RE:	PETITION FOR SPECIAL HEARING 1301 CHEVERLY ROAD 9th Election & 3rd Councilmanic Districts	*	BEFORE THE BOARD OF APPEALS
	Legal Owner: The Belvedere Baptist Church of Baltimore Lessee: Davenport Preschool LLC, Petitioners	*	FOR BALTIMORE COUNTY
		*	Case No.: 15-004-SPH

OPINION

This case comes before the Baltimore County Board of Appeals on an appeal of Administrative Law Judge John Beverungen's decision denying a Petition for a Special Hearing to approve an amendment to Restriction No. 2 in Zoning Case No. 2013-0166-X for the property located at 1301 Cheverly Road in Eastern Baltimore County. People's Counsel for Baltimore County has moved for dismissal of Petitioners' appeal on the grounds of *res judicata*. Petitioner Davenport Preschool, LLC ("Davenport") [1] and People's Counsel submitted Memoranda, and the Board heard oral arguments on January 27, 2015. Matthew T. Vocci of Ober Kaler Grimes & Shriver appeared on behalf of Davenport, J. Carroll Holzer appeared on behalf of the Protestants, and Peter M. Zimmerman appeared on behalf of People's Counsel. The Board publicly deliberated the Motion to Dismiss on January 27, 2015.

BACKGROUND

The dispute at issue dates back to March 28, 2013, when Administrative Law Judge ("ALJ") Beverungen of the Office of Administrative Hearings issued a written order granting, with certain conditions, the Petition for a Special Exception filed by The Belvedere Baptist Church of

[1] Counsel for Davenport has indicated the proper name of the Lessee is 'Davenport Education, LLC.'

Baltimore, Legal Owner ("Belvedere") and Davenport, the Lessee. (Belvedere and Davenport are collectively referenced herein as "Petitioners"). Petitioners had sought the special exception pursuant to §424.5.A of the Baltimore County Zoning Regulations ("BCZR") to permit a Class B Group Child Care Center with more than 40 children in an existing church on the subject property. (Case No. 2013-166-X). After a contested hearing involving testimony and evidence from Davenport and several members of the community, the ALJ granted the Petition, subject to three conditions. The pertinent condition is No. 2, which states as follows:

> 2. The Petitioner shall have no more than 120 children in the facility at any one time, unless state regulations or fire and life safety regulations provide a lower number which would prevail.

(March 28, 2013 ALJ Opinion and Order at 7). Petitioners did not file an appeal of this Order. Certain community members ("Protestants") did file a timely appeal to the Board of Appeals from the ALJ's decision but subsequently withdrew their appeal. By Order dated June 27, 2013, the Board of Appeals dismissed Protestant's appeal with prejudice. (The 2013 hearing and appeal process shall be referred to as "Davenport I").

More than a year later, on July 8, 2014 and pursuant to § 500.7 of the BCZR, Petitioners filed for a Special Hearing, seeking amendment of Condition No. 2. Specifically, Petitioners wanted the ALJ to amend that condition to allow a maximum of 150 rather than 120 children in the child care facility. A public hearing was held and both sides again presented testimony and evidence. By Order dated September 12, 2014, ALJ Beverungen denied the Petition. Petitioners filed a timely appeal to this Board of Appeals. (The 2014 hearing and appeal process shall be referred to as "Davenport II"). People's Counsel has filed a Motion to Dismiss Petition for Special Hearing, based on the doctrine of *res judicata*. Petitioner Davenport opposes the Motion.

FACTS

In Davenport I, Petitioner Davenport sought a special exception in order to operate a childcare facility for more than forty children. Davenport intended to lease space in the existing Belvedere Baptist Church to house the facility. The Church is situated on a 12.711 acre property in a rural residential neighborhood consisting of approximately 160 homes and zoned DR 1. See Davenport I ALJ Opinion at 2,4. Under the DR 1 classification the Petitioners would be permitted to operate a class B Group Child Care Center with up to forty children as a matter of right. See BCZR §1B01.1.A.12. The Regulations require a Special Exception to operate a facility with more than forty children. See BCZR §424.5.A.

During the hearing in Davenport I, the Davenport representative indicated that applicable child care regulations would limit the number of child in the facility as planned to approximately 135. Davenport stated further that its goal was to enroll 150 children, resulting in approximately 120 children attending the center on any given day.[2] See Davenport I ALJ Opinion at 5-6. Neighborhood residents who spoke at the hearing identified potential traffic problems as their primary concern. Id. at 4. There was some divergent testimony as to the estimated number of vehicle trips through the neighborhood 150 enrolled children would generate. ALJ Beverungen stated that each such estimate represented "a lot of traffic" for the rural residential neighborhood and may well disturb the peace and quiet of the neighborhood. He stated further, however, that a large child care center with 100+ children would generate a large volume of traffic in any DR zone, not just this particular location. Id. at 4. According to ALJ Beverungen, the increase in traffic was "inherent" in the proposed use and "is exactly the type of inherent adverse effect that the legislature

[2] Given that some of the younger children would attend on a part-time basis, Davenport counted two such part-time children as one full-time enrollment.

was presumed to have anticipated when it allowed the use by a special exception." Id. He concluded he was compelled to grant the Petition because the Protestants failed to show that the proposed use at the particular location would have non-inherent adverse effects. Id. at 5.

