

IN THE MATTER OF
PATRICE BULLOCK – LEGAL OWNER
4 GEIER COURT

2ND ELECTION DISTRICT
4TH COUNCILMANIC DISTRICT

Re: PETITION FOR SPECIAL HEARING

* BEFORE THE
* BOARD OF APPEALS
* OF
* BALTIMORE COUNTY
* Case No. 18-270-SPH

* * * * *

OPINION

This matter comes before the Board of Appeals of Baltimore County as a *de novo* appeal of the Opinion and Order of the Administrative Law Judge, John E. Beverungen, dated June 5, 2019 denying the requested Petition for Special Hearing. A Petition for Special Hearing was filed by Petitioner, Patrice Bullock, the legal owner of the subject property. The Special Hearing was filed pursuant to Section 500.7 of the Baltimore County Zoning Regulations (“BCZR”) to permit a proposed Assisted Living Facility (“ALF”) I with a distance between the facilities of 978 ft. in lieu of the required 1000 ft.

A hearing was held before this Board on October 2, 2019 and was publicly deliberated on that day as well by consent of the parties. Dr. Donovan Parks, co-owner of the proposed ALF testified on behalf of the Petitioner. Samuel Sperling, Esquire appeared on behalf of the Petitioner. Several neighbors testified in opposition, with Hollis and Michelle Hill, of 5 Geier Court sitting at the trial table, as lead Protestants.

FACTS/BACKGROUND

Petitioner proposes to operate an ALF I at the subject property that is zoned DR 3.5. The proposed location for this ALF I is in a residential neighborhood of single-family homes in the Randallstown area of Baltimore County. In 2017 the Petitioner filed a Petition for Variance relief involving the parking and the 1000 ft. separation requirement for such facility that was denied by

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ALJ Beverungen. (See Case No.: 2018-0086-A). That Order was appealed to the Board of Appeals, where the Petitioner withdrew the request for variance relief prior to the hearing. During that March 28, 2018 hearing before the Board of Appeals counsel for the Petitioner moved to have the matter remanded to the ALJ due to the fact that he intended to argue that the 1000 ft. requirement violates the spirit of the Fair Housing Amendments Act of 1988 (“FHAA”) and the Americans with Disability Act. Due to the fact that this theory for relief that would be brought through a Petitioner for Special Hearing was yet to be considered by the ALJ, this Board agreed that remand to the ALJ would be appropriate. (See Case CBA 18-086-A) Petitioner subsequently filed a Petition for Special Hearing before the ALJ alleging that the 1000 ft. requirement violated FHAA, ALJ Beverungen concluded that the Petition for Special Hearing was requesting the same relief as the previous Petition for Variance and denied the Petition based on *res judicata*.

Petitioner provided oral argument in support of its contention that Section 432A of the Baltimore County Zoning Regulations (“BCZR”) is in conflict with the requirements of FHAA. While no expert testimony, site plan or other evidence regarding the technical details of the proposed ALF was provided by the Petitioner, Dr. Donovan Parks, co-owner of the proposed ALF, testified as to the number of rooms as well as the number of employees who would be present at the site. In his opinion, the proposed ALF would not greatly affect the amount of traffic in the neighborhood.

Protestants provided photographs, and documents from the State Department of Assessments and Taxation website, which they contend illustrate the fact there are several possible ALFs already operating in their residential neighborhood. (See Protestant’s Exhibits 1-3.) Protestants testified they have witnessed disabled residents of these properties being transported to and from these locations and have witnessed, on occasion, disabled residents leaving these

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locations unsupervised, requiring staff members to retrieve them. Protestants testified they fear increased traffic from additional ALFs and fear the residential nature of their community was being threatened by the prevalence of such facilities in their neighborhood.

