

IN RE: PETITION FOR SPECIAL HEARING	*	BEFORE THE
E/S of Park Heights Avenue,		
170' S of Velvet Valley Way	*	ZONING COMMISSIONER
(10729 Park Heights Avenue)	*	OF
3 rd Election District		
2 nd Council District	*	BALTIMORE COUNTY
Rainbow Hall, Inc.,	*	
<i>Legal Owner/Respondent</i>	*	
Valleys Planning Council, Inc., et al		Case No. 2010-0280-SPH
<i>Petitioners</i>	*	

* * * * *

ZONING COMMISSIONER'S ORDER AND OPINION

This matter comes before the Zoning Commissioner for consideration of a Petition for Special Hearing filed by Michael R. McCann, Esquire, on behalf of the Petitioners, Valleys Planning Council, Inc., (VPC) et al.¹ The Petitioners have requested the special hearing filed pursuant to Section 500.7 of the Baltimore County Zoning Regulations ("B.C.Z.R.") to determine whether the present uses of the subject property are in conformance with the B.C.Z.R., including any activities that may be permitted as a non-conforming use.

The hearing in this case lasted four (4) days and it is perhaps an understatement to say that emotions are charged on both sides of this dispute.² More than 10 witnesses testified at the public hearing and more than 60 exhibits were received into evidence. Given the extent of the oral testimony and the voluminous nature of the documentary evidence, I will not belabor the point by

¹ The Petition was amended over Respondent's objection to allow the inclusion of Valleys Planning Council members Mark Wilson and Harlan Zinn as party Petitioners. Further attempts to amend the Petition to add Henry Rosenberg, Jr., David & Suzi Cordish, Blake & Angie Cordish, Reed & Maggie Cordish and Anne Brooks at the conclusion of Petitioners' case was denied.

² Numerous individuals appeared and/or wrote letters as interested citizens either in support or in opposition to the request. Due to limitations of time and space, a complete listing of all those individuals cannot be set out here; however, the sign-in sheets circulated at the hearing reflect their names and are contained in the case file as part of the record along with letters, e-mails and petitions received from many of the affected residents.

recapitulating such testimony and summarizing the documents, as is customary in Orders from the Zoning Commissioner. Rather, I will include in the substantive portion of this memorandum those facts that are relevant or dispositive of the legal issues under consideration. Prior to discussing the facts and issues presented, a brief overview of the property and its zoning history will help to place this dispute in the proper context.

HISTORY

The property at 10729 Park Heights Avenue, known as Rainbow Hill, is listed on the Baltimore County Final Landmarks List as Final Landmark No. 198. The property includes a main house constructed in approximately 1915, and a small home (10709 Park Heights) constructed in approximately 1898 which was known as the former Avalon Inn cottage. In addition, the property contains two (2) single family homes on the site (10731 and 10733 Park Heights), which were apparently constructed in the 1960s.

The Rainbow Hill property lies within the Greenspring Valley National Register Historic District, which was designated by the U.S. Department of the Interior, National Park Service, on October 3, 1980. The subject property is situated among a picturesque and pastoral valley, and includes rolling hills and is surrounded by late 20th century suburban residential development. The main dwelling at Rainbow Hill, located at 10729 Park Heights Avenue, was constructed between 1915 and 1917 and was designed by the architectural firm of Horace Trombauer. The main building is constructed in the Beaux-Arts style and is rectangular in form, surrounded by three (3) bays that project from the façade and rear elevation. The property contains a two-story wing, which gives the building an "L" shape. General Douglas MacArthur lived in the large Rainbow Hill mansion in the 1920s, and the subject property is dotted by mature trees, including a Ming tree given to the MacArthurs by Japanese Emperor Hirohito in the 1920s. The elegant house was

sold to Henry and Ruth Rosenberg in 1940. After his death, the house and entire estate was sold in 1963 to the Rainbow Hill Corporation and the Baptist Home of Maryland, Inc. renovated the thirty-three room mansion to meet the needs of its elderly residents.