Although he granted the Petition, ALJ Beverungen also conditioned the relief in an attempt "to mitigate the impacts on the community." Id. The "most significant condition" concerned the number of children at the facility. Considering both the expected traffic problems, and Davenport's testimony regarding the anticipated number of students and classrooms, the ALJ concluded 120 children was an appropriate figure. Id. He thus granted the special exception subject to the condition that Davenport would have "no more than 120 children in the facility at any one time. . . ." Id. at 7. Petitioners did not appeal this decision. Protestants did file but later withdrew an appeal. Therefore, on June 27, 2013, this Board dismissed the appeal with prejudice.

In July 2014 Petitioners reemerged and filed a Petition for a Special Zoning Hearing. The Petition sought amendment of Condition No. 2 in the March 2013 Order, such that Davenport would be permitted to increase the number of children in the facility to 150, rather than 120. Petitioners also wanted to build an additional classroom on the property to accommodate more children. ALJ Beverungen again heard testimony from witnesses for the Petitioner and Protestants and received exhibits regarding the proposed changes. In an Opinion dated September 12, 2014, ALJ Beverungen denied the Petition for Special Hearing. He emphasized that Petitioners had failed to indicate why the original restriction should not remain in place, that Davenport had not yet reached the maximum number of students permitted in condition No. 2,[3] and that Petitioners failed to demonstrate some change in circumstances that would justify a different restriction. See

[3] The Davenport representative indicated the then-current class had 109 children and that she wanted to build another classroom to house 16 more students. See Davenport II ALJ Opinion at 2.

Davenport II ALJ Opinion at 2-3. On October 10, 2014 Davenport filed a Notice of Appeal. People's Counsel filed a Motion to Dismiss the Petition for Special Hearing and Petitioner's appeal from the decision in Davenport II on the ground of *res judicata*. Davenport responded and on January 27, 2015 all parties presented arguments before the Board of Appeals.

DISCUSSION

I. Res Judicata

Under the doctrine of *res judicata,* a judgment on the merits in a previous suit between the same parties or their privies is entitled to full preclusive effect and bars a second suit predicated upon the same cause of action. Seminary Galleria, LLC v. Dulaney Valley Improvement Ass'n, Inc., 192 Md. App. 719, 734 (2010)(citations omitted). Res judicata acts as "an absolute bar, not only as to all matters which were litigated in the earlier case, but as to all matters which could have been litigated." Whittle v. Bd. of Zoning Appeals, 211 Md. 36, 49 (1956). See Garrett Park v. Montgomery County Council, 257 Md. 250, 257 (1970) (*res judicata* applies to every matter that was or might have been presented in the prior case).

Although some older cases held that *res judicata* did not apply to rulings of administrative agencies, it is now well-established that "when an administrative agency is performing a quasi-judicial function, the principles of *res judicata* are applicable." Seminary Galleria, 192 Md. App. at 735. This determination is guided by a three-part test: 1) whether the agency was acting in a judicial capacity; 2) whether the issue presented to the tribunal was actually litigated before the agency; and 3) whether the issue's resolution was necessary to the agency's decision. Id. at 736. See Batson v. Shiflett, 325 Md. 684, 705-08 (1992).

In acting upon the Petitions filed herein, the Office of Administrative Hearings acted in a judicial capacity, conducting a hearing and allowing the parties to present evidence. The parties

were precisely the same in both Davenport I and II. The issues regarding the maximum number of children presented in Davenport II were previously addressed, litigated and resolved in Davenport I. That resolution was key to the original decision. According to these criteria, the resulting conditioned decision rendered by ALJ Beverungen in Davenport I should preclude maintenance of a second action to amend that same condition.

Petitioners argue the decision is not entitled to a preclusive effect because it was based on an error of law. However, just as a final decision in a prior litigation, even if incorrect, will bind the parties to the litigation, a decision by an administrative agency acting in a judicial capacity is equally binding whether or not the decision was made in error. See Powell v. Breslin, 430 Md. 52, 64-65 (2013)(an incorrect ruling in a prior action does not deprive the ruling of *res judicata* effect). This should particularly apply when the party striving for that proverbial second bite at the apple failed to appeal the first determination. Even if this were not the case, the decision in Davenport I was not in error. Petitioners argue that Schultz v. Pritts, 291 Md. 1 (1981) and its progeny such as Montgomery County v. Butler, 417 Md. 271 (2010) should be considered in analyzing the matter. However, that is exactly the path ALJ Beverungen followed. Citing Schultz and Butler, the ALJ concluded that insofar as the community's traffic concerns are an inherent effect of a large child-care center in any DR zone, he was bound to, and therefore he did grant the Petition. See Davenport I ALJ Opinion at 3-4.

