IN RE: **PETITION FOR SPECIAL HEARING (Overshot Court)**	*	BEFORE THE
10th Election District 3rd Council District	*	OFFICE OF
Norman & Ellen Barton	*	ADMINISTRATIVE HEARINGS
Legal Owners	*	FOR BALTIMORE COUNTY
Petitioners	*	**Case No: 2021-0029-SPH**

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OPINION AND ORDER

This matter comes before the Office of Administrative Hearings ("OAH") as a Petition for Special Hearing filed by Norman and Ellen Barton. The Special Hearing was filed pursuant to BCZR § 500.7 seeking to remove the condition in Case Number 1990-0183-SPH that prohibits any future development of Tract A; and to also determine that the property qualifies as an existing lot under BCZR § 1A07.8.B.4.

A Substantive Zoning Advisory Committee ("ZAC") comment was received from the Department of Planning ("DOP"). They did not oppose the requested relief, subject to proposed conditions. Numerous residents of the Overshot neighborhood attended; some in opposition to the requested relief and some in support. Petitions opposing and supporting the relief were also submitted and accepted into evidence. In addition, a lengthy opposition letter with supporting exhibits was submitted in advance by People's Counsel. Counsel for all parties were copied on this letter and it was made a part of the official file. At the close of the hearing the undersigned agreed to accept post-hearing legal memoranda from counsel, which were received on September 27, 2021.

SPECIAL HEARING

Record Evidence

On August 25, 2021 a public WebEx hearing was conducted virtually in lieu of an in-person hearing due to ongoing Covid 19 restrictions. The Petition was properly advertised and posted. The property owners, Norman and Ellen Barton, appeared in support of the Petition. Adam Rosenblatt, Esq. and David Karceski, Esq. of Venable LLP represented the Petitioners. Michael McCann, Esq. represented numerous neighborhood residents opposing the requested relief. David S. Thaler of D.S. Thaler & Assoc., LLC also appeared on behalf of the Petitioners. He was accepted as an expert in engineering, land planning, and the BCZR. The site plan prepared by his firm was marked and accepted into evidence as Petitioner's Exhibit 1.

The subject parcel is a 13.88 acre portion of "Tract A" as shown on the site plan. It is currently zoned RC 6 but was previously zoned RC 4. It is part of the Overshot subdivision, as depicted on the 4th Amended Final Development Plan ("FDP"), which was admitted as Petitioners' Exhibit 6. Dr. Barton testified that in 1988 he and his wife purchased 19 Overshot Court, the lot and dwelling depicted as Lot 12 on the 4th FDP. The SDAT records reflect that they paid $415,000. Dr. Barton further explained that in 1990 they purchased the subject 13.88 acre portion of Tract A, which is immediately adjacent to 19 Overshot; and that in 1999 they purchased the balance of Tract A, a 7.11 acre parcel. They have owned this 28 contiguous acres since that time. SDAT records reflect that they paid $28,000 for the 13.88 acres and $15,000 for the 7.11 acres. Dr. Barton acknowledged that at the time of both of these purchases he and his wife were fully aware that, pursuant to a deed restriction on both parcels, that Tract A could not be developed. Dr. Barton further confirmed that they were aware that this restriction stems from the Zoning Commissioner's December 29th, 1989 Order in Case No. 90-183-SPH, which states, in relevant part as follows:

> The Petition for Special hearing to approve the 4th Amendment to the Final Development Plan for Overshot, in accordance with Petitioner's Exhibit 1, be and is hereby GRANTED, subject, however, to the following restrictions which are condition precedents to the relief granted herein:
>
> 1. *No further development of Tract A shall be permitted and provisions restricting future development of the subject area as described in Petitioner's Exhibit 1 shall be incorporated in the deeds for the portions of Tract A being conveyed to the owners of Lots 12, 13, 30 and 31;*
> 2. Petitioner shall file copies of the above-described deeds with the Zoning Office and those deeds shall also incorporate an express reference to this Order and this zoning case.

See, Order, admitted as Protestants' Exhibit 1 and Petitioners' Exhibit 7.

Dr. Barton further acknowledged that they had been able to purchase these parcels at these favorable prices *because of* the fact that they were not buildable lots. Dr. Barton spoke at some length about how he and his family and neighbors have treasured, cared for, and enjoyed this forested acreage. He testified that he and his wife now want to build a retirement home on the 13.88 acre parcel and sell their current home to one of their adult sons. Mr. McCann questioned him about these aspects of his testimony.

