

IN THE MATTER OF
REVEREND LUCY WARE, LEGAL OWNER
PETITION FOR SPECIAL HEARING
FOR THE PROPERTY LOCATED AT
4512 OLD COURT ROAD
2ND ELECTION DISTRICT
2ND COUNCILMANIC DISTRICT

* BEFORE THE
* BOARD OF APPEALS
* OF
* BALTIMORE COUNTY
* Case No. 14-064-SPH

* * * * *

OPINION AND ORDER

This matter is before the Board on a Motion to Dismiss filed originally by People’s Counsel for Baltimore County, and adopted and incorporated by Protestants, by and through their counsel, J. Carroll Holzer, Esquire. This case has been informally identified as “Ware II.” By way of background, the same parties were involved in a previous case, “Ware I.” The nature of the Motion and the decision reached by the Board in Ware II requires a review of the County regulations, as well as the claims, events and outcome of Ware I.

FACTUAL BACKGROUND

Lucy Ware is the Senior Pastor for Jesus is the Answer Ministries. Reverend Ware purchased the home at 4512 Old Court Road, which is 1.2 acres and zoned DR 3.5, to convert that house into a church. A building used for religious worship is a permitted use by right within a DR zone. BCZR §1B01.1.A.3. However, Baltimore County Zoning Regulations establish certain use restrictions based on existing subdivision and development characteristics. BCZR §1B01.1.B. At particular issue for Reverend Ware was the County’s restrictions concerning the Residential Transition Area (“RTA”) regulations. BCZR §1B01.1.B.1. Under those regulations, a RTA is generated if the property to be developed is zoned DR and lies adjacent to land, as relevant, DR 3.5, which: (1) contains a single-family detached, semi-detached or duplex dwelling within 150

feet of the tract boundary. BCZR §1B01.1.B.1.b.

When a RTA is generated, the County requires “a one-hundred-foot area, including any public road or public right-of-way, extending from a D.R. zoned tract boundary into the site to be developed.” BCZR §1B01.1.B.1.a(1). Certain conditions also apply in residential transition areas, which are particular to parking lots, landscaping, lighting and accessory uses. BCZR §1B01.1.B.1.e. Baltimore County Zoning Regulations permit variances of the RTA buffer requirements, as long as the modification to the RTA satisfies compatibility criteria and the reduction in the RTA “will not adversely impact the residential community...adjacent to the property to be developed.” BCZR §1B01.1.B.1.c. Also, the County Regulations identify certain exceptions to the conditions. BCZR §1B01.1.B.1.g. As relevant to this case, there is an exception that concerns existing churches/buildings for religious worship and there are two exceptions that concern new churches/buildings for religious worship:

(4) An addition to an existing church or other building for religious worship, including parking areas and driveways, provided all other applicable zoning regulations including setback, parking and screening requirements, are maintained.

(5) A new church or other building for religious worship constructed on a parcel of land large enough to provide landscaped but otherwise unimproved yard areas of 100 feet between any improvement and any property line other than street frontages.

(6) A new church or other building for religious worship, the site plan for which has been approved after a public hearing in accordance with Section 500.7. Any such hearing shall include a finding that the proposed improvements are planned in such a way that compliance, to the extent possible with RTA use requirements, will be maintained and that said plan can otherwise be expected to be compatible with the character and general welfare of the surrounding residential premises.

BCZR §1B01.1.B.1.g(4)-(6) (Emphasis Added).

Ware I

On December 21, 2012, Petitioner filed petitions for a special hearing and zoning variances seeking to change the property's use from a single-family residence to a church and to eliminate entirely the RTA buffer and RTA setback. Petitioner also sought variances for parking regulations, specifically, BCZR §§409.4, 409.8(A)(2) and §409.8(A)(6). Prior to her petitions, the property was already being used as a church in the manner consistent with the relief requested in her petitions. On February 27, 2013, a hearing was held in front of the Administrative Law Judge, who denied the petitions on March 7, 2013. Following an appeal, the Board of Appeals held a *de novo* hearing (Case No.: 13-147-SPHA).

