

IN THE MATTER OF
RAINBOW HALL, LLC – Legal Owner/Respondent
10729 Park Heights Avenue
Baltimore, MD 21117

RE: Petition for Special Hearing to Determine the
Uses of the Property pursuant to BCZR 500.7

* BEFORE THE
* BOARD OF APPEALS
* FOR
* BALTIMORE COUNTY
* Case No. 10-280-SPH

* * * * *

OPINION

This case comes to the Board on appeal of the final decision of the Zoning Commissioner of Baltimore County in which the Zoning Commissioner granted the Petitioner, Valleys Planning Council, Inc.’s, request for Special Hearing pursuant to Baltimore County Zoning Regulations (“B.C.Z.R.”) §500.7, and found that the Rainbow Hall main house could not be used as a “multi-family building” or “boarding house” under B.C.Z.R., but that the two (2) ranchers and the older cottage were non-conforming uses and may be used as single family homes.

Dissatisfied with that decision, both Parties noted appeals to this Board. A public hearing was held on multiple days: November 2, 3, and 4, 2011. The Petitioner, Valleys Planning Council (“VPC”), was represented by Michael McCann, Esquire. The Respondent, Rainbow Hall, L.L.C. (“Rainbow Hall, L.L.C.”) was represented by Michael T. Wyatt, Esquire and Michael L. Snyder, Esquire. A public deliberation was held on January 19, 2012.

Facts and Evidence

The subject property is a 19 acre parcel located at 10709 Park Heights Avenue in the Stevenson/Greenspring Valley area of Baltimore County (the “Property”). The zoning for the Property is RC2. The main house on the Property was built in approximately 1917 and was occupied by General Douglas MacArthur and his family during the 1920s. It was named “Rainbow Hill Estate” in honor of General MacArthur’s Rainbow Division of World War I. A historical feature on the Property is a Ming tree given to General MacArthur by Japanese Emperor Hirohito in 1926. (Pet. Ex. 4).

Also located on the Property are a small cottage built in 1898 located at 10709 Park Heights Avenue (the “cottage”) as well as two (2) single family homes built in the 1970s (10731 and 10733 Park Heights Avenue) (the “ranchers”).

In the 1940s, the Property was sold to Henry and Ruth Rosenberg who occupied the Property as their home until 1963, when they sold it to the Baptist Home of Maryland (the “Baptist Home”). (Pet. Ex. 25). The Property was renamed “Rainbow Hall.” It was purchased to “give improved facilities to a greater number of aged persons.” *Id.* The Baptist Home operated the Property until 2001 when it discontinued its operation.

The Property has a long zoning history which was reflected within the Opinion of the Zoning Commissioner at p.3 entitled “Zoning Chronology.” The Zoning Chronology was admitted into evidence as Petitioner’s Ex. 30. That exhibits shows that beginning on November 26, 1963, the Baptist Home received a special exception for a “boarding house for the aged (40 units/persons).” The zoning in 1963 was R-40. The Order, signed by Zoning Commissioner John G. Rose, granted the special exception as follows:

...that a special exception for a boarding house for the Aged, should be and the same is hereby granted, from and after the date of this Order, subject, however, to compliance with the following restrictions:

1. That the use of the property described in the petition shall be limited to a religious, non-profit home for the aged of the Baptist denomination.

2. That the property described in the petition shall not be operated either as a nursing home or as a home for the chronically ill or as a hospital, provided, however, that a portion of the main building presently located on the property described in the petition may be used as an infirmary for the temporary treatment of aged guests.

(Pet. Ex. 31).

The 1963 BCZR defined a "Boarding House" as:

A building other than a hotel in which meals or rooms and meals are provided for compensation for four or more persons, including a "care home,"

(Pet. Ex. 32). Conversely, an apartment house was defined in 1963 as a separate use:

A building used and/or arranged for rental occupancy, or cooperatively owned by its occupants, having three or more family units, and with a yard, compound, service or utilities in common.

Id. Separate from those uses, a "Convalescent Home" was defined as including:

"...rest homes, nursing homes, convalescent homes for children and homes providing chronic and convalescent care.....

Id.

In 1969, the Baptist Home obtained an approval to build an addition to accommodate 24 additional persons/units. The addition was known as the “McCormick Wing.” That year, the zoning was still R-40.

In 1975, the Baptist Home sought to obtain approval to build an infirmary wing to accommodate 25 people. (Pet. Ex. 33). Filed with that Petition was a Plat which lists the use of the main building as “a Boarding House For The Aged (64 beds).” (Pet Ex. 34). That plat also verifies that the 2 single family ranchers and the cottage existed as of 1975. In reviewing the 1975 Petition, the Zoning Plans Advisory Committee described the Property as:

The property is currently improved with a large masonry administration and boarding house for the aged, containing 64 beds, five dwellings, housing the administrators and employees of the home, and maintenance building in the rear, with the remainder of the property wooded unimproved land.

(Pet. Ex. 35). As of 1975, the zoning had changed to from R-40 to RDP. The request to build the infirmary wing was granted with restrictions. (Pet. Ex. 33).

In 1976, the zoning for the property was reclassified from RDP to RC2 and RC5 during the Comprehensive Zoning Map Process (“CZMP”). Between 1988 and 1990, the zoning for the Property was reclassified again during an Out-of Cycle Rezoning or Map Correction such that a portion of the Property zoned RC2, was changed to RC3. (See Plat attached to Pet. Ex. 36 for boundaries of RC2 and RC3 zones). RC3 zoning permitted convalescent homes by special exception.

