

IN THE COURT OF APPEALS OF MARYLAND

No. 183
September Term, 1965

A. W. DILL, et al.

v.

THE JOBAR CORPORATION

Hammond
Hornoy
Mar...ry
Mar...ry
McMillan

JJ.

Opinion of Hammond, J.
Sarnes, J. concurs in the result.

Filed: March 15, 1966

The County Council of Baltimore County adopted the Comprehensive Western Area Zoning Map on November 15, 1962, and on it zoned for residential use a tract of land of slightly over five acres on the west side of Rolling Road running north from Powers Lane (which runs west from Rolling Road about five hundred feet north of Route 40, the Baltimore National Pike). The land had been used for some years as a bike anti-aircraft site. Some three and nine-tenths acres of the whole fronting on Powers Lane and Rolling Road were zoned R-A (Residential apartments), three-quarters of an acre in the northwest part was zoned R-10 (Residential one-family) and slightly less than half an acre was zoned R-6 (Residential one and two-family use). In February 1964 a petition was filed by the owners, Mr. and Mrs. Diehlmann, and The Jobar Corporation, a conditional contract purchaser, for reclassification of the whole tract on the ground of original error in the 1962 comprehensive zoning. The Zoning Commissioner, the Board of Appeals and the Circuit Court all agreed that there had been such error, and our review of the record and our consideration of the printed and oral arguments have led us to conclude that there was a sound basis for the determination of original error made by the Zoning Board and affirmed by the Circuit Court.

It appears that when the zoning map was adopted in 1962, it in effect recognized the status of existing commercial and special exception uses to the south and west of the property and to the east, across Rolling Road. A strip of business roadside zoning

extends a considerable distance along the north side of Route 40 to the west of its intersection with Rolling Road. On that corner is a restaurant known as the Double T Diner. To the north of the diner's large lot is a convalescent home which has been in operation for a number of years. To the west of the convalescent home is vacant land across which the rear of the commercial uses along Route 40 are visible from the subject property. Running north on the east side of Rolling Road from its intersection with the north side of Route 40 is a large area zoned business - major. At the intersection is a Robert Hall clothing store. North of that are large advertising billboards. North of these is an extravagantly and garishly ornamented toy discount store known as Pops, which was described by one witness as having "a disgraceful frontage appearance." To the north of Pops is a research laboratory center and a store building, followed by a small area zoned for apartments and then by land zoned for single family detached homes. Much of the business major strip along the east side of Rolling Road is directly across from that part of the Diehlmann tract, which is zoned R-A, and all of it is visible from all parts of that tract.

North of the Diehlmann land is a wooded tract of almost six acres on which is a radio transmitting tower. Immediately further to the north is a dwelling house and lot, the rear of which abuts the radio tower land. North of the dwelling is a large tract of land owned by Baltimore County, on which are a reservoir and a pumping station. This tract is L shaped and encircles the Diehlmann land to the west and north. To the north of the Baltimore County land are residential developments on both sides of Rolling Road.

In 1960 the Diehlmanns applied for a change in the zoning

of their land from the then R-6 classification to manufacturing-restricted. The Office of Planning and Zoning recommended this change as proper because of the proximity of the land to Route 40 and to the commercial uses to the south and east and southeast. The Board of Appeals found it would not be reasonable to expect the property owners to erect homes on this site "with commercial uses to the south and across Rolling Road" and on October 11, 1961, granted the M-R zoning, subject to a number of conditions and restrictions, for construction of a plant to be used in treating metal. An appeal was taken from this action and while it was pending, the Western Area Map was adopted on November 15, 1962. At the time the map was under consideration, the Planning Board's minutes show that it had, in 1960, recommended the R-A zoning which was adopted by the Council as "transitional zoning" between the residential to the north and the commercial to the south and east and that it "recommended M-R, restricted manufacturing zoning to be shown on the Master Plan Overlay for the land to the west of Rolling Road across from the B-M zoning. It felt M-R is a perfectly valid use of land here and so recommends the property to whomsoever it may concern."

The Diehlmanns did not urge the Council to zone their property other than as proposed by the 1962 map because they expected the granting of the M-R zone. However, after the map was adopted, the M-R contract purchaser abandoned the contract because of the residential zoning and the delay caused by the undecided appeal from the Board's action in granting M-R zoning.

Three witnesses appeared before the Board to support the claim of original error. The president of The Jobar Corporation

testified that the primary interest and activity of the corporation was the building of apartments, that it had built over five hundred in the Baltimore area in the last several years and was currently engaged in building one hundred twenty-five more. Jobar became interested in the Diehlmann property as a site for apartments but when it sought financing through Weaver Brothers, the representative of thirty large lenders, local, national and Canadian, it was informed after inquiry and investigation of its correspondents by Weaver, that none would lend money for the building of apartments on that site because of the commercial character of the neighborhood and the nature and appearance of the surrounding commercial and non-residential activities. A further bar to the building of low rent apartments which Jobar had envisaged as the only type suitable in the area was that public transportation is essential for successful renting of such apartment units and there was no public transportation within a practicable or reasonable distance. Thereupon Jobar felt that the most sensible and appropriate use of the property would be for a retail shopping center. The witnesses' testimony as to the impossibility of financing apartments on the site was not shaken on cross-examination.

An engineer testified that fully adequate water and sewerage were available for the proposed retail shopping center.

A qualified and experienced land planner who had testified in many cases gave his opinion that there had been error in the comprehensive rezoning of 1962. He felt that the requested rezoning to business local "represents a proper request for the minimum zoning classifications to make the property usable" and that he did

not "see any way that the property can be used in its present zoning classifications, reasonably, and that the present zoning classifications are confiscatory in nature and that only a commercial use or industrial use would permit proper use of the subject tract." He gave as underlying reasons for his opinions the following: (1) at the time of the rezoning in 1962 and at the time of the hearing the surrounding land uses were entirely incompatible with residential development (referring to the stores, the diner, the billboards, the nursing home) and that the 1962 map did not recognize this; (2) the planning authorities recognized in 1960 that the influence of the surrounding commercial activities was such that light manufacturing was the suitable zoning for the property, but in the belief that such a zone should be an "overlay" on the map and not a part of the map recommended R-A as a transitional zoning, thinking that M-R could then be granted by the Board. The same belief was shared by Mr. Diehlmann - and inferentially by the District Council - who felt that M-R would be the immediately ultimate result of the 1962 rezoning. These beliefs of the planning office, Mr. Diehlmann and, it would seem, the Council, and the abandonment of the project by the contract purchaser for manufacturing use "left the subject property without a reclassification and deprived Mr. Diehlmann under this process of getting proper treatment at the time of the adoption of the map"; (3) apartment zoning may often be a proper buffer between commercial uses and individual homes but to be a buffer there must be actual use and not vacant land and since it would be impossible to either finance apartments (the witness shared the views of Weaver Brothers) on the site or rent them if they were built, the zoning of the site for R-A as a buffer or transitional area was illusory and a mistake. This was particularly true

because the reservoir and pumping station land owned by the County and which surrounded the Diehlmann land on the west and north effectively shielded the residential developments to the north from it and acts as a buffer; (4) the Diehlmann land was as unsuitable for office use (permitted and frequently granted as a special exception in an R-A zone) as it was for apartment use, largely for the same reasons and was not, in any reasonable likelihood usable for any of the special exception uses permitted in an R-A zone because of its size and environment.