DISCUSSION/ANALYSIS

This case comes before the Board *de novo*. In the second hearing of this matter before the ALJ, he did not consider the merits of Petitioner's arguments regarding the alleged conflict between Section 432A of the Baltimore County Zoning Regulations ("BCZR") and the FHAA, which restricts the passage of laws that materially impact the ability of handicapped persons to obtain housing. The ALJ raised the issue of *res judicata sua sponte* and dismissed the Petition without hearing further argument. This Board did not raise the issue of *res judicata*, and permitted the Petitioner to proceed on the merits of its Special Hearing request.

§ 432(A)1 of the BCZR states in pertinent part:

Permitted zones; conditions for use.

A. An assisted-living facility is permitted in the D.R., R.O., R.O.A., R.A.E., B.R., B.M. and OR-2 Zones as follows:

1. An assisted-living facility I is permitted by use permit.
2. An assisted-living facility II is permitted by use permit if it has frontage on a principal arterial street.
3. In a D.R. Zone, an assisted-living facility I or II is not permitted within 1000 feet of another property with an existing assisted-living facility I or II or another property for which an application for a use permit has been filed for an assisted-living facility I or II.

Applicability of the FHAA

Having abandoned its Petition for Variance relief, the only questions before the Board in the case at bar are: (1) whether Section 432(A) of the BCZR and its requirement of a 1000 foot distance from another property with an existing assisted living facility violates the FHAA, and (2), does the Baltimore County Board of Appeals have such authority to make such a determination.

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The Fair Housing Amendments Act of 1988, Pub.L. No. 100-430, 102 Stat. 1619, *codified at* 42 U.S.C. § 3601, *et seq.*, extended the protection of the federal fair housing law to persons with disabilities. The FHAA, which became effective March 12, 1989, prohibits discrimination on the basis of a physical or mental handicap. 42 U.S.C. § 3604(f) (1).

Section 3604(f) (1) of the FHAA makes it unlawful:

[t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of:

(A) that buyer or renter;

(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(C) any person associated with that buyer or renter.

As stated clearly in the FHAA legislative history, “the handicap provisions of the FHAA were intended to reach a wide array of discriminatory housing practices, including licensing laws which purport to advance the health and safety of communities:

These new subsections [§ 3604(f)] would also apply to state or local land use and health and safety laws, regulations, practices and decisions which discriminate against individuals with handicaps. While state and local governments have authority to protect safety and health, and to regulate use of land, that authority has sometimes been used to restrict the ability of individuals with handicaps to live in communities. This has been accomplished by such means as the enactment or imposition of health, safety or land-use requirements on congregate living arrangements among non-related persons with disabilities. Since these requirements are not imposed on families and groups of similar size of other unrelated people, these requirements have the effect of discriminating against persons with disabilities.

See Potomac Group Home Corporation v. Montgomery County Maryland, 823 F. Supp. 1251

(D.Md. 1993) *citing* H.R.Rep. No. 100-711, 100th Cong., 2d Sess. 24, *reprinted in* 1988

U.S.Code Cong. & Admin.News at 2173, 2185.

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As noted by the Court in *Potomac Group Home*, due to “the purpose and breadth of provisions of the FHAA, courts have consistently invalidated a wide range of municipal licensing, zoning and other regulatory practices affecting persons with disabilities.” See *Potomac Group Home Corporation v. Montgomery County Maryland*, 823 F. Supp. 1251 (D.Md. 1993) citing *Marbrunak, Inc. v. City of Stow*, 974 F.2d 43, 47 (6th Cir.1992) (striking down discriminatory fire and safety codes); *Horizon House Developmental Services, Inc. v. Township of Upper Southampton*, 80 F. Supp. 683, 693 (E.D.Pa.1992) (striking down 1000 foot spacing requirement); *A.F.A.P.S.*, 740 F. Supp. at 103 (enjoining refusal to issue special use permit to AIDS hospice); *Stewart B. McKinney Foundation, Inc. v. Town Plan and Zoning Comm'n*, 790 F. Supp. 1197, 1219 (D.Conn.1992) (hereinafter "*McKinney Foundation*") (invalidating special exception process).