The Board, on October 9, 2013, denied the petitions. Petitioner argued that no RTA was generated as there were no proposed exterior structural changes or additions to the home. Opinion, CBA 13-147-SPHA. The Board, however, determined that RTA is generated by its proposed use as a church, as a "residential transition use" includes, *inter alia*, any use "permitted as of right under BCZR §1B01.1.A." BCZR §1B01.1.B.1.d. The Board also concluded that Petitioner was, in fact, developing and improving the property irrespective of exterior changes. Opinion, CBA 13-147-SPHA. Petitioner argued, in the alternative, that the proposed use is not subject to RTA requirements because it met the exception found at BCZR §1B01.1.B.1.g(6), applicable to new churches/other buildings for religious worship. After reviewing the exceptions, the Board concluded, based on the facts presented, the only exception with possible application was BCZR §1B01.1.B.1.g(6), but even that was inapplicable based on the evidence. Opinion, CBA 13-147-SPHA. The Board concluded there was no attempt to even minimally comply with the RTA requirements and that the proposal failed to demonstrate compatibility with the character or general welfare of the surrounding homes. Id.

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On June 16, 2014, the Circuit Court for Baltimore County upheld the Board of Appeals decision, prompting appeal the Court of Special Appeals. The Court of Special Appeals, in turn, concluded that the RTA requirements applied to the proposed church and that Reverend Ware was not entitled to her requested parking variances, upholding the Board of Appeals decision. Ware v. People's Counsel for Baltimore County, 223 Md.App. 669; 117 A.3d 628 (2015).

Ware II

While Ware I was progressing through its hearings and appeals, a second petition was filed on behalf of Petitioner on September 11, 2013. Petitioner sought a Special Hearing seeking relief similar to that requested by Petitioner in Ware I, but without the parking variances. On October 31, 2013, Petitioner amended the petition in Ware II to identify a new plan, which proposed a building addition to the existing structure. As such, Petitioner asserted that the exception found at BCZR §1B01.1.B.1.g(4), applicable to existing churches, applied to the proposal.

On February 4, 2014, People's Counsel filed the Motion to Dismiss at issue. People's Counsel requested that the Board of Appeals stay Ware II and, on February 19, 2014, the Board of Appeals did so. Petitioner sought to have Ware II heard following her appeal to the Court of Special Appeals on Ware I. The Board decided to continue the stay until resolution of the appeal on Ware I. On November 30, 2016, by way of correspondence to the Board, counsel for Protestants adopted People's Counsel Motion to Dismiss. Then, on March 30, 2017, People's Counsel withdrew from Ware II.

On May 11, 2017, the Board held a hearing on the pending Motion to Dismiss. On June 1, 2017, the Board publicly deliberated and granted the Motion for the reasons that follow.

Petitioner's Claims Are Barred By *Res Judicata* and Collateral Estoppel

As identified within the Motion to Dismiss, *res judicata* applies to quasi-judicial

administrative decisions. See, Batson v. Shifflett, 325 Md. 604, 701-705 (1992) (at 702: “agency findings made in the course of proceedings that are judicial in nature should be given the same preclusive effect as findings made by a court”). Also as noted within the Motion, this Board has barred claims pursuant to *res judicata* and/or collateral estoppel numerous times in the past. See, e.g., In the Matter of Catherine Robinson, CBA Case No. 15-235-SPHA, 2016, Motion for Recon. Denied, March 10, 2017. In the Matter of Boone-Kondylas, LLC, CBA Case No.: 16-003-SPH (2016); and In the Matter of Andrew and Stephanie Mattes, CBA Case No. 11-051-SPH (2012).