The three protestants presented themselves as their only witnesses. Two lived over a mile away and the third a block and a half away. They felt the use of the property for apartments would offer "a fine buffer zone from the present commercial" and they feared increased traffic on Rolling Road if the requested rezoning were granted, although they offered no specifics.

The law which controls the case has been stated and restated in recent opinions. Original error in comprehensive zoning or rezoning or subsequent substantial change in the character of the neighborhood may require rezoning as a matter of law if the existing zoning classification deprives the owner of any reasonable use of his property.

"If the owner affirmatively demonstrates that the legislative or administrative determination deprives him of all beneficial use of the property, the action will be held unconstitutional. But the restrictions imposed must be such that the property cannot be used for any reasonable purpose. It is not enough for the property owners to show that the zoning action results in substantial loss or hardship. *Palace v. Inter-City Land Co.*, 239 Md. 549, 212 A. 2d 607 (1965). *Board of Zoning v. 277 Md. 221, 227-29, 205 A. 2d 805 (1965)* and cases therein cited. Where, as here, the facts are undisputed, the question is one of law, and the conclusion of the lower court which attaches to findings of fact." *Baltimore City v. Borkin*, 239 Md. 611, 622.

Even though the existing zoning does not result in confiscation and thus require rezoning, original error may permit the agency to which the controlling legislative body has entrusted individual rezoning properly to change a classification, Overton v. Co. Commissioners, 225 Md. 212, if it does so on evidence before it which is substantial enough to permit reasoning minds reasonably to conclude that the strong presumption of the correctness of the original zoning or comprehensive rezoning has been overcome. Miller v. Abrahams, 239 Md. 263; Pahl v. County Bd. of Appeals, 237 Md. 294, 297; Shadynook Imp. Assn. v. Molloy, 232 Md. 265, 269-70, and cases cited. The opinion of an expert that there was error in the original zoning or comprehensive rezoning is not evidence substantial or strong enough to support a finding of original error unless the reasons given by the expert as the basis of his opinion, or other supporting facts relied on by him, are in themselves substantial and strong enough to do so.

In Miller v. Abrahams, supra at 273, in reversing the Board's action in finding original error (largely on the testimony of the expert who testified in the case before us), on the ground there was no strong or probative evidence to sustain it, for the majority of the Court, said that the expert was recognized as such in the field of planning and zoning, but added: "However, the prevailing general rule, almost universally followed, is that an expert's opinion is of no greater probative value than the soundness of his reasons given thereof will warrant."

In Greenblatt v. Tony Schloss, 235 Md. 9, 12, we said of another expert whose testimony that the dividing line between two zones should have been drawn elsewhere than it had been was

Followed by the Board in finding original error (we reversed the finding for lack of supporting evidence): "His opinion, however, was entitled to no more force and effect than the reasons he said underlay it."

In the case before us there is no need to consider whether as a matter of law the residential rezoning was confiscatory and compelled rezoning and we do not do so. We think the testimony of the president of The Jobar Corporation and the expert, which we have heretofore detailed, as to the reasons the County Council had erred in putting the Diehlmann land in residential classifications in 1962 was strong, substantial and persuasive enough to justify the Board in the exercise of its expertise in finding that there had been original error. Reese v. Mandel, 228 Md. 121; Overton v. Co. Commissioners, supra. The reasoning to business local was not arbitrary, capricious or illegal, and, having determined this, we have at the same time fulfilled and exhausted our judicial function in reviewing zoning appeals of this nature.

ORDER AFFIRMED, WITH COSTS.

RE: PETITION FOR RECLASSIFICATION
from "R-10", "R-6" and "R-A"
Zones to a "B-L" Zone,
NW corner Rolling Road and
Powers Lane,
1st District
Frederick Diehlmann, et al,
Petitioners

BEFORE
DEPUTY ZONING COMMISSIONER
OF
BALTIMORE COUNTY
No. 64-82-A

COUNTY BOARD OF APPEALS
OF
BALTIMORE COUNTY
No. 64-82-A

OPINION

The petitioner's property consists of five acres and is located on the northwest corner of Rolling Road and Powers Lane. The owner acquired the property in 1944.

This land was the subject of a previous zoning case and on October 11, 1961, this Board rezoned the subject tract from an "R-6" Zone to an "M-R" Zone but a new western area map restored this land from an "M-R" Zone to its present zoning, namely, "R-10", "R-6" and "R-A".

The property has been used for sometime by the Federal Government as a Nike site for the housing of soldiers and the storage of war materials and equipment. It is currently being used by the Civil Air Patrol for meetings.

The land was described as being bordered on the north by the Baltimore County Reservoir; on the northwest is a radio antenna used by station WENAM; on the south side of the subject tract is a convalescing home and directly south of the convalescing home is a large drive-in restaurant. On the northeast corner of Rolling Road and Route 40 is a large clothing store and next to this is a large billboard. Directly across the street from the petitioner's land is a large toy store and/or carter.

There was testimony produced by the petitioner that homes could not be built on the property because of its proximity to commercial enterprises. The petitioner has had numerous offers to sell the land for commercial property but none for residential development.

The contract purchaser, The Jobar Corporation, specializes in apartment development, and attempted to get financing for apartments on that portion of the petitioner's land which is zoned R-6, however, no lending finance firm would finance the apartments because of the proximity of the land to the commercial establishments and also because there is no public transportation in the immediate area.

There was expert testimony by Bernard Willenham, Planner, to the effect the subject property cannot be used under its present zoning because of its proximity to the aforementioned commercial establishments. He felt the present zoning was confiscatory and felt that the appropriate and logical zoning for the land would be "B-L". He also

Re: PETITION FOR RECLASSIFICATION
R-10, R-6 & R-A to B-L ZONE
NW CORNER ROLLING ROAD AND
POWERS LANE - 1st District
FREDERICK DIEHLMANN, Petitioner

BEFORE
DEPUTY ZONING COMMISSIONER
OF BALTIMORE COUNTY
No. 64-82-R

MR. COMMISSIONER:

Please enter an Appeal from the decision of the Deputy Zoning Commissioner rendered on April 3, 1964, on the above Petition and forward all pertinent papers to the County Board of Appeals of Baltimore County.

James P. Kapp
509 Maryland Trust Building
Baltimore, Maryland 21202
Saratoga 7-0202
Attorney for Petitioners,
John and Virginia Burgess
Al and Veron Dill
Henry and Virginia Decker
Herman Goreschott
Thomas Neuberger
Adolph and Marguerite Merghehann

I HEREBY CERTIFY that a copy of the above was mailed to William S. Baldwin, Esq., 24 W. Pennsylvania Avenue, Towson, Maryland 21204, this 15 day of May, 1964.

