

IN RE: PETITION FOR VARIANCE	*	BEFORE THE
NW corner Regester Avenue and		
Sherwood Road	*	ZONING COMMISSIONER
(812 Regester Avenue)		
9 th Election District	*	FOR
5 th Council District		
	*	BALTIMORE COUNTY
Charles Phelan		
<i>Petitioner</i>	*	Case No. 2010-0089-A

* * * * *

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter as originally filed came before the Zoning Commissioner for consideration of a Petition for Special Hearing filed Charles Phelan, the property owner, by and through his attorney, Sebastian Cross, Esquire of Gildea and Schmidt, LLC. Petitioner had requested special hearing relief pursuant to Section 500.7 of the Baltimore County Zoning Regulations (B.C.Z.R.) to confirm the approval granted by Special Permit in Case No. 454 that allowed a convalescent home/nursing home use and to affirm the characteristics of operations of convalescent/nursing homes at that time included those maintained by the modern equivalent of an Assisted Living Facility III, and to amend the previously approved Special Permit as determined to be necessary by the Zoning Commissioner. This Petition was scheduled for a public hearing on November 18, 2009 but postponed pursuant to a jointly filed Motion for Continuance by counsel representing the Petitioner and the Idlewylde Community Association. *See* Joint Exhibit 1. This Motion stated, in pertinent part, that Idlewylde Community initially opposed the Petition and the parties requested a continuance in order to negotiate a settlement of their differences. The Motion was granted and the hearing rescheduled for March 11, 2010.

At the outset of the second hearing, the parties presented an Agreement amending both the site plan presented and the relief requested from the Zoning Commissioner.¹ Pursuant to the Agreement, Petitioner withdrew the request for a special hearing in its entirety and amended the Petition to seek a Variance from Section 432A.1A.2 of the B.C.Z.R. to permit an Assisted Living Facility II limited to a maximum of 15 beds, to be located on a non-principal arterial street. The subject property and requested relief are more fully depicted on the amended site plan, which was marked and accepted into evidence as Petitioner's Exhibit 2.

Appearing at the hearing in support of the amended relief were the Petitioner, Charles Phelan, his relatives, Michael and Paul Phelan, and Bruce Doak, the land use consultant, who prepared the site plan for the Petitioner. Sebastian Cross, Esquire of Gildea and Schmidt, LLC appeared and represented the Phelan family. J. Carroll Holzer, Esquire appeared on behalf of the Idlewylde Community Association along with Paul Romney, its board member and Recording Secretary. Since the parties had entered into an Agreement prior to the public hearing, Mr. Romney and Mr. Holzer appeared as the authorized representatives on behalf of the community association. There were no Protestants or other interested persons in attendance at the public hearing.

The testimony and evidence offered revealed that the subject property is an irregular shaped parcel containing approximately 16,910 square feet of land zoned D.R.5.5. The property is located on Register Avenue at the corner of Sherwood Road in the Idlewylde area of Baltimore County. Petitioner submitted two (2) aerial photographs revealing the precise location of the subject property. The photographs were marked and accepted into evidence as Petitioner's

¹ The copy of the Agreement that was presented at the public hearing contained a clerical error. Accordingly, the parties signed the signature page of the Agreement at the public hearing and submitted a corrected version following the conclusion of the hearing. The corrected Agreement contained in the case file marked as Petitioner's Exhibit 6 was delivered to the Zoning Commissioner on the afternoon of March 11, the same date at the public hearing.

Exhibits 4 and 5. The property is improved with a one and two-story wood frame and stucco building that was originally constructed in 1926. In 1945, the prior property owner sought and obtained a Special Permit from the Zoning Commissioner to continue using the existing structure to operate a convalescent or nursing home. A copy of the prior Order was marked and accepted into evidence as Petitioner's Exhibit 3. Testimony revealed that the property was used as a nursing home without incident until 2005. In 2007, First Mariner Bank took title to the property and sold it to Mr. Phelan in January 2008.

After purchasing the property, Mr. Phelan maintained the historic footprint of the existing building and spent a significant amount of money refurbishing both the interior and exterior of the structure. Petitioner was careful to preserve the historic value of the building while updating the facility to accompany a planned assisted living facility. While the property was used as a nursing home for over seventy years, Petitioner is now required to seek a variance for an Assisted Living Facility II because this use is only permitted as of right when located on an arterial road. B.C.Z.R. Section 101 defines an arterial street as:

“A motorway or portion thereof which: is or is intended for travel to or from major employment centers, such as town centers; has or is intended to have, four or more lanes for moving traffic; is or is intended to be designed for traffic speeds of at least 40 miles per hour; has or is intended to have a right-of-way at least 66 feet wide; is not a freeway or an expressway; and has been designated as an arterial street (or as a boulevard or thoroughfare) by the Planning Board.”

The Zoning Advisory Committee (ZAC) comments were received and are made part of the record of this case. The Office of Planning and Department of Environmental Protection and Resource Management (DEPRM) offered no objection to the requested relief. The Office of People's Counsel submitted a letter, dated October 14, 2009, that will be explained in greater detail below.

As previously stated, Petitioner initially filed for a special hearing essentially requesting authority to continue and expand upon the relief obtained by the prior owner in the zoning case from the year 1945. However, after the proposal was opposed by the Idlewylde Community Association and the Office of People's Counsel, Petitioner agreed to withdraw the request for special hearing, reduce the scope of the facility from a Class III to a Class II and submit a variance petition. The Agreement submitted at the public hearing also contains a number of limiting conditions that satisfy the needs of the Idlewylde community. For the following reasons, I find that the amended petition for variance is appropriate.

