conceded that the scope of the non-conforming use on the property was determined by the 2002 Cease and Desist

Order, thus settling the zoning dispute. Therefore, we conclude that this issue is waived.”

Decision

Having heard argument of counsel at the hearing and having reviewed the Pre-hearing Memorandums including the prior decisions of this Board and the Court of Special Appeals, we grant the Motion to Dismiss the case, *with prejudice*, for the following reasons, collectively and/or in the alternative:

(1) The April 30, 2013 Letter from Andrea Van Arsdale, Department of Planning, did not constitute an “appealable event” from which this Board could hear this case.

Article 25A, §5(U) of the MD Ann. Code provides authority for a charter county to establish the Board of Appeals to hear decisions of matters relating to:

The issuance, renewal, denial, revocation, suspension, annulment, or modification of any license, permit, approval..... or other form of permission or of any adjudicatory order....”

Section 5(U) is incorporated by referenced into §602(d) of the Baltimore County Charter, and states:

Appeals from executive, administrative and adjudicatory orders.

The county board of appeals shall hear and decide appeals from all other administrative and adjudicatory orders as may from time to time be provided by Article 25A of the Annotated Code of Maryland, as amended, or by legislative act of the county council not inconsistent therewith.

We review the holding in *United Parcel Service v. People’s Counsel*, 336 Md. 569 (1994) and find that it is dispositive on this issue. In *UPS*, the Director of the Office of Planning and Zoning responded to a letter from a citizen regarding the issuance of a

building permit. The letter explained that the proposed use, namely warehousing, was a permitted use that did not require a special exception. The Court of Appeals held that the letter “did not grant, deny, decide or order anything.” *Id.* at 585. Rather, the letter “simply explained and defended the 1986 decision approving the application for a building permit.” As a result, the Court held that the letter was not an “ ‘approval’ or ‘decision’ which was appealable to the Board of Appeals.” *Id.*

As applied to the instant case, we find that the County letter simply reaffirmed and summarized the zoning history of the Property. The letter described the County Council’s refusal to change the zoning to commercial during the 2004 CZMP. The letter further cites this Board’s previous decisions as set forth *supra*. Finally, just as we informed the Galassos in our June 14, 2007 decision that they could file an issue in the 2008 CZMP, the County letter informed the Galassos that the proper forum to file for a zoning change would be during the next CZMP.

Accordingly, based on the holding in *UPS*, the County letter does not constitute an appealable event from which this Board would have jurisdiction to hear the case. Thus, on that basis, the Motion to Dismiss is granted, *with prejudice*.

(2) The appeal is barred by the doctrine of res judicata

In the alternative, in the event that the County letter is determined to be an appealable event, this Board dismisses the case on the basis of *res judicata*. The case history repeated above confirms that the Galassos previously argued at the May 30, 2007 hearing before this Board in Case No.: CBA 07-114 that there was a zoning map error. As stated above, in our June 14, 2007 Opinion, we previously found that the Galassos’

argument had no merit. We also previously discussed the County Council's decision to retain the RC 5 zoning in the 2004 CZMP and noted that the CZMP was the proper forum in which to make such a request.

Then, in Case No.: CBA 07-205, in our September 28, 2007 Opinion, the Galassos made the same zoning map error argument. In referring to our that Opinion, we said:

The issue with respect to the zoning of the property as being commercial has been litigated, and the Galassos' position has been found to be invalid.

We repeated again that William Long moved to change the zoning in the 2004 CZMP but that the County Council did not change the zoning. We emphasized that it is up to the County Council to determine the zoning for that property, and they had given due consideration and found that the property should be zoned R.C.5.

More importantly, the Court of Special Appeals in *Galasso v. Baltimore County*, No. 286, September Term, 2009 specifically addressed in "Section F" of their Opinion entitled "Error on Site Map" that the Galassos had waived this same issue. The Court of Special Appeals concluded that the Galassos failed to preserve their right to pursue the issue of whether the property was zoned commercial when they failed to include such language in the 2005 Consent Order. The Court of Special Appeals reasoned that this zoning issue was resolved in the 2005 Consent Judgment when the Galassos conceded that the scope of the non-conforming use on the Property was determined by the 2002 Cease and Desist Order.

In *Seminary Galleria v. Dulaney Valley Improvement Ass'n*, 192 Md. App. 719, 995 A.2d 1068 (2010), the Court of Special Appeals held that "a judgment on the merits

in a previous suit between the same parties or their privies precludes a second suit predicated upon the same cause of action.” The Court in *Seminary Galleria* confirmed that this Board need not hear the facts before determining whether the doctrine of *res judicata* applies. *Id* at 995 A.2d 1070. The Court also stated that *res judicata* is applicable to administrative proceedings. *Id.* at 995 A.2d 1078.

Citing *Batson v. Shiflett*, 325 Md. 684, 701 (1992), the Court in *Seminary* said that the test for determining whether an administrative agency’s ruling is entitled to preclusive effect is as follows:

Whether an administrative agency’s declaration should be given preclusive effect hinges on three factors: (1) whether the agency was acting in a judicial capacity; (2) whether the issue presented to the reviewing court was actually litigated before the agency; and (3) whether its resolution was necessary to the agency’s decision.

Id. at 995 A.2d 1078.