Samuel P. Kapp

PETITION FOR ZONING RE-CLASSIFICATION AND/OR SPECIAL EXCEPTION

TO THE ZONING COMMISSIONER OF BALTIMORE COUNTY:

1. I, we, Frederick R. Diehlmann, legal owner of the property situated in Baltimore County which is described in the description and plat attached hereto and made a part hereof, hereby petition (1) that the zoning status of the herein described property be reclassified, pursuant to the Zoning Law of Baltimore County, from an R-10, R-6, and R-A Zone to a B-L Zone, for the following reasons:
Error in the original Map.

See Attached Description

and (2) for a Special Exception, under the said Zoning Law and Zoning Regulations of Baltimore County, to use the herein described property, for:

Property is to be posted and advertised as prescribed by Zoning Regulations.
I or we, agree to pay expenses of above reclassification and/or Special Exception advertising, posting, etc., upon filing of this petition, and further agree to and we to be bound by the zoning regulations and restrictions of Baltimore County adopted pursuant to the Zoning Law for Baltimore County.

THE JOBAR CORPORATION
Frederick R. Diehlmann
Cecelia C. Diehlmann
By: Joseph L. Solov, President
Address: 3 Hollins Avenue
Baltimore 10, Maryland
William S. Baldwin
24 W. Pennsylvania Avenue
Address: Towson, Maryland 21204
Frederick R. Diehlmann
Cecelia C. Diehlmann
Protestant's Attorney

ORDERED By The Zoning Commissioner of Baltimore County, this 17th day of February, 1964, that the subject matter of this petition be advertised, as required by the Zoning Law of Baltimore County, in two newspapers of general circulation throughout Baltimore County, that the property be posted, and that the public hearing be held before the Zoning Commissioner of Baltimore County in Room 109, County Office Building in Towson, Baltimore County, on the FEB 24, 1964, day of March, 1964, at 4:00 o'clock P.M.



(over)

Description of Part of the Property of Frederick R. Diehlmann to be rezoned from R-6 to B-L
August 15, 1963
Beginning for the same at a point on the west side of Rolling Road as proposed to be laid out 90.00 feet wide, said point of beginning being distant 524.73 feet, measured northerly along said west side of Rolling Road from the north side of Powers Lane, as proposed to be laid out 50.00 feet wide, said point of beginning being on the third or South 70° 50' East 300.14 foot line of the land conveyed by Catherine E. Kapp to Frederick R. Diehlmann by deed dated November 17, 1940, and recorded among the Land Records of Baltimore County in Liber R.J.S. 1415, folio 298, and running thence binding on said west side of Rolling Road as proposed to be laid out 90.00 feet wide South 13° 52' 20" East 40.26 feet to intersect the last line of Zoning Area 1-R-6-39, thence binding reversely on part of the last line, and binding reversely on part of the fourth line of said Zoning Area 1-R-6-39 the two following courses and distances as now surveyed viz: first South 75° 49' 50" West 16° 53 feet and second North 34° 30' 00" West 172.30 feet to intersect the second or North 19° 09' East 220.78 foot line of the above herein mentioned deed at a point distant 210.51 feet from the beginning of said second line, thence binding on the remainder of said second line, and part of the third line of said deed the two following courses and distances as now surveyed viz: first North 16° 42' 44" East 10.27 feet and second South 73° 16' 16" East 299.07 feet to the place of beginning.
Containing 0.445 acres of land more or less.

felt the Baltimore County Reservoir would be an excellent buffer zone between the subject property and the residences to the north and west. He was of the opinion the zoning map was in error with respect to the petitioner's property, and with this contention the Board agrees.

ORDER

For the reasons set forth in the foregoing Opinion, it is this 17 day of December, 1964 by the County Board of Appeals, ORDERED that the reclassification petitioned for, be and the same is hereby granted; subject to approval of the site plan by the State Roads Commission, Bureau of Public Services, and the Office of Planning and Zoning.

Any appeal from this decision must be in accordance with Chapter 1100, subtitle B of Maryland Code of Procedure, 1961 edition.

COUNTY BOARD OF APPEALS
OF BALTIMORE COUNTY

G. Mitchell Austin, Chairman
W. Oliver Parker

Note: Mr. Baldwin did not sit at this hearing.

Description of Part of the Property of Frederick R. Dielman to be rezoned from R-5 to ~~RA-10~~ **RA-10**, 6L

August 15, 1963
Sheet 2

Being part of the land conveyed by Catherine E. Kapp to Frederick R. Dielman by deed dated November 17, 1945, and recorded among the Land Records of Baltimore County in Liber R.J.S. 1415, folio 298.

Description of Part of the Property of Frederick R. Dielman to be rezoned from RA to ~~RA-10~~ **RA-10**, 6L

August 15, 1963

Beginning for the same at a point on the north side of Powers Lane as proposed to be laid out 50.00 feet wide, said point of beginning being distant 459.83 feet, measured westerly along said north side of Powers Lane, as proposed to be laid out 50 feet wide from the west side of Rolling Road as proposed to be laid out 90.00 feet wide, said point of beginning being on the first or North 15° 41' East 353.73 foot line of the land conveyed by Catherine E. Kapp to Frederick R. Dielman by deed dated November 17, 1945, and recorded among the Land Records of Baltimore County in Liber R.J.S. 1415, folio 298, at a point distant 15.08 feet from the beginning of said first line, and running thence binding on part of said first line as now surveyed North 13° 14' 44" East 246.17 feet to intersect the third line of Zoning Area 1-RA-23, thence binding on part of said third line, all of the fourth and part of the fifth line of Zoning Area 1-RA-23 the three following courses and distances as now surveyed viz: first South 70° 56' 16" East 120.61 feet, second North 19° 03' 44" East 200.00 feet, and third North 75° 49' 50" East 167.53 feet to intersect the west side of Rolling Road as proposed to be laid out 90.00 feet wide, thence binding on said west side of Rolling Road as proposed to be laid out 90.00 feet wide the two following courses and distances viz: first South 13° 52' 20" East 113.16 feet, and second southeasterly along a curve to the right with a radius of 1055.00 feet for a distance of 456.31 feet, said curve being subtended by a chord bearing South 1° 27' 58" East 453.31 feet, thence

Description of Part of the Property of Frederick R. Dielman to be rezoned from RA to ~~RA-10~~ **RA-10**, 6L

August 15, 1963

South 60° 12' 04" West 19.74 feet to intersect the said north side of Powers Lane as proposed to be laid out 50.00 feet wide, thence binding on said north side of Powers Lane as proposed to be laid out 50.00 feet wide North 70° 56' 16" West 444.83 feet to the place of beginning.

Containing 3.886 acres of land more or less.

