

IN THE MATTER OF  
MICHAEL R. MARDINEY, JR. MD/LO  
ENTOURAGE DEVELOPMENT LLC  
(CONTRACT PURCHASER/LESSEE)

\* BEFORE THE  
\* BOARD OF APPEALS

2027 YORK ROAD  
8TH ELECTION DISTRICT  
3RD COUNCILMANIC DISTRICT

\* OF  
\* BALTIMORE COUNTY

RE: SPH to allow:

- 1) a use permit for use of land in residential zone for parking to meet requirements of BCZR or in alt for confirmation that proposed parking is authorized under use permit approved in 71-269-SPH \* Case No : 13-171-SPHXA
- 2) modified parking plan;
- Petition for Special Exception to approve use of property for drive-in restaurant; \*
- Petition for Variance for 0' buffer and 0' setback ilo required 50' buffer and 75' setback in RTA. \*

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### OPINION

This case came before the County Board of Appeals as a de novo appeal. On March 22, 2013 the Administrative Law Judge for Baltimore County issued a decision denying all requested relief. Petitioners filed a Motion for Reconsideration and Order on March 28, 2013. A Motion for Reconsideration was also filed by People's Counsel for Baltimore County on March 28, 2013 and a supplement to Motion for Reconsideration was filed by People's Counsel for Baltimore County on April 1, 2013. On April 16, 2013 an Order on Motions for Reconsideration was issued by the Administrative Law Judge, granting Petitioner's Motion for Reconsideration and denying People's Counsel's Motion for Reconsideration. The Petition for Special Exception was granted, the Variance was dismissed as unnecessary, the Petition for Special Hearing to confirm

that business parking in a residential zone was permitted in 71-269-SPH was granted, and the Petition for Special Hearing for a modified parking plan was granted. A timely appeal was filed by the Protestants. A hearing before this Board was scheduled for June 20, 2013. Petitioner/Legal Owners were represented by Jason Vettori, Esquire, of Smith, Gildea, and Schmidt, LLC, and the Protestants/Appellants appeared Pro Se. The parties submitted briefs to the Board in lieu of final argument on July 22, 2013. A public deliberation was held on August 20, 2013.

### **FACTS AND BACKGROUND**

This matter comes before the Board as a de novo appeal of Administrative Law Judge John Beverungen's decision dated April 16, 2013 granting the Petition for Special Exception, dismissing the Variance request as unnecessary, granting the Petition for Special Hearing to confirm that business parking in a residential zone was permitted in 71-269-SPH, and granting the Petition for Special Hearing for a modified parking plan.

Petitioners had originally requested special hearing relief in accordance with Section 500.7 of the Baltimore County Zoning Regulations (BCZR) seeking a use permit to use the 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 Number 1971-0269-SPH, and for a modified parking plan pursuant to Section 409.12.B of the BCZR. A Petition for Special Exception was filed pursuant to Section 230 of the BCZR to permit a drive-in restaurant. A Petition for Variance was filed pursuant to the BCZR Section 1B01.1.B.1.e(5) to permit a 0 foot buffer and a 0 foot setback in lieu of the required 50 foot buffer and 75 foot setback in a Residential Transition Area (RTA).

The site in question has been vacant for over fifteen (15) years and was last used as a fast food restaurant. This use is permitted as of right in the BL zone per BCZR Section 230.1. Petitioner sought a special exception in case Sonic was to be considered a “drive-in” restaurant as defined by the BCZR section 230.3. The BCZR defines a drive-in restaurant as one where food and drink is sold to a “substantial” extent to customers in parked cars.

The matter first came before Judge Beverungen for a hearing on March 18, 2013. In his March 22, 2013 Opinion, Judge Beverungen found that Sonic was not a drive-in restaurant as he did not find that the main portion of their business would be derived from the drive-in portion of the business. Accordingly, he found that Sonic’s use of the property was permitted as of right and that a special exception relief was not necessary.