In 1988, the Baptist Home entered into a Restrictive Covenant Agreement with VPC (the "Restrictive Covenant"). The testimony before this Board was that the VPC agreed to support the zoning change from RC2 to RC3 in exchange for the Baptist Home agreeing to limit the use of the Property to a convalescent home as contained in the Restrictive Covenant Agreement. (Resp. Ex. 1).

In 1991, the Baptist Home filed a Petition for Special Exception for an addition to the convalescent home as a use permitted by special exception in an RC3 zone and to construct two (2) additions to the existing facility. On October 16, 1991, this Board granted the Petition for Special Hearing to approve an amendment to the special exception and site plan previously granted in *Case No.: 63-152-X* (i.e. the "1963 Boarding House for the Aged Special Exception"), to construct two additions to the existing facility. (Pet. Ex. 36). Ultimately, these additions were never constructed.

This Board, in its 1991 decision noted that the use formerly identified as a "convalescent home" had been deleted from the BCZR and replaced with a "nursing home" definition. This Board found that the Baptist Home operation was indeed a "nursing home."

The Plat which accompanied the 1991 Petition shows the two (2) ranchers and cottage. It indicates that one (1) of the ranchers was occupied by "Resident Directors" and that the other rancher was "vacant." The cottage was occupied by "staff." The use of the main building was described on the plat as :

Convalescent Home
55 Living Units
12 Bed Infirmary

Kitchen & Dining
Administrative Office

In 1997, Zoning Commissioner Lawrence E. Schmidt granted a request by the Baptist Home for a five (5) lot development plan approval for three additional single family dwellings. Commissioner Schmidt noted in his opinion that Rainbow Hall had been granted the special exception for a 40-unit boarding home for the aged in 1963 and that the “elderly home” had existed on the property since that approval. (Pet. Ex. 38). At the time of that hearing, an administrator for the Baptist Home testified that Rainbow Hall was licensed to provide care for up to “64 elderly residents” although the actual population at the time was 49. The testimony was that the “average age of the residents was 89 years.” *Id.*

Commissioner Schmidt found that, while the building was downzoned from R.C.3 to R.C. 2 in 1976, and RC2 prohibited an “elderly boarding house” either by right or by special exception, the use continued as a non-conforming use under BCZR, §104. *Id.* Thus, he concluded that the “elderly boarding house” became non-conforming in 1976. *Id.*

Commissioner Schmidt also found that when the zoning changed again in 1988 and the portion of the property containing the main house was contained within the RC3 zone, the operation of the elderly home was “legitimized” because RC3 zones permit convalescent homes by special exception. *Id.*

Due to financial difficulties, the Baptist Home ceased operations in February of 2001. The testimony before this Board by Sheldon Scott Lewis, former director of

environmental services for the Baptist Home, was that, by the end of February of 2001, all the residents had been moved out of the Property. From March of 2001 through April of 2002, Mr. Lewis was paid to serve as the caretaker of the main house where he resided on the first floor. He testified that he did not pay rent to live at the Property. He testified that he was the only person living in the main house during that period. He also clarified that the cottage and 1 of the ranchers were being rented to people not associated with the Baptist Home.

On December 24, 2001, Henry Wright, Jr. entered into a Contract of Sale to purchase Rainbow Hall for the purchase price of \$1,500,000.00. (Pet. Ex. 2). On March 13, 2002, Mr. Wright formed Rainbow Hall, L.L.C. as the entity which would own the Property. (Pet Ex. 1). In March of 2002, the Property was listed on the County's Final Landmarks List of Historic Places. (Pet. Ex. 4). The closing occurred on April 10, 2002, and Rainbow Hall, L.L.C. became the owner.

In 2002, the main house was renovated by decorators involved with Decorators Showhouse. An event for this organization was held between August 25 through September 21, 2002. (Pet. Ex. 4). During the renovation, the units previously occupied by the elderly were dismantled, including the removal of walls, bathrooms, handrails, and converted into individual apartments. Items used in the hospital infirmary such as IV poles, wheelchairs, hospital beds, crutches and chair lifts were removed from the Property.

Other events held at Rainbow Hall after April 2002 and through October of 2010 were on behalf of the Maryland Historical Society benefit; Baltimore Symphony Bazaar;

Baltimore Opera Company; Liza Byrd Gift Boutique (Pet. Ex. 5, 6). The Jemicy School; Ladew Gardens; a garden club; weddings; church services; a Bar Mitzvah (Pet. Ex. 15A, 15B and 15C and 16); as an overflow parking lot for events at other locations; and for an event to support University of Maryland Shock Trauma. (Pet. Ex. 9).

Beginning in 2002, VPC began corresponding with Mr. Wright in regard to the uses that were legally permitted at the Property. Copies of the Restrictive Covenant and BCZR were provided to him. VPC and surrounding community associations voiced their opposition to the uses at the Property which they deemed to be “commercial” and inconsistent with uses permitted in the RC2 zone. (Pet. Ex. 20, 22, 23, 24).

In 2004, Rainbow Hall, L.L.C. petitioned the County Council to rezone the Property in order that the commercial uses would be legal. However, during the CZMP that year, the portion of the Property containing the main house and 3 single family homes was downzoned again from RC3 to RC2 by the County Council.

Notwithstanding the downzoning, it was in 2004 that Mr. Wright began renting 3 of the apartments he had created in the main house. By 2005, he had rented 6 of the apartments. By 2006, he had all 7 apartments rented along with the rental of the “hall” inside the main house by the Church of the Resurrection for Church Services. He received monthly income for the rentals as set forth in Petitioner’s Ex. 48. In addition to renting the main house, Mr. Wright rented the 2 ranchers and cottage.