Petitioner begins its argument alleging Section 432(A) of BCZR violates the FHAA by noting the legislative history of County Council Bill 45-2017, the bill that brought about the enactment of Section 432(A). Fiscal notes from this bill state the bill was intended to “limit the number of facilities or the zones in which assisted living facilities may be located.” Counsel further notes the bill was intended to limit “clustering” of such facilities in D.R. Zones.

The Petitioner opines the following codified definition of assisted living programs clearly places such facilities as being subject to protections provided by the FHAA.

Md. Code Ann., Health - General § 19-1801, defines assisted living programs as:

... a residential or facility-based program that provides housing and support services, supervision, personalized assistance, health related services, or a combination thereof that meets the needs of individuals who are unable to perform or who need assistance in performing activities of daily living or instrumental activities of daily living in a way that promotes optimum dignity and independence for the individuals.

Petitioner argues, as is evidenced by the legislative intent of Section 432(A) of the BCZR, this law was enacted to restrict where such facilities can be located. Petitioners argues a person who has a disability who wishes to live in residential zoning in Baltimore County, D.R. zones, would be greatly limited in their ability to do so by the number of assisted living facilities being restricted by County Law. Petitioner notes living in a residential area may be particularly important to the elderly, who may desire to remain in a community with which they are familiar.

Petitioner concedes the County Council is not completely prohibited from enacting legislation that affects the permissible locations for assisted living facilities. As noted by the Court in *Bryant Woods Inn, Inc. v. Howard County, Md.*, 124 F.3d 597 (4th Cir. 1997), that in enacting the FHAA, Congress clearly did not contemplate abandoning the deference that courts have traditionally shown to such local zoning codes. “And the FHAA does not provide a ‘blanket waiver of all facially neutral zoning policies and rules, regardless of the facts’,” *See Bryant Woods citing Oxford House, Inc. v. City of Virginia Beach*, 825 F. Supp. 1251, 1261 (E.D.Va.1993), which would give the disabled “carte blanche to determine where and how they would live regardless of zoning ordinances to the contrary,” *Thornton v. City of Allegan*, 863 F. Supp. 504, 510 (W.D.Mich.1993). Seeking to recognize local authorities' ability to regulate land use and without unnecessarily undermining the benign purposes of such neutral regulations, Congress required only that local government make “reasonable accommodation” to afford persons with handicaps “equal opportunity to use and enjoy” housing in those communities. 42 U.S.C. § 3604(f)(3)(B).

Petitioner notes the legislative history of Section 432(A) is lacking in details whether the County Council considered the detrimental effects it may have in conjunction with the FHAA and is further lacking in expressing a compelling public interest for creating such legislation despite possible detrimental effects.

Authority of the Board of Appeals to Review Invalidate 432(A)

Md. Code Ann., Local Government, § 10-305 dealing with the powers of County boards of appeals states in pertinent part:

(b) Jurisdiction: - The county board of appeals may have original jurisdiction or jurisdiction to review the action of an administrative officer or unit of county government over matters arising under any law, ordinance, or regulation of the county council that concerns:

- (1) an application for a zoning variation or exception or amendment of a zoning map;
- (2) the issuance, renewal, denial, revocation, suspension, annulment, or modification of any license, permit, approval, exemption, waiver, certificate, registration, or other form of permission or of any adjudicatory order; or
- (3) the assessment of any special benefit tax.

After careful reading of the powers afforded County Boards such as this one, it is clear such Boards may “review the action(s) of an administrative officer or unit of county government over matters arising under any law, ordinance, or regulation of the county council.” What is not clearly enumerated in such powers, is the ability of this Board to strike down County Zoning Regulations found to be in conflict with Federal Law. While the Petitioner raises interesting points regarding the potential conflict between the County Regulations at issue and the FHAA, it is not within the purview of the Baltimore County Board of Appeals to invalidate the requirements of Section 432(A) of the BCZR. In a judicial proceeding in which the validity of a Baltimore County law is being challenged, it would be fair and equitable for Baltimore County to be put on notice as to such a challenge, affording it an opportunity to participate in such a judicial proceeding. A Petition for Special Hearing filed with the Baltimore County Board of Appeals provides no such notice to the County Council or the Baltimore County Office of Law, leaving them in the dark that such a challenge is being litigated. Consequently, the Petitioners request for Special Hearing relief must be denied.