Res judicata precludes the relitigation of a suit if: (1) the parties in the present litigation are the same or in privity with the parties to the earlier action; (2) the claim in the current action is identical to the one determined in the prior adjudication; and (3) there was a final judgment on the merits in the previous action.¹ Powell v. Breslin, 430 Md. 52, 63–64; 59 A.3d 531, 538 (2013); citing, Colandrea v. Wilde Lake Cmty. Ass’n, Inc., 361 Md. 371, 389; 761 A.2d 899, 908 (2000); Cicala v. Disability Review Bd., 288 Md. 254, 263; 418 A.2d 205, 211 (1980); Cook v. State, 281 Md. 665, 668; 381 A.2d 671, 673 (1978).

Counsel for Petitioner argued at the hearing on May 11, 2017 that the parties to the present litigation may not have been the same as Ware I. Notably, that argument is absent from Petitioner’s Reply to the Motion to Dismiss. Nevertheless, at least some of Protestants in Ware I and Protestants in Ware II. Because there is and was a common interest, Protestants pooled together to contest Petitioner in Ware I and the same thing occurred in Ware II. There is no evidence that shows that the parties are different or any allegation identifying which parties are different. At a minimum, there is unquestionably overlap among the Protestants in these cases. Therefore, for those Protestants that were party to Ware I and remain as Protestants for Ware II, which again, it is

¹ There is no argument over whether there was a final judgment on the merits in Ware I.

unquestioned that there are at least some, the parties are the same for purposes of *res judicata*. Any notion that because one or more participants in Ware I are no longer participating in Ware II, *res judicata* is inapplicable even to those parties participating in both, Ware I and Ware II, must be summarily disregarded.

The real thrust of Petitioner's argument, as set forth in Petitioner's Reply and at argument, is that *res judicata* is inapplicable because the second case, Ware II, is different from Ware I in that different sections of Baltimore County Zoning Regulations apply. Specifically, Petitioner argued that, in Ware I, it was seeking an exception pursuant to BCZR §1B01.1.B.1.g(6) but in Ware II, was seeking an exception pursuant to BCZR §1B01.1.B.1.g(4). A key distinction between those two exceptions, as noted above, is that BCZR §1B01.1.B.1.g(4) applies to existing churches, while BCZR §1B01.1.B.1.g(6) applies to new churches.

However, *res judicata* bars "the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been-but was not-raised in the first suit." Gonsalves v. Bingel, 194 Md. App. 695, 709; 5 A.3d 768, 777 (2010) (emphasis added), quoting, Anne Arundel County Bd. of Educ. v. Norville, 390 Md. 93, 106; 887 A.2d 1029 (2005) (citations omitted). As to what Maryland Courts consider to be transactional, "considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." Norville, 390 Md. at 109; 887 A.2d at 1038, quoting Restatement (Second) of Judgments § 24; citing, FWB Bank v. Richman, 354 Md. 472, 493; 731 A.2d 916, 927-928 (1999).

Therefore, the question arises --- could Petitioner have raised the exception claimed under BCZR §1B01.1.B.1.g(4), for an existing church, at the same time as the claim under BCZR

§1B01.1.B.1.g(6) for a new church? In other words, could Petitioner have raised the claims in Ware II in Ware I?

While Schrodinger's cat may be both dead and alive until observed, seemingly a church building cannot be both new and also existing until Petitioner's theory is argued. However, the law allows for claims in the alternative, even those inconsistent or mutually exclusive of one another. See, e.g. Md. Rule of Civil Procedure 2-303(c) ("A party may also state as many separate claims or defenses as the party has, regardless of consistency and whether based on legal or equitable grounds.").