On March 4, 2009, Rainbow Hall, L.L.C. was issued a Correction Notice from Baltimore County Code Inspections and Enforcement which informed Mr. Wright that he needed to obtain a permit to have a “For Rent” sign, or, remove the sign. (Pet. Ex. 7). The

following day, a second citation was issued for “Illegal conversion of dwelling” and “non-permitted apartment use in RC2 zone”. (Pet. Ex. 8). The citation required Rainbow Hall, L.L.C. to cease and desist the apartment use, to seek a special exception hearing for a non-conforming use as apartment, if applicable, and to obtain proper permits, if applicable.

Prior to the Zoning Commissioner’s hearing in October of 2010, the Office of Planning provided it’s analysis regarding VPC’s request for special hearing. The Office of Planning noted that the original special exception in 1963 provided for a non-profit, Baptist affiliated, age restricted, boarding house limited to 40 residents. The use became non-conforming after the 1976 CZMP when the Property was rezoned to RC2. In 1988, when the Property was rezoned during the CZMP to RC3, a convalescent home was a permitted use by special exception. (Pet. Ex. 50).

The Office of Planning concluded that rental apartments and multi-family dwellings are not listed in BCZR, §1A01.2 as permitted uses by right or by special exception in the RC2 zone. Further, the Office of Planning advised that neither the rental of apartments nor multi-family dwellings are non-conforming uses on the Property. Further, the prior hearings did not grant the right to use the Property for either apartment rentals or for a multi-family dwelling. Moreover, the special exception for the convalescent home was abandoned and discontinued when the Baptist Home sold the property in April of 2002. In summary, the use of the main building for apartments is a zoning violation. (Pet. Ex. 50).

Mr. Wright, Mr. Scott Lewis, and Beverly Pearce, the Property manager for Mr. Wright's rental properties testified as adverse witnesses on behalf of VPC. Other witnesses called by the VPC were Harlan Zinn, 10628 Park Heights Ave., Owings Mills, MD 21117; Mark Wilson, 10705 Park Heights Ave., Owings Mills, MD 21117; Kathleen Pontone, Esquire, Vice President of VPC, 2522 Caves Road, Owings Mills, MD 21117; Theresa Moore, Executive Director of VPC; James Patton, PE, Patton Consulting; and Theodore Hauck, MD, the former Medical Director of the Baptist Home.

Testifying for Rainbow Hall, L.L.C. were Henry Wright; Jean Lubke, Operations Manager for Mr. Wright's rental properties and tenant of the cottage; John Nearhood, the tenant of Apt. C1 in the main house; and David Thaler, PE, DS Thaler & Associates.

The Law

BCZR §500.7 provides that a special hearing will be held for any interested person to petition the Zoning Commissioner to determine the existence of any purported nonconforming use on any premises or to determine any rights whatsoever of such person in any property:

Section 500.7 - Petitions for public hearing; notice.

The said Zoning Commissioner shall have the power to conduct such other hearings and pass such orders thereon as shall, in his discretion, be necessary for the proper enforcement of all zoning regulations, subject to the right of appeal to the County Board of Appeals as hereinafter provided. The power given hereunder shall include the right of any interested person to petition the Zoning Commissioner for a public hearing after advertisement and notice to determine the existence of any purported nonconforming use on any premises or to determine any rights whatsoever of

such person in any property in Baltimore County insofar as they are affected by these regulations.

BCZR, §101.1 defines a “nonconforming use” as:

Nonconforming Use

A legal use that does not conform to a use regulation for the zone in which it is located or to a special regulation applicable to such a use. A specifically named use described by the adjective "nonconforming" is a nonconforming use.

BCZR, §104.1 provides how a nonconforming use can expire:

Continuation of nonconformance: exceptions.

A nonconforming use (as defined in Section 101) may continue except as otherwise specifically provided in these regulations, provided that upon any change from such nonconforming use to any other use whatsoever, or any abandonment or discontinuance of such nonconforming use for a period of one year or more, the right to continue or resume such nonconforming use shall terminate.

A “boarding house” is separately defined in BCZR, §101.1 as:

BOARDING- OR ROOMING HOUSE

[Bill Nos. 44-1982; 124-1993; 86-2001; 102-2001; 137-2004; 17-2009]

A. A building:

1. Which is the domicile of the owner and in which rooms with or without meals are provided, for compensation, to three or more individuals who are 18 years old or older and not related by blood, marriage or adoption to the owner; or
2. Which is not the owner's domicile and which is occupied in its entirety, for compensation, by three or more individuals who are 18 years old or older and not related to each other by blood, marriage or adoption.

A nursing home (formerly called a “convalescent home”) is separately defined in BCZR, §101.1 as:

NURSING HOME (formerly "convalescent home")

A facility which provides board, shelter and nursing care to chronic or convalescent patients. This term also includes facilities which provide domiciliary care within a nursing home.

[Bill No. 37-1988]

The reasons for the creation of the RC2 zone are found in BCZR §1A01.1:

Section 1A01.1.

General provisions.

A. Legislative statement of findings.

1. Declaration of findings. It is found:

a. That Baltimore County is fortunate in that it is endowed with a variety of very productive agricultural soil types which should not be lost unnecessarily to urbanized development;

b. That the agricultural industry is an integral part of the Baltimore economy and that a continued conversion of agricultural land will continue to undermine this basic industry;

c. That scattered development is occurring in a sporadic fashion in areas of Baltimore County containing productive agricultural land;

d. That continued urban intrusion into productive agricultural areas not only destroys the specific area upon which the development occurs but is incompatible with the agricultural use of the surrounding area;

e. That heretofore Baltimore County has been unable to effectively stem the tide of new residential subdivisions in productive agricultural areas of Baltimore County;

f. That Baltimore County has certain wetlands along Chesapeake Bay and its tributaries which

serve as breeding grounds and nursery areas for the bay's biotic life; and

g. That Baltimore County possesses numerous areas which are highly suitable for urban development, including residential subdivisions which are not located in areas of productive agricultural land.

