IN THE MATTER OF COMMUNITY ENTERPRISES, INC. 4217 FITCH AVENUE 14TH ELECTION DISTRICT 5TH COUNCILMANIC DISTRICT	*	BEFORE THE
	*	BOARD OF APPEALS
	*	OF
RE: APPEAL OF CODE ENFORCEMENT VIOLATIONS	*	BALTIMORE COUNTY
	*	CASE NO: CBA-17-037

* * * * * * * * * * * *

OPINION

This matter came before the Baltimore County Board of Appeals as a record appeal of an April 6, 2017 decision of Administrative Law Judge Lawrence M. Stahl of the Office of Administrative Hearings. In his Findings of Fact and Final Order, Judge Stahl imposed a civil penalty of $500.00 against Respondent Community Enterprises, Inc. ("Community Enterprises"), legal owner of the property located at 4217 Fitch Avenue (the "Property"), and ordered that Respondent cease and desist all use of the Property as a storage yard, including the immediate cessation of all sorting and storage of discarded construction material brought to the site and the removal of portable spot-a-pots, trailers, dumpsters, truck/shipping containers, and other such unauthorized items presently on the Property.

The Board held a hearing on this matter on June 29, 2017 and publicly deliberated the matter on August 10, 2017. James L. Shea, Jr., Esq. represented Respondent, R. Brady Locher, Esq. represented Baltimore County, and Peter M. Zimmerman, Esq. appeared on behalf of People's Counsel for Baltimore County.

FACTS

The Property is 3.52 acres in size and currently is leased to a general contracting company identified as A-L Abatement, Inc. ("AL"). A 17,000 square-foot metal warehouse and office

building and two sheds sit on the Property. (Transcript dated Jan. 11, 2017 at 182.). Respondent purchased the Property in 2010. At that time, it was zoned M.L.- I.M. (T. 186). On August 30, 2016, the Property was rezoned to D.R. 3.5.

The Property has been the subject of multiple Citations and administrative hearings concerning the Property's use. Most recently, on December 13, 2016, Respondents received a citation for the failure to cease use of the property as a contractor equipment storage yard, failure to cease recycling, sorting, storage of discarded materials and scrapping type business, and failure to cease use of the property as a Class II Trucking Facility.

In 2016, Paul Redding, representing Community Enterprises, testified that AL brings to the site construction materials such as concrete metal and wood. AL sorts the materials on the Property and places them in dumpsters that, at some later time, are taken from to the site. (Amended Opinion and Order dated 9/9/16 at 2). AL also brings to the Property products containing asbestos and stores those products in an enclosed truck trailer parked at the site. Id.

At the January 2017 hearing before ALJ Stahl, Mr. Redding testified that AL typically dismantles structures or building interiors and transports the waste products such as carpets, walls, ceilings, steel, and other construction detritus in 55-gallon drum containers to the Property. (T. 187-88, 200). Other waste is put in clear bags. (T. 208). AL sorts these products, including metal, for potential sale to recyclers. Mr. Redding stated the site stores air compressors, skid steers, trash chutes, spare steel, trash bins, pallets, drums, scaffolding parts, salt for snow removal, dumpsters containing lots of building materials, and waste generated from AL's construction work. (T. 199-204). The debris is put into dumpsters on the property, where it sits until the dumpster is full, which typically is no more than a week (T. 207). At that point, the dumpster is taken to a landfill. (T. 188-190). He does not think of his operation as a recycling facility; AL does not bale material,

chop it up or shred it. (T. 207). AL also handles products containing asbestos and stores those waste products in a separate trailer on the Property. (T. 202). Mr. Redding indicated that during all relevant times, both before and after the rezoning, AL's use of the property remained relatively consistent. (T. 204).

At the January 2017 hearing, County Inspector Christina Frink from the Department of Permits, Approvals & Inspections testified. She originally issued a correction notice for the site in March 2016. In May 2016, she re-inspected and issued a Citation for the failure to cease storage of materials, equipment and vehicles within 100 feet of a residential zone, and failure to cease recycling, sorting, storage of discarded materials and scrapping in a ML zone. (Resp. Ex. 1). In October, 2016 she issued a similar citation to Community Enterprises. (Resp. Ex. 2). On December 13, 2016, Inspector Frink again re-inspected and ultimately issued another citation for the property based on the same grounds. (County Exs. 1, 2). Inspector Frink photographed, but did not enter upon the site in September 2016. Those photos reveal an extensive array of port-a-pots on site, many cinderblocks, multiple trucks/trailers containing barrels of some sort, dumpsters stacked in the middle of the property, wood and/or metal debris, and a pile of either metal or ladders or some type of long beams. (T. 55-62; County Ex. 4 A-CC). She issued notices and citations both before and after the zoning change from ML to DR 3.5. (T. 64-65).