Judge Beverungen also found that the RTA regulations were not applicable. If they were applicable, he did not find that the Petitioners presented a sufficient case for variance relief from those regulations. The property is not unique as many sites in the area are split zoned commercial and residential and, even if it met the criteria of *Cromwell v Ward*, the BCZR provides a specific provision for “Variance of RTA”. The BCZR state that the RTA may only be modified in a development plan, which was not the case in the instant matter, or by the hearing officer upon recommendation of a county agency, suggesting that a variance of RTA may not be granted in a zoning case. Judge Beverungen found that the RTA did not apply in the instant case because the Petitioners were not seeking to develop the D.R. zoned portion of the property. Regardless of this however, the site plan showed that the drive through facility and two commercial dumpsters were to be located within the D.R. zone resulting in using residential property for commercial purposes which is not permitted under the BCZR. The regulations allow for commercial parking within a residential zone, however, Judge Beverungen found that

Petitioners' request for relief went far beyond that and for that reason he denied same.

Thereafter, on March 28, 2013, Petitioners filed a Motion for Reconsideration of Order and Opinion. Submitted along with their Motion was a redline site plan removing the drive through facility and two commercial dumpsters from the D.R. zoned property and moving the drive through facility and one dumpster to the B.L. zoned property. They proposed that once the changes were in place, the only use for the D.R. zoned property would be that of parking. The proposal to eliminate one of the dumpsters and move the other would also result in an additional two (2) parking spaces. Additionally, the relocation of the remaining dumpster and drive through lane would result in a drive aisle of twenty-two (22) feet, as opposed to their previously proposed drive through of twenty (20) feet, eliminating the need for the modified parking plan.

They also proposed additional landscaping between the restaurant and the adjoining neighbors as a result of the proposed changes. They made changes to the preview and menu boards, relocating them further west so as to diminish the noise from the order board upon the adjoining neighbors.

People's Counsel for Baltimore County also submitted a Motion for Reconsideration of the Order and Opinion on March 28, 2013. They agreed with the decision reached by Judge Beverugen, that the encroachment of the restaurant's drive through and use into the D.R. zone, along with the dumpsters, were not permitted uses in the zone per BCZR Section 1B01. However, they had some concerns regarding the identification of the use and the RTA law.

People's Counsel argued that as the drive-in stalls, regardless of how many, are to be prominently placed adjacent to York Road, they play a significant marketing role for Sonic. The sit-down portion of the restaurant appeared to be modest in comparison to the drive-in and drive through components. As the Petitioners can also add more drive-in stalls at a later date should

the business necessitate it, they argued that Sonic should qualify as a drive-in restaurant and special exception review should be applicable under BCZR Section 230.3.

Regarding the RTA, although the stated purpose is to prevent dissimilar housing types, BCZR Section 1B01.B.1.d.3 addresses the issue of parking within the RTA. People's Counsel argues that business parking in a residential zone, per BCZR Section 409.8.B, is usually to the rear of businesses which front a busy road such as York Road, subject to the RTA requirements which includes the setbacks and buffer requirements. The legislative intent in split business/residential zones is to provide transition and protection for the adjacent residential areas. In other words, the protection extends beyond dissimilar housing types to include protection from business parking.

People's Counsel supplemented their Motion by letter dated April 1, 2013. They produced the results of a Google search for "Sonics Drive-in" to show that the drive-in feature is a major part of their profile. They argued that the proposed use is for a drive-in restaurant. The previous restaurants at the location, Roy Rogers and Boston Market, were not drive-ins. The petition filed by the Petitioners was for a drive-in restaurant. The correct request should be for a special exception and the matter should be classified and reviewed as such.

A second hearing was held on April 8, 2013 and Judge Beverungen issued an Order on Motions for Reconsideration on April 16, 2013. He reviewed the Petitioners' new site plan which showed that the drive through lane for the restaurant and the remaining commercial dumpster were relocated from the D.R. zoned portion of the property to the B.L. zoned portion which fronts York Road. This revised site plan addresses and remedies the deficiencies from the March 22, 2013 Order and so the drive through lane and dumpster are no longer obstacles to approval of their site plan.

Judge Beverungen also considered the issues raised by People's Counsel. He first responded to their assertion that the use proposed by the Petitioners is for a drive-in restaurant in which case special exception relief is required. He reaffirmed his ruling from the original Order that for a restaurant to be a "drive-in" restaurant, as defined by the BCZR, requires that the restaurant serve food and beverage, to a substantial extent, to diners in their cars. The testimony of Mr. Behrle, that the drive-in portion would only account for approximately twenty (20%) percent of their business, does not, in Judge Beverungen's opinion, meet the definition of substantial as defined by the Webster's Third New International Dictionary. The Baltimore County Code does not provide a definition for the term. The fact that Petitioners filed for special exception relief and that Sonic identified itself as a "drive-in" restaurant is not sufficient. Judge Beverungen construed the language of the BCZR and focused on the word "substantial". Twenty (20%) percent does not qualify as a substantial portion of a business.

