

RE: PETITION FOR SPECIAL HEARING	*	BEFORE THE
11019 Gateview Road; E/end of Gateview	*	BOARD OF APPEALS
Road, 140' E of Norgate Court	*	FOR
8 th Election & 3 rd Councilmanic Districts	*	BALTIMORE COUNTY
Legal Owner(s): James & Karole Riffin	*	2014-094-SPH
Petitioner(s)		

* * * * *

OPINION

Background

This case comes to the Board of Appeals for Baltimore County (CBA) as an appeal from a Petition for Special Hearing heard before Administrative Law Judge John Beverungen (ALJ) pursuant to a October 9, 2013 Complete and Comprehensive Settlement Agreement (the Agreement) between the County and the Petitioners. The Agreement and subsequent hearing before ALJ Beverungen grows out of County Zoning Enforcement proceedings brought against James and Karole Riffin. The issues presented during the hearing before ALJ Beverungen related to the legality of several land uses at their residential property at 11019 Gateview Road in the northern county. In exchange for the County staying enforcement of several citations related to the Riffin property, the Riffins agreed to allow ALJ Beverungen to make a legal determination as to legality of machinery located on the property. The Riffins also agreed to waive their right to appeal the ALJ's findings.

The Agreement enabled the Riffins to file a Petition for Special Hearing, during which time the county would suspend enforcement proceedings, pending a decision by the Administrative Law Judge. The County agreed also that the County Attorney's Office would not participate in the proceedings. The Riffins agreed, in turn, that they would abide by and comply with the ALJ decision. As stated in the Agreement:

"James and Karole Riffin agree that the Order of the Administrative Law Judge is a final Order and they will forego any right to appeal or otherwise contest the Order."

On October 15, 2013, as contemplated by the Agreement, the Riffins filed a Petition for Special Hearing to determine the legitimacy of many controversial uses on their property.

After a hearing, ALJ John Beverungen denied the petition by opinion and order dated January 7, 2014. Upon review of Petitioners' Motion for Reconsideration, ALJ Beverungen issued his final order denying the motion on February 25th 2014. As agreed, the County Attorney's office did not appear in the proceedings.

The Petitioners, James and Karole Riffin, did not appeal. But a neighbor, Will Geddes, filed an appeal. Despite the agreement with County, Mr. Riffin filed a memorandum in Mr. Geddes' appeal before this Board and appeared as a participant at the hearing. Both Mr. Riffin and Mr. Geddes appeared without counsel. Peter Max Zimmerman appeared on behalf of People's Counsel. Baltimore County did not participate in the hearing.

PRELIMINARY MOTIONS

Prior to the Board's hearing of this matter, Mr. Riffin filed motions contesting People's Counsel's standing to participate in this appeal and requested that the appeal before the Board be on the record and not held *de novo*.

1. Does People's Counsel have standing to participate in the case at bar?

People's Counsel for Baltimore County argues that it appears in zoning cases to defend the comprehensive zoning maps and master plan in the public interest. Baltimore County Charter Sec. 524.1 People's Counsel further states that the office's function and responsibility extends broadly to zoning and related cases, including special hearings and development cases with zoning issues.

Section 524.1(a)(3)A, it states in pertinent part,

"Powers and duties. The People's Counsel shall have the following powers and duties:

He shall appear as a party before the zoning commissioner of Baltimore County, his deputy, the county board of appeals, the planning board, and the courts on behalf of the interests of the public in general to defend any duly enacted master plan and/or comprehensive zoning maps as adopted by the county council, and in any matter or proceeding now pending or hereafter brought involving zoning reclassification and/or variance from or special exception under the Baltimore County Zoning Regulations as now or hereafter in force or effect, in which he may deem the public interest to be involved.”

People’s Counsel cites People’s Counsel v. A.V. Williams 45 Md. App. 617 (1980), a zoning reclassification case, where the appellate courts approved and recognized People’s Counsel’s participation and standing. Additionally, People’s Counsel notes that in 1989, the Court of Appeals recognized the authority of People’s Counsel to participate in special hearing cases. People’s Counsel v. Maryland Marine Mfg. Co. 316 Md. 491 (1989), determination of geographic extension of zoning lines into navigable waters; Board of Child Care v. Harker 316 Md. 683 (1989), zoning of child care facilities, including preemption and immunity issues.

In 1992, upholding People’s Counsel’s participation in development cases where zoning issues are involved, the Court of Appeals discussed the office’s “broad charge to protect the public interest in zoning and related matters.” People’s Counsel v. Crown Development Corp. 328 Md. 303, 317 (1992). The case arose in a County Review Group residential development proceeding, but also involved a zoning issue relating to transfer of density. Judge McAuliffe wrote:

“People’s Counsel has been given a broad charge to protect the public interest in zoning and related matters. See Baltimore County Charter Sec. 524.1. Density regulation is an important part of the zoning process. West Mont. Assn. V. MNCP & P Com’n 309 Md. 183 (1987). Although participation in the development process may often be outside the intended ambit of People’s Counsel’s authority, where protection against a violation of a density regulation is involved, People’s Counsel has a legitimate interest.”