Being part of the land conveyed by Catherine E. Kapp to Frederick R. Dielman by deed dated November 17, 1945, and recorded among the Land Records of Baltimore County in Liber R.J.S. 1415, folio 298.

Description of Part of the Property of Frederick R. Dielman to be rezoned from R-10 to ~~RA-10~~ **RA-10**, 6L

August 15, 1963

Beginning for the same at the end of the first or North 15° 41' East 353.73 foot line of the land conveyed by Catherine E. Kapp to Frederick R. Dielman by deed dated November 17, 1945, and recorded among the Land Records of Baltimore County in Liber R.J.S. 1415, folio 298, said point of beginning being distant 339.65 feet measured northerly along said first line from the north side of Powers Lane, as proposed to be laid out 50.00 feet wide, and running thence binding on part of the second line of said deed as now surveyed North 16° 42' 44" East 210.51 feet to intersect the fourth or south-easterly 700 foot line of Zoning Area 1-R-6-39 at a point distant 172.30 feet from the end of said fourth line, thence binding on part of said fourth line as now surveyed South 34° 30' 00" East 172.30 feet to the end of the fifteenth or northwesterly 200 foot line of Zoning Area 1-R-10-19, thence binding reversely on all of the fifteenth and part of the fourteenth line of Zoning Area 1-R-10-19 the two following courses and distances as now surveyed viz: first South 19° 03' 44" West 200.00 feet, and second North 70° 56' 16" West 120.61 feet to intersect the said first line of said deed at a point distant 261.25 feet from the beginning of said first line, thence binding on the remainder of said first line as now surveyed North 13° 14' 44" East 92.48 feet to the place of beginning.

Containing 0.750 acres of land more or less.

Description of Part of the Property of Frederick R. Dielman to be rezoned from R-10 to ~~RA-10~~ **RA-10**, 6L

August 15, 1963

Being part of the land conveyed by Catherine E. Kapp to Frederick R. Dielman by deed dated November 17, 1945, and recorded among the Land Records of Baltimore County in Liber R.J.S. 1415, folio 298.

BALTIMORE COUNTY, MARYLAND

INTER-OFFICE CORRESPONDENCE

TO: Mr. John G. Reas, Zoning Commissioner Date: March 6, 1964
FROM: Mr. George E. Gervais, Acting Director Office Planning and Zoning
SUBJECT: 44-82-1, B-10, 6L and RA-10 to B-1. Northwest corner of Rolling Road and Powers Lane. Being property of Frederick A. and Cecilia G. Dielman, 1st District

REMARKS: Thursday, March 19, 1964 at 1:00 P.M.

The staff of the Office of Planning and Zoning has reviewed the subject petition for reclassification from R-10, 6L and RA-10 to B-1 zoning, and has the following advisory comments to make with respect to pertinent planning factors:

1. This property was the subject of a request for R-8 zoning some years ago. The appeal process overlapped the adoption of the zoning map. It is the recollection of the planning staff that R-8 zoning was granted, and at the same time was wiped out by the adoption of the Western Planning Area Zoning Map.
2. Although the planning staff and the Planning Board were in accord with R-8 zoning here, the policy of the Planning Board was not to create R-8 zoning by map. R-8 zoning was recommended on the Master Plan overlay. A combination of apartment and single family residential uses were recommended by the Board on the Zoning Map itself. The intent was to establish a transitional land use between the commercial zoning in the area and the residential zoning. The Planning Staff believes that the R-8 zoning along Rolling Road. The Planning Staff believes that the R-8 zoning along Rolling Road was in error. Furthermore, no changes in the character of the area have occurred which, in the opinion of the Planning Staff, warrant reclassification to commercial uses on the subject property.

GEA/cs

BALTIMORE COUNTY, MARYLAND

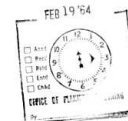
INTER-OFFICE CORRESPONDENCE

TO: Mr. James A. Byer, Chairman Zoning Advisory Committee Date: February 19, 1964
FROM: Capt. Paul H. Reinecke
SUBJECT: Frederick Dielman
N/S Powers Lane corner of Rolling Rd.
District 1 - 2/24/64

Water mains, meters, and fire hydrants shall be of an approved type and installed in accordance with the Baltimore County Standard Design Manual. Spacing of fire hydrants is 300 feet apart as measured along an improved road and the National Board of Fire Underwriters requirements for the structures involved. Hydrants shall be located at least 50 feet from the building and in a pattern approved by the Baltimore County Fire Bureau.

Cont. of Capt. Paul H. Reinecke at Valley 5-7310 for information concerning above comments.

PHR/bbr
cc: File



BALTIMORE COUNTY, MARYLAND OFFICE OF FINANCE

No. 27689

DATE 1/13/64

TO: Maryland Commercial Contractors, Inc., 3000 E. Baltimore Ave., Baltimore, Md. 21210
FROM: Planning Department of Balto. Co.

QUANTITY	DETAILS UPPER SECTION AND RETURN WITH YOUR REMITTANCE	TOTAL AMOUNT DOLLARS
1	Advertising and posting of property for Frederick Dielman #64-82-1	141.00
1	1-1465 9018 • 27589 TYP-	141.00

IMPORTANT: MAKE CHECKS PAYABLE TO BALTIMORE COUNTY, MARYLAND
MAIL TO DIVISION OF COLLECTION & RECEIPTS, COURT HOUSE, TOWNSHIP 4, MARYLAND
PLEASE RETURN UPPER SECTION OF THIS BILL WITH YOUR REMITTANCE.

BALTIMORE COUNTY, MARYLAND OFFICE OF FINANCE

No. 23257

DATE 5/28/64

TO: Samuel F. Kennedy, Esq., 509 Maryland Trust Bldg., Baltimore 2, Maryland
FROM: Office of Planning & Zoning
219 County Office Building
Towson 1, Maryland

QUANTITY	DETAILS UPPER SECTION AND RETURN WITH YOUR REMITTANCE	TOTAL AMOUNT DOLLARS
1	Cost of appeal - Frederick Dielman No. 44-82-1	870.00
1	5-1264 3694 • 23257 TYP-	70.00

IMPORTANT: MAKE CHECKS PAYABLE TO BALTIMORE COUNTY, MARYLAND
MAIL TO DIVISION OF COLLECTION & RECEIPTS, COURT HOUSE, TOWNSHIP 4, MARYLAND
PLEASE RETURN UPPER SECTION OF THIS BILL WITH YOUR REMITTANCE.

Rolling Road there is a small section of apartment zoning and then R.10. All of the commercial uses, which I have described, were in existence at the time of the adoption of the official zoning map on November 13, 1942, as well as the convalescent home referred to. This commercial development originated by private petitions for rezoning which were granted prior to the adoption of the map.

The property in question was formerly owned by Frederick Diehlmann, who is now deceased, and is under contract of sale to the Johar Corporation. The petition for rezoning was signed by Mr. and Mrs. Diehlmann, as legal owners and the Johar Corporation as the contract purchaser.