Judge Beverungen granted the Petitioners' request for the special exception. A use permitted by special exception is presumed to be in the public interest and the burden is on the Protestants to establish that the inherent adverse effects associated with the use would be greater at the proposed location than at similar zones throughout the County. Several of the Protestants expressed concerns with traffic safety, congestion, noise, trash, and quality of life issues. However, Judge Beverungen found that they were inherent adverse effects presumed to have been anticipated when allowing the restaurant in the first place. In spite of the concern of the Protestants over increase traffic, there was no expert testimony from the State Highway Administration or Baltimore County expressing concerns with the proposal. The Department of Planning recommended approval of the project on March 13, 2013 and the intersection about which the Protestants expressed concerns, York Road and Timonium Road, has not been deemed

a failing intersection by State or County officials. Any drive in fast food restaurant will generate a large volume of traffic and noise and therefore those impacts are inherent in the use of the property. Sonic would generate the same volume of traffic and noise at any B.L. zones property as it would at the proposed site.

In addressing the RTA issue and whether the RTA regulations are applicable, after listening and considering the arguments and submissions along with the BCZR, Judge Beverungen found that the regulations were not applicable in the instant case. The purpose for the RTA as stated in the BCZR Section 1B01.1.B.1.a.(2) was to assure that similar housing types are built adjacent to each other and when they are not that is adequate buffers and screening provided. No housing is proposed to be constructed and therefore the RTA regulations are not applicable. Further, the RTA is triggered when property is developed in the D.R. zone. In the instant case, under the new site plan, only parking will be on the D.R. zone property as it has been for the last forty (40) years. If any property is being developed, it is being done in the B.L. zoned portion. Dismantling the dumpster and repaving the surface is not development as defined in the Baltimore County Code, Section 32-4-101(p). The County's landscaping manual provides for the buffer and screening requirements when commercial use adjoins a residential zone and so he found that the RTA provisions did not apply. The Petitioner satisfied the landscaping requirements as indicated by the County's approval of its Final Landscaping Plan on April 4, 2013.

The next issue addressed by Judge Beverungen concerned the use of the D.R. zoned property for parking. He considered the 1971 special hearing case involving the property wherein the zoning commissioner granted approval for business parking in the D.R. zoned portion of the property and found that the right to continue to use that portion of the property

vested regardless of whether the property had been vacant for a number of years. A lawfully issued use permit can give rise to vested rights. A use permit is a protected property right, perpetual in nature and runs with the land. In support of this proposition, he cites *O'Donnell v Bassler*, 289 Md. 501 (1981) and *Upper Minnetonka Yacht Club v City of Shorewood*, 770N.W.2d 184 (Minn 2009). A use permit for commercial parking in a residential zone is akin to the grant of special exception relief and the Maryland Courts have held that a special exception is a vested constitutionally protected right. *Powell v Calvert County*, 368 Md. 400 (2002).

The final issue addressed by Judge Beverungen was regarding the special hearing request for the modified parking plan. This request is governed by BCZR Section 409.12 which requires a showing of undue hardship. Petitioner was not seeking a use variance which would require adherence to a stricter standard. Here, the Petitioner would experience an undue hardship if the parking regulations as set forth in BCZR Section 409 were strictly enforced. Petitioner's deficiencies are minor and if they were to stop him from completing his project it would cause an undue hardship.

Accordingly, in his April 16, 2013 Opinion, Judge Beverungen, granted the Motion for Reconsideration filed by the Petitioners and denied the Motion for Reconsideration filed by People's Counsel. He granted the Petition for Special Exception to operate a drive through restaurant in a B.L. zone, dismissed as unnecessary Petitioner's Petition for Variance relief from the RTA buffer and setback requirements, granted the Petitioner's Petition for Special Hearing to confirm that parking in a residential zone is permitted under the relief granted in Case No. 1971-0269-SPH, and granted the Petitioner's Petition for Special Hearing to approve a modified parking plan. It was from this decision that Protestants filed a timely appeal.

