

<b>IN RE: PETITION FOR SPECIAL HEARING</b>	*	BEFORE THE
S/side of Geise Avenue, 272' W of		
Lincoln Avenue	*	OFFICE OF ADMINISTRATIVE
<b>(7349 Geise Avenue)</b>		
15 <sup>th</sup> Election District	*	HEARINGS FOR
7 <sup>th</sup> Council District		
	*	BALTIMORE COUNTY
Audrey L. Leamer, <i>Legal Owner</i>		
Charles E. Kunarski, <i>Resident (Son)</i>	*	<b>CASE NO. 2012-0137-SPH</b>
Petitioners		

\* \* \* \* \*

**ORDER AND OPINION**

This matter comes before the Administrative Law Judge as a Petition for Special Hearing filed by the legal owner of the property, Audrey Leamer. The Petitioners are requesting Special Hearing relief pursuant to Section 500.7 of the Baltimore County Zoning Regulations (B.C.Z.R.) to permit two (2) pigeon coops as a legal non-conforming use. The subject property and requested relief is more fully depicted on the site plan that was marked and accepted into evidence as Petitioners' Exhibit 2.

Appearing at the public hearing held for this case was Charles E. Kunarski, resident and son of Audrey L. Leamer. Mr. and Mrs. Leisher, who live at 7347 Geise Avenue, attended the hearing and opposed the request. The file reveals that the Petition was properly advertised and the site was properly posted as required by the Baltimore County Zoning Regulations.

This matter is currently the subject of a violation case (Case No. CO-00900934) before the Office of Administrative Hearings, and a copy of the Code Enforcement file was made a part of the zoning hearing file. Mrs. Leisher indicated that she appeared for a code hearing in the County Office Building, but that Lionel Van Dommelin told her the inspector had erroneously dismissed the case. As such, it may be that the case noted above is in fact no longer pending. It should be noted that the fact that a code violation is issued is generally not considered in a

zoning case. Zoning enforcement is conducted by the Department of Permits, Approvals, and Inspections, which has the authority to issue Correction Notices and Citations and to impose fines and other penalties for violation of law. On the other hand, the role of the Administrative Law Judge in this matter is to decide the discreet legal issue of whether the Petitioners are entitled to the requested special hearing relief.

The ZAC comments were received and made a part of the file. Comments were received from the Department of Environmental Protection and Sustainability (DEPS), dated December 27, 2011, concerning requirements for compliance with the Chesapeake Bay Critical Area regulations. The Department of Planning also submitted comments, and as noted below, the relief granted herein will be expressly conditioned upon Petitioners' compliance with those conditions.

Testimony and evidence revealed that the subject property is 17,050 square feet and is zoned DR 5.5. Mr. Kunarski stated that his father, since at least 1960, kept pigeons at the subject premises. Petitioner's father died in 1972, and he has continued keeping pigeons at the property since that time. Petitioner also submitted letters from several neighbors (Petitioner's Exhibit 1) indicating that pigeons have been kept at 7349 Geise Avenue for at least 25 years. Ms. Audrey Leamer stated she recalls pigeons at the location since the 1950s. Mr. Kunarski further stated that other than the recent code enforcement notice, he has never in 25+ years received a violation notice from the Health Department or any county or state agencies.

Kelli Leisher, Petitioner's neighbor, stated she moved to her home in 2006, and could not refute Petitioner's evidence regarding how long the pigeons have been kept at this location. She did however submit photos (Protestant's Exhibit 1) showing the poor condition of the Petitioner's yard, and she said that the pigeons cause obnoxious odors that make it difficult for her family to enjoy their pool or deck. She also said her children have asthma and that pigeon

odors and feces can aggravate their condition, and she presented a letter from Scott Krugman, M.D. and certain articles which advised that pigeons can exacerbate respiratory conditions. Protestant's Exhibit 2.

Ms. Leisher also advised that in 2009, Petitioner constructed an additional pigeon coop in the rear yard, and that this structure in fact sits next to the fence at her property line. Mr. Kunarski conceded that he did construct an additional coop in or about 2009, but he telephoned the OAH after the hearing and advised that he was mistaken, and recalled that in fact he added the coop in 2001. Of course, pursuant to long-standing practice, evidence or testimony submitted after a hearing has concluded cannot be considered in the disposition of the case.

In zoning law, a use or structure that pre-dates a regulation outlawing such use or structure is known as a nonconforming use. Here, the B.C.Z.R. was amended in 2009 (Bill 63-09) to require one acre minimum lot size to keep fowl or pigeons. The Petitioner presented sufficient evidence he (or his father) kept pigeons prior to this time, and thus he has established a nonconforming use for the keeping of pigeons. But that is not the end of the matter.

Nonconforming uses are disfavored in the law, and cannot be expanded or enlarged. Here, Petitioner enlarged his pigeon operation after 2009, and he does not enjoy a nonconforming use status for the pigeon coop added after that date. *Prince George's Co. v. E.L. Gardner, Inc.*, 293 Md. 259, 267 (1982).

In addition, pigeons may be kept only when they do not create a nuisance on the property. B.C.Z.R. § 100.6. A nuisance is generally defined as any activity that prevents a neighboring owner from the use and enjoyment of his property. Here, Ms. Leisher described the odors and mess associated with the pigeons, but it is not clear this evidence would be sufficient to establish a nuisance. The more appropriate forum for this inquiry would be a code enforcement proceeding in the Department of Permits, Approvals and Inspections. The Baltimore County

Code (B.C.C. §§ 13-7-111 et. seq.) establishes a set of procedures for the processing and trial of a private nuisance case, and I believe that avenue would be more appropriate than this hearing for determining whether a private nuisance exists on these premises. The Petitioner should be aware that the Zoning Commissioner can terminate a nonconforming use if he is found to have violated the county code after a code enforcement hearing under Article 3, Title 6 of the Code. B.C.Z.R. § 104.8.

Pursuant to the advertisement, posting of the property and public hearing on this Petition, and for the reasons set forth above, the relief requested shall be granted in part and denied in part.

THEREFORE, IT IS ORDERED, this 13<sup>th</sup> day of January, 2012 by the Administrative Law Judge for Baltimore County, that the Petition for Special Hearing pursuant to Section 500.7 of the Baltimore County Zoning Regulations (B.C.Z.R.) to permit one (1) pigeon coop as a legal non-conforming use, be and is hereby GRANTED.

IT IS FURTHER ORDERED that the Petition for Special Hearing, be and is DENIED in part, to the extent that Petitioner must discontinue immediately the use of the “front” pigeon coop which is situated closest to the premises at 7347 Geise Avenue.

The relief granted herein is subject to the following conditions:

- Petitioner must comply with the ZAC comments and conditions set forth in the letters from the Department of Environmental Protection and Sustainability and the Department of Planning; copies of which are attached hereto and made a part thereof.

JEB:dlw

Signed \_\_\_\_\_  
JOHN E. BEVERUNGEN  
Administrative Law Judge for  
Baltimore County