



Board of Appeals of Baltimore County

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February 19, 2014

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RE: *In the Matter of: Harlan Zinn – Legal Owner/Petitioner*
Case No.: 13-295-SPH

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,

Krysundra "Sunny" Cannington
Administrator

Enclosure
Multiple Original Cover Letter

c: Harlan Zinn
Danan Holding Corporation
Richard and Amelia Pitz
John Schmidt
Michael Vivirito
Ernestine Sisson
Robert Kroll
Lawrence M. Stahl, Managing Administrative Law Judge
Andrea Van Arsdale, Director/Department of Planning
Michael Field, County Attorney, Office of Law

Allen Robertson
Daniel and Nancy Hubers
Edward Bardroff, Sr.
Fred Conrad
Albert and Holly Leggett
Thomas and Tina Bentz

Arnold Jablon, Director/PAI
Nancy West, Assistant County Attorney

IN THE MATTER OF
HARLAN ZINN –Petitioner/Legal Owner
809 Cold Spring Road
Middle River, MD 21220

RE: Petition for Special Hearing to Approve
Building Permit for Undersized Lot

* BEFORE THE
* BOARD OF APPEALS
* OF
* BALTIMORE COUNTY
* Case No. CBA- 13-295-SPH

* * * * *

OPINION

This case comes to the Board on appeal of the denial by the Administrative Law Judge of a Petition for Special Hearing filed by Harlan Zinn, Petitioner, pursuant to Baltimore County Zoning Regulations §500.7 (“B.C.Z.R.”) to approve a building permit for an undersized lot located at 809 Cold Spring Lane, Middle River, MD 21220 (the “Property”).

A public hearing was held on November 13, 2013. The Petitioner was represented by Michael McCann, Esquire. Deputy People’s Counsel for Baltimore County, Carole DeMilio, participated in the hearing. Edward C. Covahey, Jr., Esquire represented Danan Holding Corporation, Daniel and Nancy Hubers, Richard and Amelia Pitz, Edward Bardroff, Sr. and Mirium Lee O’Hare, Protestants.

MOTION TO DISMISS

At the beginning of the Board hearing, Deputy People’s Counsel made a oral motion to dismiss the case on the basis of *res judicata*. Mr. Covahey joined in the Motion. Mr. McCann opposed the Motion contending that the instant case was different than the previous cases filed by the Petitioner or his predecessor in title.

PRIOR ZONING LITIGATION

In this appeal, Mr. Zinn seeks a building permit to construct a residence on the Property. The hurdle he faces is that BCZR §1B02 (a/k/a the “small lot table”) requires that property zoned D.R. 3.5. be at least 10,000 sq. ft. with a front and rear yard setback of 30 feet each. Because this Property measures less than 10,000 sq. ft., it is ‘undersized’. Mr. Zinn argues that the small lot table setbacks restrictions do not apply based on BCZR §1B02.3.A.5.

By way of background, the Property was platted in 1914 as Lot 304, Part of Plan C of Long Beach Estates on Galloway Creek. Other than a shed, the Property has remained unimproved, having been used as a place to dock and launch boats. In 1976, the Property was zoned D.R. 5.5 and the minimum lot size was 6,000 sq. ft. In 1992, the Property was rezoned D.R. 3.5 and the minimum lot size was increased to 10,000 sq. ft.

In considering the Motion to Dismiss, the Board reviewed the zoning history of the Property which is extensive and summarized from prior Orders as follows:

(1) 2003 – Petition for Variance; Zoning Commissioner, Case No.: 03-500-A. Janice Oberst, the predecessor in title, along with a contract purchaser, Robert Long, filed a Petition for relief from BCZR §303.1 and from the setback restrictions in small lot table in BCZR, §1B02.3.C.1. Specifically, she requested a front yard setback of 11 feet in lieu of the required 55 ft. and a rear yard setback of 2 ft. in lieu of the required 30 ft. In addition, she requested that the Property be approved as an undersized lot.

Ms. Oberst and her family had owned the Property since 1954. They lived in the house located at 810 Cold Spring Road. During the 50 years that Ms. Oberst’s family had owned the Property, they kept a small sailboat there, and her father operated a charter business out of the

Property. A storage shed was also on the Property as well as a pier and bulkhead. In 2004, the Oberst family sold the home at 810 Cold Spring Road to Robert Kroll.