Carl Richards also testified on the County's behalf as an expert in Baltimore County zoning regulations. According to Mr. Richards, "recycling" is not listed as a permitted use in the regulations. (T. 82). It also is not defined in the regulations but the department itself has defined it for their purposes and applied the definition consistently as a matter of administrative policy through the years. (T. 110). When confronted with a purported recycling business in a ML zone, the county may approve it but only if it is located *inside*, completely contained within a permitted

warehouse type of building. (T. 81). Any debris, whether inside a vehicle or piled up, is to be inside of a building. (T. 83). An open trash dump is not permitted in the zone. (T. 85). Mr. Richards stated that while a contractor's machines might be considered acceptable in a contractor's equipment storage yard, he did not believe that also contemplated "materials." Further, when containers are involved "you're looking more like a dump recycling or something like that." (T. 85-86). "Piles of material could be – could be construction type debris. It could be metal. Could be aggregate. Could be stone, wood." If such material is outside, "I would think that would be more of a dump. . . ." (T. 86-87). Mr. Richards noted however, that if a small number of neatly-bound bales of processed material were stored outside a building containing a principal recycling business, those products might be permitted as an accessory use. (T. 87-89). On cross-examination, Mr. Richards agreed that a "building materials storage yard" is a permitted use in an ML zone. (T. 94). He also stated that classification as a "construction equipment storage facility" can be a matter of degree, depending upon what else is stored on the property beyond such equipment as bobcats, skid loaders etc. If one trash bin was stored on the site temporarily that might be acceptable as an accessory use, but 50 bins would not be. (T. 101- 103). If the storage receptacle use is "very minor" it possibly would be acceptable. (T. 104-105). However, if building materials were stored for weeks or months in open containers outside, that could be a violation, depending on the length of storage and amount stored. (T. 116-120).

The County's final witness was Gloria Kelly. She owns a residence that abuts the Property, has observed the operations at the Property for many years and testified specifically about the state of the site since September 2016. She described pictures she had taken of the site, showing dumpsters, a boat, tires and metal, pallets, and over 1000 port-a-pots on the Property. (T. 136-143; County Exs. 5, 6). She also testified generally as to the equipment and materials she has observed

on the Property including trucks with skids or ladders that can move dumpsters on and off the site, many plastic bags with red tags on them, uncovered dumpsters (some with warning signs), tires and metal. (T. 151- 160). According to Ms. Kelly, she has observed people standing in the trucks emptying the truck by throwing things to people in dumpsters, as well as dumpsters emptied into other dumpsters. (T. 161-163). Her subsequent Affidavit noted a subsequent running of trucks while stationery, producing pollution and noise, metal oil tanks containing unknown substances and the severe noise at all hours of the day and night.

Mitchell Kellman testified on Community Enterprises' behalf as an expert in zoning, zoning compliance, and lawful use of properties in Baltimore County. He visited the site twice, first on a Sunday in December 2016 when the business was closed, and the other time in the week between Christmas 2016 and New Year's 2017. (T. 249). He testified that the use of the Property has remained the same before and after the rezoning. (T. 222). Mr. Kellman does not think the use constitutes a recycling facility, but does believe the property operates as a contractor or construction equipment storage yard and that the port-a-pots, the dumpsters, trailers etc. can remain on site as long as they're outside the regulated 100' buffer area. (T. 232-233). He believes that the Property use conformed to the prior ML zoning and that the current use is a legal, nonconforming use under the DR 3.5 zoning. (T. 223, 233).

Discussion

I. Res Judicata

As an initial matter, the parties have raised the issue of *res judicata*, and whether ALJ Beverungen's opinion of September 2016 and Community Enterprises' dismissal of its subsequent appeal bars rehearing of the claim that AL's activities on the Property were legal. ALJ Stahl ruled that Community Enterprises' dismissal of the appeal "acted as *res judicata* against any claim that

the activities of A-L on the site are or were legal; and would bar any further claim to permit uses on the site that were made in that case or could be made in the future." (ALJ Stahl Opinion at 3).