Petitioner's Burden for Special Hearing Relief

Assuming, *arguendo*, this Board found Section 432(A) to be in violation of the FHAA and further found the Board possessed the authority to nullify its requirements, the Petitioner still bears the burden of presenting evidence (customarily through experts) on which the Board can assess whether a zoning request pursuant to the BCZR may be approved. A petition for special hearing is in essence a proceeding for a declaratory judgement. *Antwerpen v. Baltimore County* 163 Md.App 194 (2005). While the BCZR provides no specific criteria for the granting of a Request for Special Hearing, "the administrative practice in Baltimore County has been to determine whether the proposed Special Hearing would be compatible with the community and generally consistent with the spirit and intent of the regulations." *Kiesling v. Long*, Unreported Opinion, No. 1485, Md. Ct. Spec. App. (Sept. Term 2016). The Board has often turned to the criteria for granting Special Exceptions found BCZR § 502.1 to guide such a determination. Additionally, it is the administrative practice in Baltimore County that evidence pursuant to BCZR § 502.1 be presented by a witness recognized as an expert in the related field in order to satisfy the Petitioner's burden of proof. In this matter the Petitioner provided no such testimony, nor did it present lay testimony that would persuade this Board that the proposed ALF would be compatible with the community and generally consistent with the spirit and intent of the regulations. Consequently, the Petitioner's request for Special Hearing relief is denied, notwithstanding any conflicts between BCZR § 432(A) and the FHAA.

ORDER

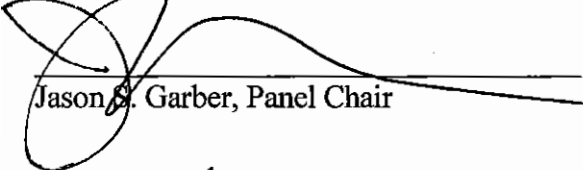
THEREFORE, IT IS THIS 9th day of January, 2020 by the
Board of Appeals of Baltimore County

ORDERED that the Petition for Special Hearing is hereby **DENIED**.

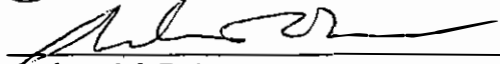
In the Matter of: Patrice Bullock
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Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.


**BOARD OF APPEALS
OF BALTIMORE COUNTY**



Jason S. Garber, Panel Chair



Andrew M. Belt



Maureen E. Murphy



Board of Appeals of Baltimore County

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January 9, 2020

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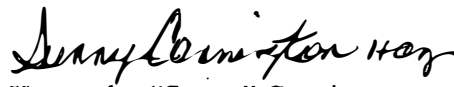
RE: In the Matter of: *Patrice Bullock – Legal Owner*
Case No.: 18-270-SPH

Dear Mr. Sperling:

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/taz
Enclosure

c:	Patrice Bullock	Aaron Burrell
	Andrew and Virginia Stills	M.L. and Dorothy Hull
	Albert Barnes	Linda Fink
	Office of People's Counsel	Vivian Salters
	Paul M. Mayhew, Managing Administrative Law Judge	Margaret Beard
	C. Pete Gutwald, Director/Department of Planning	Hollis and Michelle Hill
	Michael D. Mallinoff, Director/PAI	Mazola P. Goode
	Nancy C. West, Assistant County Attorney/Office of Law	Columbus and Yolanda Goode
	James R. Benjamin, Jr., County Attorney/Office of Law	Leon D. Riley, Jr.