The facts in Ware I and Ware II concern the same Petitioner, regarding the same property, and same proposed conversion of a single-family residence into a church. The issues related to the application of the RTA regulations and the generation of the RTA and required buffers and setbacks, as well as potential exclusions are present in both. The only difference is that Petitioner, once denied in Ware I as a new church, wants a second bite as under the theory it is an existing church. Tellingly, Ware II was originally filed seeking the exclusion pursuant to BCZR §1B01.1.B.1.g(6) for a new church and was subsequently amended to seek the exclusion pursuant to BCZR §1B01.1.B.1.g(4) for an existing church. Nothing prevented Petitioner from doing the same in Ware I. If the church is a legally existing church for Ware II, it was a legally existing church for Ware I.²

Therefore, Petitioner could have brought both claims in Ware I and/or Petitioner could have proceeded solely under its theory of being an existing church. Petitioner could have amended the petition in Ware I, prior to adjudication, as Petitioner did in Ware II. Petitioner, however, failed

² As referenced earlier, Petitioner converted the property from a residence to a church and then filed her petition in Ware I. At the Motion hearing, it was argued that the church was existing because of the use prior to the petition.

to bring the Ware II claims in Ware I or amend Ware I to include the Ware II claims. As a result, Petitioner is barred by *res judicata* from relitigating matters that could have been brought in Ware I and particularly, its claims in Ware II are barred. For these reasons, the Motion to Dismiss is granted.

Relatedly, Petitioner's claims are also barred by collateral estoppel as to whether the church is new or existing.

Collateral estoppel precludes a party from re-litigating a factual issue that was essential to a valid and final judgment against the same party in a prior action. Shader v. Hampton Imp. Ass'n, Inc., 217 Md. App. 581, 606; 94 A.3d 224, 238 (2014), *aff'd*, 443 Md. 148; 115 A.3d 185 (2015), citing, Welsh v. Gerber Prods., Inc., 315 Md. 510, 516, 555 A.2d 486 (1989). Maryland has adopted a four-pronged test that must be satisfied in order to apply collateral estoppel:

1. Was the issue decided in the prior adjudication identical with the one presented in the action in question?
2. Was there a final judgment on the merits?
3. Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?
4. Was the party against whom the plea is asserted given a fair opportunity to be heard on the issue?

Shader, 217 Md. App. at 605; 94 A.3d at 238, citing, Pat Perusse Realty Co. v. Lingo, 249 Md. 33, 45; 238 A.2d 100 (1968); *accord* Wash. Suburban Sanitary Comm'n v. TKU Assocs., 281 Md. 1, 18–19; 376 A.2d 505 (1977).

In this instance, Petitioner filed to change the property's use from a single-family residence to a church. Prior to that, the property had always been a single-family residence. To use the property as a church, Petitioner was required to have parking, pursuant to BCZR §409.6. The parking and required landscaping constituted improvements to the property and development of

the property.

Petitioner's expert in Ware I acknowledged that if the property was used as a residence, it would not need to comply with the RTA conditions, but to operate as a church it did need to comply. See, e.g., Ware I, 223 Md. App. at 677. The purpose for the petition and hearing in Ware I was to convert the residence to a church and obtain relief from the application of the RTA regulations to the church. In order to be excluded from the RTA regulations, Petitioner argued that it was a new church, and therefore, the new church exception pursuant to BCZR §1B01.1.B.1.g(6) applied. In other words, to legally become a church, County zoning required parking and other measures to be proven at the hearing to the satisfaction of this Board. In order for the property to be used as a legal church, Petitioner had to prove, *inter alia*, that it could meet all the regulations for a new church as required, or that it met the exception under Subsection g(6). Petitioner failed to meet those regulations.

Pursuant to that argument, the Board in Ware I examined all possible exceptions in BCZR §1B01.1.B.1.g and concluded that the only exception that potentially applied was BCZR §1B01.1.B.1.g(6). Opinion, CBA 13-147-SPHA. Therefore, the Board evaluated the applicability of the exceptions for existing churches and found them inapplicable to Petitioner. The Board denied the applicability of the new church exception because the proposal did "not even minimally comply with the RTA requirements" for new churches. Opinion, CBA 13-147-SPHA.