The uses permitted as of right in RC2 zone are found in BCZR, §1A01.2B.¹ The uses permitted by special exception in an RC2 zone are contained within BCZR, §1A01.2.C.²

¹ BCZR, §1A01.2B lists the uses permitted as of right in the RC2 zone.

1. Dwellings, one-family detached.
2. Farms and limited acreage wholesale flower farms
3. Open space, common.
4. Public schools.
5. Streets and ways.
6. Telephone, telegraph, electrical-power or other lines or cables, provided that any such line or cable is underground; underground gas, water or sewer mains or storm drains; or other underground conduits, except interstate or international pipelines.
7. Trailers, provided that any trailer allowed under this provision must be used or stored in accordance with the provisions of Subsection B, C, E or F of Section 415.1 and Section 415.2.A.1 or 415.3.C.1, as applicable.
8. Antennas used by CATV systems operated by companies franchised under Article 25 of the Baltimore County Code, if situated on property owned by the county, state or federal government or by a governmental agency.
9. Accessory uses or structures, including, but not limited to, the following:
 - a. Excavations, uncontrolled.
 - b. Farmer's roadside stand and produce stand, subject to the provisions of Section 404.4.
 - c. Home occupations (see Section 101).
 - d. Offices or studios of physicians, dentists, lawyers, architects, engineers, artists, musicians or other professional persons, provided that any such office or studio is established within the same building as that serving as the professional person's primary residence at the time of application; does not occupy more than 25% of the total floor area of that residence; and does not involve the employment of more than one nonresident employee.
 - e. Parking space, including residential-garage space and space for recreational vehicle (Section 415A).
 - f. Piers, wharves, docks and bulkheads, subject to the provisions of Section 417.
 - g. Radio operator antennas, subject to Section 426A.
 - h. Swimming pools, tennis courts, garages, utility sheds, satellite receiving dishes (subject to Section 429) or other accessory structures or uses (subject to the height and area provisions for buildings as set forth in Section 400).
 - i. Tenant houses, including trailers used as tenant houses.
 - j. Rubble landfills, provided that the actual fill area does not exceed 3% of the total contiguous acreage of the property in the same ownership and subject to the provisions of Section 412.7 only.
 - k. Signs, subject to Section 450.
10. Commercial film production, subject to Section 435.
11. Transit facilities.
12. Equestrian centers, provided that any such equestrian center has access to two roads, one of which is a road having, within two miles from the equestrian center, an interchange with an interstate expressway; contains no permanent grandstand; and contains no lights other than those consistent with farm use. Temporary structures, such as removable tents, viewing stands and seating, are permitted, provided that they are removed within a reasonable time following the event or events which they serve.

13. Farmstead creamery, subject to the provisions of Section 404.13.

14. Domestic animal sanctuary, if located on or within property that is greater than 7.5 acres in size.

² The following uses, only, may be permitted by special exception in any R.C.2 Zone, provided that in each case the hearing authority empowered to hear the petition finds that the use would not be detrimental to the primary agricultural uses in its vicinity; and, in the case of any use permitted under Item 29, further provided that the hearing authority finds that the use would support the primary agricultural use in its vicinity and would not itself be situated on land more appropriately used for primary agricultural uses:

1. Airports.
2. Animal boarding places (regardless of class), commercial kennels, private kennels, veterinarians' offices or veterinarians (see Section 421).
3. Antique shops (see Section 402B).
4. Camps, including day camps.
5. Community care centers provided that no residential community care center, i.e., a center which serves as the residence of the persons for whom care is provided, shall provide care for more than 15 persons per site, and no day community care center shall provide care for more than 15 persons per acre nor more than 75 persons per site.
6. Churches or other buildings for religious worship.
7. Excavations, controlled.
8. Farm market, subject to the provisions of Section 404.4.
9. Fishing and shellfishing facilities, Class I and II.
10. Golf courses or country clubs.
11. Home occupations of disabled persons, where the use is established in a structure originally constructed as a dwelling or as accessory to a dwelling or where the use is established in a structure that is situated on the same lot as a dwelling and which the Zoning Commissioner finds to be compatible with its surrounding neighborhood, provided that:
 - a. Only three persons, including the disabled person and the members of his immediate family who are residents of the dwelling, are employed in the use on the premises; and
 - b. In any case the use is conducted by a disabled person whose domicile is the dwelling to which the use is accessory and whom the hearing authority finds is so severely disabled as to be unable to engage in his occupation away from the premises of his home.
 - (1) Five years after the issuance of the permit;
 - (2) The death of a disabled person;
 - (3) The termination of the disability; or
 - (4) The failure of the disabled person to permanently reside at the premises.
12. Horticultural nurseries, subject to the provisions of Sections 404.1 and 404.2.
13. Hunting or fishing preserves.
14. Landscape service operations, subject to the provisions of Sections 404.1 and 404.3.
15. Offices for agriculture-related uses.
16. Offices or studios of physicians, dentists, lawyers, architects, engineers, artists, musicians or other professional persons as an accessory use, provided that any such office or studio is established within the same building as that serving as the professional person's primary residence at the time of application; does not occupy more than 25% of the total floor area of that residence; and does not involve the employment of more than one nonresident professional associate nor two other nonresident employees.
17. Public utility uses not permitted as of right.
18. Rail passenger station, subject to Section 434.
19. Residential art salons (see Section 402C).
20. Standard restaurants or tearooms converted from dwellings (Section 402.2).
21. Riding stables.