### TESTIMONY

At the hearing before this Board, Petitioners first called Tom Berhle, from Entourage Development. He has been a franchiser for Sonic since 2009. He is the contract purchaser to buy the property from Michael R. Mardiney, Jr., MD. He testified that the lot in question has been vacant for about fourteen (14) years. The lot is located at the corner of York Road and Belfast Road (Various site plans were submitted as Petitioners' Exhibits #1, 2, 5, and 17). It is close to a Burger King and Maria Dee's Sandwich Shop and across the street from Smyth's Jewelers.

They are proposing to leave the lot the same except to add additional parking spaces. There will be two entrance/exits, one on the York Road side and one on the Belfast Road side. It is their intention to fit into the footprint of the existing building so that it sits back from York Road. For any new building they have to do, they will use limestone to match the existing architecture. The Sonic will create one hundred new jobs in the area. They have hired a manager from Cockeysville.

Sonic has been around since the 1950's. Historically, fifty-five (55%) percent of their business comes from the drive-through, twenty-five (25%) percent of their costumers come into the restaurant to eat, and the remaining twenty (20%) percent use the drive-in. As for personal knowledge, at his Pulaski Road restaurant, fifty (50%) percent of the business comes from the drive through. They will need forty-five (45) parking spaces for the restaurant.

The neighborhood is residential on the east side, behind the business. The traffic will be coming from York Road. The Greater Timonium Community Council and the Yorkshire Community Board expressed concerns over the trash and dumpsters. There will be a privacy

fence surrounding the property which has been approved by the County. They also intend to landscape the property as there had been no prior landscaping(Petitioners' Exhibit #9). This business will be different from the other businesses in the area as they will have less customers. For example, the Dunkin Donuts next door does twice as much business as they project they will do (Petitioners' Exhibit #8).

Mr. Berhle testified that he does not believe he should need a special exception for a drive-in restaurant. He has submitted a modified parking plan because of the drive through lane. The original handicapped parking spaces are no good because of grading. He does not believe that the Sonic will have any impact on traffic. The people who come into his restaurant will already be on York Road looking for a place to stop and eat. He testified that there are approximately 22,000 cars that travel on York Road every day, although he does not know the exact traffic counting point. Regardless, there is a difference between convenience eating and destination eating and Sonic falls into the category of convenience eating.

As to Belfast Road, seven of the stalls will have it easier if they exit onto Belfast Road. This also includes two (2) handicapped spaces. The York Road exit will be easier for all other spaces. There will be painted arrows directing traffic towards York Road. There will be a sign which says "Right Turn Only". If those cars did not want to use that exit or want to make a left onto York Road, they would have to go around the building to the Belfast Road exit. Mr. Berhle assumes that it will be a little crazy for the first couple of weeks and people will probably try and exit onto Belfast Road in order to make the left onto York Road but he will have employees who will direct traffic. There will be signs and cones.

There will be fourteen drive-in stalls. Music from the "Sonic Channel" will be played at the stalls. There is volume control. The music will be played at a manageable level. You will

not be able to hear the music outside of the stalls. There was some concern because the houses nearby do not have air conditioning and would have their windows open in the summertime. Mr. Berhle testified that the traffic riding by on York Road will be louder than the music.

Mr. Berhle looked at hundreds of sites in Baltimore County. He had three sites under contract before settling on this one. He testified that this is good for the community (Petitioners' Exhibits #6 and 7). He uses local contractors and local businesses and he hires local kids to work there. The property has been vacant for approximately fifteen (15) years. It has become an eyesore (Petitioners' Exhibits #3A and 3B). Maria Dee's dumpster is a problem (Petitioners' Exhibit #3C). It needs to be sealed up. It is offensive and a safety hazard. He would never let that happen to his dumpster (Petitioners' Exhibit #3D). Mr. Berhle presented large photographs depicting what the business will look like once it is completed (Petitioners' Exhibits #3E and #F). As for traffic, he looked at the traffic studies on the Baltimore County website and there does not appear to be a problem. The County does not think it is necessary to widen Belfast Road. All County agencies have signed off on this project (Petitioners' Exhibit #10).