Zoning Chronology

Date & Case No(s)	Zoning	Request / Petition Request	Action / Order
1957	R-40	Reclassification from "A" Residential to R-40	Comprehensive Rezoning by County Council
11/26/63 63-152-X	R-40	Special Exception for a "boarding house for the aged" (40 Units/Persons)	Granted by Zoning Commissioner John G. Rose
1969	R-40	Approval of the McCormick Wing addition (24 Units/Persons) to "boarding house for the aged"	
12/01/75 76-89-SPH	RDP	Special Hearing to approve the construction of a new infirmary wing on an existing boarding home for the Elderly. Proposed Infirmary Wing (25 Units/Persons)	Granted with restrictions
10/08/76	RC 2 and RC5	Reclassification from RDP to RC 2 and RC 5	Comprehensive Rezoning by County Council
Between 10/13/88 & 04/03/90	RC 2, RC 3 and RC 5	Reclassification of a portion of RC 2 to RC 3	Cycle Rezoning, Out-of-Cycle Rezoning or Map Correction
10/16/91 91-166-SPHX	RC 2, RC 3 and RC 5	Special Exception for an addition to an existing convalescent home as a use permitted by special exception in an RC 3 zone pursuant to BCZR 1A02.2.B.16. Special Hearing to approve an amendment to the special exception and site plan in Case No. 63-152-X to construct two additions to the existing facility.	Granted by Board of Appeals. While the legality of the existing convalescent home or nursing home use was not confirmed in the order itself, the legality was confirmed in the opinion of the Board that accompanied the order.
06/03/97 97-230-SPH & PDM # III-393	RC 2, RC 3 and RC 5	Five Lot Development Plan approved for three additional single family dwellings. Special Hearing to approve the creation of three undersized RC 5 non-density and one RC 2 non-density parcels, and to approve the removal of existing special exception from a portion of the tract.	Granted in Part and Dismissed as Moot in Part by Lawrence E. Schmidt as Hearing Officer
11/2004	RC 2 and RC 5	Reclass. RC 3 portion of property to RC 2	Comprehensive Rezoning by County Council
04/16/2010 2010-0280-SPH	RC 2 and RC 5	Special Hearing to determine the uses of the property that comply with the BCZR and previous approvals, and whether the property is and has been used in violation or non-compliance with same.	Decision pending

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Although voluminous testimony and exhibits were introduced during the four-day hearing in this matter, resolution of the request for special hearing turns on only a handful of pivotal facts. Conceptually, the discussion that follows will treat individually the main Rainbow Hill structure, and the three (3) single family dwellings on the subject property. Thereafter, the Opinion will conclude with a discussion of the permissible uses for these structures.

Based on the testimony and exhibits, it would appear as if the Rainbow Hill property (which comprised approximately 43 acres) was used as a private residence from the date of its construction (1915) until 1963, when it was acquired by the Baptist Home.³ At that time, in Case No. 63-152-X, the Zoning Commissioner granted a special exception for a "boarding house for the aged", which allowed for an occupancy of 40 persons in the Rainbow Hill main house. The care home for the aged was operated by the Baptist Church, and that use continued on the property from 1963 until approximately 2001, according to the testimony of Theodore Houck, M.D., the former medical director of the facility. In 1969, the Baptist Home received approval for an additional 24 residents at the boarding house for the aged, and according to Dr. Houck, the number of residents was approximately 60 until the facility ceased operation in 2001 upon the bankruptcy of the entity managing the operation.