Decision

After reviewing all of the testimony and evidence presented, the Board has determined that Rainbow Hall Inc.'s use of the main house as apartments and/or multi-residential living is a zoning violation. However, the Board also finds that the rental of the cottage and 2 ranchers for single family dwellings are non-conforming uses.

Rainbow Hall, L.L.C. raised seven (7) issues in its Brief filed with this Board:

1. BCZR, § 500.7 does not authorize the Zoning Commissioner or County Board of Appeals to conduct a private party code enforcement action.

22. Sanitary landfills, or rubble landfills in which the actual fill area exceeds 3% of the total contiguous acreage of the property in the same ownership. However, the fill area of a rubble landfill may not exceed 7% of the total contiguous acreage, nor may the fill area exceed a depth of 20 feet unless the Zoning Commissioner specifically finds that the landfill should be exempt from the depth limitation (see Section 412).

23. Schools, including schools for agricultural training, private preparatory schools, business or trade schools, conservatories or colleges.

24. Shooting ranges, including archery, pistol, skeet, trap or small-bore rifle ranges, or turkey shoots.

25. Sludge disposal facility — landspreading (Section 412A.2.E).

26. Trailers, as provided in Section 415.1.D.

27. Volunteer fire company or ambulance-rescue facilities.

28. Wireless telecommunications towers, subject to Section 426.

29. The following "agricultural-support" uses as principal commercial uses:

a. Farm-machinery sales, storage or service; blacksmithing.

b. Feed or grain mills or driers.

c. Fertilizer sales or storage.

d. Sawmills.

e. Slaughterhouses or manufacture, processing or packing of fruit, vegetables, animal or meat products, or by-products.

f. Spirits manufacture, including the manufacture of alcohol to be used in gasoline/alcohol mixtures, but excluding the production of these mixtures.

g. Firewood operations.

h. Winery, including accessory retail and wholesale distribution of wine produced on-premises. Temporary promotional events, such as wine tastings or public gatherings associated with the winery, are permitted, within any limits set by the special exception.

i. Bottled water plant, if the source of the water is located on the same site as the plant, and provided that the Director of Environmental Protection and Sustainability makes a recommendation that the proposed facility will not adversely affect the quality or capacity of surface water or groundwater.

As set forth above, §500.7 permits any “interested person” to determine the existence of any purported nonconforming use on any premises or to determine any rights regarding any property in Baltimore County. The Board finds that §500.7 is not ambiguous and permits VPC to bring this action. In *Sugarloaf Citizens Ass’n v. Northeast Maryland Waste Disposal Auth.*, 323 Md. 641, 650 (1991), the Court of Appeals said:

As we have often stated, “[w]here there exists a party having standing to bring an action ... we shall not ordinarily inquire as to whether another party on the same side also has standing.” *Board v. Haberlin*, 320 Md. 399, 404, 578 A.2d 215, 217 (1990). *See also State v. Burning Tree Club, Inc.*, 315 Md. 254, 291, 554 A.2d 366, 385, *cert. denied*, 493 U.S. 816, 110 S.Ct. 66, 107 L.Ed.2d 33 (1989); *Montgomery County v. Board of Elections*, 311 Md. 512, 516 n. 3, 536 A.2d 641, 643 n. 3 (1988); *State's Atty. v. City of Balto.*, 274 Md. 597, 602, 337 A.2d 92, 96 (1975).

Section 500.7 has a lower threshold for standing of a party in that it does not require that a party be “aggrieved” but only “interested.” Accordingly, the Petition will not be dismissed on these grounds.

2. The Petition and Plat upon which it is based must be dismissed because of numerous inaccuracies and an inherent lack of reliability as determined at the hearing in this matter.

The Board appreciates that there were errors and inaccuracies in the Plat and even in the redlined plat prepared by James Patton, PE. on behalf of VPC. However, the Board does not find that any of these errors or inaccuracies were significant. There was no prejudice shown to Rainbow Hall, LLC that any of the errors or inaccuracies

prevented it from identifying the Property or the applicable zoning. The Board finds that the errors did not deprive Rainbow Hall of due process in that it was represented by counsel before the Zoning Commissioner and before this Board and by David Thaler, PE who discussed the zoning history and attributes of the Property at the Board hearing. Rainbow Hall had the opportunity to participate in the 3 day hearing, to present evidence and to rebut adverse evidence. *Boehm v. Anne Arundel County*, 54 Md. 497 (1983). Therefore, the Petition will not be dismissed on these grounds.

3. Rainbow Hall's multi-residential uses at the Property represent a valid continuation of prior special exception approvals.

The position of Rainbow Hall, L.L.C. is that its use of the main house for apartments and/or as a multi-residential dwelling is the same as a "boarding house" use for which a special exception was granted in 1963. Indeed, Rainbow Hall, L.L.C. argues that the "boarding house use" today is less intensified than the prior use by the Baptist Home which had the capacity for 89 residents and staff coming to and from the Property. This Board disagrees that the apartment use today is the same as the "boarding home for the aged".

The zoning history clarified that the special exception originally granted in 1963 was restricted to: "a religious, non-profit home for the aged of the Baptist denomination". (Pet. Ex. 31). The 1963 Order prohibited the use of the Baptist Home as a nursing home or as a home for the chronically ill or as a hospital. *Id.* In the 1963 BCZR, the term "nursing home" was included within the definition of "convalescent home" but "apartment and "boarding house" were defined separately. As a result, this Board

concludes that if the Zoning Commissioner in 1963 intended to grant a special exception for a “boarding house,” he would not have restricted it to a “Boarding House for the Aged.”