The doctrine of *res judicata* provides that "a judgment on the merits in a previous suit between the same parties or their privies precludes a second suit predicated upon the same cause of action." Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n. 5 (1979). Under the doctrine, judgment on the merits in a previous suit between the same parties or their privies is entitled to full preclusive effect and bars a second suit predicated upon the same cause of action. Seminary Galleria, LLC v. Dulaney Valley Improvement Ass'n, Inc., 192 Md. App. 719, 734 (2010) (citations omitted). *Res judicata* acts as "an absolute bar, not only as to all matters which were litigated in the earlier case, but as to all matters which could have been litigated." Whittle v. Bd. of Zoning Appeals. 211 Md. 36, 49 (1956).

The Board declines to find that the issue of non-conforming use is barred by *res judicata*. It is our opinion instead that ALJ Stahl's conclusion on this issue constitutes an error of law. Judge Beverungen's 2016 opinion did not adjudicate this issue on the merits, he ruled only that the issue was moot. Absent the requisite decision on the merits, *res judicata* is inapplicable.

II. Legal Non-Conforming Use

The heart of the remaining matter before the Board is whether the current use of the Property is a legal non-conforming use. That is, even though the Property currently is zoned DR 3.5, under which all agree the current admitted use is not permitted, was this same, ongoing use permitted under the prior ML-IM zoning?

The Baltimore County Zoning Regulations ("BCZR") define nonconforming use as "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." BCZR §101.1. "A valid and lawful nonconforming use is

established if a property owner can demonstrate that before, and at the time of, the adoption of a new zoning ordinance, the property was being used in a then-lawful manner for a use that, by later legislation, became non-permitted." Trip Assocs. v. Mayor & City Council, 392 Md. 563, 573 (2006). "Consistent with the notion that nonconforming uses are disfavored, Maryland law allocates the burden of proving a property's status as a nonconforming use upon the party seeking to establish that use." Lagna v. People's Counsel for Balt. Cty., No. 0036, 2016 Md. App. LEXIS 690, at *22 (App. Jan. 27, 2016). Community Enterprises had the burden to establish that the Property, when it was zoned ML, was being used in a lawful manner.

Community Enterprises argues that prior to the recent rezoning, the Property was being used as a "construction equipment storage yard" or a "building materials storage yard." A construction equipment storage yard is permitted in the ML zone if it is not within 100 feet of a residential zone. BCZR §253.1(B)(3); BCZR §253.4 The regulations also permit a building materials storage or sales yard in an ML zone. BCZR §253.1(B)(2).

A construction equipment storage yard is defined as follows:

> The use of any space, whether inside or outside a building, for the storage or keeping of contractor's equipment or machinery, including building materials storage, construction equipment storage or landscaping equipment and associated materials.

BCZR §101.1. The definition covers a space for the storage or keeping of contractor's equipment or machinery including building materials. The facts established here show that the Property's principal use is not such a space. ALJ Stahl found that "the use of the subject property [is] to receive trucked in construction debris, to sort and store that debris for later removal by truck. (ALJ Stahl Opinion at 3). He further stated that "the evidence establishes that AL "stored equipment on the site, including the extensive spot-a-pot storage, that construction debris was brought to the site by truck, separated, and stored on the site in dumpsters, or cants, etc.; and then removed later by

truck to a recycling facility or dump." Id. His conclusions are borne out by the testimony.

The owner of the Property testified to an extensive array of activity including the ongoing dumping, sorting and storage of waste materials on the site (some from local hospitals) before transfer to an off-site location. He did not however, testify to anything to indicate that AL stored construction equipment or machinery on the site, much less that it was the site's principal use. Ms. Kelly's testimony similarly referenced the sorting and dumping of waste materials, the presence of hundreds of port-a-pots on the site, the constant noise, plastic bags of waste, a boat, tires, dumpsters for the collection and storage of waste materials. Inspector Frink in her testimony and citations noted the continuing presence of many port-a-pots, cinder blocks, dumpsters, trailers, wood and metal debris, etc. Ms. Frink's and Ms. Kelly's photos corroborated their observations, and documented the extent of the waste and dumping and sorting activities on the site, the large numbers of port-a-pots, the dumpsters, the tires, and scrap metal around the site and even the boat sitting in the midst of all this. Those photos did not evidence a property dedicated primarily to storage of construction equipment and materials. Mr. Kellman opined that the site could be considered a contractor or construction equipment storage yard. We note, however, that a contractor storage yard is not permitted in an ML zone. Further, Mr. Kellman's familiarity with the property was limited to two visits, including one on a Sunday when the facility was not in operation. The testimony similarly does not demonstrate a principal use as a building materials storage or sales yard. A building materials storage or sales yard is defined as "the use of any space . . . used principally for the storage or sale of building materials. BCZR 101.1.

