BOARD OF APPEALS CASE NOS. 087/088	*	BEFORE THE
APPLICANTS: Henry & Patricia Boyer	*	ZONING HEARING EXAMINER
REQUEST: Rezone .4 and .59 acres from RO, Residential Office, to B2, Community Business; 9-11 N. Fountain Green Road, Bel Air	*	OF HARFORD COUNTY
HEARING DATE: July 15, 1998	*	Hearing Advertised Aegis: 6/3/98 & 6/10/98 Record: 6/5/98 & 6/12/98

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ZONING HEARING EXAMINER'S DECISION

The Applicants are Henry and Patricia Boyer. The Applicants filed Case Nos. 087 and 088 requesting reclassification of the subject parcels from RO, Residential Office, to B2, Community Business classification. The Applicants requested that both cases be consolidated for the purpose of the hearing because the parcels are adjoining.

The parcel which is the subject of Case No. 087 contains .59 acres m/l and is located at 11 North Fountain Green Road, and is identified as Parcel No. 26, in Grid 4-E, on Tax Map 41. The parcel which is the subject of Case No. 088 contains .4 acres m/l, and is located at 9 North Fountain Green Road, and is identified as Parcel No. 130, in Grid 4-E, on Tax Map 41. The .59 acre parcel and the .4 acre parcel shall hereinafter be referred to as the "property".

Mr. Paul Wayne Taylor, Vice President of the Bel Air office of George W. Stephens and Associates, testified that he has been a certified professional engineer since 1984 and that he is familiar with the development regulations in the Harford County Code. Mr. Taylor testified he is familiar with the Amyclae development in that he has been the project engineer on the development since 1990. Mr. Taylor identified Petitioner's Exhibit No. 2-A, which was the preliminary plan approval letter for Sections 3 and 4 of Amyclae Estates. Mr. Taylor said that in response to preliminary plan approval for Amyclae, his firm submitted a road plan to the State Highway Administration. He specifically referenced Petitioner's Exhibit No. 9, which was the construction plan for the intersection of Amyclae Drive with MD Route 543.

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Mr. Taylor testified that the improvements as submitted represented the extent of the highway improvements he thought were necessary to obtain entrance permits for the Amyclae Drive intersection. He also pointed out that the plans did not extend down Route 543 to the Boyer property. Mr. Taylor testified that on October 4, 1990, he received a red-lined plan and a letter from the State Highway Administration requiring a new vertical alignment for MD Route 543. Mr. Taylor then identified Petitioner's Exhibit No. 11, which was the final construction plan for Route 543 as it relates to the Amyclae development. Mr. Taylor testified that this plan differed from the initial proposal and consisted of minor changes to MD Route 543 and widening the roadway for acceleration and deceleration lanes into Amyclae Drive, but did not lower the existing roadway. The final plan as shown on Petitioners' Exhibit No. 11 lowered the roadway to meet the 40 mile an hour design speed as required by the State Highway Administration. The final plan as approved necessitated a change in the elevation in front of the Boyer property.

Mr. Taylor testified that, to the best of his knowledge, Exhibit No. 11 reflects how MD Route 543 was ultimately constructed. He further testified that the work did not actually take place until sometime in 1996. To support this time frame, Mr. Taylor identified Petitioners' Exhibit No. 12, which is a July 28, 1995 letter from Ronald Burns from the Engineering Access Permit Section of the State Highway Administration to George Twig of Mr. Taylor's office. The letter stated that Stephens Engineering was to provide the State with plans, performance bonds, and a utility letter of acceptance and the State would issue a permit for the MD Route 543 construction.

On cross-examination, Mr. Taylor maintained that there was a lowering in the road in order to meet a 40 mile an hour design speed, which varies from 0 to approximately 3-1/2 feet at the peak of the curve. Mr. Taylor testified the road was lowered between 18 inches and 2 feet along the Boyer property.

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On re-direct, Mr. Taylor stated there was a substantial change between the drawing as submitted on September 6, 1990 and the drawing that was ultimately approved. Mr. Taylor then testified about several photos of the property and the surrounding area. He noted that the approximate relationship in grade between the house and the highway prior to construction was 4 feet. After construction, he noted that the road was lowered approximately 2 feet and that the slope was cut back to the edge of the right-of-way, which also required the removal of several large trees.

The next witness to testify was Mr. Denis Canavan, who qualified as an expert in land use planning and zoning. Mr. Canavan testified that he made a personal inspection of the subject properties and that he is familiar with the area surrounding the subject properties. He said that he is familiar with the various planning documents and policies in the County which are relevant to the subject property and the surrounding area. Finally, he stated that he had an opportunity to study the area from a land planning standpoint to determine the impact of granting B2 zoning to the subject property.

Mr. Canavan used Petitioners' Exhibit No. 6, which are aerial photographs of the subject area, to identify the property and general land use in the area. He stated that the properties are rectangular in shape and that they adjoin a Rite Aid store under construction. He described the land use pattern as mixed and identified developed parcels and vacant parcels of land already slated for development.