The fact that the ALJ also imposed certain conditions in an attempt to alleviate the traffic burden and protect the neighborhood does not in any way undermine the validity of his decision. To the contrary, the applicable zoning regulations specifically permit such conditional grants. According to BCZR §502.2, "[i]n granting any special exception, the Zoning Commissioner . . . shall impose such conditions, restrictions or regulations as may be deemed necessary or

advisable for the protection of surrounding and neighboring properties." See Halle Companies v. Crofton Civic Ass'n, 339 Md. 131, 140 (1995) (agency may impose reasonable conditions and restrictions in connection with a special exception order to mitigate the effect upon neighboring property and the community at large.); Baylis v. City Council of Baltimore, 219 Md. 164, 168 (1959). The ALJ permitted Petitioners to operate their business on a scale larger than that permitted as of right while concomitantly imposing certain restrictions intended to protect the neighborhood and its residents. This compromise was an appropriate use of his discretionary powers.

II. Substantial Change in Circumstances

Res judicata operates on the premise that faced with the same information, there is no reason to expend judicial resources and force opposing parties to rehash the same case in an ongoing effort to reach a different result. Thus, if a party *does* provide evidence of substantial changes in circumstances and fact between the first case and the second, res judicata may not necessarily prevent a second hearing on a previously decided matter. This issue arises fairly often in the zoning arena. According to the Court of Appeals, "[t]his rule seems to rest not strictly on the doctrine of *res judicata* but upon the proposition that it would be arbitrary for the board to arrive at opposite conclusions on substantially the same state of facts and the same law." Whittle, 211 Md. at 45. See Seminary, 192 Md. App. at 737("The Court of Appeals has emphasized that before a party can apply to a zoning agency for relief previously denied by the agency, 'substantial changes in fact and circumstances' must be, indeed, substantial.") (citations omitted); Jack v. Foster Branch Homeowner's Ass'n No. 1, Inc., 53 Md. App. 325, 333 (1982) (*res judicata* doctrine may not preclude a second case where there has been a material change in circumstances since the first decision); Chatham Corp. v. Beltram, 243 Md. 138, 151-52 (1966)

(barring a second attempt to re-raise a previously decided issue where the underlying facts remained unchanged).

Davenport contends that the actual operation of the school is a significant change in circumstances. They point to a document all school parents are required to sign regarding safe driving through the neighborhood and note that there have not been any traffic accidents. They further indicate that the growth of the student population and current space restrictions may require them in the future to refuse admittance to a few families. (Davenport's Response Memorandum at 7-8). These are not significant material changes that would warrant a rehearing or amendment of Condition No. 2. These same items were raised in Davenport I. The school's operation and the consequences thereof was a fact that was anticipated and discussed at the prior hearing. Condition No. 2 was imposed precisely to mitigate contemplated traffic problems resulting from the student population; the current absence of accidents argues more for the continuation of the condition rather than its amendment and a larger student body.[4] As to the school's parents now signing an agreement regarding safety and neighborhood issues, that is not a change warranting a rehearing; one would have assumed that school parents would obey traffic laws and exercise caution when driving through the neighborhood irrespective of the agreement. [5] In short, there was no substantial change to the property, the neighborhood or the facts that would lead to a contrary result upon re-litigation, particularly in the relatively short time span between the decisions.

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[4] Moreover, while Davenport may desire more available student slots, the school has yet to reach the maximum number of students allowed under the existing condition.

[5] The "Community Respect Agreement" signed by the Davenport parents includes such statements as "I will come to a complete stop at every stop sign" and "I will not speed through the neighborhood . . . ."

CONCLUSION

In Davenport I, the ALJ struck a valid compromise between each party's concerns in light of the governing law. If Petitioners took issue with Condition No. 2 in the ALJ's decision they could have and should have filed a timely appeal with the Board. They failed to do so. The Protestants filed an appeal but withdrew that appeal in the apparent belief that Petitioners would be adhering to the conditions set forth in Davenport I. The community's good faith in withdrawing its appeal should not mean they are now required to fight the same battle every new school year. The parties in both Davenport I and II are identical, there are no material changes of fact or law, and the issues now presented either were addressed or could have been addressed in Davenport I. Petitioners have not presented any compelling reason permitting them, contrary to the doctrine of *res judicata*, to go back to the well and re-litigate the same issue in the hope of achieving a different result.

ORDER

IT IS THEREFORE, this 27th day of February, 2015 by the Board of Appeals for Baltimore County,

ORDERED, that the Motion to Dismiss Petition for Special Hearing filed by Baltimore County's People's Counsel be and is hereby GRANTED; and it is further

ORDERED, that the appeal in Case No. 2015-0004-SPH be and is hereby DISMISSED WITH PREJUDICE.

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

David L. Thurston, Chairman

Benfred B. Alston

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Board of Appeals of Baltimore County

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February 27, 2015

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RE: *In the Matter of: The Belvedere Baptist Church of Baltimore – Legal Owner Davenport Preschool, LLC*
Case No.: 15-004-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,

Sunny Cannington

Krysundra "Sunny" Cannington
Administrator

KLC/tam
Enclosure
Multiple Original Cover Letters

c: See Attached Distribution List

The Belvedere Baptist Church of Baltimore
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