IN RE: **PETITION FOR SPECIAL HEARING** **(164 E. Carroll Island Road)**	*	BEFORE THE
15th Election District	*	OFFICE OF
6th Councilmanic District		
Carroll Island Associates, LP *Legal Owner*	*	ADMINISTRATIVE HEARINGS
Middle River Hobbies, *Lessee*	*	FOR BALTIMORE COUNTY
Petitioners		
	*	**Case No. 2014-0274-SPH**

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OPINION AND ORDER

This matter comes before the Office of Administrative Hearings (OAH) for consideration of a Petition for Special Hearing filed on behalf of Carroll Island Associates, LP, legal owner and Middle River Hobbies, lessee ("Petitioners"). The Special Hearing was filed pursuant to § 500.7 of the Baltimore County Zoning Regulations ("B.C.Z.R.") to approve temporary outdoor model car racing, on specific dates, in the shopping center parking lot, as an accessory use to a hobby shop.

Appearing at the public hearing in support of the requests was Gordon Ross, proprietor of the hobby shop. Louis Grenzer, Jr., Esq., represented the Petitioner. Peter Zimmerman, People's Counsel, participated in the case and opposed the relief. The Petition was advertised and posted as required by the Baltimore County Zoning Regulations. There were no substantive Zoning Advisory Committee (ZAC) comments received.

A petition for special hearing is in an essence a proceeding for a declaratory judgment. Antwerpen v. Baltimore County, 163 Md. App. 194 (2005). That is, the Petitioner asks for a determination that its activities are lawful under the B.C.Z.R.

The subject property is 20.44 acres in size and is zoned BL. The property is improved with a strip shopping center and Wal-Mart store, and is located near the intersection of Bowley's

Quarters and Carroll Island Roads in eastern Baltimore County. Mr. Ross operates Middle River Hobbies, LLC, a store in the Carroll Island Shopping Center that sells a variety of merchandise including remote or radio ("RC") controlled cars. RC cars are small scale replica vehicles that are raced on a variety of surfaces, including carpet, dirt and pavement. The Petitioner conducts indoor races on carpet at his shop, and also operates an outdoor "track" on a seldom used parking lot at the periphery of the shopping center. Though the outdoor racing has been put on hold due to this case, the Petitioner previously held events on Saturdays during the months of April-September. Following complaints from an adjoining owner, the County insisted that Petitioner stop the events and this proceeding was then filed.

Petitioner seeks a determination that the outdoor racing is a lawful use which is "accessory" to the operation of his hobby shop, a point on which the parties disagree. As such, the use must be examined to determine whether it qualifies as "accessory" as that term is defined in B.C.Z.R. §101.1. People's Counsel urges that before this analysis is undertaken, we must categorize or define the specific use at issue.

Mr. Zimmerman contends this is a "racetrack," a term not defined under the B.C.Z.R. The Webster's Third New International Dictionary definition of "racetrack" references an "oval course over which races are run." This would not describe the use here, where the temporary race track (the contours of which are defined by concrete curbs and PVC tubing positioned on the parking lot) is not oval, but consists of a series of twists and turns. But even more fundamentally, I do not believe the operation can be classified as a racetrack because there are absolutely no structures or physical improvements to the land, and I believe the B.C.Z.R. contemplates a "racetrack" as being a venue of some sort with infrastructure and accommodations for spectators, as one would find at the Timonium State Fairgrounds.

In addition, as noted in Petitioner's memorandum, the B.C.Z.R. identifies (in excluding the use from the definition of "commercial recreational facilities") a "go-cart course" (not "track") which must obviously be something other than a "racetrack," or else the reference would be mere surplussage. Though it too is not defined, I believe that the reference to "go-cart course" indicates that the B.C.Z.R. contemplates a use or venue where racing is conducted that does not constitute a "racetrack." Although the RC car racing does not constitute a "go-cart course," this analysis does in my opinion establish that the use is not a "racetrack" either.

In my opinion, the use defies rigid categorization under the B.C.Z.R. It is a relatively modern, niche land use that post-dates the adoption of the BCZR. Further, I do not believe it is necessary to ascribe any particular name to the activity, since we are evaluating an accessory rather than principal use. The B.C.Z.R. is considered an inclusionary zoning code; i.e., if a use is not expressly permitted by right or special exception in a zone it is excluded. Kowalski v. Lamar, 25 Md. App. 493 (1975). But this maxim concerns "principal" not "accessory" uses. In fact, I believe the rule is otherwise with respect to accessory uses. In Carroll County v. Zent, 86 Md. App. 745, 769 (1991), the court held that when a use is incidental to the principal use "it is an accessory use and, unless expressly prohibited by statute, is permitted."