The Petition filed by Ms. Oberst was opposed by Richard Pitz, a neighboring property owner who is also opposed to the instant Petition. In 2005, the Zoning Commissioner denied the relief finding that the lot was too small to build a house, that to do so would be inconsistent with the neighborhood and further, that the requested relief failed to meet the uniqueness test set forth in *Cromwell v. Ward*, 102 Md. App. 691 (1995). Ms. Oberst did not appeal the Commissioner's decision.

(2) 2004 – Petition for Variance – Deputy Zoning Commissioner;
Case No.: 04-522-A.

In 2004, Mr. Zinn, as the contract purchaser, along with Ms. Oberst, sought relief to allow construction of a dwelling on the Property. In requesting that relief, Mr. Zinn argued that the Property was an undersized lot, that the front yard setback be 23 ft. in lieu of the required 30 ft. and the rear yard setback be 2 ft. in lieu of the required 30 ft.

The Deputy Zoning Commissioner denied the relief sought and agreed with the prior decision of the Zoning Commissioner. That decision was appealed to this Board.

(3) 2005. Petition for Variance - Board of Appeals; Case No.: 04-522-A.

In the hearing on appeal, Mr. Zinn amended the Site Plan and argued that the size of the Property was larger at 7,504 sq. ft. because the property lines included a portion of the 40-foot right of way known as Cold Spring Road as well as a 900 sq. ft. road end parcel purchased by Ms. Oberst from Bowley's Quarters Improvement Association in 1992.

Protestant, Mr. Pitz, testified in opposition to that request, pointing out that his home and others in the area were built on double and triple lots. In addition, Robert Kroll, the purchaser of 810 Cold Spring Rd. also opposed Mr. Zinn's request.

In that case, this Board considered whether the case should be barred under *res judicata* and collateral estoppel. At that time, we allowed the case to go forward but ultimately denied the requested relief. We held that the Property could not be used as an undersized lot upon which a home could be built, without variances being granted for setbacks. In considering the variance requested, the Board found that the Property was not unique. We said that the fact that the Property was wider than it is long was not sufficient to make it unique for zoning purposes. We held that the Property was too small for a home to be built.

In making that decision, the Board found that the Property was not 7,504 sq. ft. as Mr. Zinn contended but rather the original 5,396 sq. ft. The Board did not find credible the argument that the property lines included the 40 foot right of way or the 900 sq. ft. purchased by Ms. Oberst. We held that the extent of the property lines must be determined by the Circuit Court.

Mr. Zinn did not appeal the decision of this Board.

(4) 2007 –Petition for Special Hearing under BCZR, §500.7,
Zoning Commissioner, Case No.: 07-236-SPH.

In 2007, Mr. Zinn filed for special hearing relief under BCZR, §500.7 to request that a storage shed be constructed for kayaks, boating equipment and gardening equipment. The shed was intended to supplement the use of the pier. The Deputy Zoning Commissioner granted that relief subject to restrictions to ensure that the shed would not be converted to a dwelling. There was no opposition to the requested relief. There was no appeal filed.

(5) 2007 –Petition for Variance, Zoning Commissioner, Case No.: 07-545-A.

Five months after the Order granting the storage shed, Mr. Zinn filed a Petition for Variance from the setback restrictions contained in the small lot table. In that case, Mr. Zinn argued that the Property measured 7,342 sq. ft. and he wanted variances from the 10,000 sq. ft.

minimum lot size and from the 25 ft. front and rear setbacks in lieu of the required 30 foot setbacks.

The Zoning Commissioner dismissed the case on the basis of *res judicata* indicating that Mr. Zinn was bound by this Board's 2005 decision and could not relitigate the same matter. Mr. Zinn appealed that decision to this Board.

(6) 2008 – Board of Appeals, Petition for Variance, Case No.: 07-545-A.

This Board heard the appeal of the Zoning Commissioner's dismissal. In our decision, we summarized the previous cases and Opinions concerning the Property. Mr. Zinn alleged that the size of the Property at that time was 7,342 sq. ft. We held that *res judicata* barred that appeal and said that the matter was fully litigated. We noted that *res judicata* is intended to prevent endless re-litigation of issues that have already been legally determined. Mr. Zinn did not appeal our 2008 decision.

Baltimore County Zoning Regulations

§ 1B02.3. Special regulations for certain existing or proposed developments or subdivisions and for small lots or tracts in D.R. Zones.