Mr. Thaler testified next. He explained that the purpose of the 4th FDP was to apportion out parts of Tract A in order to enlarge lots 12 (owned by the Petitioners), 13, 30 and 31. Concurrently, Tract B was reconfigured into new lots 33 and 34. He further explained that the 4th FDP was the product of Case No. 90-183-SPH, wherein the Zoning Commissioner noted that "[p]etitioner proposes to incorporate a reference restricting future development as well as a reference to this case in the deeds for the four proposed out conveyances." Mr. Thaler further acknowledged that the Order in that case expressly imposes this prohibition on any future development of Tract A and states that this restriction was a "condition precedent" to the grant of the Special Hearing relief. However, Mr. Thaler then explained that during the 2004 CZMP this

property was re-zoned to RC 6, and that in his view this should nullify the express restriction on any development in Tract A because it is, in his opinion, a "lot or parcel in the RC 6 zone that existed prior to the effective date of Bill 73-2000," within the meaning of BCZR § 1A07.8.B.4.

Mr. Thaler then testified that he believed the condition barring any further development of Tract A was based on the fact that there were no density units left in the Overshot development under the then existing RC 4 zoning. He also speculated that the restriction may also have been based on the fact that in 1990 all the perc tests in Tract A failed. Mr. Thaler then offered the opinion that Tract A could now be lawfully developed with the proposed dwelling because it was a "lot or parcel in the RC 6 zone" within the meaning of BCZR § 1A07.8.B.4; and further, because successful perc tests had purportedly been performed in Tract A in 2019.[1]

Mr. Thaler then also opined that the Order in Case No. 90-183-SPH was not binding under the doctrine of *res judicata* because there have been substantial changes in the law and the facts: to wit – the parcel is now zoned RC 6, and it now percs. Mr. Thaler then described the site plan, stressing that the proposed dwelling would be over 300' from the road and, due to the topography and forest cover, would be barely visible from the road or from any adjoining lot. In his view the proposed development of Tract A would therefore be within the spirit and intent of the Overshot development.

A rather awkward exchange then took place when the undersigned asked Mr. Thaler about the need for approval of a 5th Amended FDP. After conferring with counsel Mr. Thaler revealed that, in fact, a 5th Amended FDP had already been conditionally approved. The 5th Amended FDP was subsequently admitted as Petitioner's Exhibit 10. Mr. Thaler then stated that he had obtained

[1] Petitioners did not offer these 2019 perc reports into evidence. When questioned as to how the parcel could fail to perc in 1990 and then perc in 2019 Mr. Thaler merely stated that sometimes the geology and hydrology at a site change over time.

the signatures of all property owners within 300' of Tract A, and that the 5th Amendment of the FDP could therefore be approved without a hearing pursuant to BCZR § 1B01.3.7.c.

Mr. McCann questioned Mr. Thaler on several aspects of his testimony, including the method by which the 5th Amended FDP was allegedly approved, and whether the Director of Planning had approved the amendment. He also asked Mr. Thaler how development of this lot is within the spirit and intent of the 4th FDP, when that plan contains the condition from Case No. 90-183-SPH, which expressly prohibits it. Finally, upon questioning by Mr. McCann, Mr. Thaler conceded that nowhere in the Order in Case No. 90-083-SPH is any mention made of the density or the perc issue. On re-direct, Petitioners' counsel showed Mr. Thaler the DOP ZAC comment that states that DOP does not object to the requested relief in this case, including removal of the ban on development imposed in Case No. 90-183-SPH. Evidently this was intended to demonstrate that the Director of Planning had "concurred" with approval of the 5th Amended FDP, as required by BCZR § 1B01.3.7.c.

Mr. McCann then called several property owners from within the Overshot development. They testified that they had reviewed and relied upon the 4th Amended FDP when they purchased their properties. They testified that their purchases were based in part upon their belief that Tract A would forever remain undeveloped forest. They are strongly opposed to allowing any development of Tract A in contravention of this express restriction. They also complained that the proposed one story dwelling would be incompatible with the Overshot development, which requires all homes to be at least two stories, of traditional architecture, and at least 3000 sq. ft. In addition, the owner of 21 Overshot Court testified that her property line is within 300' of Tract A and she was never notified of, nor did she agreed to, the 5th Amended FDP.

Mr. Rosenblatt then called several Overshot residents who voiced support for the

Petitioners' requested relief, including two of the neighbors who signed the 5th Amended FDP (the other signatures on the Plan are the Bartons themselves).

