BOARD OF APPEALS CASE NO. 109	*	BEFORE THE
APPLICANT: Steve Feazell	*	ZONING HEARING EXAMINER
REQUEST: Rezone 1.2 acres from RO, Residential/Office to B2, Community Business; 1615 E. Churchville Road, Bel Air	*	OF HARFORD COUNTY
	*	Hearing Advertised
HEARING DATE: February 14 and 28, 2000	*	Aegis: 9/229/99 & 9/29/99 Record: 9/24/99 & 10/1/99

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ZONING HEARING EXAMINER'S DECISION

The Applicant, Steve Feazell, is requesting that 1.2 acres, more or less, be rezoned from RO Residential/Office to B2 Community Business District based upon an alleged mistake which occurred during the 1997 Comprehensive Rezoning process. The Applicant claims that it was a mistake for the County Council to retain the RO zoning on the property because RO is inappropriate for the area and there were other similar properties nearby which were reclassified to B2 during the comprehensive rezoning in 1997.

The subject property is located at 1615 E. Churchville Road, Bel Air, just east of the intersection of Routes 22 and 543. It is more specifically identified as Parcel 560, in Grid 4E, on Tax Map 41. The parcel is located in the Third Election District and is currently zoned RO Residential/Office.

The Applicant, Mr. Steve Feazell, who resides at 1002 Klender Court, Bel Air, appeared and testified that he is the current owner of 1615 E. Churchville Road. He was also qualified and accepted as an expert in commercial real estate brokerage. Mr. Feazell testified he bought his parcel in 1999, approximately two years after the comprehensive rezoning process had been concluded. Mr. Feazell described his property as slightly larger than an acre, improved by a small, dilapidated house which sits up close to Route 22. A 24-hour-a-day convenience store and a gas station lie directly to the west. The Harris property (also the subject of a zoning reclassification which was heard together with the Feazell request) lies adjacent to the east. A Rite-Aid pharmacy is located directly across Route 22 from the Feazell parcel, as well as the Quillen property which has proposed construction of a bank.

Case No. 109 - Steve Feazell

Mr. Feazell's property is currently zoned RO, but he is requesting reclassification to B2. The county has recently advised him that the abandoned house on the property is unsafe. According to Mr. Feazell, the cost to remodel the dwelling is economically prohibitive and, in his opinion, the RO classification is inappropriate because, without significant "foot traffic", there is no market for RO uses. However, Mr. Feazell did concede that the Quillen property across the street is currently zoned RO and a bank has been proposed for that site. He also agreed that there are a series of parcels approximately one-half mile from his property which are also zoned RO. Mr. Feazell does believe that the property is marketable and developable as B2 zoned property. He testified that he did not believe there would be any adverse impact to adjoining properties if the B2 zoning were approved.

Ms. Lee Harris, 2905 Fallston Road, Fallston, appeared and testified that she purchased the property at 1619 E. Churchville Road, adjacent to the subject property, at an auction in 1993. From the time of purchase, she has used the property for rental to residential tenants. Ms. Harris indicated that the parcel is a narrow, one (1) acre lot, sixty-seven (67) feet wide and six hundred and ten (610) feet deep. The property is improved by a small, 60-year old house, in poor condition, and an open garage. According to Ms. Harris, the house sits up close to the roadway, the front yard having been significantly reduced when Route 22 was widened during the latter part of 1996. A church and an associated graveyard adjoins the subject property to the east and the Feazell property is adjacent to the west. A Royal Farms is located to the west at the rear of the property. It was Ms. Harris' testimony that the property is not desirable for residential use, even if the condition of the dwelling were improved, because the house is located too close to Route 22 and surrounding non-residential properties. She indicated that she has had tenants leave because of the proximity to the road and the commercial businesses in the area. However, Ms. Harris did note that the property has been rented most of the time since she bought it in 1993, and that she is earning about six-hundred and fifty ($650.00) dollars per month in rental income at this time. She paid $83,000 for the property at the auction.

Case No. 109 - Steve Feazell

According to Ms. Harris, she did not apply to rezone the property during the 1996-1997 comprehensive rezoning review because she was not aware of the application process and was not familiar with the procedure. She became aware of the possibility of rezoning when she received written notice for the proposed rezoning of the nearby Boyer property on Route 543.