Next to testify for the Petitioners was John Demos. Mr. Demos was accepted as an expert in engineering, surveying, zoning, and development issues (Petitioners' Exhibit #11). He was the project manager. The lot in question is split zoned. It is zoned DR 5.5, residential and commercial. He reviewed Note 28 on the site plan (Petitioner's Exhibit #5). In 1971, special hearing relief was granted for business parking in the residential zone (Petitioners' Exhibit #12). When the original site plan submitted by the Petitioners had questionable items in the residential zone, such as the dumpsters, they revised the site plan and moved them to the business zone. He also reviewed the Zoning Advisory Committee's comments. Various agencies also reviewed the plans and made comments. They have tried to take everything into consideration.

Mr. Demos testified that Sonic's drive-in component does not make a drive-in restaurant as identified in the 1967 regulations. It is not exclusively a drive-in restaurant. The 1967 Zoning regulations use the word "substantially". Fourteen (14) out of forty-seven (47) spaces will be used for the drive-in. That is not a substantial portion of the business.

Section 502.1 sets forth the requirements for special exceptions. You must first look at the inherent adverse effects of the drive-in restaurant. That would be issues such as noise and traffic on York Road. There would be no additional impact from Sonic beyond the inherent adverse effects of any business at that location. They have made adequate provisions to meet the inherent adverse effects.

Section 307 addresses variance relief from the RTA regulations. The original purpose of the RTA was to protect against development. They are not proposing any development as development is defined by the Baltimore County Code. If variance relief from the RTA is necessary, this project does meet the criteria of *Cromwell v Ward*. The site is unique. There are two entrance/exits. The topography is different from the other lots because it slopes up from York Road towards the residential properties. The shape of the property is also different from others in the area. There is also a practical difficulty in that they cannot use the property for its stated purpose if the RTA standards are applied. The set back and buffer requests are necessary for parking. The fifty (50) foot buffer and seventy-five (75) foot setback would eliminate all rear parking and therefore they could not meet the parking requirements.

Mr. Demos supports the argument of the existing use permit. You cannot abandon a use permit. Under Special Exception Relief, Section 500.6 and 500.7, they can request a new use permit or they can request an amendment for change in use if Sonic is a drive-in restaurant. The modified parking plan fits into the existing site plan.

The menu board and speakers have been moved. They also moved the teller window. One dumpster has been removed and the other has been moved to the B.L. portion. Parking in the D.R. portion will not be detrimental to the health, safety or general welfare of the surrounding community. Section 437 limits the hours of operation. The surrounding fencing will be six (6) feet high. They would need special permission for anything higher. The fence will serve as a visual screen.

Mr. Demos believes that what the Petitioners are proposing to do is not considered development because they are using what is already there (Petitioners' Exhibits #14, 15, and 16). Demolition does not equal construction. Replacing or redesigning curbs and resurfacing is not development. The State Highway Administration rebuilt the entry way. Twenty-four (24) feet is the standard entry. The Country requires that there be sufficient room for seven (7) cars in line and two (2) cars between the order board and pickup window. The only thing they are really adding is the additional exit because, as with any commercial building, you want multiple exits. If necessary, they could operate without the exit onto Belfast Road but it would not be ideal. Commercial vehicles could make the turn from York Road but it might be easier for them to turn in from Belfast Road.

The property is zoned DR 5.5. That means five and one-half (5 ½) dwellings per acre. The purpose of the RTA in this area is to have conforming structures of a variety, such as all single family homes or townhouses. Its purpose is to insure conforming residential uses. The RTA does not apply between residential and commercial properties.

The first Protestant to testify was Maria Markham Thompson. Ms. Thompson has a bachelor's of science degree in business, specifically in public administration and economics. She has a master's degree in urban planning. She is a CPA and a charter financial analyst. She

last worked as a planner in 1983 (Protestants' Exhibit #1).

Ms. Thompson testified that a six (6) foot fence will not screen the site from the neighborhood. The topography is such that there is a grading increase (Protestants' Exhibits #2 and 3). Her other concern was that Belfast Road is very narrow (Protestants' Exhibits #4, 5, and 6). It is twenty-two (22) feet wide and when cars are parked on the street it becomes even more narrow. She cannot get her car out of her driveway if a car is parked across from her driveway. The street was never widened as it was supposed to be after the 1971 variance. Because of the narrowness of the street and the existing traffic problems, the neighbors have asked the County to consider calming measures (Protestants' Exhibit #7). She anticipates that the Sonic will bring more traffic problems as they are already having problems with people speeding (Protestants' Exhibit #8).

