

IN RE: PETITION FOR SPECIAL HEARING	*	BEFORE THE
W side of York Road, 329' S of c/l		
of York Road	*	OFFICE OF ADMINISTRATIVE
(10410 York Road)		
8 th Election District	*	HEARINGS FOR
3 rd Council District		
	*	BALTIMORE COUNTY
Southside Oil, LLC, <i>Legal Owner</i>		
Kelly's Corner, <i>Contract Purchaser</i>	*	CASE NO. 2012-0099-SPH
Petitioners		

* * * * *

OPINION AND ORDER

This matter comes before the Office of Administrative Hearings for consideration of a Petition for Special Hearing filed by Southside Oil, LLC, the legal property owner and Kelly's Corner, LLC, the contract purchaser. The Special Hearing was filed pursuant to Section 500.7 of the Baltimore County Zoning Regulations ("B.C.Z.R.") to permit the use of the property for retail use (Pharmacy) under Section 103.1B grandfathering provision¹.

The subject property and requested relief are more fully described on the site plan that was marked and accepted into evidence as Petitioner's Exhibit 1.

Appearing at the public hearing in support of the requested relief was Mr. Dan Feeley, owner of Kelly's Corner, LLC, which subsequent to the filing of this petition but prior to this hearing settled on the subject property and therefore Mr. Feeley appeared at the hearing on behalf of the property owner, and Mr. Eugene Cunningham, Esquire, personal attorney for Mr. Feeley. Jennifer R. Busse, Esquire appeared as Counsel for the Petitioner. Patrick Richardson, an expert retained by Petitioner, also attended the hearing. There were no Protestants or other persons present, and the file does not contain any letters of protest or opposition from neighboring owners.

¹ B.C.Z.R Section 103.1 is comprised of two paragraphs and although within the text of the B.C.Z.R. these paragraphs are not separately identified or outlined, the Zoning Office apparently instructed the applicant to identify the relevant B.C.Z.R. provision as "Section 103.1.B" because that is how the second paragraph of Section 103.1 is identified within the Zoning Commissioner Policy Manual.

Being that there was no one attending the hearing in opposition to the request, counsel for the Petitioner and Mr. Richardson proceeded by way of a modified proffer.

Testimony and evidence revealed that the subject property (herein referred to as the “Property”) is currently zoned ML-AS, ML-IM and BR-AS. Notably only a sliver of the Property is zoned BR-AS, specifically the portion that abuts the commercially zoned and used property to the south. As explained by Mr. Richardson, it is apparent that this sliver of BR-AS zoning is simply the result of today’s more accurate and computerized mapping systems, as evidenced by the fact that this sliver of BR-AS zoning was only recently identified as being located on the Property.

The Property is utilized as an Exxon fuel service station in combination with a convenience store, having obtained a special exception for said uses via prior zoning cases 96-262-XA (variance approval was obtained for the existing double-sided freestanding ID sign). Approval was later granted to permit a roll-over car wash via case 00-138-SPHX but was never constructed. These prior zoning cases were accepted into evidence as Petitioner’s Exhibit 2 and 3.

As detailed on Petitioner’s Exhibit 1, the Property comprises approximately 2.44 gross and 1.76 net acres in Cockeyville, and is specifically located on the southwest corner of York and Warren Roads. As is shown on Petitioner’s Exhibit 1, the applicant desires to replace the existing fuel service station and convenience store on the Property with a Walgreen’s retail pharmacy which will be located in approximately the same location and configuration as the existing building.

The Property is the subject of a 2012 Comprehensive Zoning Map Process (“C.Z.M.P.”) Issue, namely Issue 3-059, requesting that the zoning of the Property be changed to BL (Business – Light). In the event the C.Z.M.P. request is granted, this instant special hearing request will

appear to have been unnecessary in that a retail pharmacy is permitted by right in the BL zone. However, the 2012 C.Z.M.P. will not conclude until approximately September of 2012, and the applicant desires to begin work immediately.

The subject request, to permit the use of the Property for a retail use under B.C.Z.R. Section 103.1.B (known as the “grandfathering provision”), is very rarely the subject of a zoning hearing because changes in the zoning maps over the years have addressed many of the situations covered under this section. Section 103.1.B was enacted via County Council Bill 100-1970 (known as “Bill 100”), a copy of which was accepted into evidence as Petitioner’s Exhibit 5.

Bill 100 was landmark legislation, and today is mostly known for creating the D.R. Zones. However, it also drastically amended the then existing M.L. zone regulations; and, in what was clearly designed as a method to protect existing developments (and/or approvals obtained before September 19, 1970 for developments in the M.L. zone), Bill 100 also amended Section 103.1 by adding what is now the second paragraph of that section (identified within the Zoning Commissioner’s Policy Manual (“ZCPM”) as Section 103.1.B).

Section 103.1.B established a separate category of “grandfathering” which, as explained in the ZCPM, is very different in both scope and implementation to the nonconforming use concept. The ZCPM provides, “[t]he specific intent of Section 103.1 was to grandfather the B.L., B.R., & B.M. uses allowed under the then Section 253.1 (1963 edition B.C.Z.R.).” Section 253.1 was then (prior to Bill 100) and is now the section relating to the M.L. zone.