Mr. Mark Decker, 503 Giles Street, Bel Air, appeared and testified that he was a member of the Harford County Council from 1994 to 1998 and participated in the 1997 Comprehensive Rezoning as part of his council duties during that time. Mr. Decker recalled that there had been a request to rezone two properties located on Route 543 just north of the intersection of Route 22 (known as the "Boyer" properties) from RO Residential/Office to B2 Community Business District. According to Mr. Decker, the County Council voted to change the zoning of the Boyer properties to B2 primarily because Route 543 had been widened, leaving the dwellings on the properties without much of a setback from the roadway. Mr. Decker did not recall whether other properties located near the intersection were considered for rezoning. However, he did note that the Council did not consider the potential rezoning of any properties which were not listed in the Comprehensive Rezoning Log prepared by the Department of Planning and Zoning during the process. If he or other Council Members had concerns about a particular parcel, they could have raised those concerns with Planning and Zoning, visited the properties and perhaps spoken with the property owner. They could have requested that a property be added to the log.

It was Mr. Decker's testimony that the Council did look at the Route 543/22 intersection and surrounding properties as a whole during the review of the county's Master Plan with particular regard for future improvements to the roadways and to the water and sewer plan. He did not believe that he was misled or given misinformation regarding any of the properties located near this intersection. He felt that all required guidelines were followed by the Council during the comprehensive process and that the process itself was extensively advertised. He believed that when the Council reviewed the water and sewer plan, the Master Plan and the highway plan, they considered the impact of proposed changes on adjoining properties.

Case No. 109 - Steve Feazell

Ms. Arden Case McClune, the former Director of the Department of Planning and Zoning, currently employed in the Department of Parks and Recreation, appeared and testified that she was the Director of Planning & Zoning during the 1997 Comprehensive Rezoning process. At that time, her legal name was Arden Case Holdredge. It was Ms. McClune who issued the "Director's Report" for the 1997 Comprehensive Zoning Review, marked and admitted as Petitioner's Exhibit 4-D. According to Ms. McClune, 417 applications for rezoning were filed during the comprehensive, with 21 additional properties added by the Department itself. All subject properties were listed in the Issue Log (Petitioner's Exhibit 4-E) and each property was given an individual technical assessment by the Department of Planning and Zoning. No assessment was performed on any property that was not submitted for reclassification within the comprehensive process. The only properties considered for reclassification by the Council during the comprehensive were those properties listed in the Issue Log and analyzed by Planning and Zoning.

Ms. McClune testified that, as part of Planning and Zoning's analysis of each property, the Department also investigated whether any adjoining properties should be included in the requests for reclassification based upon whether there were changes in the neighborhood which would justify a rezoning. Ms. McClune stated that the purpose of the comprehensive process was to look at all properties to be sure that there were consistent zoning patterns throughout the county. According to Ms. McClune, not only did the staff of Planning and Zoning take a comprehensive view throughout the county, but members of citizen planning councils also were enlisted in the process to review their particular communities and make recommendations to the Director if they believed there were other properties which should be rezoned. Ms. McClune stated that it was the Department's responsibility to conduct the most thorough and comprehensive zoning review possible in order to implement the policies of the Master Plan. The results of this review by the Department were reflected in the recommendations set forth in the Director's Report, referenced earlier. Specifically, Ms. McClune testified that the Department recommended adding additional properties to the comprehensive where appropriate zoning patterns indicated that certain changes should be made.

Case No. 109 - Steve Feazell

As an example, Ms. McClune noted that if there were properties on either side of a parcel which were recommended for rezoning, that parcel would have been added to the comprehensive as well. Planning and Zoning would then notify the parcel's owner that the property was being recommended for rezoning in the comprehensive zoning bill. In sum, Ms. McClune gave extensive testimony about the comprehensive rezoning review process itself, including a detailed description of meetings, hearings, citizen input and County Council participation and action.

In the area in question, the Department of Planning and Zoning and the Planning Advisory Board (PAB) recommended that the Boyer properties on Route 543 retain their zoning of RO. The County Council voted to change their zoning to B2. Another property along Route 22 near the 543 intersection (known as the Quillen property) also applied for rezoning to B2. Again, the Department and the PAB recommended that it retain its RO zoning. As to the Quillen property, the County Council agreed with the Department and kept that property RO. The Quillen property lies almost directly across Route 22 from the Harris and Feazell properties which are at issue here.

Finally, Ms. McClune stated that the Route 543 and 22 intersection has been the subject of community concerns regarding traffic and significant commercial development for a number of years. These concerns led the Department of Planning and Zoning to look specifically at this area and all of the properties near the intersection during the comprehensive process. The Department considered these factors in determining whether to recommend that the B2 District be expanded or to leave a certain amount of RO property to serve as a buffer between the commercial development and the residential and agricultural land which remains along those highways. With regard to the Harris property, it was Ms. McClune's testimony that she considered whether the R2 zoning should remain as a buffer between the existing church property to the east and the RO zoned Feazell property to the west and that the recommendations set forth in her Director's report reflect the fact that she believes the buffer should remain. According to Ms. McClune, there is no additional information available today which was not considered during the 1997 Comprehensive Rezoning process.