As People's Counsel aptly points out in his October 14, 2009 correspondence, the relief requested in the initial petition for special hearing should have been denied for two (2) reasons. First, the relief obtained in the 1945 Order, a "special permit", is similar to the term "nonconforming use" as defined under the current iteration of the B.C.Z.R. Since the parties agreed at the public hearing that the use permitted under the 1945 Order was discontinued in 2005, the special permit/nonconforming use was terminated pursuant to Section 104.1 of the B.C.Z.R. Indeed, the Court of Appeals of Maryland has repeatedly held that nonconforming uses are not favored under Maryland law. *See, Prince George's County v. E.L. Gardner*, 293 Md. 259 (1982); *Purich v. Draper Properties*, 395 Md. 694 (2006).

Second, the 1945 Order permitted the prior owner to use the subject property as a "convalescent or nursing home" and the initial petition for special hearing requested authority to operate an "assisted living facility" on the property. While these terms appear similar, and are interchangeable in everyday language, they are separately regulated under the B.C.Z.R. Convalescent homes are permitted by special exception in D.R. zones without regard to density, and assisted living facilities are regulated and separated into three (3) categories by Section 432A

of the B.C.Z.R. Accordingly, the special hearing request to turn a nursing home into an assisted living facility could have been construed as a change in use, which is not permitted for a nonconforming use under Maryland law.

While the initial petition for special hearing would likely not have been granted, considering all of the evidence presented on the supplemental petition, I am persuaded to grant the requested variance relief. I find special circumstances or conditions exist that are peculiar to the land or structure. This property was used as a nursing home without incident for over seventy years. While the nonconforming use was technically terminated in 2005, Petitioner is proposing to use this property as an assisted living facility, which should similarly operate without incident in the future. I find that preventing the proposed facility solely due to its location on Regester Avenue where a similar facility operated for decades would cause the Petitioner to suffer practical difficulty and undue hardship. Petitioner is not requesting a variance from any area or height restrictions and is only seeking to continue using the structure in the same or similar manner in which it was used for over seventy years. Given that the Phelan family has maintained the historic value of the property and spent a significant amount of time and money renovating the structure for the purpose of operating an Assisted Living Facility in the future, denial would unnecessarily burden the Petitioner.

I further find that the variance can be granted in strict harmony with the spirit and intent of the regulations and in such a manner as to grant relief without injury to the public health, safety and general welfare. Most importantly, the Petitioner took the time to work with the Idlewylde Community Association to form an Agreement that permits the proposed facility to function while providing a number of limitations that meet the needs of the surrounding community. The agreement alleviates concerns regarding issues such as traffic, parking, and

aesthetics. While the terms of the Agreement are incorporated in the site plan presented at the public hearing, the Agreement is also attached hereto and expressly incorporated herein. Since the Agreement meets the needs of all parties,² I find that the variance can be granted in such a manner as to meet the requirements of Section 307 of the B.C.Z.R., as construed in *Cromwell v. Ward*, 102 Md. App. 691 (1995).

Pursuant to the advertisement, posting of the property, and public hearing on this petition held, and after considering the testimony and evidence offered by Petitioner, I find that Petitioner's variance request should be granted.

THEREFORE, IT IS ORDERED by the Zoning Commissioner of Baltimore County this 23rd day of March, 2010, that the Petition for Variance seeking relief from Section 432A.1A.2 of the Baltimore County Zoning Regulations (B.C.Z.R.) to allow an Assisted Living Facility II to be located on a non-principal arterial street that is limited to a maximum of 15 beds, in accordance with Petitioner's Exhibit 2 (amended site plan), be and is hereby GRANTED, subject to:

1. Petitioner may apply for any required permits and be granted same upon receipt of this Order; however, Petitioner is hereby made aware that proceeding at this time is at his own risk until such time as the 30-day appellate process from this Order has expired. If, for whatever reason, this Order is reversed, the relief granted herein shall be rescinded.
2. The terms of the Agreement attached hereto are expressly incorporated as conditions precedent to the relief granted herein and state in pertinent part:
 - a. Petitioner agrees to eliminate the parking spot closest to Sherwood Road to reduce the number of on-site parking spaces to ten (10).
 - b. Petitioner will remove the existing wood frame shed.

² Mr. Holzer proffered at the public hearing that the Office of People's Counsel has reviewed the Agreement and does not oppose the variance request as long as the terms of the Agreement are incorporated as conditions of the approval.

- c. Petitioner will relocate the dumpster to the area indicated on the site plan as “Dumpster Enclosure.” Depending on the timing of trash pickup and haul away, the parties agree that this may reduce the number of available onsite parking spaces from ten (10) to nine (9).
- d. The handicapped ramp will be removed and replaced with landscaping as shown on the site plan.
- e. The fire escapes must be removed pursuant to the Baltimore County Fire Code.
- f. Residents of the assisted living facility are prohibited from keeping and storing automobiles on the site or any adjacent street.
- g. Employees and visitors of the facility are prohibited from parking on adjacent streets.
- h. Delivery and trash pick-up will be limited to weekdays between the hours of 9:00 A.M. and 5:00 P.M.
- i. The operators of the facility agree to meet with the Board of Directors of the Idlewylde Community Association on an as needed basis to facilitate resolution of any additional Community concerns that may arise.

Any appeal of this decision must be taken in accordance with Section 32-3-401 of the Baltimore County Code.

WJW:dlw

____SIGNED____
WILLIAM J. WISEMAN, III
Zoning Commissioner
for Baltimore County