

IN RE: PETITION FOR SPECIAL HEARING	*	BEFORE THE
(1600 Frederick Road)		
1 st Election District	*	OFFICE OF ADMINISTRATIVE
1 st Councilmanic District		
1600 Frederick Road, LLC	*	HEARINGS FOR
Petitioner	*	BALTIMORE COUNTY
	*	CASE NO. 2013-0071-SPH

* * * * *

ORDER AND OPINION

This matter comes before the Office of Administrative Hearings (OAH) for Baltimore County as a Petition for Special Hearing filed by Jason T. Vettori, Esquire with Smith, Gildea & Schmidt, LLC, on behalf of Allen Parsons, authorized representative of 1600 Frederick Road, LLC. The Petitioner is requesting Special Hearing relief pursuant to Section 500.7 of the Baltimore County Zoning Regulations (B.C.Z.R.), to determine whether or not the Administrative Law Judge should approve:

- (1) The extension of the existing restaurant no more than 25% of the ground floor area of the building;
- (2) A modified parking plan; and
- (3) For such and further relief as may be deemed necessary by the Administrative Law Judge for Baltimore County.

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 Lori and Allen Parsons, Ronald Johnston, and Kenneth J. Wells, Professional Line Surveyor with kj Wells, Inc., the consulting firm that prepared the site plan. Jason T. Vettori, Esquire appeared and represented the Petitioner. Citizens who attended were Mike Silverman, James Styer, Thomas Neary and Jason Schiffman.

The file reveals that the Petition was properly advertised and the site was properly posted as required by the Baltimore County Zoning Regulations.

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 October 3, 2012, indicating development of this property must comply with the Forest Conservation Regulations (Sections 33-6-101 through 33-6-122 of the Baltimore County Code [B.C.C.]). A ZAC comment was also received from the Department of Planning (DOP) on October 22, 2012, indicating their support of the Petitioner's request. In addition, a ZAC comment was received from the Maryland Department of Transportation, State Highway Administration (SHA), indicating the applicant must contact SHA to obtain an entrance permit. Furthermore, a ZAC comment was received from the Bureau of Development Plans Review (DPR) on September 25, 2012, indicating that if the project was approved some landscaping would be required.

Testimony and evidence revealed that the subject property is 1.43 acres and is zoned DR 3.5. The property is improved with a restaurant known as "Matthew's 1600" and the Petitioner submitted a series of photos depicting the site and business. Petitioner's exhibits 5A-F. Lori Parsons, one of the property owners, testified as to the history of the site (which was constructed as a hotel in approximately 1862), and she stated that she has 35 plus years of experience in the restaurant business. In an effort to update the restaurant, the Petitioner proposed to construct a two-story addition with open air dining on the second level, as shown in the elevation drawings submitted. Petitioner's exhibits 4A-C.

NON- CONFORMING USE ISSUE

The subject property at 1600 Frederick Road has, since at least 1955, been residentially zoned. Even so, it is also the case that the property has since that time been used in a commercial fashion, whether as an Inn, Tavern and/or Restaurant business. As such, the subject property enjoys non- conforming use status, which was verified in a 1960 zoning case involving this property. See 1960-5114-SPH. Some of the neighbors in attendance argued that the current owners ceased operation of the restaurant for 2 +/- years when they acquired the property in 2004, which resulted in the abandonment of the non conforming use under Baltimore County Zoning Regulations (B.C.Z.R.) §104. I do not believe that is the case, given that while intent to abandon need not be shown in such matters, there must nonetheless be “active and actual” abandonment and discontinuance of that use. City of Baltimore v. Dembo, 123 Md. App. 527 (1998). Here, Ms. Parsons testified that the restaurant was completely renovated and upgraded in 2003-2004, and that was quite obviously done with an eye toward the resumption of the restaurant business, not its abandonment.

In many cases involving non- conforming uses, the parties dispute whether a development proposal under consideration would result in an extension or expansion of the use versus a “mere” intensification of the non -conforming use. Under Maryland law, the former is prohibited, while the latter is permitted. Trip Associates v. Baltimore City, 392 Md. 562 (2006). In this case, a “physical expansion” is proposed, and therefore it is obvious that an “extension” is at issue, as sought in the petition. Id. 582-83.

Whether a non -conforming use can be extended is governed by the applicable local zoning regulation, in this case B.C.Z.R. §104. Phillips v. Howard County, 225 Md. 102, 109 (1961). But such laws must be strictly construed, given that Maryland has a well established

policy against non-conforming uses, which are of course antithetical to the zoning plan. County Council v. Gardner, 293 Md. 259, 268 (1982).

Under the B.C.Z.R., the “ground floor” area of a non-conforming structure may be extended no more than 25%, and that is exactly what is proposed here. Architect Ronald Johnston, who was accepted as an expert, testified that the ground floor area of the current building was 6018 feet, and the addition proposed was 1459 sq. ft, which is almost an exact 25% increase proposed. As such, the addition proposed in this case would only be permissible if the structure has not since 1955 (when it was zoned residential) been extended on a previous occasion. But according to the 1960 zoning case involving this property, cited at the outset of this section, the owner at that time was granted permission to “enclose an existing porch” which the Deputy Zoning Commissioner deemed a “lawful extension of a non-conforming use in accordance with Section 104 of The Baltimore County Zoning Regulations.” See 1960-5114-SPH.

Although the Order in that case, as was common at the time, is extremely terse (one sentence in fact), the Petitioner submitted a site plan from that 1960 zoning case. See Petitioner’s Exhibit No. 9. Though the measurements on the plan are hard to read given the quality of the photocopy, it certainly appears as if the area in question (which the Architect labeled “existing open porch area”) was approximately 60 ft. by approximately 54 ft., which looks to be as large as the enclosed building to which it was appended. In fact, based on that site plan, dated September 30, 1960, it seems entirely possible that the extension permitted by the Deputy Zoning Commissioner at that time was in fact greater than the 25% permissible under the B.C.Z.R.

Be that as it may, it is clear that the non-conforming use at this property, which has existed since at least 1955, has been extended on at least one previous occasion, which means that the

current proposal for a 25% extension of the “floor area” of the structure cannot be permitted under the zoning regulations. Given this determination, it is unnecessary to address the modified parking plan sought in the petition as the second component of special hearing relief.

Pursuant to the advertisement, posting of the property, and public hearing, and after considering the testimony and evidence offered, I find that Petitioner’s Special Hearing request should be denied.

THEREFORE, IT IS ORDERED, this 5th day of December, 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:

- (1) The extension of the existing restaurant no more than 25% of the ground floor area of the building;
- (3) A modified parking plan; and
- (3) For such and further relief as may be deemed necessary by the Administrative Law Judge for Baltimore County,

be and is hereby **DENIED**.

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:slh