Case No. 109 - Steve Feazell

Mr. Lee Cunningham, of Lee Cunningham & Associates, was qualified and testified as an expert in land use and transportation planning. In addition to being familiar with the current applications, the Code, and the exhibits, Mr. Cunningham testified as to his knowledge of the zoning history of the Harris and Feazell properties. Prior to 1980, both the Harris and Feazell properties were zoned AG Agricultural. In 1980, the Harris property was rezoned to R2 Urban Residential, and this zoning was reaffirmed in the 1982, 1989 and 1997 comprehensive rezonings. The Feazell property remained Agricultural until 1989 when it was rezoned to RO Residential/Office. Mr. Cunningham also indicated that the Route 543 and Route 22 intersection is designated as a neighborhood center, and appears as a "low intensity" area for development in the 1996 Master Land Use Plan.

Mr. Cunningham testified that he measured the distance from the Harris property to the church building to the east, noting that it was approximately two-tenths (2/10ths) of a mile, with the church property extending another tenth of a mile before arriving at the next piece of residentially-zoned property. The distance from the Harris and Feazell properties to the nearest houses (heading east along Route 22 towards the Greenridge subdivision) is approximately 800 feet. Based upon his review of all the information, Mr. Cunningham opined that: the requested rezoning to B2 is consistent with the neighborhood center concept in the Master Plan; the institutional use adjacent to the Harris property (the church and cemetery) do not require the type of transition that the RO and R2 zoning were intended to provide; the structures located on the Boyer properties are located further from the roadway than the dwellings on the Harris and Feazell properties and that, based upon Mr. Decker's testimony, the short distance to the roadway was a factor in the Council's decision to rezone the Boyer properties; and, it is unlikely that the subject properties could be viable for RO or residential uses because of the heavy traffic volume on Route 22 and the resulting significant road noise.

In sum, Mr. Cunningham believes that a mistake was made in the legal sense during the 1997 Comprehensive Rezoning by failing to rezone the Harris and Feazell properties to B2. It was Mr. Cunningham's testimony that if the County Council had known of the proximity of the dwellings to the widened roadway and the increase in traffic volume, they would have rezoned the properties to B2.

Case No. 109 - Steve Feazell

Mr. Cunningham went on to testify that he did not believe that the requested rezoning would have a detrimental effect on adjoining properties, nor would it adversely impact the public health, safety or welfare. He believes that the proposed rezoning would meet all the standards, guidelines and limitations set forth in the Code and that it would encourage the orderly development of the properties. Mr. Cunningham did testify that he was aware of the level of service for traffic at the 543/22 intersection and that there have been problems at this intersection over the years. He believes that the improvements made to the intersection, including the addition of an extra lane, renders the level of service acceptable to handle the increased traffic volume. He believes that had the County Council been made aware of the impact of the traffic volume and distance of structures from the roadway, as they were so made aware with regard to the Boyer properties, they would have rezoned the subject properties as well. Mr. Cunningham further noted that if the requested rezoning was granted and traffic studies showed that unacceptable levels would result from the proposed projects, the developer would have to mitigate these adverse effects before the project could proceed.

Mr. Anthony McClune, Manager, Division of Land Use Management for the Department of Planning and Zoning, appeared and testified that the Department of Planning and Zoning recommends denial of the requested rezoning based upon the fact that there was no mistake made on the part of the County Council during the 1997 Comprehensive Rezoning process and that the current zoning of the parcel is appropriate. Mr. McClune noted that the Planning Advisory Board considered the zoning request on the Feazell property and voted unanimously against rezoning the parcel to B2.

According to Mr. McClune, who was employed by Planning and Zoning at the time and participated in the comprehensive rezoning process, the 543/22 intersection was extensively studied by Planning & Zoning and both the Department and the Council were aware of the improvements that had been and were going to be made to Route 22. Mr. McClune pointed out that the Quillen property, directly across Route 22, is a similar property with an existing dwelling located very close to the roadway. The Quillen property is zoned RO and was denied rezoning to B2 during the comprehensive.