Accessory uses are not catalogued in the BCZR in the same way as principal uses, nor could they be. As stated in a well-known treatise, "the perception of which accessory uses are considered 'customary' changes with the times." 2 Rathkopf's, The Law of Zoning and Planning, § 33:3. This may explain why in 1973 a New York court ruled that a helipad was not an accessory use to the operation of a department store, while in 1978 a New Jersey court found that such a heliport was an accessory use to a construction firm's headquarters, based upon the fact that helicopter usage was gaining widespread acceptance among business executives. *Compare*

Gray v. Ward, 343 N.Y.S.2d 749 (1973) *with* State v. P.T.& L. Constr., Inc., 389 A.2d 448 (N.J. 1978).

Under the B.C.Z.R., an "accessory use" is defined as follows:

> **ACCESSORY USE OR STRUCTURE**
>
> A use or structure which: (a) is customarily incident and subordinate to and serves a principal use or structure; (b) is subordinate in area, extent or purpose to the principal use or structure; (c) is located on the same lot as the principal use or structure served; and (d) contributes to the comfort, convenience or necessity of occupants, business or industry in the principal use or structure served[.]

The terminology used in this definition is relatively straight forward. But there is a dearth of Md. case law concerning accessory uses, which means that out of state cases will be consulted to aid in the interpretation.

In this case, Mr. Ross testified that he is familiar with the operation of hobby shops around the country and that it is customary for such shops to conduct RC racing in conjunction with their business. He cited several examples, yet conceded his is the only such outdoor use in Maryland. But even though a use is not necessarily widespread, it can nonetheless be "customarily incident" to the principal operation. In Lake County v. LaSalle Natl. Bank, 395 N.E.2d 392 (Ill. 1979), the court considered whether temporary housing for groundskeepers was an accessory use to a golf course. The court held that it was, and stressed that the petitioner did not need to show that most, or even many, golf courses featured such housing. The court found that an accessory use can be sustained if it constitutes a "recognized mode of activity in the field." In addition to Mr. Ross's testimony, a cursory Google search revealed several RC car sales (i.e., hobby shops) operations being conducted in conjunction with indoor and outdoor race courses. Thus, I think it is fair to characterize it as a "recognized mode of activity in the field," and I believe the Petitioner has satisfied this element.

The next issue is whether the racing use is subordinate in "area, extent or purpose." These elements are stated in the disjunctive; any one would suffice. As such, even though the racing and spectator areas arguably occupy a larger land area (which is not dispositive), it seems clear the racing events held one day a week for less than half the year would qualify as subordinate in extent and/or purpose to the hobby shop operation, which occupies 7,000 SF of commercial space and is open nearly every day of the year according to the proprietor. Mamaroneck Beach & Yacht Club, Inc. v. Zoning Board, 862 N.Y.S.2d 81 (2008)(accessory use can be larger in square footage than principal structures on site). Whether viewed temporally or financially, the hobby shop is clearly the principal operation. Thus, this element is also satisfied.

The B.C.Z.R. also requires the accessory use to be located on the same lot as the principal use. In this case, both the site plan for the shopping center and the site plan for the zoning case (Petitioner's Exhibit Nos. 1& 2) reveal that this is indeed the case. Finally, based on the testimony of the race participants and shop patrons, I find the racing use serves the "comfort" and/or "convenience" of the hobby shop business and its customers.

One recent unreported case from Connecticut provides further support for the proposition that a race course is an accessory use to a business that sells RC cars. In Sorrentino v. Ives, 2010 WL 626086 (Conn. 2010), the owner (Kenneth Ives) operated an RV sales business that also sold ATVs and RC cars. Mr. Ives constructed both "off road" and "on pavement" racing facilities in the parking lot area at the rear of his lot. The race facilities involved "extensive construction" and a two-story grandstand. The town zoning commission "determined [the race facility] to be a permissible accessory use." Id. at 3. But it was subsequently determined the property was split zoned and that the race course was located in a rural residential zone rather than a business zone.