Said another way, the zoning history makes clear that there was never a special exception granted for non-elderly residents to live at the Property in a manner that fits the current BCZR definition of “boarding house.” The evidence produced before this Board confirms that the Baptist Home never used the main house as apartments for non-elderly tenants. The use of the main house during the Baptist Home operation was consistently for elderly people in a nursing home style setting.

This Board finds significant our Order dated October 16, 1991, wherein we said that the use of the property was found to be “somewhere between that of a nursing home and a convalescent home.” (Pet. Ex. 36; Resp. Ex. 9). Testimony presented to this Board in 1991 was that the Baptist Home had operated as “a retirement facility since 1915 and that it is available to persons over 65 years of age to receive care.” *Id.* After hearing the evidence in that case, we said that the Baptist Home was “nursing home”:

Taking into consideration the use of the property as testified to be Reverend Fowler and the expert testimony of Mr. Gavrelis, we are persuaded that the present use of the property clearly meets the previous definition of the BCZR as to “convalescent home.” In 1988, the definition of “convalescent home” was simply replaced with the “nursing home” definition. That definition reads as follows:

Nursing Home: (Formerly Convalescent Home): A facility which provides board, shelter and nursing care to chronic or convalescent patients. This term also includes

facilities which provide domiciliary care within a nursing home. [Bill No. 37, 1989].

For reasons unknown to this Board, the convalescent home definition was simply replaced with the nursing home definition. Mr. Gavrelis, on cross-examination, testified that in his opinion the definitions were interchangeable. The Board agrees with Mr. Gavrelis. Having met the requirements of Section 502.1 of the BCZR and having found that the present use on the property meets the definition of a convalescent home, the Board finds that the Petitions should be granted and that certain restrictions should be imposed.

Id.

This Board is not persuaded by Rainbow Hall's argument that the approval for the "boarding house" in 1963 survived *separately from, and exists in addition to,* an approval for a "nursing home". That argument is contrary to this Board's 1991 decision and the zoning history. It is clear from the zoning history, and this Board finds that, the "boarding house for the aged" use became a "convalescent home", which ultimately became the "nursing home". Thus, there are not 3 separate approvals but 1 approval which served to benefit elderly residents.

Even if this Board agreed with Rainbow Hall, L.L.C. that a special exception exists today for a "boarding house" (which this Board does not find) the evidence was insufficient to prove that either the main house was the "domicile" of Rainbow Hall, L.L.C. or that the tenants occupied the entire main house. The evidence was that Rainbow Hall, LLC was "domiciled" in the main house based on a photograph of Jean Lubke's laptop sitting on a table in a room in the main house. (Resp. Exh. 8U). Yet, the address for Rainbow Hall, L.L.C. is 4840 Benson Avenue. In addition, the evidence

offered to prove that the tenants occupied the entire main house was lacking in that it consisted of Mr. Wright's testimony that he allows the tenants in the main house to use a pool table and the main kitchen.

This Board also notes the existence of the Restrictive Covenant in place when Rainbow Hall, L.L.C. purchased the Property in 2002. (Resp. Exh. 1). It was recorded in the Land Records of Baltimore County at Liber 8039, page 123. That document was notice to Mr. Wright that the operation of the convalescent home by the Baptist Home was a nonconforming use in 1988. It also informed him that the VPC entered into the Restrictive Covenant to place restrictions on the Property so that future use would not adversely affect the area. In the Restrictive Covenant, the Baptist Home bound its successors and assigns, (including Rainbow Hall, L.L.C.), to the terms contained therein such that any Petition filed to rezone the Property would be limited to seeking permission for a "nonprofit or eleemosynary convalescent or nursing home..." *Id.*

The Restrictive Covenant further explained to Rainbow Hall, L.L.C. that because Rainbow Hall, L.L.C. is not "a nonprofit entity operating a convalescent or nursing home", the only use for the Property would be those uses enumerated in the BCZR for RC2 zones. *Id.*

4. Rainbow Hall, L.L.C. claims that, in the alternative, the multi-residential use at the Property is permissible as a valid non-conforming use.

Rainbow Hall, L.L.C. defends that, in the alternative, if this Board finds that there is no special exception for its apartments/multi-residential use, then the apartments/multi-residential use or boarding house is a valid non-conforming use as a "boarding house".

In order to find that Rainbow Hall, LLC has a nonconforming use for a “boarding house”, this Board would have to find that the type of operation conducted by the Baptist Home (i.e. a boarding home for the aged/convalescent home/nursing home) is the same as renting individual apartments, complete with kitchens and bathrooms to non-elderly tenants such that the use should continue. The Board finds that, based on the testimony of the witnesses and documents in evidence, the current use is not same as the Baptist Home use. Having found above that the Property has never been used as apartments or for multi-residential use by the Baptist Home, and because such uses are not legal within the RC2 zone, the current use as apartments or for multi-residential, is not a nonconforming use.

In *Arundel Corp. v. Board of Zoning Appeals of Howard County*, 255 Md. 78 (1969), the Court of Appeals held that the use of the subject property as a quarry could not be regarded as a valid nonconforming use, although existing at the time of the adoption of a new comprehensive zoning, where such use prior to the adoption of the comprehensive zoning regulations was neither a permitted use nor a valid nonconforming use.

The fact that Rainbow Hall, LLC has 7 tenants living in the main house whereas the Baptist Home had the capacity for 89 residents, does not change what the law provides for in the RC2 zone. As set forth above, the permitted uses and uses permitted by special exception in the RC2 zone do not allow for apartments, multi-family or multi-residential uses. The purpose of the RC2 is to protect the agricultural nature of the area against these type of uses. The Zoning Citations issued to Mr. Wright and Rainbow Hall,

L.L.C. were notice that these uses were not legal. (Pet. Ex. 7 and 8). The citations recommended that Mr. Wright file a Petition for Special Exception and/or for non-conforming use status. When no Petition was filed by Rainbow Hall, L.L.C. or Mr. Wright, the VPC requested this relief. This Board also recognizes that previous zoning complaints were filed with Baltimore County regarding the use by Rainbow Hall, LLC but for reasons unknown to this Board, such complaints were dismissed by the County. (Resp. Ex. 9).