Case No. 109 - Steve Feazell

Mr. McClune testified that the Council was aware of their ability to review and accept or reject the recommendations of the Department of Planning and Zoning during the comprehensive process, and while they chose to reject the Department's recommendations on the Boyer properties located on Route 543, they upheld the Department's recommendation to keep the Quillen property on Route 22 zoned RO. Mr. McClune stated that this decision was most likely based upon the fact that the Master Land Use plan proposes that the expansion of B2 zoning should be directed westward, towards Bel Air. It is his belief that the denial of B2 zoning for the Quillen property, east of the intersection, was an expression of the Council's decision not to extend the B2 district in an easterly direction, towards existing residential zoning.

Mr. McClune also disputed prior testimony by one of the applicants that no RO property had been developed because it was not marketable. He gave several examples of RO properties that have been developed for offices and services around the county. He also noted that the cemetery located adjacent to the property is a special exception use in an R2 district, and thus is compatible with the current zoning of both the Harris and Feazell properties. A medical office, which is the facility depicted on the Feazell proposed site plan is a special exception use permitted in the RO zone, so no reclassification would be required for such a project to be built on the Feazell property.

Mr. McClune further testified that, if the requested rezoning were granted based upon Applicant's argument that the adjoining institutional use and the widening of the road justifies an increase in the intensity of the zoning, it would set an adverse precedent for future rezonings. Given all the factors and the information available, it was Mr. McClune's testimony that he was not aware of any evidence to show that the County Council failed to take into account certain facts or information in making their decision not to rezone the Quillen property, nor to include the subject property in the comprehensive. He did not believe that the Council was misinformed regarding the development in the area and he is not aware of any presumptions on the part of the Council that were incorrect. Accordingly, Mr. McClune testified that it is the Department's position that there is no evidence of mistake on the part of the County Council during the comprehensive rezoning and therefore the request for reclassification should be denied.

Case No. 109 - Steve Feazell

Several residents from the surrounding neighborhoods testified in opposition to the Applicant's request. Mr. Michael Wingfield, 1102 Volus Court, Bel Air, lives in the Amyclae East subdivision, located directly across Route 22, approximately 150 feet from the subject property. He testified that he opposed an increase in the intensity of the zoning to B2 because many of the types of uses allowed in a B2 district create significant amounts of light and noise which would interfere with his enjoyment of his property. He is also concerned that it will be impossible for cars exiting a business on the subject property to turn left. Instead, he believes they will turn right onto Route 22 and then turn left into the Amyclae residential subdivision for the sole purpose of turning around so that they can proceed westward on Route 22 or north on 543.

Ms. Lori Grover, who resides on Hillside Drive in the Fountain Green Heights development, east of 543 and south of 22, testified that her home is approximately 200 yards from the subject property. She is opposed to the requested rezoning primarily because the intersection of 543 and 22 is already inadequate to handle the traffic in the area. She indicated that it can take 15 to 20 minutes to move through the intersection at certain times of the day, and she has personal knowledge of several neighbors who have been involved in accidents in or around the intersection. Traffic backed up from the intersection already interferes with her ability to turn left onto 543 out of Hillside Drive. Ms. Grover also testified that she is the president of the Fountain Green Community Alliance, which has been formed to address concerns about safety and zoning issues relating to the intersection and the surrounding area. She testified that the organization opposes the requested rezoning, although she noted that the organization itself does not own real estate. Several other witnesses also testified in opposition to the request for the same reasons articulated by Mr. Wingfield and Ms. Grover.

Case No. 109 - Steve Feazell

CONCLUSION:

The Applicant is requesting a rezoning of the subject property from RO to B2 based upon an alleged mistake by the County Council in failing to rezone the property during the 1997 Comprehensive Rezoning. Although the Applicant did not file a request for rezoning during the Comprehensive process (the Applicant did not own the property at the time), the Applicant contends that the current zoning is inappropriate for the area and that if the Council had considered such a request, or analyzed the property, during the comprehensive, it would have rezoned the property to B2 at that time. This position is based upon the fact that the subject property is similar to another property that the Council did, in fact, rezone. This argument, while creative, is simply untenable and unsupported by the substantial weight of the evidence.

The principles of law regarding rezoning based upon an alleged mistake or a change in the neighborhood are outlined in the case of Boyce v Sembly, 25 Md. App. 43, 334 A.2d 137 (1975). These principles may be summarized as follows:

1. The zoning classification assigned a subject property as part of the last comprehensive rezoning is presumed to be correct.

2. A piecemeal zoning reclassification of a parcel of land cannot be granted unless and until the presumption of correctness is overcome.

3. The presumption of correctness can only be overcome by strong evidence that there was a mistake in the comprehensive zoning.

4. There has been a change in the character of the neighborhood since the last comprehensive zoning which justifies the piecemeal zoning reclassification.

5. The burden to show mistake or error in zoning is to show both:

   a) The then existing facts and conditions that allegedly made the comprehensive zoning incorrect; and also,

   b) The literal failure of the Council to have considered those facts and conditions.