The record before the Board of Appeals showed that the following witnesses testified on behalf of the petitioner; namely, Mr. Joseph L. Soley, president of the Johar Corporation, Mr. John Hocheder, Jr., a civil engineer, and Mr. Bernard Willmann, who was offered as a zoning and planning expert. The witnesses testifying on behalf of the protestants were Mr. Thomas Neubergner, who resides at 1414 Woodcliff Avenue, Mrs. Betty Wiesner, who

resides at 1427 North Rolling Road, and Mr. Richard M. Henry, Jr., who resides at 937 Praetwood Road. All of the witnesses for the protestants are individual property owners, and there was no expert testimony offered on behalf of the protestants bearing on the subject of an error in the original zoning of this tract or as to what might be an appropriate use to which the tract of land could be put under its present zoning classification.

The testimony of Mr. Soley, president of the contract purchaser, was to the effect that he could not use this property for apartment house use or at least there was difficulty in obtaining financing of the land for this particular use. Mr. Hocheder, the civil engineer, testified as to the availability of utilities for the subject property, and Mr. Willmann, the zoning and planning expert, was the witness offered by the petitioners to establish the fact of error in the original zoning and also their contention that the property not be used in the present zoning classification.

The sole question before the Court is whether or not there was substantial, positive, and

affirmative evidence before the Board of Appeals upon which it could base a decision that there was error in the original zoning as established by the Official Baltimore County Zoning Map. If there was such evidence, it is not the province of the Court to substitute its judgment for that of the Board of Appeals as to its findings. The Court believes that one of the most recent cases decided by the Court of Appeals of Maryland on this subject is the case of the Johar Corporation v. Rodgers Forge, now reported at 236 Md. 106. In that case there were two issues asserted by the petitioners for the reclassification requested; namely, error in original zoning and change in character of the neighborhood. As pointed out in that case, the zoning map is entitled to a presumption of correctness and the burden was upon the applicants seeking reclassification to show an error in that map if they were to be successful. In the course of the opinion, the Court states at page 130 as follows: and I quote, "It is obvious that the Board (referring to the Board of Appeals) could have been more specific and definite in its findings of fact; however, it is certain that the Board found that there had been changes

in the neighborhood and error in the original zoning sufficient to justify the reclassification (its other findings clearly meet the test of being fairly debatable, so it will be unnecessary to discuss them further). We have stated time after time that it is not the function of the courts to second-guess, and the courts will not substitute their judgments for that of the expertise of the zoning officials. It is only where there is no reasonable debate or where the record is devoid of substantial supporting facts that the courts are justified in reversing a decision of the Board, or declaring its actions arbitrary or capricious."

In the Johar case, from which I have just quoted, Mr. Willmann was also the expert who testified on behalf of the petitioners in that case. Of course, I recognize that the opinion of any expert is only as valid as the reasons given to support it, however, if those reasons do have a substantial basis, then, the opinion of such an expert is entitled to due deference. The Court of Appeals, in the Johar case, did consider Mr. Willmann's testimony and at page 121 said this, "We turn to the

JAMES HENRY
VINCENT HENRY
BENNY HENRY
VINCENT HENRY
A. W. DILL
VIRGINIA DILL
THOMAS HENRY
RICHARD H. HENRY
WILLIAM HENRY
ADOLPH HENRY
MARGARET HENRY
THOMAS F. HENRY
WILLIAM EARLE STEINMAN
BETTY WILLIAM

Plaintiffs

vs. Mace. 7/66/3174

G. MICHAEL ARTHUR
W. DILL FANCER and
WILLIAM S. BAKER
constituting the
COUNTY BOARD OF APPEALS
OF BALTIMORE COUNTY

Defendants

BEFORE: HONORABLE WILLIAM S. JENKINS, Judge

APPEARANCES:

SAMUEL F. KERRY, ESQ., Attorney for Appellants.
WILLIAM S. BAKER, ESQ., Attorney for Appellees.

Submitted by: Samuel F. Kerry

(ORAL OPINION)

THE COURT: This matter involves an appeal from an order of the County Board of Appeals of Baltimore County, dated December 17, 1964. The property in question contains 5.061 acres, more or less. Under the Official Zoning Map for Baltimore County, adopted November 15, 1962, known as Map 28, which comprises the Second Election District and portions of the First and Third Election Districts of Baltimore County, Maryland, the subject tract is divided into three classifications. The largest portion, containing 3.884 acres, is zoned R. A. Residential, Apartments. Another portion, containing .750 acres, is zoned R.10 Residence-One Family, and the remaining portion, containing .427 acres, is zoned R.6 Residential-One and Two Family. The petition for reclassification, therefore, asks for three reclassifications of all portions from R.A., R.10, and R.6 to a B.L. Zone-Business, Local. The Board of Appeals granted the reclassification by its order dated, December 17, 1964. The Deputy Zoning Commissioner of Baltimore County had likewise granted this reclassification under an order passed April 3, 1964. The Board of Appeals

filed an opinion as a basis for its order which is almost a verbatim copy of the opinion of the Deputy Zoning Commissioner, which formed the basis of his order of April 3, 1964.

The sole basis of the request for the reclassification is error in the official zoning map in establishing the property as a R. A. or Apartment Zone.

It might prove helpful to describe the subject property and the surrounding properties. The subject property was used by a branch of the Federal Government from 1932 as an aircraft site until the lease expired in July of 1961. The property is situated at the northwest corner of Rolling Road and Powers Lane, approximately 450 feet north of Route 40, which is also known as the Baltimore National Pike. On the northeast corner of Rolling Road and the Baltimore National Pike, as shown on the map, is a strip of B. B. zoning, Business, Roadside, extending for a considerable distance to the west from the intersection of Rolling Road and Route 40. On the southwest corner is, what is referred to in the testimony as the Double T Store, which is a restaurant.

Adjoining the Double T Store property, proceeding north on Rolling Road is a tract of land zoned for apartment use and presently improved by a convalescent home, which convalescent home has been in use for some period of years. We then come to the subject property which has been zoned as herein before indicated by the Zoning Map and then to the immediate north of the subject property is another R.6 zone on the west side of Rolling Road. To the west of the subject property is a tract of R.10 zoning which, incidentally, is improved by one dwelling. We then come to a property owned by Baltimore County as a reservoir on which there is a water pumping station. On the east side of Rolling Road and bordering on the north side of the Baltimore National Pike is a large tract of land zoned B. B. or Business, Major as shown on the zoning map. This property is improved by a Robert Hall Department Clothing store on the northeast corner of Rolling Road and Route 40; then, by a building occupied by Pope Toy Discount Store, and between the Robert Hall Store and Pope Toy Discount Store, there are some commercial billboards. To the north of Pope Toy Store is a Research Laboratory Center, then proceeding north on

Rolling Road there is a small section of apartment zoning and then R.10. All of the commercial uses, which I have described, were in existence at the time of the adoption of the official zoning map on November 15, 1962, as well as the convalescent home referred to. This commercial development originated by private petitions for rezoning which were granted prior to the adoption of the map.