In the case at bar, Petitioners James and Karole Riffin request a determination as to whether various uses at their Gateview Road property are permitted under Baltimore County Zoning Law. Consequently, the following regulations become applicable: BCZR Section 102.1

relating to permitted uses generally; BCZR 1B01 for the D.R. 1 (Density Residential) Zone; BCZR Sec. 1A07 for the R.C. 6 (Rural Conservation and Residential) Zone; BCZR 101.1 for definitions of principal and accessory uses; and several other provisions of the zoning law. In light of the plethora of cases cited by People's Counsel and the standard practice of this Board, the Board is convinced that these issues are directly within the purview of People's Counsel's charter authority and that its participation in this matter is appropriate.

2. Is the Petitioner's Appeal to be heard *de novo*?

County Charter Section 603 states, in relevant part,

"All hearings held by the board shall be *de novo*, unless otherwise provided by legislative act of the County Council, and shall be open to the public."

The appellate courts have recognized this provision Pollard's Towing v. Berman's Body Frame & Mechanical 137 Md. App. 277, 289 (2001). In Pollard's Towing, Judge Moylan explained the contours of the *de novo* process,

"Sect. 603 of the Baltimore County Charter provides:

All hearings held by the board shall be held *de novo*. Boehm v. Anne Arundel County, 54 Md.App. 497, 511, 459 A.2d 590 (1983), elaborated on a *de novo* hearing:

A trial or hearing '*de novo*' means trying the matter anew as if it had not been heard before and as if no decision had been previously rendered.

BCZR Sec. 501.6 is consistent with this framework, in that it begins,

"Appeals from the Zoning Commissioner shall be heard by the Board of Zoning Appeals *de novo*."

The reference to the Zoning Commissioner translates to the Administrative Law Judge, who functions in zoning cases in the capacity of zoning commissioner. See Bill 123-10, Code Sec. 3-12-104(b).

As pointed out by People's Counsel, the pertinent provision for appeals of ALJ decisions in zoning cases is Code Section 32-3-401. It does not "otherwise provide" for an appeal process different from that set by the County Charter as *de novo*.

Based on the wealth of case law, precedent and standard practice of this Board, it is clear and well-established that the case at bar shall be heard *de novo*.

3. May Riffin Contest ALJ Beverungen's final Order

While Mr. Riffin raised the issues of the People's Counsel's standing and the Board's power to hear this matter *de novo*, People's Counsel raised the issue as to whether Mr. Riffin could participate in this matter in the first place. As was previously noted, the Riffins made the commitment in the Agreement that they would not appeal or contest ALJ Beverungen's final Order.

In arguing his position before the Board, Mr. Riffin acknowledged that he was a signatory to the agreement and was bound by it. Mr. Riffin attempted to explain his participation in the hearing before the Board by arguing that the Board of Appeals was not an appellate body and that what he was participating was not an "appeal". As previously discussed, the role of the Board of Appeals in Baltimore County is well established and Mr. Riffin's arguments to the contrary are without merit. Consequently, it is clear that Mr. Riffin was participating in a proceeding that he admitted he was precluded from pursuing by agreement. The agreement between the Riffins and the County was entered into for purposes of equity and judicial economy. Enforcing such agreements is in the interest of sound public policy and should not be disregarded lightly. As Mr. Riffin offered no testimony that he was in anyway mislead or forced into this agreement, this Board will hold him to its conditions and finds that he is precluded from pursuing an appeal of this matter.

While it is clear that Mr. Riffin entered into an agreement with the County which waived his right to appeal, his neighbor Will Geddes made no such agreement and is permitted to pursue an appeal pursuant to statute.

BCC §32-3-401(a) *In general.* A person aggrieved or feeling aggrieved by a decision of the Zoning Commissioner or the Director of Permits, Approvals, and Inspections may appeal the decision or order to the Board of Appeals.

In light of BCC §32-3-401(a), Mr. Geddes clearly testified that he felt “aggrieved” by ALJ Beverungen’s decision. Despite the fact that this Board finds that Mr. Geddes’ appeal is contrary to the spirit of the Agreement between the Riffins and the County, we are obligated to allow him to proceed as the Appellant in that he was not a signatory to the Agreement.