The demonstrated use appears to be more a dumping ground for waste materials; deconstruction scrap, not construction or building materials. In all, the use as described seems more akin to a junkyard as defined in section 101.1 of the BCZR:

> Any land used commercially or industrially for storage or for sale of scrap metal, wastepaper, rags or other junk, and any land. . . used for the storage of unlicensed or inoperative motor vehicles, dismantling or storage of such vehicles or parts thereof, or used machinery, regardless of whether repair or any other type of commercial operation occurs, but excluding scrap for use in manufacturing processes on the premises or waste materials resulting from such processes or resulting from the construction or elimination of facilities for such processes.

In this regard, we note that on March 21, 2016 the County cited the property owner for operation as a junkyard and instructed Community Enterprises to stop outside storage of all trash and debris. (County Ex. 2 at 2). A junkyard is not a permitted use in an ML-zoned site.

"When it comes to reviewing the factual basis for the hearing officer's decision . . . the standard is the traditional one of looking only to whether there is substantial evidence to support the findings. In that examination, the Board does *not* make independent evaluations, for to do so would require the Board to make credibility decisions without having heard the testimony." Monkton Pres. Ass'n v. Gaylord Brooks Realty Corp., 107 Md. App. 573, 581, 669 A.2d 195, 199 (1996). Community Enterprises had the burden to establish a legal non-conforming use. The majority of the Board finds that it did not meet this burden and find further that substantial evidence supports ALJ Stahl's findings of fact. Community Enterprises failed to demonstrate that the activities AL conducted while the Property was zoned ML were permissible under that zoning. Upon rezoning the activities remained illegal and therefore do not constitute a legal non-conforming use.

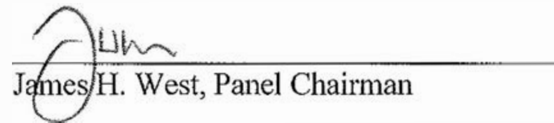
ORDER

THEREFORE, FOR THE REASONS STATED ABOVE, IT IS THIS 25th day of August 2017 by the Board of Appeals of Baltimore County

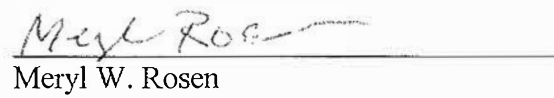
ORDERED that the April 6, 2017 Findings of Fact and Final Order of the Administrative Law Judge, be and is hereby, AFFIRMED

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



James H. West, Panel Chairman



Meryl W. Rosen

IN THE MATTER OF COMMUNITY ENTERPRISES, INC. 4217 FITCH AVENUE 14TH ELECTION DISTRICT 5TH COUNCILMANIC DISTRICT RE: APPEAL OF CODE ENFORCEMENT VIOLATIONS	* * * * *	BEFORE THE BOARD OF APPEALS OF BALTIMORE COUNTY CASE NO: CBA-17-037

* * * * * * * * * * * *

CONCURRING AND DISSENTING OPINION

I concur in part and dissent in part.

As to the dissent, I would not affirm Judge Stahl's determination because as I read his decision, he never actually considered the Respondent's argument that it was a Construction Equipment Storage Yard as defined in BCZR Section 253.1. My review of the testimony and the exhibits demonstrates to me that the evidence of whether it was a Construction Equipment Storage Yard was fairly debatable. Respondent's expert testified that it was. Carl Richards testified for the County. His testimony on the salient issues can be usefully summed up in the phrase "It depends". I do not mean this pejoratively. Mr. Richards' view of the situation was properly nuanced. There were factors that indicated it was a Construction Equipment Storage Yard and factors that indicated it was not. It was a question for a neutral factfinder to decide, and I do not believe that Judge Stahl addressed that question. The only aspect of his opinion that spoke to the issue was to dismiss the possibility in two lines by indicating that it was "not permitted." The language of that comment was linked to Judge Beverungen's earlier decision in which he found that respondent's use – whatever it was – violated the buffer. Judge Stahl's decision reads: "As indicated by the ALJ [Beverungen], since the property is within 100 ft. of a residential zoned boundary, even that use [Construction Equipment Storage Yard] is not permitted." Inherent in Judge Stahl's opinion appears to be the view that the violation of the buffer meant that the use over

the entire parcel was illegal. Otherwise the language and context of the reference in Judge Stahl's opinion to Judge Beverungen's opinion makes no sense. Intruding into the buffer may make the Respondent subject to a violation notice, but it does not invalidate the legality of an otherwise permitted use outside of the buffer.