A. In D.R. Zones, contrary provisions of this article notwithstanding, the provisions of or pursuant to this subsection shall apply to the use, occupancy and development of; alteration or expansion of structures upon; and administrative procedures with respect to:

* * * *

5. Any lot or tract of lots in single ownership which is in a duly recorded subdivision plat not approved by the Baltimore County Planning Board or Planning Commission.

C. Development standards for small lots or tracts.

1. Any dwelling hereafter constructed on a lot or tract described in Subsection A.3 or A.4 shall comply with the requirements of the following table:

Zoning Classification	Minimum Net Lot Area per Dwelling Unit (square feet)	Minimum Lot Width (feet)	Minimum Front Yard Depth (feet)	Minimum Width of Individual Side Yard (feet)	Minimum Sum of Side Yard Widths (feet)	Minimum Rear Yard Depth (feet)
D.R.1	40,000	150	50	20	50	50
D.R.2	20,000	100	40	15	40	40
D.R.3.5	10,000	70	30	10	25	30
D.R.5.5	6,000	55	25	10	—	30
D.R.10.5	3,000	20	10	10	—	50
D.R.16	2,500	20	10	25	—	30

Decision

Over the past 10 years, 4 cases have been heard and decided by the Zoning Commissioner's office and 2 appeals have been heard and decided by this Board in regard to the Property. The issue before us is whether the instant appeal should be dismissed on the basis of *res judicata*. Having heard argument of counsel on the Motion to Dismiss at the hearing, having reviewed the prior decisions of the Zoning Commissioner's office and of this Board, and having deliberated the Motion at the hearing on the record (with consent of all Parties) we grant the Motion to Dismiss the case, on the basis of *res judicata*.

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 of a case before determining whether the doctrine of *res judicata* applies. *Id.* at 995 A.2d 1070.

The Court also stated that the doctrine of *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.

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. In *Powell v. Breslin*, 430 Md. 52 (2013), the Court of Appeals reaffirmed its holding in *Alvey v. Alvey*, 225 Md. 386, 390 (1961):

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,....

The doctrine of *res judicata* applies in zoning cases where the issue revolves around property use rather than the owner's identity. *City of Baltimore v. Pre*, 224 Md. 428 (1961).

The Court of Appeals in *Deleon, et ux. v. Slear, et al.*, 328 Md. 569, 589 (1992) citing its holding in *Kent County Bd. of Educ. v. Bilbrough*, 309 Md. 487 (1987), explained that the test for determining whether claims are the same for the purposes of *res judicata* is the 'transaction' test as set forth in §24 of the Restatement (Second) of Judgments. The Court said that regardless of the number of substantive legal theories or forms of relief that may be available to a petitioner,

and notwithstanding the number of rights that may have been invaded, or the variations in evidence needed to support the theories or rights, the transaction test analyzes the facts of each claim to determine whether they are coterminous.

The concept of 'claim' is distinguished from the narrow concept of 'cause of action' in that a claim is defined as "a group or aggregate of operative facts giving ground or occasion for judicial action..." *Deleon* at 589. Specifically, the holdings in *Bilbrough* and *Deleon* narrow our focus to whether the facts of each case "are related in time, space, origin or motivation." *Deleon* at 591.

Applying the holdings in *Deleon* and *Alvey* here, this case involves the same property, the same parties, and the same request for a building permit on a lot that has repeatedly been adjudicated as 'too small' for a residence. The facts of this case are related in time, space, origin and motivation. Mr. Zinn created this zoning history himself, without filing for all forms of available relief back in 2004, under whatever legal theories could have been brought, including the instant one. Rather, his approach over the years has been to file cases in piece-meal fashion, arguing that the size of this property has changed, or by changing the dimensions of his proposed residence. His failure to appeal and have our previous findings of fact overturned, binds him to the facts previously adjudicated.

The way we see it, without even considering the other 5 zoning decisions, the 2003 Zoning Commissioner's decision alone is enough to deny Mr. Zinn relief here. This is true under *Seminary Galleria* even if he was not a party in 2003 because as a successor owner, he is in privity. His predecessor in title, Ms. Oberst admitted that the small lot table applied by filing for relief from it and by requesting approval of the Property as an undersized lot. In this case, Mr. Zinn's latest theory is that the small lot table does not apply. He is bound by not only Ms.