DISCUSSION

After a clarification of the issues, this case then went forward on the merits of the proposed land uses with Mr. Geddes acting as the Appellant. Mr. Geddes testified personally and called James Riffin as a witness, who often took the opportunity to answer fact questions with legal arguments. People’s Counsel called Inspector Phillip Mills, who testified to his two site visits in July and September, 2013. He produced an array of 108 photos correlated with “zones” delineated on a GIS aerial photo of the property. P.C. Ex. 4, 5A-U, 6A-F. Mr. Riffin objected. Mr. Riffin contended either that Mr. Mills’ evidence somehow violated the County Attorney’s promise not to participate or that his “search” was improper. This objection was overruled. Inspector Mills’ testimony and photos provide the only pictorial evidence of the actual site conditions and uses.

During the hearing, it was clearly established through Mr. Geddes’ testimony that he had been instructed to “sign” an Appeal drafted by Mr. Riffin, with Mr. Riffin also paying the appeal fee. Mr. Geddes testified additionally that Mr. Riffin plows his driveway in the winter, and, as

far as he is concerned, Mr. Riffin's uses are not objectionable to him. Mr. Geddes was not familiar with the nature of the issues involved in the Petition for Special Hearing.

SPECIAL HEARING PETITIONS

Despite the unique procedural issues present in the case at bar, the actual purpose of the Appeal before the Board is to determine the questions presented in the Request for Special Hearing as previously done by ALJ Beverungen.

Special Hearing petitions under BCZR Sec. 500.7 relate either to determination, and application of zoning law to particular situations or to determination of nonconforming use status. The present case is the former. In Antwerpen v. Baltimore County 165 Md. App. 194, 209 (2005), Judge Salmon found that a Special Hearing is analogous to a declaratory judgment proceeding. It is the CBA's function to declare the rights of the parties under the law.

As argued by People's Counsel, the interpretation of zoning use definitions involves evaluation of law and language and also applies to the differentiation of accessory and principal uses. Arundel Supply Co. v. Cason 265 Md. 371, 377-78 (1972); Smith v. Miller 249 Md. 390, 394-95 (1968); St. Clair v. Colonial Pipeline Co. 235 Md. 578, 582-83 (1964); Kenyon v. Board of Zoning Appeals 235 Md. 388, 394 (1964); Kowalski v. Lamar 25 Md. App. 493, 496-501 (1975); United Parcel Service v. People's Counsel 93 Md. App. 59, 71-74 ((1993), rev'd on other grounds 336 Md. 569 (1994).

Under zoning law, to be permitted, a use or structure must be enumerated as permitted by right or special exception in the particular zone. BCZR Sec. 102.1 states,

"No land shall be used or occupied and no building or structure shall be erected, altered, located or used except in conformity with these regulations and this shall include any extension of a lawful nonconforming use." Apx. 25.

See Kowalski v. Lamar 25 Md. App. 493, 496-501 (1975); People's Counsel for Baltimore County v. Surina 400 Md. 662, 688 (2007).

The uses at issue are located in the main R.C. 6 Zone section of the split-zoned property. The R.C. 6 Zone permitted uses are listed in BCZR Sec. 1A07.3. As noted by People's Counsel, none of Riffins' uses, described earlier, are listed as permitted uses, either by right or special exception. The uses are likewise not among the uses permitted by right or special exception in D.R. (Density-Residential) Zones. BCZR Sec. 1B01.1.A, C.

The Appellant, through the testimony of Mr. Riffin, argues his uses are either accessory to farming, recreational, or part of his hobbies. As to farm use, he says he is growing trees for eventual sale for use as "mast" grade lumber. He contends that such lumber is marketable for use as ship masts. There was no evidence presented of any current sales or active agricultural activities. Mr. Riffin testified that it would be several years before his trees would be ready for sale and could not recall any past sales.

As noted by People's Counsel, the burden of proof is on the petitioners. See Grasslands Plantation v. Frizz-King Enterprises 410 Md. 191, 204-17 (2009); Turner v. Hammond 270 Md. 41, 54-55 (1974). Unfortunately, neither Mr. Geddes nor Mr. Riffin provided any testimony that would lead to that burden being met. Mr. Geddes' testimony had nothing to do with the issues. Mr. Riffin went through a catalog of his uses and stated his case for their legitimacy. He said some of the equipment was used to trim trees which eventually might be sold years from now. But he did not provide specifics.

As Mr. Riffin clarified, the crane and railroad equipment were imported relatively recently from Mr. Riffin's industrial properties on Greenspring Dr. and Beaver Dam Road. The State Department of Assessments Real Property data sheet entered into evidence by Peoples Counsel identifies the Gateview Road property as residential.

People's Counsel called Inspector Mills as a witness to provide personal observations and photographic evidence of the specific land uses.

Through the aerial photography provided by People's Counsel and the testimony of Inspector Mills, the property appears to be residential use; there is a significant wooded area; and there are the various items of construction equipment; railroad cars, tracks, and material; and trucks, buses, and automobiles.