Ms. Thompson raised the question of what qualifies as "substantial" use. Petitioners claim that Sonic is not a drive-in restaurant. In support of her position, that Sonic is a drive-in restaurant, Ms. Thompson produced a copy of People's Council's letter to Judge Beverungen arguing why Sonic should qualify as a drive-in restaurant (Protestant's Exhibit #10). Sonic refers to themselves as a drive-in restaurant. They describe their carhops, which make them different from other fast food restaurants. The drive-in concept is an integral part of what they are. It makes their business different. What does substantial mean? The definition from Webster's Dictionary is that it must be material. In the accounting world, Ms. Thompson testified that if something is more than three (3%) percent, then it is material. If the drive-in portion of the business is substantial, they need a special exception.

The biggest problem which Ms. Thompson sees from the Sonic is from engines idling (Protestants' Exhibit #11). Fourteen drive-in spots will have a significant impact on the air

quality. Ms. Thompson testified that she suffers from asthma. Ozone alert days are made worse because of car exhausts.

As to other issues, Ms. Thompson believes that the fence they propose to build will not serve as a screen or barrier because six (6) feet will not block the neighborhood. Section 409 addresses off-site parking. She also testified that a drive-in must have twenty (20) parking spaces per one thousand customers. Therefore, to be in compliance, Sonic needs fifty-two (52) parking spaces.

Next to testify for the Protestants was Craig Hutton. His primary concern is safety (Protestant's Exhibits #12A-C) Traffic backs upon York Road during rush hour and cars use the side streets, like Belfast Road, to avoid the traffic. Cars will have to exit onto Belfast Road if they want to make a left onto York Road, which will cause an additional backup on Belfast Road. There is a high risk of an accident occurring on Belfast Road. People walk in the street on Belfast Road as there are no sidewalks.

The lot is directly adjacent to his property (Protestant's Exhibit #13). He is also concerned about the noise (Protestants' Exhibit #19). There are fourteen (14) speakers for the drive-in stalls plus the music. Under the Quiet Act, in 2012, Maryland enacted noise legislation. In a residential neighborhood, sound cannot be more than Fifty-Seven (57) decibels and in a commercial area it cannot be more than Sixty-Seven (67) decibels.

Melanie Hutten testified next. Her concerns are noise, lighting and safety. She presented a letter and signatures of people who share in her concerns (Protestants' Exhibit #14). There are no sidewalks on Belfast Road and, besides people walking, children play in the streets. She would also like to see a higher fence (Protestants' Exhibits #16A-C).

John Wilhelm III also testified for the Protestants. He is employed as a sound engineer

and is also concerned about the noise. If the noise coming from Sonic is too loud, people will not be able to sit on the porches. This Sonic will be different from other Sonics because of its proximity to homes (Protestants' Exhibits #20A-20D). It is also different from other fast food restaurants in the area because the others are drive through or dine in only. The noise is contained because the windows in those restaurants do not open. He visited other Sonic restaurants and they were very noisy. The noise from the Sonic coupled with the exhaust from the cars equals pollution. The sound of passing traffic is less annoying than the sound of static traffic. He questioned whether there was a way to implement a plan which would stop the noise bleed.

As for traffic concerns, there is no traffic light at the intersection to control speed. The Petitioners' Route 40 Sonic also has a "Right Turn Only" onto the major highway but there is an island so that people exiting the Sonic cannot make a left hand turn. This is a public safety issue.

The Protestants next called Michael Henry whose main concerns were also sound and traffic. He testified that there were backups on York Road when the property was a Hardees and a Roy Rogers. He believes that when cars are stopped on York Road, they will turn onto Belfast Road. The extra exit onto Belfast Road will only make things worse.

The last witness to testify for the Protestants was Jeffrey Ball. He too is concerned about safety. He grew up in the neighborhood. He saw the problems when Roy Rogers was at the location. Most people will use Belfast Road because the turn onto York Road is too tight. As bad as the problems were, they will be worse now because traffic has increased quite a lot over the years. Most people use Belfast Road and other back roads to avoid York Road. The intersection of York Road and Belfast Road is a very dangerous intersection. There are a lot of

accidents at that intersection.