Oberst' admission but by the Zoning Commission's decision to deny the relief and his finding of fact that the "lot is too small" for a house. When the decision was not appealed, it became final. Moreover, under holdings in *Powell, supra*, and *Alvey, supra*, the issue of whether the small lot table even applied should have been raised as alternative relief in the 2003 case. Since it was not, it is barred from being raised 10 years later.

Notwithstanding the 2003 decision, the very next year, Mr. Zinn, as a contract purchaser of the Property, files for virtually the same relief as Ms. Oberst - that he needed relief from the small lot table. The only appreciable difference is that he reduced the amount of the setback variance needed. After a hearing on the merits, the Deputy Zoning Commissioner in 2004 denied the relief for the same reason set forth in the 2003 decision. Any claim by Mr. Zinn that the Property was not subject to the small lot table restrictions should have been raised as an alternative form of relief in that case.

Thereafter, this Board permitted the appeal of the 2004 decision to be heard on the merits in a *de novo* hearing in which Mr. Zinn was represented by counsel. In that appeal, Mr. Zinn rearranged his argument and claimed that the lot size had increased by including the 40' right of way and the 900 sq. ft. of unbuildable land purchased by Ms. Oberst. After a hearing on the merits, we rejected this argument and specifically found that the Property was still the original 5,396 sq. ft. Mr. Zinn did not appeal our decision and is bound by our findings as to the Property size.

He waited another 3 years before filing for relief again with the Zoning Commissioner's office. At that time, in 2007, Mr. Zinn filed a Petition for Special Hearing. While his request for relief was for a storage shed to supplement his use of the pier where he docked a houseboat, the Deputy Zoning Commissioner granted the storage shed request but placed restrictions in the

Order to prohibit the use of the shed as a residence. The 2007 case and the instant one both involve a Petition for Special Hearing, Mr. Zinn could have raised his latest legal theory in 2007 but failed to do so. He did not appeal the Deputy Zoning Commissioner's decision.

After the 2007 decision, he only waited 5 months to file another request for variance relief from the restrictions in the small lot table so he could build a house. In June of 2007, Mr. Zinn attempted at that time to increase the square footage of the lot to 7,342 sq. ft. He made this argument in 2007 despite this Board's previous decision and factual finding that the Property size was 5,396 sq. ft. In 2007, he also asked for a larger front and rear yard setbacks than he did back in 2004 notwithstanding our previous denial of the smaller setbacks. When we heard the Zoning Commissioner's 2007 decision, we agreed that the case should be dismissed on the basis of *res judicata*. Mr. Zinn did not appeal our decision and it became final.

Applying the standard set forth in *Seminary Galleria*, our previous decisions in Case No. CBA - 04-522-A and CBA 07-545-A 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 the lot was large enough to construct a residence and the size of the Property was actually litigated; and (3) this Board's rulings and that of the Zoning Commissioner's office were necessary for a resolution of the requests for relief from the setback restrictions in the small lot table as well as variance relief.

The Board finds it to be incredulous that Mr. Zinn has repeatedly requested relief from the small lot table restrictions over the years and now wants to claim that such restrictions do not apply. Under the applicable case law, BCZR §1B02.3.A.5 provides no refuge for Mr. Zinn. As the foregoing sequence of decisions and factual history indicate, the instant case fits squarely within the doctrine of *res judicata* and should be dismissed.

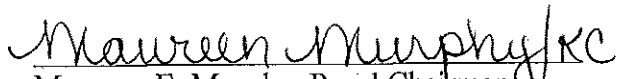
ORDER


THEREFORE, IT IS THIS 19th day of February, 2014, by the Board of Appeals of Baltimore County

ORDERED that the Motion to Dismiss the Petition for Special Hearing relief is hereby **GRANTED** for the reasons set forth herein and the case shall be dismissed; and it is further,

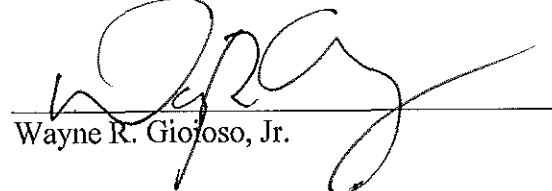
Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

**BOARD OF APPEALS
OF BALTIMORE COUNTY**


Maureen E. Murphy, Panel Chairman



David L. Thurston



Wayne R. Gioioso, Jr.