BCZR §101.1 defines "accessory use or structure" and "principal use." Apx. 19:

"ACCESSORY USE OR STRUCTURE: A use or structure which: (a) is customarily incident and subordinate to and serves a principal use or structure; (b) is subordinate in area, extent or purpose to the principal use or structure; (c) is located on the same lot as the principal use or structure served; and (d) contributes to the comfort, convenience or necessity of occupants, business or industry in the principal use or structure served; except that, where specifically provided in the applicable regulations, accessory off-street parking need not be located on the same lot. An accessory building, as defined above, shall be considered an accessory structure. A trailer may be an accessory use or structure if hereinafter so specified. An ancillary use shall be considered as an accessory use; however, a use of such a nature or extent as to be permitted as a "use in combination" (with a service station) shall be considered a principal use."

"PRINCIPAL USE: A main use of land, as distinguished from an accessory use."

As noted by People's Counsel, here, the size, scope, and character of the various uses are of sufficient magnitude to exceed the framework of "accessory uses." The proposed uses do not meet the "accessory use or structure" definitional criterion of (a) "customarily incident and subordinate to ... the principal use." Nor are they (b) "subordinate in area, extent, or purpose." Rather, they are akin to a "principal use." It is "[a] main use of land, as distinguished from an accessory use."

There is nothing "incidental," or "appertaining, subordinate, or casual," about this use or structure either in size or character. In Dampman v. City of Baltimore 231 Md. 280 (1963), the Court analyzed the meaning of "incidental" where the ordinance allowed an "incidental" addition to a legal nonconforming use. The Court held that a second-floor addition, 12 feet wide and 22 feet long was not incidental, and wrote,

"The statute in requiring that the use be 'incidental' does not, we think, contemplate a major addition to or a major expansion of the nonconforming use, but rather one appertaining, subordinate or casual thereto." 231 Md. at 286.

Here, the uses of Mr. Riffin's property are more in line with the BCZR 101.1 definitions of "contractor's equipment storage yard" and "junkyard." As noted by ALJ Beverungen many of these items are more akin to things found in a "contractor's equipment storage yard" not on a residential property. As the Webster's 3rd New International Dictionary defines "farm equipment" as including combines, farm tractors, plows, harrows, seeders, balers and spreaders, this Board is not persuaded that any of the items found on Mr. Riffin's property meet this definition either.

In sum, the various uses are not accessory to the principal residential use and are not recreational residential uses.

In regards to the Appellant's question as to whether a County Code Inspector can enter onto private land, this Board concurs with ALJ Beverungen that such a question is beyond the jurisdictional scope of the OAH, and thus is beyond the jurisdictional scope of the Board of Appeals. Both the B.C.C. and the B.C.Z.R. provide that the Zoning Commissioner may interpret the zoning regulations, however, the Zoning Commissioner is not given the power to construe or interpret the B.C.C. in the context of a Special Hearing. Accordingly, the Board will not address this issue.

Consequently, Appellant's Special Hearing Request should be dismissed without prejudice with respect to the Code Inspector issue and DENIED with respect to the proposed uses and storage of enumerated equipment in the DR and RC zone.

ORDER

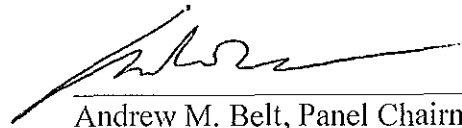
THEREFORE, IT IS THIS 7th day of November, 2014 by the

Board of Appeals of Baltimore County

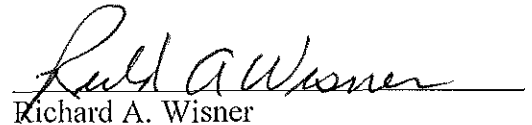
ORDERED that the Petition for Special Hearing to determine which uses are permitted in a DR-1, RC-6, zone and which are non-conforming be and is hereby DENIED.

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
FOR BALTIMORE COUNTY**



Andrew M. Belt, Panel Chairman



Richard A. Wisner

Wayne R. Gioioso, Jr. was a Panel member at the hearing on July 15, 2014 and public deliberation on August 5, 2014. He resigned effective October 11, 2014.



Board of Appeals of Baltimore County

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November 7, 2014

Mr. Will Geddes
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Towson, Maryland 21204

RE: *In the Matter of: James & Karole Riffin – Legal Owners*
Case No.: 14-094-SPH

Dear Mr. Geddes and Mr. Zimmerman:

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

KLC/tam
Enclosure
Duplicate Original Cover Letter

c: James & Karole Riffin
Lawrence M. Stahl, Managing Administrative Law Judge
Arnold Jablon, Director/PAI
Andrea Van Arsdale, Director/Department of Planning
Nancy West, Assistant County Attorney
Michael Field, County Attorney/Office of Law