In 1991 (91-166-SPHX), then Zoning Commissioner J. Robert Haines granted a special exception to the Baptist Home, permitting its continued operation as a "convalescent home" or "continuing care facility". The Board of Appeals affirmed, finding that the property was being operated as a "convalescent home". The Baptist Home operation, however, faced mounting financial difficulties in the latter years of its operation. In 1997, the home sold approximately 22

³ The documents reflect that a country club may have been operated on the site in approximately 1960. This was short-lived, and really has no bearing on the outcome of this dispute.

acres of the property, and was granted approval to create three (3) additional single family building lots as reflected on the development plan approved in PDM Case No. III-393. Following the subdivision, the Baptist Home property was reduced in size to approximately 20 acres.

As noted at the outset, the property includes a historic cottage erected in 1898, and which was originally part of a hotel use. It next appears, according to witness testimony, that this historic cottage was used as a caretaker home in connection with the boarding house for the aged, although as will be discussed later, that fact is inconsequential in connection with an evaluation of this structure's legitimacy and the uses to which it might be put.

The other two (2) dwellings located in the northern portion of the lot are single family dwellings constructed in the late 1960s or early 1970s. These houses are noted on the plat that accompanied the petition in zoning Case 76-89-SPH as "housing for the administrators and employees of the home". However, according to the testimony of Sheldon Lewis, who resided on the property from 1998 through April 2002, these houses were occupied by Cheryl Beloga and Sherry Rubin, neither of which were associated with the operation of the aged home in the Rainbow Hill structure. Since the Baptist home ceased operation, these dwellings have been used as single family residences, and exhibits were admitted which reflected rental payments received by Henry M. Wright, Jr. and/or an entity with which he is affiliated. There is no evidence in the record establishing that those two (2) dwellings were ever vacant for a year or longer.

With regard to the historic cottage constructed in 1898, that construction and use of course predated the B.C.Z.R. and the creation of Baltimore County as a charter government, by more than a half century. As such, it is a non-conforming dwelling⁴ and may continue to be used as such. The cottage cannot be expanded more than 25% in area (per B.C.Z.R. Section 104.3), and though

⁴ The court of appeals recognizes both non-conforming "uses" and "buildings". *Beyer v. Balto. City*, 182 Md. 444, 446 (1943)

it can be leased, it must be occupied by a family or no more than two (2) unrelated individuals, or else it would constitute a "boarding house" which is permitted only in a D.R. zone per B.C.Z.R. Section 408.B.1.

The two (2) single family homes located in the northern portion of the subject property were apparently used for more than 30 years as an accessory use (i.e., living quarters for staff) to the Baptist home. There are no administrative or judicial orders declaring these homes accessory structures however, and it is not clear that a single family dwelling could properly be an accessory (as opposed to principal) structure. Moreover, and unlike the scenario where an apartment superintendant will live on site, it is not readily apparent that workers at a convalescent or senior home "customarily" reside on site, as that term is used in B.C.Z.R. Section 101.1 in defining an accessory structure. Although it is clear that these homes are no longer used in that fashion, that fact is not dispositive of the present inquiry.

These dwellings are reflected on a subdivision plat recorded among the land records of Baltimore County in Plat Book S.M. 70, Folio 95 (from PDM Case No. III-393), and as such are "vested" as a matter of Maryland constitutional and common law, as well as under the Baltimore County Code. B.C.C. Section 32-4-264; *Baiza v. College Park*, 192 Md. 321, 334 (2010).

In addition, these dwellings were constructed in the late 1960s, at which time the property was zoned R-40. Under then applicable regulations, each "principal building hereafter erected shall be located on a lot having an area of not less than 40,000 square feet." 1955 B.C.Z.R. Section 202.1. According to County officials, residential development at this time took place by using "divisional lines" instead of a minor subdivision process. Cf. Zoning Commissioner Policy Manual, p. 1B-26.1. While there is no evidence in the record concerning the exact method or