In addition to their live testimony, Protestants introduced letters from people who objected to the Sonic (Protestants' Exhibits #18A-18G). They also introduced a photograph of cars pulling into McDonalds and backing up onto York Road (Petitioners' Exhibit #17). In support of their position that Sonic is a drive-in restaurant, they produced an article from the Timonium Patch (Petitioners' Exhibit #15).

In rebuttal, Petitioners' recalled John Demos. He testified that the parking plan submitted by the Petitioners has been approved by Baltimore County. The modified parking plan could adjust the number of spaces if necessary. The twenty-four (24) foot entranceway is standard. Some businesses have a thirty (30) foot entrance but you need special permission for that. The fence in the back meets the screening requirements. The development plan's review determines the fence requirements. They would need the County's permission to build a higher fence. There are issues regarding air-flow and the upkeep of a higher fence.

Thomas Berhle also testified in rebuttal. Regarding the fence issue, he spoke with neighbors regarding their concerns then he met with the County and his Contractor. The problems with a higher fence also include the footings, wind flow and light. He has agreed to move the bushes and trees if they are a safety issue. He has no obligation to landscape the property but he has done it anyway to make it look better.

### **ISSUES PRESENTED**

The issues before the Board center around Petitioners' request for certain zoning relief which will allow them to use the site for a Sonic Restaurant. The first issue which needs to be addressed is whether the Sonic Restaurant is a drive-in as defined by the Baltimore County

Zoning Regulations. If so, then Petitioners need to be granted special exception relief.

The subject property was granted a use permit in 1971. The second issue is whether that permit is still applicable to the subject property. If the existing use permit is not a vested property right, the Petitioners have requested special hearing relief for a use permit to use the existing parking lot in the residential zone. They have also requested special hearing relief for a modified parking plan.

The third issue centers around the question of the RTA. The issue is whether those regulations are applicable, and, if so, is the Petitioner entitled to a variance from same.

### **BOARD'S DECISION**

We first must address the issue of whether Sonic meets the definition of a drive-in restaurant. We believe that it does. BCZR Section 101.1 defines a drive-in restaurant as a “retail outlet where food or beverages are sold to a substantial extent for consumption by customers in parked motor vehicles”. There is no definition in the BCZR or in the Baltimore County Code for the word “substantial” so we must look at the ordinary meaning of the word as defined by the Webster Dictionary. In its definition, the dictionary uses words like “material”, “important” and “essential”. It defines something as being substantial if it relates to main part of something. The drive-in component is an essential part of Sonic’s identity even if it is not the source of the majority of its business. They market themselves as “America’s Drive-In”. They have carhops and stalls and their own music. It is how they identify themselves and what sets them apart from other fast food restaurants. Looking at Sonic in its entirety, Sonic meets the definition of a drive-in restaurant and a special exception is necessary to approve the use of the property for a drive-in restaurant.

Section 502.1 sets forth the requirements for special exceptions. We have considered the inherent adverse effects of the drive-in restaurant. That would include the issues raised by the Protestants such as noise and traffic on York Road. There would be no additional impact from Sonic beyond the inherent adverse effects of any business at that location. After reviewing the prior uses for the property and looking at the zoning issues, we have determined that the Petitioner's request for a special exception should be granted.

We have considered the Protestants concerns regarding increased traffic and noise. The property has been used in the past for fast food restaurants such as Boston Market and Roy Rogers. The traffic might increase due to the change from an empty building into a restaurant but that is to be expected of any fast food business at that location. The modified parking plan proposed by the Petitioners should eliminate some of the traffic concerns. As to the concerns regarding light and noise, the Petitioners are well aware of the community's concerns. There are sections of the Baltimore County Code which address the issues of noise and light and if the Petitioners violate the County's ordinances, they can be issued a Citation by a Code Enforcement Officer. We cannot deny the Petitioners the relief they have requested because a violation might occur.

As to the Petition for a Special Hearing, we do not believe that is necessary to grant the Petitioners a new use permit. The parking plan which the Petitioners propose is authorized under the use permit approved in 71-269-SPH. The lawfully issued use permit gives rise to vested rights. A use permit is a protected property right, perpetual in nature and runs with the land. As for the modified parking plan, the BCZR require the Petitioners to show an undue hardship if the BCZR were to be applied. We agree that the Petitioners would experience an undue hardship if the parking regulations as set forth in BCZR Section 409 were strictly enforced. Petitioner's

deficiencies are minor and if they were to stop him from completing his project it would cause an undue hardship. We therefore approve the modified parking plan request.