Our previous decisions in Case No. CBA - 07-114 and CBA 07-205 meet this test. (1) This Board was acting in a judicial capacity by conducting hearings in both cases, where evidence was presented, and rulings were made on disputed legal issues; (2) The issue of whether there was a zoning map error necessitating a correction was actually litigated; and (3) This Board’s ruling was necessary for a resolution of the code violations.

Even if the Galassos’ phrased the legal issue in this latest appeal slightly differently, we find that it is still the same issue with the same set of facts. The Galassos had every opportunity in two (2) separate hearings before this Board to specifically

mention BCC §32-3-231 and/or to present evidence regarding 'Petition No. 0793' as marked on prior zoning maps, to the extent that they did not do so previously. The doctrine of *res judicata* bars litigation of the same matter with respect not only to the legal claims or issues decided in the case but also as to all matters which could have been litigated in the first suit. The Court of Appeals in *Alvey v. Alvey*, 225 Md. 386, 390 (1961) said:

The doctrine of *res judicata* is that a judgment between the same parties and their privies is a final bar to any other suit upon the same cause of action, and is conclusive, not only as to all matters which with propriety could have been decided in the original suit, but as to all matters which with propriety could have been litigated in the first suit,....

Applying the holdings in *Seminary Galleria* and *Alvey* here, we reject the Galassos' contention that their request for a zoning map correction under BCC, §32-3-231 is new or different.

Under *Deleon v. Slear*, 328 Md. 569 (1992), the Court of Appeals made clear that in determining whether claims are the same for the purposes of *res judicata*, the Court has in the past applied "same evidence test". However, the *Deleon* Court acknowledged that the concept of "claim" is broad and that "claim" is defined as a "group or aggregate of operative facts giving ground or occasion for judicial action, as distinguished from the narrow concept of a 'cause of action.'" *Id.* at 589. The *Deleon* Court, citing *Kent County Bd. of Educ. v. Bilbrough*, 309 Md. 487, 525 A.2d 232 (1987), emphasized that the most recent test for determining when two claims or causes of action are the same for purposes

of *res judicata* is the “transaction” test as set forth in §24 of the Restatement (Second) of Judgments.

The Court of Appeals in *Bilbrough*, recited with emphasis Restatement (Second) of Judgments describing the transaction test as follows:

The present trend is to see [a] claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights. The transaction is the basis of the litigative unit or entity which may not be split.

Id. at 497-498; *Deleon* at 589.

Specifically, with respect to whether the claims are the same, the *Deleon* Court reviewed the facts to see whether they “are related in time, space, origin or motivation.” *Id.* at 591. As applied to the instant case, the same parties are involved here as have been involved in all the prior litigation as set forth above. We further find that, the same piece of property has been involved as well as the same zoning issue with respect to whether the zoning should be commercial or RC 5.

In summary, as succinctly stated by People’s Counsel in the Pre-Hearing Memorandum:

The present litigation series is in its twelfth year. There have been five enforcement actions, two special hearings, three Circuit Court direct actions (to reduce to judgment or for injunction), and five Galasso appeals to the Court of Special Appeals, one dismissed and four resulting in unreported, but lengthy opinions.

Thus, this Board finds that the instant case fits squarely within the doctrine of *res judicata* and should be dismissed, *with prejudice*.

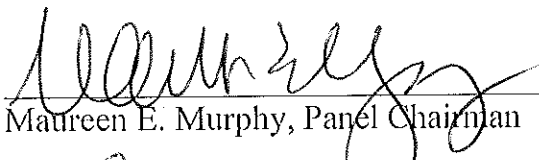
ORDER

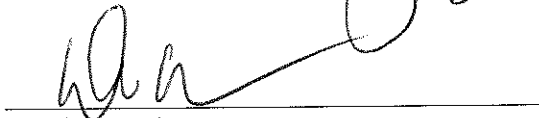
THEREFORE, IT IS THIS 16th day of December, 2013, by
the County Board of Appeals of Baltimore County

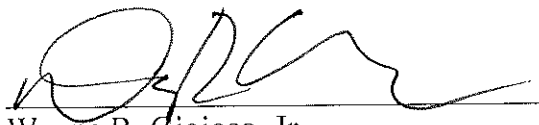
ORDERED that the Motion to Dismiss the Request for Zoning Map Correction is hereby **GRANTED** for the reasons set forth herein and the case shall be dismissed *with prejudice*; and it is further,

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**


Maureen E. Murphy, Panel Chairman


David L. Thurston


Wayne R. Gioioso, Jr.



Board of Appeals of Baltimore County

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December 16, 2013

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RE: *In the Matter of: Steven and Joanne Galasso - Appellant*
Case No.: CBA-13-029

Dear Counsel:

Enclosed please find a copy of the final Opinion and Order issued this date by the Board of Appeals of Baltimore County in the above subject matter.

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*, **WITH A PHOTOCOPY PROVIDED TO THIS OFFICE CONCURRENT WITH FILING IN CIRCUIT COURT.** Please note that all **Petitions for Judicial Review filed from this decision should be noted under the same civil action number.** If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,

A handwritten signature in cursive script that reads "Sunny Cannington".

Krysundra "Sunny" Cannington
Administrator

Enclosure
Multiple Original Cover Letter

c: Steven and JoAnne Galasso
Arnold Jablon, Director/PAI
Andrea Van Arsdale, Director/Department of Planning
Jeff Mayhew, Deputy Director/Department of Planning
Michael Field, County Attorney, Office of Law