6. Once a change in the character of the neighborhood or a mistake in the last comprehensive zoning is established, rezoning is permissible but not mandated.

7. However, once an Applicant establishes the requisite change in the character of the neighborhood or a mistake in the comprehensive zoning, the denial of the requested reclassification must be sufficiently related to the public health, safety or welfare to be upheld as a valid exercise of the police power. Aspen Hill Venture v. Montgomery County Council, 265 Md. 303, 289 A.2d 303 (1972).

See also, People's Counsel for Baltimore County v Beachwood I Limited Partnership, 107 Md. App. 627, 670 A.2d 484 (1995); and White v Spring, 109 Md. App. 692, 675 A.2d 1023 (1996).

As the Court stated in Boyce:

"A perusal of cases, particularly those in which a finding of error was upheld, indicates that the presumption of validity accorded to a comprehensive zoning is overcome and error or mistake is established where there is probative evidence to show that the assumptions or premises relied upon the Council at the time of the comprehensive rezoning were invalid. Error can be established by showing that at the time of the comprehensive zoning the Council failed to take into account then existing facts, or projects or trends which were reasonably foreseeable of fruition in the future, so that the Council's action was premised initially on a misapprehension. Bonnie View Club v. Glass, 212 Md. 16, 52-53, 217 A. 2d 647, 651 (1966); Jobar Corp. v. Rodgers Forge Community Ass'n., 236 Md. 106, 112, 116-18, 121-22, 202 A. 2d 612, 615, 617-18, 620-21 (1964); Overton v. County Commissioners, 255 Md. 212, 216-17, 170 A. 2d 172, 174-76 (1961); see Rohde v. County Board of Appeals, 234 Md. 259, 267-68, 199 A. 2d 216, 218-19 (1964). Error or mistake may also be established by showing that events occurring subsequent to the comprehensive zoning have proven that the Council's initial premises were incorrect."

25 Md. App. At 50-51, 334 A.2d at 142-43.

The testimony offered by both the current and the former Directors of the Department of Planning and Zoning is compelling in its support of the correctness of the current zoning. The Director at the time of the comprehensive, Ms. Arden McClune, testified that the Department gave thorough and careful consideration to the properties located around the intersection of Routes 543 and 22, including those that were not submitted for rezoning by the owners, and determined that transitional zoning between the commercial enterprises located at the intersection and surrounding residential neighborhoods was appropriate and desireable.

Planning and Zoning, as well as the Council members, had the opportunity and the authority to initiate a rezoning on any property, regardless of whether the owner made such a request and no such request was made. Mr. Decker confirmed that he and other Council members were aware of the changes occurring near the intersection, in terms of road improvements and increasing traffic, and it is clear that the physical characteristics of the subject property were readily discernible by any passerby. Mr. McClune, the current Director of Planning and Zoning was definitive and credible regarding the appropriateness of the RO zoning as a transition, not only for the residential neighbors but for the church and cemetery patrons as well.

In addition, Mr. McClune noted that the Council was given accurate and complete information about the properties involved in the comprehensive, as well as the surrounding area, and Mr. Decker confirmed that he did not believe that the Council was misled at any point. There was no evidence to suggest that conditions or events have changed subsequent to the 1997 Comprehensive to prove that the Council's premises, presumptions, or knowledge was incorrect.

The Hearing Examiner finds that the evidence produced by the Applicant is not sufficient to overcome the presumption of correctness which is associated with the adoption of the comprehensive zoning map by the County Council in 1997. The burden of proof required to show mistake in the zoning of the subject property has not been met. In addition, it should be noted that adoption of Applicant's argument regarding the alleged "mistake" would set a dangerous precedent, one which the Hearing Examiner finds to be inconsistent with the fundamental principles of zoning, as outlined by the Courts and set forth in the Zoning Code. A granting of the Applicant's request in this case would suggest that any property owner who did not participate in the comprehensive rezoning could later obtain a rezoning simply by arguing that a similar property in a similar location was rezoned during the comprehensive, and therefore the Council made a mistake in failing to rezone or even consider rezoning their property. This is clearly not in accord with the legal definition of "mistake", nor is it in keeping with the principles of orderly growth and development which the comprehensive rezoning process is intended to provide.

Case No. 109 - Steve Feazell

Therefore, based upon the evidence presented at hearing and for the reasons outlined above, it is the recommendation of the Hearing Examiner that the Applicant's request for rezoning be denied.

Date April 27, 2000

Valerie H. Twanmoh
Zoning Hearing Examiner