Therefore, the issue of whether the church was new or existing was decided in Ware I. In that case, the Board determined that the Petitioner's request for a new church on this property should be denied. "[F]or the doctrine of collateral estoppel to apply, the probable fact-finding that undergirds the judgment used to estop must be scrutinized to determine if the issues raised in that proceeding were actually litigated, or **facts necessary to resolve the pertinent issues were**

adjudicated in that action.” Shader, 217 Md. App. at 605-606; 94 A.3d at 238 (emphasis added), quoting Colandrea v. Wilde Lake Cmty. Ass'n, Inc., 361 Md. 371, 391-92; 761 A.2d 899 (2000) (citations omitted).

As factors two and three are not at issue (or are addressed above), turning to the fourth element, certainly Petitioner had the opportunity to litigate whether it was an existing church (though it could be more than reasonably questioned whether it should be considered an existing church given its infancy, as well as its brief operation in violation of the zoning regulations that prompted the petition in Ware I). Petitioner requested approval that it was a new church. Only now, with nothing different as to its operations at the time of the petition of Ware I, does Petitioner claim it is an existing church. In short, this property is not a lawful church. Therefore, by default, it does not “exist” and an addition cannot be built onto it as requested.

CONCLUSION

In conclusion, Petitioner could have brought the claim that her property was a valid, legally existing church to avail herself of at the time of Ware I, whether solely or in the alternative. The failure to so do bars her claim pursuant to the doctrine of *res judicata*. Even in the absence of *res judicata*, Petitioner’s claim is barred by collateral estoppel as Petitioner sought validation of her property as a new, legal church but, the Board in Ware I specifically denied her request. For that reason as well, Petitioner’s claims in Ware II are barred. As a result, Protestants’ Motion to Dismiss is granted.


ORDER

THEREFORE, ON THIS 13th day of September, 2017, by the Board of Appeals of Baltimore County, it is hereby:

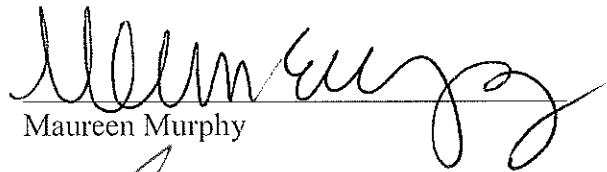
ORDERED that Protestants' Motion to Dismiss is **GRANTED**.

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*.

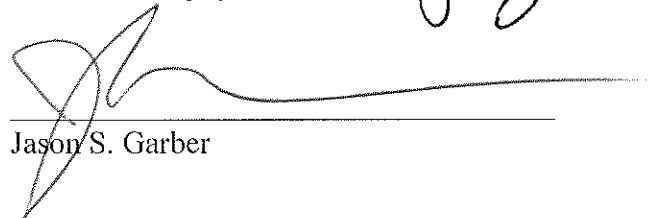
**BOARD OF APPEALS
OF BALTIMORE COUNTY**



Andrew Belt, Chairman



Maureen Murphy



Jason S. Garber



Board of Appeals of Baltimore County

JEFFERSON BUILDING
SECOND FLOOR, SUITE 203
105 WEST CHESAPEAKE AVENUE
TOWSON, MARYLAND, 21204
410-887-3180
FAX: 410-887-3182

September 13, 2017

Lawrence E. Schmidt, Esquire
Smith, Gildea & Schmidt, LLC
600 Washington Avenue, Suite 200
Towson, Maryland 21204

J. Carroll Holzer, Esquire
508 Fairmount Avenue
Towson, Maryland 21286

RE: *In the Matter of: Reverend Lucy Ware – Legal Owner/Petitioner*
Case No.: 14-064-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,

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

Krysundra "Sunny" Cannington
Administrator

KLC/taz
Enclosure
Duplicate Original Cover Letter

c: See Distribution List Attached

Distribution List
September 13, 2017
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