

IN RE: PETITION FOR SPECIAL HEARING	*	BEFORE THE
(1401 Regester Avenue)		
9 th Election District	*	OFFICE OF ADMINISTRATIVE
4 th Councilmanic District		
Paul M. Dziwanowski	*	HEARINGS FOR
<i>Petitioner</i>		
	*	BALTIMORE COUNTY
	*	CASE NO. 2013-0039-SPH

* * * * *

OPINION AND ORDER

This matter comes before the Office of Administrative Hearings (OAH) for Baltimore County as a Petition for Special Hearing filed by Keith S. Franz, Esquire, on behalf of the legal owner, Paul M. Dziwanowski. The Petitioner is requesting Special Hearing relief pursuant to Section 500.7 of the Baltimore County Zoning Regulations (B.C.Z.R.), to approve a non-conforming use of the property as an auto service garage, which (according to the Petition) has been its use dating back to and beyond approximately 1955. The subject property and requested relief is more fully depicted on the site plan that was marked and accepted into evidence as Petitioner’s Exhibit 1.

Appearing at the public hearing held for this case was Paul M. Dziwanowski, legal owner, Donald E. Hicks, with Hicks Engineering Associates, Inc., and Jean Berner. Keith S. Franz, Esquire with Azrael, Franz, Schwab and Lipowitz, appeared as counsel and represented the Petitioner. Appearing as interested citizens were James F. Cosgrove, Edward T. Smith, Peggy Squitieri, and Barbara F. Bachur.

The Zoning Advisory Committee (ZAC) comments were received and made a part of the file. A ZAC comment was received from the Department of Environmental Protection and Sustainability (DEPS) on September 21, 2012, indicating that the Maryland Department of the

Environment (MDE) would have any records regarding any on-going groundwater contamination case(s) for this site. But it is unclear, at least from this comment, whether any such cases exist.

NON-CONFORMING USES

Under the B.C.Z.R., a non-conforming use is a “legal use that does not conform to a use regulation for the zone in which it is located.” B.C.Z.R. § 101.1. Under Maryland law, a non-conforming use (which is a vested right entitled to constitutional protection) is “protected against re-zoning by non-conforming use status if the property owner demonstrates that substantially all of the property was being used in a permissible means before a zoning change was enacted.” *Maryland Reclamation Associates, Inc. v. Harford County*, 414 Md. 1, 63 (2010).

In this case, the property in question was zoned B.L. (Business, Light) since at least 1955. In the B.L. zone, a gasoline service station is permitted by special exception only, and the property in this case was the subject of a Court of Appeals decision in 1957, which affirmed the grant of special exception relief for a “gasoline (filling) service station.” *Erdman v. Baltimore County*, 212 Md. 288, 290-91 (1957).

Thus, in 1957 this property was lawfully operating as a “filling station,” pursuant to B.C.Z.R. (1955) §§ 230.13 and 405. Under the 1955 regulations, automotive “repairs” were permitted in connection with filling stations, provided the repairs (with minor exceptions) were completed inside of a building. B.C.Z.R. (1955) § 405.3. Perhaps the most accurate way of characterizing the historical use of this property is to say that the filling station was the principal use, while repairs to customers’ licensed cars would be deemed accessory to that principal use. Zoning Commissioner’s Policy Manual (ZCPM), § 405.4, p. 4-16.

At some point in the past, gasoline stopped being sold at the subject property. Indeed, though the site has a freestanding enterprise sign with a “Getty” logo, that same sign also indicates

that gasoline was available for \$1.91 a gallon, which obviously indicates that gasoline has not been sold at the location for many years. *See*, Citizens' Exhibit 1. In addition, there is a derelict and rusted gasoline pump and pump island at the site, and those too have not been used for many years. But discontinuing the sale of gasoline would not operate to abandon or forfeit the special exception granted in 1957, which remained affixed to the property and is a property interest which "runs with the land" to subsequent owners. *Reid v. Zoning Board*, 670 A.2d. 1271 (Conn. 1996).

As such, the subject property has since 1957 operated pursuant to a special exception as a gasoline service station, and that status continued until 1996, at which time the property was zoned C.B. (which is a performance based community business zone under B.C.Z.R. § 229). Significantly, neither a gasoline filling station nor automotive service garage or repair facility is permitted (by right or by special exception) in the C.B. zone. Accordingly, the business operation¹ at 1401 Register Avenue became, at the time the property was zoned C.B., a lawful non-conforming use. The Petitioner would therefore be entitled to continue its current operations, which involves solely the service of automobiles.