process by which County approval was secured, for purposes of this Opinion I will assume the “divisional line” process was used. Inasmuch as the property comprised approximately 43 acres at this time, it is beyond dispute that the lot⁵ area requirements were satisfied at the time of construction. As such, these dwellings too are non-conforming structures, and may be used in the same fashion as the cottage discussed above. Any other ruling, which would in effect forbid these homes from being used as single family dwellings, “would have the effect of confiscating such property and destroying a vested right therein of the owner”. *Purich v. Draper Props., Inc.*, 395 Md. 694, 708-09 (2006) (holding non-conforming use is a vested right and entitled to constitutional protection). Petitioners contend in their Reply Memorandum that there is “insufficient density” to support the three (3) single-family dwellings on the Rainbow Hall parcel. This is demonstrably false, given that the development plan in PDM Case No. III-393 (Exhibit 45) reflects (in the “Site Data” portion) that the RC-3 portion of the property would support four (4) units.

It is irrelevant to the present analysis whether these dwellings are used in connection with the Baptist care home. Rather, given that the owner of the subject property enjoys vested legal rights with respect to these dwellings, they may be used as single family dwellings. Significantly, and this issue will be discussed shortly in connection with the main dwelling on the property, these two (2) single family dwellings (like the cottage) cannot be used as apartments or boarding houses, which are prohibited uses in the present R.C. 2 zone.

⁵ “Lot” is not a defined term in the 1955 (or current) regulations. In the 1945 zoning regulations, “lot” was defined as “[L]and occupied, or to be occupied, by a building and its accessory buildings...”

Finally, it is the main Rainbow Hill dwelling itself (aka Rainbow Hall) that has been the subject of much of the zoning history,⁶ and its use has changed greatly over the years. Again, between the years of 1963 and 2001, the structure was used as a boarding house for the aged or convalescent home. Equally clear is that such use ceased in 2001, which means that the special exception for that use has become dormant.⁷

Since that time the Rainbow Hill structure has been occupied by various numbers of non-disabled, non-elderly residents. Such use would constitute a “multi family building” or “boarding house” under the B.C.Z.R., neither of which are permitted as of right or by special exception in the R.C. 2 zone, which is the current zoning designation for the subject property. As such, to the extent the Rainbow Hill structure is being used in this regard, such use is unlawful under the B.C.Z.R. All of the prior zoning Orders explicitly restricted the special exception (or non-conforming) use of this property to a home for the aged or convalescent home, which is obviously not the same thing as an apartment, multi-family dwelling or boarding house. Even if – for sake of argument only – it was assumed a “boarding house” was at one time lawfully operated on the property, that use would not be lawful at present because, as Petitioners note in their Reply Memorandum, the B.C.Z.R. requires a public hearing and application process which has not taken place in the present case.

⁶ As noted above, none of the prior zoning cases even mentions the three (3) single family homes or the use(s) to which they were or could be put.

⁷ On this point, I part company with former Zoning Commissioner Lawrence E. Schmidt, who ruled in Case No. 97-230-SPH that the special exception granted in 1963 (and clarified and re-issued by Zoning Commissioner Haines in 1991) was lost when the property was down-zoned to RC2, which did not permit a convalescent home by special exception. Mr. Schmidt opined that the use became nonconforming. More than semantics is at stake: if the convalescent home operated as a nonconforming use, it is obvious that such use ceased several years ago, meaning the nonconforming use has terminated per B.C.Z.R. Section 104.1. I am of the opinion that the special exception, once granted, in essence attaches to and runs with the land, and is therefore potentially available, although dormant at this time. See, 3 Anderson, *American Law of Zoning 3d* pp. 631-33 (1986) (once granted, special exception attaches to and runs with land and survives despite change in ownership). If Mr. Wright desired to resuscitate the convalescent/nursing home use, he would of course need to file for a special hearing to determine whether the operation would be in the public interest.