To be clear, prior to Bill 100, and as documented in the 1963 edition B.C.Z.R., the M.L. zone permitted the commercial uses which now, post Bill 100, are typically only permitted by right in the zones we now refer to as the business or commercial zones (B.L., B.R. & B.M.). A copy of the version of Section 253.1 found within the 1963 edition of the B.C.Z.R. was accepted

into evidence as Petitioner's Exhibit 7.

So long as the identified "eligibility criteria" is met, the ZCPM identifies the method by which an applicant can either expand existing commercial uses on property in the M.L. zone or convert to a new one. The facts which support the application of Section 103.1.B in this case are undisputed.

The Property was once part of a larger tract, approximately 17.5 acres, which was previously all owned by Baltimore Gas & Electric ("BGE"). In 1958, via Case 4330, a copy of which was accepted into evidence as Petitioner's Exhibit 2, BGE obtained approval of a development plan permitting a Public Utility Distribution Service Center on the property. The Order in Case 4430 specifically identifies the permitted uses as including an office building, storeroom, storage yard and transportation facilities. At the time the site was zoned mostly M.L. and these uses were all permitted by right in the M.L. zone. However, since the site had a small piece of M.R. zoning along its York Road frontage, the subject method of approval was required per the M.R. regulations at the time.

As shown on the plan accompanying the 1958 approval, Warren Road did not cross over York Road at that time. The area of BGE's property which was then zoned M.R. was located on the north side of where Warren Road ultimately would cross over the property. The Deed conveying the 2.477 acres from BGE to the State of Maryland for the use of the SHA was That Deed is dated March 8, 1990 and recorded within the Land Records of Baltimore County at Liber 8440, Folio 573 and was accepted into evidence as Petitioner's Exhibit 8.

Aerial photographs obtained by Mr. Richardson from the Department of Planning from the years 1960 and 1972 were accepted into evidence as Petitioner's Exhibits 6A and 6B. These photographs clearly show that the Property which is the subject of this instant petition was utilized

by BGE as part of its Public Utility Distribution Center which, again, as particularly identified and approved within the 1958 Case 4330, included an office building and storage yard.

Mr. Richardson demonstrated that the plan which was approved as part of Case 96-262-XA when the Property was developed as a fuel service station and convenience store showed the then existing lighting poles on what was mainly a parking area servicing BGE's office building and storage yard. Mr. Richardson also demonstrated how the current and prior zoning maps match up so as to clearly document that the Property has been zoned M.L. as far back as the 1958 development plan approved in Case 4330.

It is clear from the evidence that the Property subject to this petition, which was originally part of the property subject to BGE's 1958 development plan approval and was subsequently bifurcated from that property via the extension of Warren Road (and is therefore now located on the south side of Warren Road), has always been zoned M.L.

Per the ZCPM, because the Property was the subject of the 1958 development plan approval, all of the uses then permitted in the B.L., B.R., & B.M. zones were grandfathered. Said another way, due to the undisputed facts in this case, the Property may be used for the commercial uses permitted in the M.L. zone prior to the enactment of Bill 100 (subject to the conditions outlined in the ZCPM).

The Zoning Advisory Committee (ZAC) comments were received and are made part of the record of this case. The Bureau of Plans Review and the State Highway Administration provided "no comment" / "no objection" comments. The only other comment came from the Department of Planning. Planning, suggests in their comment that the Petitioner wait until their comprehensive zoning request is approved and proceed with their project at that time. However, as stated previously, that event will not occur until some time later and the applicant is eager to

proceed with their project at this time.

In addition, there was no evidence presented that the operation of either the existing fuel service station and convenience store or the proposed retail pharmacy have/will create a negative impact upon the surrounding community. Indeed, arguably the proposed use will fulfill a need in the community as there is no other pharmacy in the vicinity. Furthermore, the proposed use will create additional jobs, something very needed in today's economy. After due consideration of the evidence presented, I am persuaded to grant the special hearing relief.

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

THEREFORE, IT IS ORDERED by the Administrative Law Judge for Baltimore County this ___9___ day of December, 2011 that the Petition for Special Hearing pursuant to Section 500.7 of the Baltimore County Zoning Regulations ("B.C.Z.R.") seeking to permit the use of the property for retail use (Pharmacy) under Section 103.1B grandfathering provision be and is hereby GRANTED;

IT IS FURTHER ORDERED that when a building permit for the proposed retail pharmacy is issued for the Property that the previously granted special exception relief in Cases 96-262-XA and 00-138-SPHX will be deemed to be abandoned and extinguished.

The relief granted herein shall be subject to the following:

1. The Petitioners may apply for their building permit and may be granted same upon receipt of this Order. However the Petitioners are hereby made aware that proceeding at this time is at their own risk until such time as the thirty (30) day appellate process from this Order has expired. If for whatever reason, this Order is reversed, the Petitioners will be required to return and be responsible for returning said property to its original condition.

Any appeal of this decision must be made within thirty (30) days of the date of this Order.

Signed _____
TIMOTHY M. KOTROCO
Administrative Law Judge
for Baltimore County

TMK/pz