5. Rainbow Hall, L.L.C. further contends that granting the relief sought by the VPC would not be a proper exercise of zoning administration because it would deprive the owner of all economically viable uses of the Property.

Rainbow Hall, L.L.C. contends that a decision by this Board to grant the relief requested by VPC would constitute a 'taking' of Property.

This Board is charged with applying the zoning law to the facts of the case. Mr. Wright, the sole owner of Rainbow Hall, LLC is an experienced purchaser of historic properties as his testimony reflected. He knew or should have known that the uses that he desired for the Property were not permitted in the RC2 zone. He knew or should have known about the Restrictive Covenant which affected title to the Property. Indeed, he must have known because he requested a change in zoning which was denied by the County Council.

The Property is not 'wholly useless.'" *Pennsylvania Coal Co. v. Mahon*, 260 Md. 393 (1922). To the contrary, the main house can still be used as a single family residence or for any of the enumerated uses set forth in BCZR *supra*. Rainbow Hall, L.L.C. can apply for a special exception for the uses set forth in BCZR *supra*. While such permitted

uses may not yield the amount of income that Mr. Wright desires, it does not amount to a 'taking' of Property under *Lucas v. South Carolina*, 505 US 1003 (1992) as cited by Rainbow Hall, L.L.C. Suitability and feasibility are not criteria for establishing confiscation in the constitutional sense. *Anne Arundel County v. Maryland Nat'l Bank*, 32 Md. 437, 444 (1976).

Just because the Property may have *no value to Mr. Wright* if he can not rent the apartments, does not mean that the Property is deprived of all reasonable uses. To succeed on this point, Rainbow Hall, L.L.C would have had to have proven that restrictions placed upon the property preclude its use for any purpose. *City of Baltimore v. Cohn*, 204 Md. 523, 530-31 (1954).

Moreover, the Court of Special Appeals has said that there can be no taking of Property where the use in question is not legal. *Chesapeake Outdoor Enters., Inc. v. Mayor & City Council of Baltimore*, 89 Md. App. 54 (1991). Here, as set forth above, a boarding house/multi-residential use of the Property is not legal in the RC2 zone.

6. Rainbow Hall, L.L.C. argues that hosting events at the Property does not violate BCZR.

While Mr. Wright may have equity arguments on his side for charitable events he has hosted at the main house, these events are not permitted uses nor are they uses allowed by special exception in the RC2 zone. On this point, the Board agrees with VPC that the use of the main house for parties, weddings, bar mitzvahs, etc. is contrary to the purpose of the RC2 zone. These uses fall within the definition of "catering hall" in BCZR, §101.1 which is defined as:

Catering Hall. A facility or part of a facility used regularly for serving beverages and food to groups that reserve the facility for banquets or gatherings before the day of the event. A catering hall is not a standard restaurant.

Consistent with this Board's opinions *In the matter of the application of Oregon, LLC – Contract Purchaser; Baltimore County Recreation and Parks – Legal Owner, Case No: 02-461-SPHX*, and *In the matter of the application of Mark Greene (Manor Tavern) (“Manor Tavern”), Case No: R-91-115* cases, hosting of such events constitutes “catering” which is not permitted in RC zones. As we previously explained in the *Manor Tavern* case, catering was not permitted in an R.C.C. zone:

Consideration shows that catering does properly belong only in the heavier commercial zones, namely B.M. and B.R. Wedding receptions, large parties, catered affairs, by their very nature, attract a large number of persons who primarily arrive at a party and leave a party at approximately the same time. Also, such wedding receptions and parties even when held indoors, usually involve music and loud talk.

We find, given the purposes behind the creation of the RC2 zone, that the same reasoning we used for the R.C.C. zone in *Manor Tavern* applies here. Such events are not permitted at the Property regardless of whether or not income was earned, or some other consideration was exchanged, for use of the Property to host such events.

7. The three (3) Single Family Homes on the Property are Nonconforming Uses.

Rainbow Hall, L.L.C. argues that the three (3) single family residences on the Property which include the cottage and the 2 ranchers are nonconforming uses and vested as a matter of law. This Board agrees with the Respondent on this issue.

The evidence presented to this Board was that the cottage was built in 1898 - prior to zoning. The ranchers were built in or around 1972 when the zoning was R40. The Plat which accompanied the 1975 Petition for Special Hearing wherein the Baptist Home requested the construction of a new infirmary wing, shows that both the ranchers and cottage were present. (Resp. Exh. 13).

As pointed out by David Thaler, PE, expert on behalf of Rainbow Hall, L.L.C., in the 1970s the subdivision process was not required where the ownership of all 3 buildings was with the same owner. Instead, the use of divisional lines created the separation between the dwellings. Mr. Thaler highlighted for this Board that there is a 1996 recorded plat (Liber SM 70, page 95) on which the 3 dwellings appear. (Resp. Ex. 14). As such, he argued that the single family dwellings are vested under BCC, §32-4-264(c)(2) which provides in pertinent part:

(c) Residential Development Plan.

* * * *

(2) A residential Development Plan for which a plat is recorded vests when plat recordation occurs for any lot, tract, section or parcel thereof.