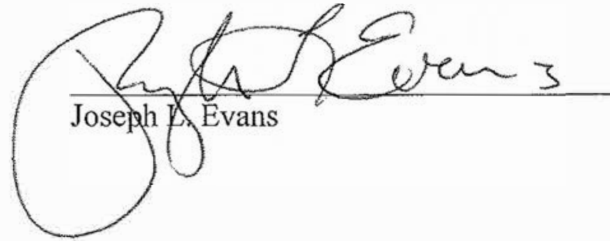
I understand that the deference standard commands us to look at the opinion in its entirety to see whether there is evidence by which the decision could be justified. The problem in this instance is that Judge Stahl did not even consider the question. For us to now cobble together some of his findings and conclude that he would have decided against Respondent had he actually decided the question takes deference, in my opinion, to an unreasonable degree. Because of the re-zoning to DR 3.5, if Community Enterprises is not a Construction Equipment Storage Yard, the site can now only be used for residential and very limited non-residential purposes. *See e.g.* BCZR Section 1B02.1. The property – which has been a commercial property for decades – may well be worthless. Moreover, the taxes, employment, and related economic benefits are at risk. These are consequences that are simply too extreme to be permitted to happen by resort to a legal fiction that says that if a judge had decided something that he did not actually decide, he would have decided it in a particular way. As indicated above, the record shows that the Construction Equipment Storage Yard question can be decided for, or against, Community Enterprises. If Community Enterprises is going to be put out of business, it deserves to hear the factfinder say why. For this reason, I would remand the case to Judge Stahl with instructions to decide the Construction Equipment Storage Yard question.

I concur in the Board's conclusion that *res judicata* did not prevent Respondent from raising the possibility of being a Construction Equipment Storage Yard as a defense to the violation. As indicated above, Judge Beverungen's opinion did not decide the issue on the merits,

finding, instead, that it was moot. That should end the argument because there is no decision on the merits, one of the basic requirements of *res judicata*. The rejoinder that Respondent's failure to pursue an administrative appeal constitutes res judicata only makes sense if one presupposes that pursuit of an appeal would have resulted in a decision on the merits against Respondent. The argument reduces to the claim that Respondent is foreclosed from raising the argument because if it had litigated the question further, it would have ultimately lost on the merits. The argument assumes that Respondent's position is incorrect and would have been found to be incorrect if Respondent had bothered to litigate it, and therefore, because Respondent did not litigate it, Respondent is now barred. In other words, its failure to litigate the moot question (to the CBA, the Circuit Court, the Court of Special Appeals, and/or to the Court of Appeals?) somehow stands for the proposition that Respondent has forfeited his position on the merits. If Judge Beverungen had decided the issue on the merits and Respondent had not pursued the appeal, then and only then would *res judicata* arguably apply.

Even if *res judicata* did technically apply in this matter, I would not invoke it. As explained in *Parklane Hosiery vs. Shore*, 439 U.S. 322 (1979), cited with approval *in Garrity v. Maryland State Board of Plumbing*, 447 Md. 359 (2016), the non-mutual offensive use of *res judicata* to foreclose a defense does not further the traditional rationale of *res judicata* to prevent vexatious and repetitive litigation. Accordingly, while such use is permissible, it is not required to be enforced if doing so would be inequitable. In this instance, the use of res judicata would put Community Enterprises out of business. That is a highly inequitable result, which in my view, nullifies any effort to impose *res judicata* on this case.

August 25, 2017
Date



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RE: *In the Matter of: Community Enterprises, Inc.*
Case No.: CBA-17-037

Dear Counsel:

Enclosed please find a copy of the final Opinion and Order, and Concurring and Dissenting Opinion, 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,

Sunny Cannington /taz

Krysundra "Sunny" Cannington
Administrator

KLC/taz
Enclosures
Multiple Original Cover Letters

c: See Attached Distribution List

c: Paul Redding, President/Community Enterprises, Inc.
A-L Abatement, Inc.
Gloria Kelly
Lawrence M. Stahl, Managing Administrative Law Judge
Christina Frink, Zoning Inspector/PAI
Lionel van Dommelen, Chief/Code Enforcement
W. Carl Richards, Jr., Zoning Supervisor/PAI
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