Decision

In my view, Petitioners are correct that *res judicata* does not bar the requested relief in this case because there *has been* a substantial change in the law, and at least purportedly a substantial change in the facts. *See, Whittle v. Bd. of Zoning Appeals,* 211 Md. 36 (1956) (*res judicata* does not bar relitigation of a claim or issue where there has been a substantial change in the law and/or facts); *and, Seminary Galleria v. Dulaney Valley Improvement Ass'n.*, 192 Md. App. 719 (2010) (*res judicata* barred relitigation because there was no substantial change in law or facts). In the case at bar the law has changed in that the property has been rezoned from RC 4 to RC 6, and the new zoning could potentially permit development of Tract A if the parameters of BCZR § 1A07.8.B.4 are met. Further, a potentially relevant fact has changed if Tract A does in fact now pass the perc requirements. Nevertheless, as explained below, though not barred by *res judicata,* the requested relief is still not available. First, as People's Counsel forcefully explains:

> One of the purposes of recordation of subdivision plats and associated public records is to protect lot purchasers. 5 Rathkopf, The Law of Zoning and Planning Sec. 89:2, 89:3. This includes their reliance on the existing configuration and character of the subdivision. The consistency requirement for amendments is intended to protect those reliance interest.

See, Letter of People's Counsel, p. 2.

Here, several of the Overshot property owners testified that one of the reasons they bought their homes was their belief, based on the Overshot 4th Amended FDP, and Case No. 90-083-SPH, that Tract A would forever remain undeveloped. The purpose clause of BCZR §

1B01.3.A.1.a. governs this scenario and states that the law is intended "*to provide for the disclosure of development plans to prospective residents and to protect those who have made decisions based on such plans from inappropriate changes therein."* (emphasis added).

In this case removing this express condition of the Order in Case No. 90-183-SPH, as expressly stated on the 4th FDP, and on the Deeds for the affected parcels, would violate the spirit and intent of the 4th FDP, and of BCZR § 1B01.3.A.1.a. This leads to my conclusion that BCZR § 1A07.8.B.4 does not apply here. People's Counsel and Mr. McCann are correct that this "grandfathering" provision does not apply to lots or parcels that are part of existing development plans. Especially where, as here, the existing development plan expressly prohibits development of the very lot or parcel in question. In my view this grandfathering provision logically applies only to lots or parcels that are not part of existing development plans. To allow this provision to be used to fundamentally amend the 4th FDP, and to remove the condition in Case No. 90-183-SPH would be to eviscerate the very purpose of BCZR § 1B01.3.A.1.a.[2] In sum, how could removal of the development prohibition ever be within the "spirit and intent" of the 4th Amended FDP when a *condition precedent* for the approval of the 4th FDP was the development prohibition itself?

[2] Even if the 4th FDP could be lawfully amended it does not appear that the proper procedures of BCZR § 1B01.3.7.c were followed here. First, the Director of Planning and the ALJ did not "concur" with the 5th Amended FDP. Instead, the Plan was signed by Jeff Perlow of the Zoning Office "for" the Director, and the Plan had never even been presented to the Office of Administrative Hearings before it was "approved" by Mr. Perlow. Further, the owner of 21 Overshot Court testified that she lives within 300' of Tract A and she was never notified that the Bartons were filing the 5th Amended FDP, and would not have consented. Finally, the DOP ZAC comment, which was submitted months after the 5th Amended FDP was filed, does not "certify that the amendment does not violate the spirit and intent of the original plan." It is troubling that no mention of the 5th FDP was even made at the Special Hearing until the undersigned inquired about it.

Mr. Thaler suggested, without any evidentiary or legal support, that the only reasons the Order in Case No. 90-183-SPH contained the condition restricting any future development of Tract A was because there was no density left under RC 4, and that the parcel would not perc. But if this logic were followed this central condition of the Order would be rendered mere surplusage; i.e., it would only be stating the then existing realities. In my view, the more logical reading of this "condition precedent" to the grant of the 4th Amended FDP is that the condition was meant to address the very scenario presented by the case at bar: the situation where the zoning *changed* and someone then wanted to develop Tract A. It was that very request for future development that the condition at issue is supposed to address. And that it prohibits.

Finally, the equities do not favor the Petitioners. First, they directly benefited from the Order in Case No. 90-183-SPH because their Lot 12 was one of the lots that was enlarged by the 4th Amended FDP. Therefore, even in the absence of the other bars to the requested relief, they should not be allowed to disavow the condition precedent of that Order, which expressly bars any future development of Tract A. It is unquestioned that the Bartons have been good stewards of Tract A, but the fact is that they were able to purchase these parcels for a mere $2000 an acre only because the land cannot be developed. Further, they have enjoyed the tangible and intangible benefits of this land for many years, and this adjacent forest will no doubt be a valuable selling feature if and when they ever sell their home at 19 Overshot Court.

It is, THEREFORE, ORDERED this **12th** day of **October, 2021** by this Administrative Law Judge, that the Petition for Special Hearing under BCZR § 500.7 to remove the condition in Case Number 1990-0183-SPH, and to find that that the property qualifies as an existing lot under BCZR § 1A07.8.B.4. is hereby **DENIED**.

Any appeal of this decision must be made within thirty (30) days of the date of this Order.

Signed
PAUL M. MAYHEW
Managing Administrative Law Judge
for Baltimore County

PMM/dlm