This Board finds that the use of the 3 single family dwellings was lawful at the time of their construction and continues to be a lawful use today. This Board agrees that the use of those dwellings as single family residences cannot be affected by any subsequent change in zoning. It is for this reason that, notwithstanding the requirement of 1 single family dwelling per lot which current exists in the RC2 zone (BCZR §1A01.2B1), vesting under the recordation plat validates their use.

VPC argues that Rainbow Hall, L.L.C. abandoned the cottage for more than 1 year between March of 2001 through April of 2002 when Sheldon Lewis moved out of the cottage and into the main house.

The Board finds that the existence of the three dwellings constitutes the non-conforming use in an RC 2 zone. The fact that one home may have been vacant for one year or more, is not an indication of abandonment or discontinuance of the non-conforming use. The houses have traditionally been occupied as single family dwellings. The fact that the owner may be seeking another family to move into the cottage does not indicate abandonment or discontinuance. The homes were not used for office space or storage areas. They were used as single family dwellings when tenants were available. The only indication of abandonment or discontinuance would be to take down the three dwellings. In the opinion of this Board, that would be taking the owner's property right without just compensation. The Board is unwilling to do that. We find that the non-conforming use of the three single family dwellings has continued.

ORDER

THEREFORE, IT IS THIS 24th day of February, 2012 by the County Board of Appeals of Baltimore County,

ORDERED that the Petition for Special Hearing seeking relief pursuant to §500.7 of the Baltimore County Zoning Regulations to determine the uses are the subject Property, be, and the same is hereby, **GRANTED**; and it is further,

ORDERED that main house located at the Property having the address of 10709 Park Heights Avenue, Baltimore, MD 21117 shall not be used as a boarding house, apartment or multi-residential use; and it is further,

ORDERED that there is no special exception that exists for a “boarding house” for the Property; and it is further,

ORDERED, that the current use by Rainbow Hall, L.L.C. of the main house as a boarding house, apartment or multi-residential use is a zoning violation in the RC2 zone; and it is further,

ORDERED, that the current use by Rainbow Hall, L.L.C. of the main house as a boarding house, apartment or multi-residential use is not a nonconforming use; and it is further,

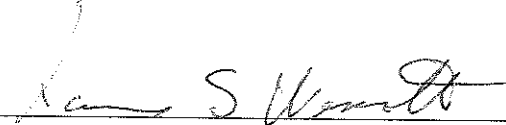
ORDERED, that granting the VPC’s relief and determining the uses permitted in RC2 does not unreasonably deprive Rainbow Hall, L.L.C. of all use of the Property; and it is further,

ORDERED, that the hosting of events by Rainbow Hall, L.L.C. at the main house on the Property is a zoning violation in the RC2 zone; and it is further,

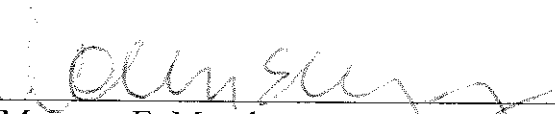
ORDERED, that the 3 single family homes located on the Property are non-conforming uses and may continue to be used as single family residences.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

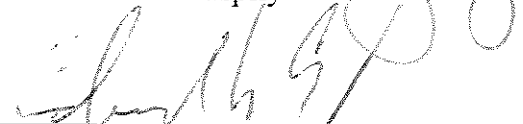
**BOARD OF APPEALS
OF BALTIMORE COUNTY**



Lawrence S. Wescott, Panel Chairman



Maureen E. Murphy



Edward W. Crizer, Jr.



Board of Appeals of Baltimore County

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February 24, 2012

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Michael R. McCann, Esquire
118 W. Pennsylvania Avenue
Towson, MD 21204

RE: *In the Matter of: Rainbow Hall, LLC – Legal Owner*
Case No.: 10-280-SPH

Dear Counsel:

Enclosed please find a copy of the final Opinion and Order issued this date by the Board of Appeals of Baltimore County in the above subject matter.

Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*, **with a photocopy provided to this office concurrent with filing in Circuit Court. Please note that all Petitions for Judicial Review filed from this decision should be noted under the same civil action number.** If no such petition is filed within 30 days from the date of the enclosed Order, the subject file will be closed.

Very truly yours,

Theresa R. Shelton
Administrator

TRS/klc
Enclosure
Duplicate Original Cover Letter

- | | | | |
|----|---|----------------------|--|
| c: | Rainbow Hall, LLC c/o Henry M. Wright, Jr., Resident Agent | | |
| | Valleys Planning Council, Inc. c/o Michael R. McCann, Esquire | | |
| | Mark Wilson | Harlan Zinn | James S. Patton |
| | Jayne Gerson | Emanuel Bronstein | Al and Florence Shapiro |
| | Mark and Sue Levi | Cheryl Aaron | Noel Levy |
| | Elizabeth Wilmerding | Paul Brickman | Cleon Shutt |
| | Linda Corbin | Aurelia Bolton | Theodore Houck |
| | Jean Lubke | Steven Ganzermliller | Sheldon Lewis |
| | Michael L. Snyder, Esquire | Teresa Moore | David Thaler, D.S. Thaler & Associates, Inc. |
| | Office of People's Counsel | | Lawrence M. Stahl, Managing Administrative Law Judge |
| | Arnold Jablon, Director/PAI | | Andrea Van Arsdale, Director/Planning |
| | Vincent J. Gardina, Director /DEPS | | Lionel VanDommelen, Chief of Code Enforcement |
| | Nancy C. West, Assistant County Attorney | | Michael E. Field, County Attorney |
| | | | Kathleen Pontone |
| | | | Louis Rosenthal |
| | | | Suitbertus VanDerMeer |
| | | | Ruth Goldstein |
| | | | Beverly Pearce |
| | | | Henry M. Wright |