As such, the owner was then obliged to seek a change in zoning district classification (which was denied), and was not permitted to conduct the races in the residential zone.

Two witnesses testified in opposition to the Petitioner's request. Kevin Arnold, who lives immediately adjacent to the parking lot on which the races are held, testified that the events are noisy and disruptive. He stated that attendees frequently argue and use profanity, and also urinate/defecate in the bushes next door to his home. Dan Mearkle, who dates Mr. Arnold's sister (but lives some distance from the subject property), testified that the events cause traffic snares when patrons of the shopping center slow down to take a look at the racing. He also presented a short video that he took on his I-phone which showed the cars racing around the course.

As noted by Petitioner, Mr. Arnold operates a boat repair business at his property, which is zoned B.L., pursuant to a special exception granted in Case # 99-311-X. In that Order then Zoning Commissioner Schmidt noted that the "area at large is commercial in character." The special exception in that case was granted despite the objection of the Department (then Office) of Planning, which did not feel that the business (which "operates 6 days a week, Monday through Saturday from 7:00 A.M. thru 10:00 P.M.") was appropriate at the location.

On cross examination, Mr. Arnold confirmed that he operates and repairs boat engines on his property, and he said they make as much noise as an automobile engine. My point in mentioning this is that the area in question is certainly commercial (a large Wal-Mart store anchors the shopping center at the location) and businesses and activities are conducted in those environs that generate noise and other disturbances that may be objectionable if conducted in a residential zone. While there are residential zones adjoining the subject property, Mr. Arnold was the only nearby resident to testify at the hearing, and the file does not contain any letters of

complaint or opposition from other neighbors in the area. In addition, other than Mr. Mearkle's testimony there was no evidence or testimony presented to show that the traffic problems described impacted motorists along the adjoining roadways or generated calls for service to the police department. In addition, none of the other tenants at the shopping center testified or submitted comments indicating the racing was negatively impacting their businesses, and the owner of the shopping center advised that it does "not oppose the racing on our property." As such, I do not believe that the use has the potential for the range of detrimental impacts described by the Protestants. See Kaiser v. Western R/C Flyers, Inc., 477 N.W.2d 557 (Neb. 1991)(noise from RC airplanes, although annoying to residents, did not constitute a nuisance).

None of this is meant to dismiss the concerns raised by Messrs. Arnold and Zimmerman. But I believe those concerns can be ameliorated (even if not eliminated) by the imposition of restrictive conditions, which will be included in the Order which follows. The approved development plan for the shopping center (PDM #XV-760) was not submitted by either of the parties, and the site plans do not indicate the exact setback between the parking lot and Mr. Arnold's property line. Both properties are zoned commercial, and there does not appear to be any landscape strip, fencing or other screening between the properties. Such feature(s) would not only provide a buffer for the racing events but would also screen Mr. Arnold's property from the parking lot itself, which though zoned B.L. is his primary residence.

THEREFORE, IT IS ORDERED this **18th** day of August 2014, by this Administrative Law Judge, that the Petition for Special Hearing pursuant to § 500.7 of the Baltimore County Zoning Regulations ("B.C.Z.R) to approve temporary outdoor model car racing, on specific dates, in the shopping center parking lot, as an accessory use to a hobby shop, be and is hereby

GRANTED.

The relief granted herein shall be subject to the following:

1. Petitioners may apply for appropriate permits and be granted same upon receipt of this Order; however, Petitioners are hereby made aware that proceeding at this time is at their own risk until such time as the 30-day appellate process from this Order has expired. If, for whatever reason, this Order is reversed, Petitioners would be required to return, and be responsible for returning, said property to its original condition.
2. RC car racing shall be permitted from May 1-August 31. The races shall be held no more than one time per week, on a Saturday or Sunday. While administrative activities (i.e., registration or course marking) in connection with the races may begin at 8:00 A.M., operation of RC cars for whatever reason (i.e, racing, practice, repairs, etc.) shall be restricted to the hours of 10:00 A.M.-5:00 P.M. All activities of any nature in connection with the RC racing shall be concluded by no later than 7:00 P.M.
3. Petitioners must provide a landscape strip, fence or other screening between the parking lot and Mr. Arnold's property. The type of screening required will be determined in the sole discretion of the County's Landscape Architect.

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