IN RE: PETITIONS FOR SPECIAL HEARING AND SPECIAL EXCEPTION	*	BEFORE THE
(7400 Pulaski Highway)	*	OFFICE OF
15th Election District		
7th Council District	*	ADMINISTRATIVE HEARINGS
Harnek Singh & Charanjit Kaur		
Legal Owners	*	FOR BALTIMORE COUNTY
Petitioners		
	*	**Case No. 2014-0253-SPHX**

* * * * * * * * *

OPINION AND ORDER

This matter comes before the Office of Administrative Hearings (OAH) for consideration of Petitions for Special Hearing and Special Exception filed on behalf of Harnek Singh & Charanjit Kaur, legal owners. The Petition for Special Hearing was filed pursuant to §409.12 of the Baltimore County Zoning Regulations ("B.C.Z.R.") to approve a modified parking plan. A Petition for Special Exception was filed to use the property for a used automobile lot.

Appearing at the public hearing in support of the requests was Harnek Singh. Frank V. Boozer, Jr., Esquire represented the Petitioners. The Petition was advertised and posted as required by the Baltimore County Zoning Regulations. A nearby resident attended the hearing and testified, and Deputy People's Counsel also participated in the case.

Zoning Advisory Committee (ZAC) comments were received and are made part of the record of this case. The Department of Planning (DOP), in its comment dated July 7, 2014, indicated it did not support the requests, while the Bureau of Development Plans Review (DPR) noted a landscape plan is required.

This is an unusual case and one with a zoning history as well. The Petitioners sought special exception relief in 2008 to operate a used car lot, and that petition was ultimately denied. As such, Ms. Demilio contends that *res judicata* should apply to bar the current Petition which

also seeks special exception relief to operate a used car sales lot, albeit one with fewer cars offered for sale. Thus, whether or not that doctrine applies is an important issue in the case.

But there is another aspect of the case that warrants additional scrutiny. The Petition identifies the "property" as 7400 Pulaski Highway, and references only one 10 digit tax account number. The hearing notice, sign posting and newspaper advertisement also reference only 7400 Pulaski. Adding to the confusion is that the property description which accompanied the Petition also describes only one parcel, with "0.144 acres of land." This cannot be the legal description of the tavern parcel at 7400 Pulaski, which according to SDAT records contains 0.35 acres. The parcel of land on which the used car lot would operate has a separate entry and account number in the State tax records. In the 2008 case, the used car parcel was referenced as 7404 Pulaski in both the case caption and opinion, and the parcel was described as "approximately 0.15 acre(s) in size," which would match the zoning description filed with the petition in this case.

As such, it could be this Office does not have authority to enter an Order with respect to either parcel. With respect to the 7400 Pulaski property, it does not appear as if an accurate zoning description was provided, and the parcel at 7404 Pulaski was not identified in the Petition, hearing notice, posting and/or advertisement. On the other hand, it is arguable the Petitioner substantially complied with the Regulations, and a nearby resident did attend the hearing, in which Deputy People's Counsel participated. Thus, in the broadest sense "notice" was provided to the public, and I will consider the case to be proper for resolution.

Special Hearing

It appears to be undisputed that the tavern at 7400 Pulaski Highway is a lawful nonconforming use. Petitioner's counsel noted a tavern was first established at the site in the 1930's, and the tax records reflect the building on site was constructed in 1935. Mr. Kellman

conceded the parking at the tavern was "woefully deficient," and that Petitioners were not proposing a "shared parking" arrangement, as permitted in certain circumstances by the B.C.Z.R. According to the B.C.Z.R., 77 spaces are required, while only 33 are provided.

In these circumstances, I am not inclined to grant the special hearing request for a modified parking plan for the tavern. The Petitioners have not proven they would experience an "undue hardship" if the request is denied, nor have they satisfied the elements set forth in B.C.Z.R. §409.8.B.1. In addition, I do not believe the special hearing relief is even required in the first instance, as alluded to at the hearing.

As Mr. Kellman testified: "the parking is what it is." While not poetic, this testimony is an accurate statement of the nonconforming nature of the property. A lawful nonconforming use is a constitutionally protected property right that can only be forfeited through abandonment, amortization provisions or repeated County Code violations per B.C.Z.R. §104.8. As such, the Petitioners can continue the tavern/nightclub use as they have been, and the "woefully deficient" parking is one aspect of the nonconforming nature of the property. As such, the Petition for Special Hearing will be dismissed.

Res Judicata

The BCZR contains a provision that permits a second petition for special exception after the denial of such a petition, after the lapse of 18 months. B.C.Z.R. § 502.12. But, as Ms. Demilio argued, this rule does not trump the doctrine of *res judicata*. Indeed, the court stated as much in Whittle v. Baltimore County, 211 Md. 36 (1956), where it held that after the lapse of the time specified in an ordinance, a zoning board may consider a new application for relief that was previously denied, but "only if there has been a substantial change in conditions." Id. at 45. So

the question is whether there has been such a substantial change in conditions here, to preclude the application of the doctrine.

I do not believe there has been such a change, and find that the Petition for Special Exception is barred by *res judicata*. There was no evidence presented indicating that the neighborhood has changed in character since the 2008 case. The same (or very similar, as explained below) parcels of land are at issue, and the subject property was at that time, and is now, in a busy commercial area, wedged between two heavily travelled highways. The same Petitioner (owner) testified in both hearings, and the use (used car lot) is the same in both cases. Petitioners argue they are in this case proposing to offer fewer cars for sale, and also note that the lot line separating the parcels at 7400 and 7404 Pulaski Highway was adjusted since the 2008 case. Mr. Kellman explained that the tavern building straddled the previous lot line, a condition which was remedied by the lot line adjustment. Even so, the lots are otherwise the same as they were in 2008.

The other unique legal issue in the case concerns the nature of, and basis for, the previous orders denying the special exception. The Board of Appeals did not consider whether the used car lot would satisfy the special exception requirements. Instead, it (and the circuit court) based the denial upon the fact that "failure to utilize the lot (i.e., 7404 Pulaski) …for overflow parking for the restaurant/nightclub, would be detrimental to the [community]" citing B.C.Z.R. § 502.1. With all due respect, I believe the Board addressed the wrong question; it should have considered whether the used car operation, for which a special exception was sought, would satisfy B.C.Z.R. § 502.1. In this case, I believe it would, especially considering that special exception uses are presumed to be compatible with other uses in the zone. Montgomery County v. Butler, 417 Md. 271 (2010). But as Ms. Demilio noted, *res judicata* applies even if the decision below was

erroneous. Powell v. Breslin, 430 Md. 52 (2013)("mere fact that prior ruling is wrong does not deprive it of *res judicata* effect").

In effect, the Board and circuit court rulings are tantamount to a finding that the parcels at 7400 and 7404 merged, even though that terminology was not used. Lots merge when one is used in the service of another, and the result is that a "single parcel emerges for zoning purposes." Friends of Ridge v. BG&E, 352 Md. 645, 658 (1999). The earlier rulings in this case in essence treated this as one parcel, and while I believe those rulings were erroneous, they still have *res judicata* effect.

THEREFORE, IT IS ORDERED this **3rd** day of September 2014, by this Administrative Law Judge, that the Petition for Special Hearing to approve a modified parking plan be and is hereby DISMISSED; and

IT IS FURTHER ORDERED that the Petition for Special Exception to use the herein described property for use as a used automobile lot, be and is hereby DENIED.

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

_____Signed_____
JOHN E. BEVERUNGEN
Administrative Law Judge
for Baltimore County

JEB/sln