The property in question was formerly owned by Frederick Dielman, who is now deceased, and is under contract of sale to the Jobar Corporation. The petition for rezoning was signed by Mr. and Mrs. Dielman, as legal owners and the Jobar Corporation as the contract purchaser.

The record before the Board of Appeals showed that the following witnesses testified on behalf of the petitioners; namely, Mr. Joseph L. Soley, president of the Jobar Corporation, Mr. John Hochstetler, Jr., a civil engineer, and Mr. Bernard Willemain, who was offered as a zoning and planning expert. The witnesses testifying on behalf of the respondents were Mr. Thomas Huchberger, who resides at 1414 Woodliff Avenue, Mrs. Betty Wilmann, who

resides at 1227 North Rolling Road, and Mr. Richard M. Henry, Jr., who resides at 937 Praetwood Road. All of the witnesses for the respondents are individual property owners, and there was no expert testimony offered on behalf of the respondents bearing on the subject of an error in the original zoning of this tract or as to what might be an appropriate use to which the tract of land could be put under its present zoning classification.

The testimony of Mr. Soley, president of the contract purchaser, was to the effect that he could not use this property for apartment house use or at least there was difficulty in obtaining financing of the land for this particular use. Mr. Hochstetler, the civil engineer, testified as to the availability of utilities for the subject property, and Mr. Willemain, the zoning and planning expert, was the witness offered by the petitioners to establish the fact of error in the original zoning and also their contention that the property not be used in the present zoning classification.

The sole question before the Court is whether or not there was substantial, positive, and

affirmative evidence before the Board of Appeals upon which it could base a decision that there was error in the original zoning as established by the Official Baltimore County Zoning Map. If there was such evidence, it is not the province of the Court to substitute its judgment for that of the Board of Appeals as to its findings. The Court believes that one of the most recent cases decided by the Court of Appeals of Maryland on this subject is the case of the Jobar Corporation v. Rodgers Forge, now reported at 236 Md. 106. In that case there were two issues asserted by the petitioners for the reclassification requested; namely, error in original zoning and change in character of the neighborhood. As pointed out in that case, the zoning map is entitled to a presumption of correctness and the burden was upon the applicants seeking reclassification to show an error in that map if they were to be successful. In the course of the opinion, the Court states at page 130 as follows: and I quote, "It is obvious that the Board (referring to the Board of Appeals) could have been more specific and definite in its findings of fact; however, it is certain that the Board found that there had been changes

in the neighborhood and error in the original zoning sufficient to justify the reclassification (its other findings clearly meet the test of being fairly debatable, so it will be unnecessary to discuss them further). We have stated time after time that it is not the function of the courts to second-guess, and the courts will not substitute their judgments for that of the expertise of the zoning officials. It is only where there is no reasonable debate or where the record is devoid of substantial supporting facts that the courts are justified in reversing a decision of the Board, or declaring its actions arbitrary or capricious."

In the Jobar case, from which I have just quoted, Mr. Willemain was also the expert who testified on behalf of the petitioners in that case. Of course, I recognize that the opinion of any expert is only as valid as the reasons given to support it, however, if those reasons do have a substantial basis, then, the opinion of such an expert is entitled to great deference. The Court of Appeals, in the Jobar case, did consider Mr. Willemain's testimony and at page 121 said this, "We turn to the

question of error in the original zoning. Again, we start off with the same presumption of validity. The Deputy Director of Planning did not consider the B-2 zoning of the subject property in 1955 to be an error in original zoning, although it was "suspect" and "maybe" erroneous then. Mr. Williamin stated that it was his "considered opinion" that the B-2 zoning was error in the original zoning, and gave his reasons for reaching that conclusion (again we do not repeat them here). Although the above may constitute some conflict in the testimony relative to original zoning, we are unable to conclude that this left the record barren of substantial, supporting facts relative thereto. The Board stated that it was "impressed with the testimony of Mr. Williamin regarding the error" in original zoning, and if it decided to accept his opinion for the reasons given by him, we cannot, under our previous holdings, reverse the Board's action. In the absence of a showing that the acceptance of the opinion was arbitrary and capricious in a legal sense, as *Reade v. County Board*, supra. Consequently, we hold that the question of error in the original zoning was fairly debatable."

Now, the Board of Appeals, in the present

case had before them Mr. Williamin's opinion that there was error in the zoning established on the official zoning map, and the opinion of the Board of Appeals shows that they considered Mr. Williamin's testimony in part as a basis for its opinion. Without repeating the reasons of Mr. Williamin here the Court believes that those reasons were substantial in their nature and that his opinion did have a justifiable and reasonable basis. There was no testimony of any expert to controvert Mr. Williamin's opinion, so if the Board of Appeals did give it credence and believed Mr. Williamin's reasons to be substantial, that would form a justifiable basis for the Board's decision. It is true, probably in this case, that as was stated by the Court of Appeals in the *Johar* case, from which I quoted, that the Board might have been more specific and definite in its findings of fact. However, if there was substantial evidence before the Board and which it did unobscurely consider because of its reference to Mr. Williamin's testimony in its opinion, it is not for this Court to conclude that the Board was in error since there was certainly

sufficient evidence to make the question fairly debatable.

As then came to the question, as pointed out by counsel for the protestants, as to whether or not this zoning classification, namely, B. L. or Business, Local, is the appropriate zoning. Well, it was the zoning classification which was requested, and the Court feels that there was substantial evidence before the Board to justify the reclassification as Business, Local property. In this connection, Mr. Williamin's testimony, and I quote from page fifty of the transcript, was as follows: "What we are dealing with is the question of what is the minimum or most restrictive zoning classification for the subject tract that will permit a reasonable use for that land. In my opinion, it comes down to a commercial classification, and the B-1 is the most restrictive classification." Mr. Williamin had previously testified that, in his opinion, the present classification of an R. A. zone was confiscatory since he did not feel this land could be used for apartment use because of adjacent commercial development and the commercial development on the immediate opposite side of Rolling Road.

As I have indicated before, the protestants did not offer any testimony to controvert Mr. Williamin's opinion of that of Mr. Wiley. The three witnesses which they produced were individual residential property owners. One of them, Mr. Leuberg, lives about a mile and a third from the subject property, and another of them, Mr. Henry, lives about a mile and a half from the subject property. The third, Mrs. Wiesner, is probably the only one of the three who really would be aggrieved by the decision of the Board of Appeals, if that question had been raised in the case. But, be that as it may, the testimony of all three of them merely dealt with the fact that they didn't want the zoning or commercial use and that they felt that it would have some effect on traffic competition in the area along Rolling Road. I do not believe, however, that their testimony was of sufficient probative force to establish that the reclassifying of this property for Business, Local use would create any traffic hazard which would be detrimental to the health, safety and public welfare of the community.