The only arguable non-conforming use to which the property was put is for a care home for the aged or convalescent/nursing home. No evidence was presented establishing that – during the years of the Baptist Home operation – non-elderly or non-disabled tenants were leased apartments or dwelling quarters in Rainbow Hall. To the contrary, Petitioners’ Exhibit 4 contains numerous residential lease agreements for “apartments” within the main Rainbow Hall addition structure and the three (3) single-family dwellings on the property, and all post-date the closing of the Baptist Home. Under Maryland law, non-conforming uses are disfavored. *Trip Assoc. v. City of Balto.*, 392 Md. 563, 578 (2006). The Court of Appeals has held that “[w]hether a non-conforming use can be changed...ordinarily is governed by the provisions of the applicable local ordinances and regulations”. *Prince George’s Co. v. Gardner, Inc.*, 293 Md. 259, 268 (1982). Turning to the B.C.Z.R., it is clear that “upon any change from such non-conforming use to any other use whatsoever” the non-conforming use will terminate. B.C.Z.R. Section 104.1. The Rainbow Hill house is thus restricted to the permitted uses set forth in Section 1A01.2.B of the B.C.Z.R. or its owner must seek zoning relief/reclassification for any other use.

I am aware of and am sympathetic to Mr. Wright’s plight: he is preserving an historic structure and using the premises in a manner – seven (7) or so tenants – that is a much less intense use than a convalescent home with 80+ patients. Even so, I am bound by the zoning regulations and as the court of special appeals has held, any use other than those permitted as of right or by special exception is prohibited. *Kowalski v. Lamar*, 25 Md. App. 493 (1975).

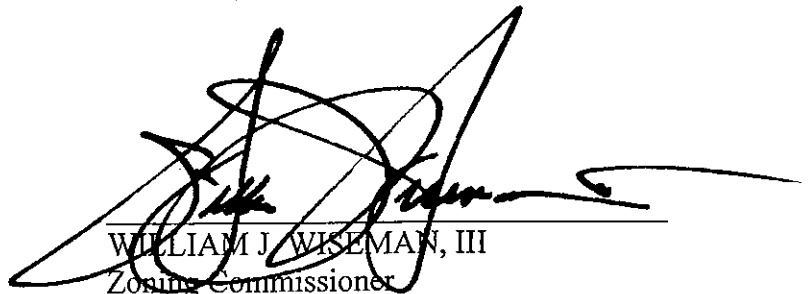
One final note is in order concerning the disposition of this case, and the “laundry list” of issues set forth in the original and amended Petition(s). I am persuaded and in agreement with many of the arguments presented in Respondent’s brief concerning the impropriety of allowing a community group – in this case, VPC – to essentially prosecute a private code enforcement case under the guise of Section 500.7, after the County has repeatedly declined to do so. As an initial

matter, the *Falls Road Community Association v. Baltimore County, et al*, in Case No. 03-L-08443, recently confirmed that County code enforcement authorities possess broad discretion in determining whether or not to initiate code enforcement proceedings at the behest of community members and associations.

More to the point, Section 500.7 does not, in my opinion, grant to the Zoning Commissioner wide ranging authority to issue what are in essence “advisory opinions” concerning Baltimore County land-use and zoning matters. It is true that Maryland law provides a lax standard for administrative standing – especially where, as here, a Petitioner need only show he is an “interested party”, as opposed to an “aggrieved party”, *Chesapeake Bay Foundation v. Clickner*, 192 Md. App. 172, 183 (2010). Even so, the only relief which may be sought by an “interested party” under Section 500.7 is a determination of whether a nonconforming use exists on an identified parcel of land. As such, the foregoing Opinion has considered only that issue, and I do not believe that I have statutory authority – or that Petitioners have standing – to address the other requests in the Petition(s).

THEREFORE, IT IS ORDERED by the Zoning Commissioner for Baltimore County this 13th day of January, 2011 that the Petitioners’ (Valleys Planning Council, Inc.) request for Special Hearing is granted and that the subject property may be only used in accordance with the terms set forth in the foregoing memorandum and opinion.

Any appeal of this decision must be taken in accordance with Section 32-3-401 of the Baltimore County Code.


WILLIAM J. WISEMAN, III
Zoning Commissioner
for Baltimore County

WJW:pz/dlw