

IN RE: PETITIONS FOR SPECIAL HEARING,	*	BEFORE THE
SPECIAL EXCEPTION & VARIANCE	*	OFFICE OF
(2027 York Road)	*	ADMINISTRATIVE HEARINGS
8 th Election District	*	FOR BALTIMORE COUNTY
3 rd Councilmanic District	*	Case No. 2013-0171-SPHXA
Michael R. Mardiney, Jr., M.D.	*	
Legal Owner	*	
Tom Berhle, Entourage Development LLC	*	
Contract Purchaser/Lessee	*	

* * * * *

OPINION AND ORDER

This matter comes before the Office of Administrative Hearings (OAH) for Baltimore County for consideration of Petitions for Special Hearing, Special Exception and Variance filed by Jason T. Vettori, Esquire, on behalf of the legal owner, Michael R. Mardiney, Jr., M.D. and contract purchaser Entourage Development, LLC. The Petition for Special Hearing was filed pursuant to § 500.7 of the Baltimore County Zoning Regulations (“B.C.Z.R.”), seeking: **(1)** a use permit for the use of land in a residential zone for parking facilities to meet the requirements of Section 409.6 pursuant to Section 409.8.B of the BCZR, or in the alternative for confirmation that the proposed parking facility is authorized under the use permit approved in Case No. 1971-0269-SPH, and; **(2)** A modified parking plan pursuant to Section 409.12.B of the BCZR.

A Petition for Special Exception was filed pursuant to §230.3 of the B.C.Z.R., to permit: a drive-in restaurant.

Finally, a Petition for Variance was filed pursuant to the B.C.Z.R. as follows: **(1)** Section 1B01.1.B.1.e.(5) of the BCZR to permit a 0 ft. buffer and 0 ft. setback in lieu of the required 50 ft. buffer and 75 ft. setback in a Residential Transition Area

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 2.

Appearing at the public hearing in support of the requests was John Demos and Tom Berhle. Jason T. Vettori, Esquire, appeared as counsel and represented the Petitioner. Several members of the community attended the hearing and opposed the Petitions. 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 are made part of the record of this case.

SPECIAL HEARING

This is an unusual case. The Petition seeks several varieties of zoning relief, but upon a closer review of the plan, exhibits, and the BCZR, I do not believe that special exception or variance relief is required in the first instance. It is undisputed that the site has been vacant for 15+ years, and was last used as a Roy Rogers fast food restaurant. Such a use is permitted as of right in the BL zone, per BCZR §230.1. But the Petitioner, apparently at the urging of county staff, sought a special exception for a “drive in” restaurant, under BCZR §230.3. It appears that provision was added to the BCZR in 1967, and it is not at all clear that what is being proposed here would fall within the strictures of a “drive in,” a use category that is all but extinct in the modern era.

In addition, the BCZR defines a drive-in restaurant as one where food and drink is sold to a “**substantial**” extent to customers in parked cars. BCZR §101.1. Though the term is not defined in the BCZR, “substantial” is defined (for present purposes) in the Webster’s Third New International Dictionary as “to a large degree or in the main.” Here, Mr. Behrle testified that 58% of his patrons will use the drive through facility. Inside dining is also proposed. The petitioner testified the facility will have 14 drive-in stalls, a number that is much lower than at other Sonic

locations throughout the country. In these circumstances, I do not believe that the “drive in” portion of the restaurant would constitute a “large degree” or “main” portion of the enterprise, either in terms of square footage, customers served, or revenue generated. As such, I believe the use can be permitted as of right, and that special exception relief is not required.

Likewise, I do not believe that the RTA regulations are applicable in this case. Assuming for a moment they were, I do not believe the Petitioner presented a sufficient case for variance relief from those regulations. Indeed, Mr. Demos testified that the site was in fact not unique, but was similar to the other commercial zoned parcels in that vicinity of York Road. Upon further questioning by counsel, Mr. Demos grudgingly accepted that the split zoning might make the site unique, but upon cross examination by Mr. Zimmerman, the witness agreed that many sites in the area were also split zoned commercial and residential. So I do not think the testimony in this case would suffice to satisfy the rigorous burden set forth in Cromwell v. Ward and similar cases.