For the reasons stated, the Court is

TELEPHONE 823-3000

BALTIMORE COUNTY, MARYLAND No. 19278
OFFICE OF FINANCE DATE 3/28/63
Division of Collection and Receipts
COURT HOUSE
TOWSON 4, MARYLAND

REPORT TO ACCOUNT NO. 06-82

QUANTITY	DETAILS UPPER SECTION AND RETURN WITH YOUR REMITTANCE	TOTAL AMOUNT
1	Patition for Reclassification for Frederick Dabhamm	\$50.00
1	Paid to Baltimore County, Md. - Office of Finance	\$50.00

NOTE: MAKE CHECKS PAYABLE TO BALTIMORE COUNTY, MARYLAND
DIVISION OF COLLECTION & RECEIPTS, COURT HOUSE, TOWSON 4, MARYLAND
RETURN UPPER SECTION OF THIS BILL WITH YOUR REMITTANCE.

TELEPHONE 823-3000

BALTIMORE COUNTY, MARYLAND No. 27515
OFFICE OF FINANCE DATE 6/20/64
Division of Collection and Receipts
COURT HOUSE
TOWSON 4, MARYLAND

TO: Samuel F. Lowry, Esq.,
509 Maryland Trust Building
Baltimore 2, Md.

ALLIED Office of Planning & Zoning
119 County Office Bldg.,
Towson 4, Md.

REPORT TO ACCOUNT NO. 01-622

QUANTITY	DETAILS UPPER SECTION AND RETURN WITH YOUR REMITTANCE	TOTAL AMOUNT
1	Cost of posting property of Fred. R. Dabhamm for appeal hearing No. 64-82-8	\$10.00
1	Paid to Baltimore County, Md. - Office of Finance	\$10.00

IMPORTANT: MAKE CHECKS PAYABLE TO BALTIMORE COUNTY, MARYLAND
MAIL TO DIVISION OF COLLECTION & RECEIPTS, COURT HOUSE, TOWSON 4, MARYLAND
PLEASE RETURN UPPER SECTION OF THIS BILL WITH YOUR REMITTANCE.

TELEPHONE 823-3000

BALTIMORE COUNTY, MARYLAND No. 29903
OFFICE OF FINANCE DATE 3/26/65
Division of Collection and Receipts
COURT HOUSE
TOWSON 4, MARYLAND

TO: Thomas F. Donnelly, Esq.,
Maryland Trust Building
Baltimore, Md. 21202

CLERK: County Board of Appeals (Zoning)

REPORT TO ACCOUNT NO. 01-712

QUANTITY	DETAILS UPPER SECTION AND RETURN WITH YOUR REMITTANCE	TOTAL AMOUNT
1	Cost of Certified Documents - No. 64-82-8 Frederick Dabhamm, et al 1951 car, Rolling Road & Powers Lane 1st District	\$13.05
1	Paid to Baltimore County, Md. - Office of Finance	\$13.00

IMPORTANT: MAKE CHECKS PAYABLE TO BALTIMORE COUNTY, MARYLAND
MAIL TO DIVISION OF COLLECTION & RECEIPTS, COURT HOUSE, TOWSON 4, MARYLAND
PLEASE RETURN UPPER SECTION OF THIS BILL WITH YOUR REMITTANCE.

CERTIFICATE OF POSTING
ZONING DEPARTMENT OF BALTIMORE COUNTY
Towson, Maryland

District: 1st Date of Posting: MAY 21 1964

Posted for: APPEAL

Petitioner: FREDERICK DABHAMM, ET AL

Location of property: N.W. COR. Rolling Rd. & Powers Lane

Location of Sign: N.W. COR. Rolling Rd. & Powers Lane

Remarks: J. S. Brown

Posted by: J. S. Brown Date of return: MAY 21 1964

TELEPHONE 823-3000

BALTIMORE COUNTY, MARYLAND No. 34538
OFFICE OF FINANCE DATE 1/28/66
Division of Collection and Receipts
COURT HOUSE
TOWSON, MARYLAND 21204

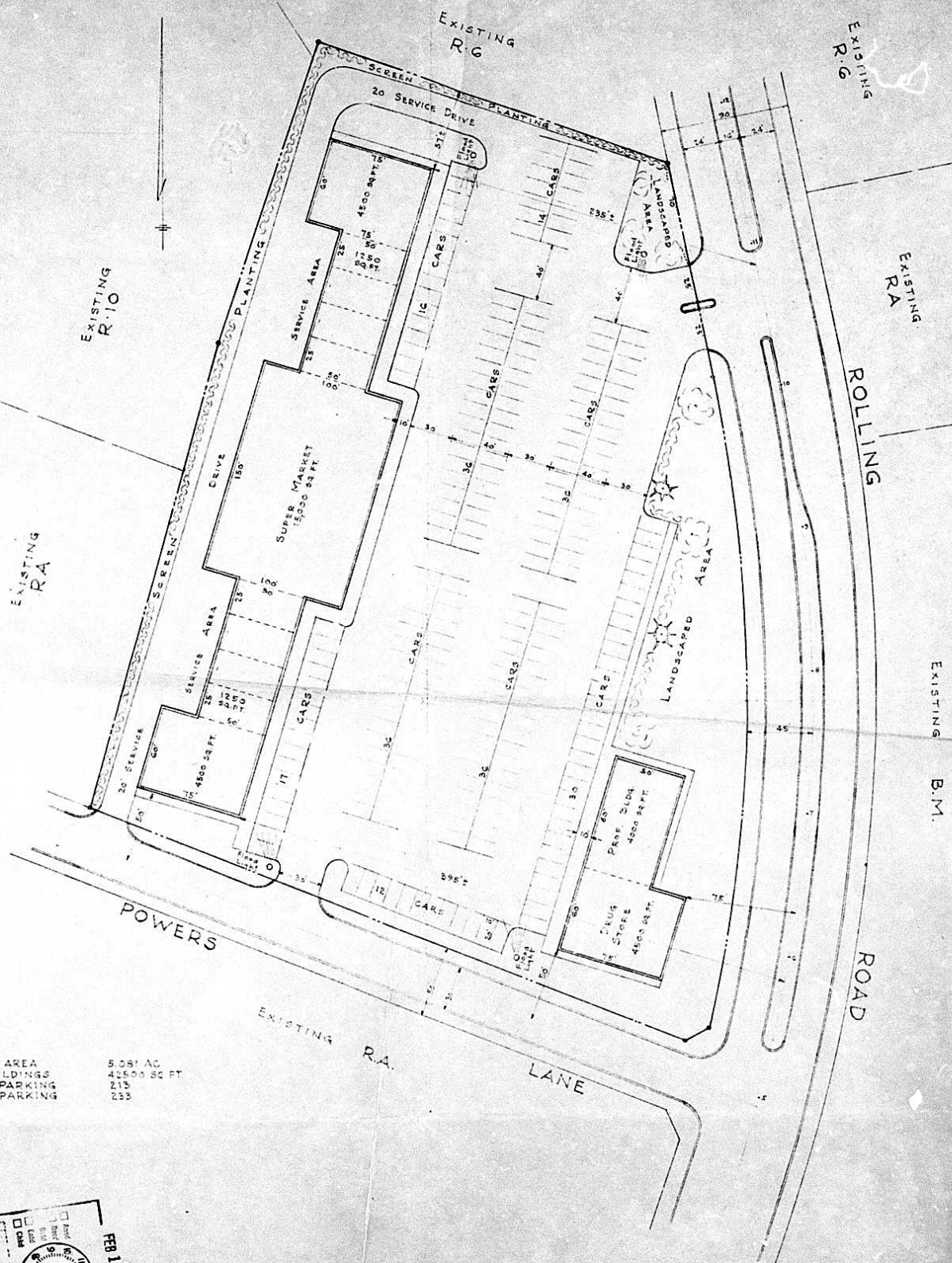
TO: Donald C. Gaudin, Esq.,
303 E. Fayette Street
Baltimore, Md. 21202