The special exception granted for this property in or about 1957 is rescinded by operation of law, given that a "property cannot operate where the use is both a non-conforming use and a special exception use." *Purich v. Draper Props.*, 395 Md. 694 (2006). Non-conforming uses are disfavored under Maryland law, and (unlike with a special exception) can be lost due to abandonment or discontinuance of the use in question. *McLay v. Maryland Assembly*, 269 Md. 465 (1973). In addition, the Baltimore County Council enacted legislation in 2006 which

¹ This terminology ("business operation") is generic, deliberately so. It is unclear whether the sale of gasoline had ceased before the 1996 rezoning, and whether the use was therefore a "filling station" or "service garage." In any event, the court of appeals noted in the 1957 special exception case involving this property that to "be economically sound the station should cater to a minimum of one hundred automobiles a day." 212 Md. at 293. Certainly, the servicing of vehicles at this site (by only the Petitioner, who has no employees) is a less obnoxious and lower volume use than a filling station would be.

provides that a non-conforming use can be terminated if the owner is determined, after a Code Enforcement hearing, to be in violation of the Baltimore County Code (B.C.C.) or zoning regulations. B.C.Z.R. § 104.8.

Which brings us to the only disputed issue in this case. Several members of the community attended the hearing, and indicated that although they did not oppose the continuation of Petitioner's business, they were adamant that several longstanding deficiencies at the site be corrected, and that the overall appearance of the business be improved so as to be compatible with the adjoining Loch Hill and Idlewyde neighborhoods. The citizens indicated that for at least the past 10 years, they have met with and urged the Petitioner to make improvements to the site, and a draft letter dated October 15, 2001, which outlines the concerns, was submitted at the hearing and is included in the case file.

Having reviewed the list of the community's grievances, it would appear that they are reasonable and, in many cases, are in fact required by the zoning regulations. The neighbors seek removal of the freestanding "Getty" sign, which was constructed pursuant to a permit issued by Baltimore County on March 22, 1988. *See*, Petitioner's Exhibit 4. Even so, that sign itself is most likely non-conforming, and is now subject to the abatement provisions found at B.C.Z.R. § 450.8.D, which requires that business owners remove non-conforming signs or obtain zoning relief for same on or before October, 2012.

The neighbors also object to the abandoned gasoline pump and the untagged motor vehicles stored on the lot, which were also clearly depicted in color photographs. *See*, Citizens' Exhibit 2. Again, the regulations require that abandoned pumps and service station/filling station fixtures be dismantled when no longer in use (*See*, B.C.Z.R. § 405), and the regulations also prohibit the storage of unlicensed motor vehicles, and require screening and appropriate paving

when a business stores damaged or disabled motor vehicles. *See*, B.C.Z.R. § 405A.

In the end, I agree with Petitioner’s counsel that the petition in this case is akin to a declaratory judgment proceeding, whereby the Petitioner merely seeks confirmation of its legal status, and it is therefore not appropriate to impose “conditions” on such a declaration. *Antwerpen v. Balto. Co.*, 163 Md. App. 194, 209 (2005) (“request for special hearing is, in legal effect, a request for a declaratory judgment”). But the Petitioner should not take much solace from this fact, given that (as outlined above), the existing conditions on site are undoubtedly in violation of the Baltimore County Code (B.C.C.) and zoning regulations, and an adjudication to that effect could result in the forfeiture of the Petitioner’s non-conforming use status.

It is the County’s Department of Permits, Approvals, and Inspections (PAI) [not the OAH] that investigates and prosecutes zoning violations. I would strongly encourage Petitioner to meet with community representatives and decide upon a concrete timetable for correcting the noted deficiencies. An amicable resolution in that fashion is far preferable to a code enforcement proceeding, which for Petitioner could be expensive and have far-reaching consequences.

THEREFORE, IT IS ORDERED, this 30th day of November, 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 approve a non-conforming use of the property as an auto service garage, be and is hereby GRANTED.

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

Signed _____
JOHN E. BEVERUNGEN
Administrative Law Judge for
Baltimore County

JEB:dlw