In preparation for the hearing, Mr. Canavan testified that he had an opportunity to perform research at the Department of Planning and Zoning and reviewed the files of Stephens Engineering concerning the subject property. As a result of the investigation, Mr. Canavan stated it was his opinion that a mistake did occur in the 1989 Comprehensive Rezoning. Mr. Canavan said the property was zoned Residential Office in 1989. In 1989, this designation would allow the conversion of an existing residence to an office use. He said in 1989, the elevation of MD Route 543 was higher and access to the property was close to on-grade, while MD Route 543 and the house location was further from the travel lane.

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Mr. Anthony McClune, Chief of Current Planning for the Department of Planning and Zoning, appeared and testified that the need for road improvements to MD Route 543 was recognized and discussed as early as 1987 and that the County Council in 1989 knew that the road improvements were going to be made to MD Route 543, but did not know the specifics of the improvements. Mr. McClune also testified that the County Council knew in 1989 that the MD Route 543/22 intersections would be improved. He went on to testify that in 1989 the Residential Office zone was specifically created to provide for transition uses between zones and to allow greater residential use of properties which front on major roadways. Mr. McClune also explained that all Neighborhood Centers are different and each one must be examined to determine the land use at each particular site to determine the appropriate land use designation.

The first opponent to testify was Mr. Mark Garrett, who resides at 1116 Pericles Drive. Mr. Garrett said his residence directly adjoins the subject property and that he felt the RO District provided for a smooth transition from high intensity uses which exist in a commercial district to the south to the low intensity uses which exist in his residential district. He also said that his property value as an adjacent property owner will be greatly affected, he was not aware of the proposed rezoning when he purchased the property, and he said he felt rezoning the subject property would take away from the quality of his life and that of his family.

Ms. Patty Fabiszak, resides at 1118 Pericles Drive, adjacent to Mr. Garrett. Ms. Fabiszak was concerned about additional traffic generated by a commercial use and expressed concern that the RO use of property be maintained as a buffer between her property and the other residents in her subdivision and the more intense commercial uses to the south.

The Staff Report of the Department of Planning and Zoning recommends denial of both requests and provides:

> "...it is the opinion of the Department of Planning and Zoning that the changes outlined by the Applicants were anticipated at the time of the last comprehensive review and cannot be considered an argument for change in this case."

In addressing the mistake argument of the Applicants, the Department stated:

> "In 1989, the County Council was aware that the adjacent tract to the east and north was owned by the developer of Amyclae and was planned for future residential development. It should be noted that, during the 1997 Comprehensive Zoning Review, the County Council amended the RO District to make it more flexible. Although this allowed for additional service in retail uses, this zoning district is intended for less intense uses more compatible with adjacent residential neighborhoods. Therefore, RO was and remains the appropriate zoning classification allowing a greater flexibility for the property owner while protecting existing and future residential developments."

CONCLUSION:

The applicable rule to apply when deciding whether or not to rezone the subject parcels from an RO classification to a B2 classification is the change-mistake rule. The change-mistake rule applies to all piecemeal or local rezonings. Scull v. Coleman, 251 Md. 6 (1968). The early recitation of the Rule was set forth in Wakefield v. Kraft, 202 Md. 136, 141 (1953).

> "It is presumed that the original zoning was well planned and designated to be permanent; it must appear, therefore, that either there was a mistake in the original zoning or that the character of the neighborhood change to an extent which justified the amendatory action."

Once a change in the character of the neighborhood or a mistake in the last comprehensive zoning is established, rezoning is permissible; however, it is not mandatory. Boyce v. Sembly, 25 Md. 43 (1975).

The Applicant did not establish a neighborhood nor did the Applicant introduce evidence of substantial change in the character of the neighborhood. Therefore, the issue before the Hearing Examiner is whether it was a mistake for the County Council to zone the subject RO in the 1989 Comprehensive Rezoning.

The thrust of the Applicants' argument for mistake were two-fold:

1. In order to be consistent with the zoning of other Neighborhood Centers, the subject property should be rezoned B2.

2. That State Highway Administration mandated changes to MD Route 543 were not known to the County Council in 1989 when they zoned the subject property RO.

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Considering the Applicants' first argument regarding the Neighborhood Center, the Applicant did not introduce documentation or authority for the theory. The evidence introduced was the testimony of the Applicant's witness, Denis Canavan, who expressed the opinion that the Neighborhood Center should be extended to the subject property. This argument was rebutted by Anthony McClune, who stated that every Center must be evaluated individually and that no overall zoning classification can be uniformly applied to all Neighborhood Centers.

The Applicants' second argument is that the County Council, in approving RO zoning for the subject parcel in the 1989 Comprehensive could not have been aware of the road improvements which would be required by the State Highway Administration as a result of the Amyclae subdivision. The testimony of Anthony McClune clearly indicates that the need for road improvements to MD Route 543 was recognized and discussed as early as 1987 and that the County Council knew in 1989 that road improvements were going to be made to MD Route 543, but they did not know the specifics of the road improvements. Additionally, documentation introduced as Exhibits clearly indicate that road improvements would be necessary on MD Route 543 due to the size of the Amyclae development.

The testimony further indicates that the original plan submitted by the Amyclae engineers was rejected by the State Highway Administration and a subsequent plan was ultimately approved which changed the elevation of Route 543 in front of the subject property by about 18 inches.

It is, therefore, the finding of the Hearing Examiner that the Applicant has failed to prove mistake sufficient to justify the requested rezoning.

Date SEPTEMBER 21, 1998

L. A. Hinderhofer
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Zoning Hearing Examiner