Further confusing matters, the BCZR provides a specific provision for “Variance of RTA,” which apparently “trumps” Section 307 of the Regulations and the cases (like Cromwell) which have interpreted that provision. BCZR §1B01.1.B.1.c. Under that specific provision, the RTA may be modified in a development plan hearing (not applicable here) or by the “hearing officer” upon the recommendation of a county agency, which also seems to suggest that the issue will arise in the context of a development plan or HOH, as opposed to a zoning case. In addition, section 307 itself provides that the Zoning Commissioner may grant variances from height, area, sign and parking regulations, but may not “grant any other variances.” These, and other, inconsistencies are what caused me in a recent case to describe the RTA regulations as “hard to decipher,” and I think describing them as cryptic might be charitable.

In any event, RTA regulations are designed to “assure that similar housing types are built adjacent to one another or that adequate buffers and screening are provided between dissimilar housing types.” BCZR §1B01.1.B.1.a. “An RTA is generated if the property to be developed is zoned D.R. and lies adjacent to land zoned [D.R.]” BCZR §1B01.1.B.1.b. (emphasis added). Here, the Petitioner does not propose to “develop” the D.R. zoned portion of the property. In fact, it is forbidden from doing so, given the residential zoning classification, a point discussed at greater length below. In light of the above, I do not believe that an RTA is generated in this case.

But in the end, none of this inures to the Petitioner’s benefit. According to the site plan, a portion of the drive through facility and two commercial dumpsters within an enclosure will be located within the D.R. zone. In my opinion, this is using residential property for commercial purposes, which is not permitted under the BCZR. While the regulations allow for commercial parking in a residential zone, and the Petitioner has sought such relief, much more than parking is proposed here. As such, I believe the Petition and plan must be denied.

In Leimbach Constr. Co. v. City of Baltimore, 257 Md. 635 (1970), the plaintiff owned two parcels of land, zoned commercial, on which it hoped to construct new facilities for its general contracting business. The parcels were essentially landlocked, since a bridge that formerly accessed the parcels had fallen down many years prior. Id. at 636. The plaintiff therefore sought to acquire a third parcel of land, zoned residential, on which would be constructed a driveway and culvert to access the aforementioned commercial parcels. Id. at 637. The court of appeals (affirming the trial court) held that “the use [plaintiff] proposes to make of the driveway would be a ‘business’ use of land in a residential use district.” Id. at 640. Likewise, in this case, the use Petitioner proposes to make of the D.R. zoned parcel would constitute a business use of the land. As Mr. Behrle testified, the drive through portion of the restaurant

accounts for 58% of the customers, and the dumpsters will be emptied on a daily basis. These are not trivial matters, but are in fact vital and integral portions of the proposed operations, which are prohibited in the D.R. zone.

THEREFORE, IT IS ORDERED this 22nd day of March, 2013, by this Administrative Law Judge, that Petitioner's request for Special Hearing filed pursuant to § 500.7

of the Baltimore County Zoning Regulations ("B.C.Z.R."), seeking: (1) a use permit for the use of land in a residential zone for parking facilities to meet the requirements of Section 409.6 pursuant to Section 409.8.B of the BCZR, or in the alternative for confirmation that the proposed parking facility is authorized under the use permit approved in Case No. 1971-0269-SPH, and; (2) A modified parking plan pursuant to Section 409.12.B of the BCZR, be and is hereby DENIED.

IT IS FURTHER ORDERED that Petitioner's request for Special Exception filed pursuant to §230.3 of the B.C.Z.R., to permit a drive-in restaurant, be and is hereby DENIED.

IT IS FURTHER ORDERED that Petitioner's request for Variance relief: (1) 1B01.1.B.1.e.(5) of the BCZR to permit a 0 ft. buffer and 0 ft. setback in lieu of the required 50 ft. and 75 ft. setback in a Residential Transition Area, be and is hereby DENIED.

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

JEB/sln

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