Lastly we address the issue of the RTA. We do not believe that the regulations are applicable in the instant case. The purpose for the RTA as stated in the BCZR is to assure that similar hosing types are built adjacent to each other and when they are not, that is adequate buffers and screening provided. No housing is proposed to be constructed and therefore the RTA regulations are not applicable. The RTA can also apply when property is developed in the D.R. zone. In the instant case, under the final site plan, only parking will be on the D.R. zone property which is allowable for the reasons stated herein. If any property is being developed, it is being done in the B.L. zoned portion. The County's landscaping manual provides for the buffer and screening requirements when commercial use adjoins a residential zone. The Petitioner satisfied the landscaping requirements as indicated by the County's approval of its Final Landscaping Plan on April 4, 2013.

The Board, after reviewing all of the evidence presented in this case, believes that the relief requested in the Petitioner's request for Special Exception to approve the use of the property for a drive-in restaurant is appropriate, their request for a Special Hearing for a use permit to allow parking in a residential zone is not necessary based upon the use permit approved in 71-269-SPH, the modified parking plan is approved, and the Petition for Variance is not necessary as the RTA does not apply.

**ORDER**

IT IS THEREFORE THIS 21<sup>st</sup> day of November, 2013,

by the Board of Appeals of Baltimore County

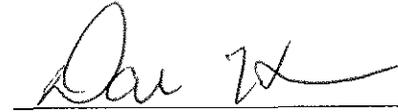
**ORDERED** that the Petition for Special Exception to approve the use of property for a

drive-in restaurant is GRANTED, the Petition for Special Hearing for the Modified parking plan is GRANTED, the Petition for Special Hearing to use land in a residential zone for commercial parking is DISMISSED AS UNNECESSARY, and the Petition for Variance from the RTA requirements is DISMISSED AS UNNECESSARY.

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**

  
\_\_\_\_\_  
Andrew M. Belt, Chairman

  
\_\_\_\_\_  
David L. Thurston

  
\_\_\_\_\_  
Wendy A. Zerwitz



## Board of Appeals of Baltimore County

JEFFERSON BUILDING  
SECOND FLOOR, SUITE 203  
105 WEST CHESAPEAKE AVENUE  
TOWSON, MARYLAND, 21204  
410-887-3180  
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November 21, 2013

Jason T. Vettori, Esquire  
Smith, Gildea & Schmidt, LLC  
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Towson, MD 21204

John B. Wilhelm, III  
8 Belfast Road  
Timonium, MD 21093

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9 Belfast Road  
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Maria Markham Thompson  
10 Belfast Road  
Timonium, MD 21093

Michael Henry  
12 Belfast Road  
Timonium, MD 21093

Sandra Barger  
22 Belfast Road  
Timonium, MD 21093

RE: *In the Matter of: Michael R. Mardiney, Jr., M.D. – Legal Owner*  
*Entourage Development, LLC - Lessee*  
Case No.: 13-171-SPHXA

Dear Mses. Thompson, Barger and Messrs. Vettori, Wilhelm, Mueck, and Henry:

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,

A handwritten signature in cursive script that reads "Sunny Cannington".

Krysundra "Sunny" Cannington  
Administrator

Enclosure  
Multiple Original Cover Letter  
See attached Distribution List

c: Michael R. Mardiney, Jr., MD  
Entourage Development, LLC/Tom Berhle, Authorized Representative  
John Demos, P.E., L.S.  
Eric Rockel  
Billy Hicks  
Steve Miller  
Scott White (Eliot)  
Gail Baity  
Craig Hutton  
Deborah Henninger, President/Yorkshire-Haverford Community Association  
Office of People's Counsel  
Lawrence M. Stahl, Managing Administrative Law Judge  
John E. Beverungen, Administrative Law Judge  
Arnold Jablon, Director/PAI  
Andrea Van Arsdale, Director/Department of Planning  
Nancy West, Assistant County Attorney  
Michael Field, County Attorney, Office of Law