CLERK: County Board of Appeals (Zoning)

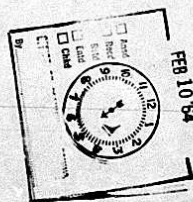
REPORT TO ACCOUNT NO. 01-712

QUANTITY	DETAILS UPPER SECTION AND RETURN WITH YOUR REMITTANCE	TOTAL AMOUNT
1	Cost of verification copies - Zoning File No. 64-82-8 Frederick Dabhamm	\$2.00
1	4 sheets @ 50¢ per sheet	\$2.00
1	Paid to Baltimore County, Md. - Office of Finance	\$2.00

IMPORTANT: MAKE CHECKS PAYABLE TO BALTIMORE COUNTY, MARYLAND
MAIL TO DIVISION OF COLLECTION & RECEIPTS, COURT HOUSE, TOWSON 4, MARYLAND
PLEASE RETURN UPPER SECTION OF THIS BILL WITH YOUR REMITTANCE.



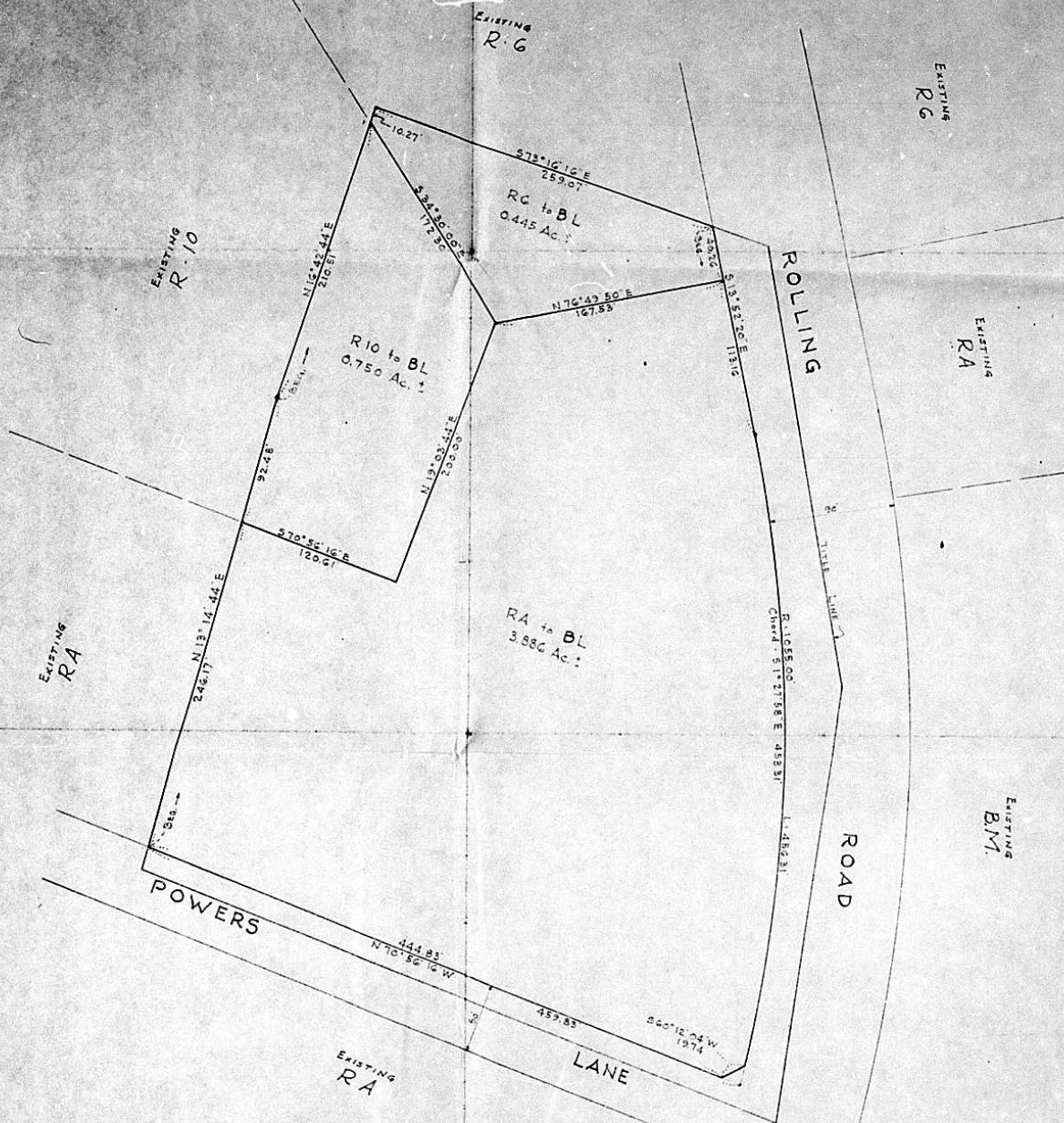
TOTAL NET AREA 5.081 AC
 AREA OF BUILDINGS 42,500 SQ. FT.
 REQUIRED PARKING 215
 PROPOSED PARKING 235



GEORGE WILLIAM STEPHENS, JR.
 AND ASSOCIATES, INC.
 ENGINEERS
 303 ALLEGHENY AVE.
 TOWSON 4, MARYLAND

PROPOSED
 SHOPPING CENTER
 ROLLING ROAD & POWERS LANE
 BALTO. CO. MD. ELECT. DIST. # 1.
 SCALE: 1" = 50'
 FEB. 6, 1964.





64-82R

WESTERN
AREA
SEC. 2-B
BL



PLAT TO ACCOMPANY ZONING PETITION
POWERS LANE & ROLLING ROAD
BALTIMORE COUNTY, MARYLAND
ELECTION DISTRICT NO. 1
SCALE 1"=50'
AUG. 15, 1963.
FEB. 6, 1964

GEORGE WILLIAM STEPHENS, JR.
AND ASSOCIATES, INC.
ENGINEERS
303 ALLEGHENY AVE.
TOWSON, MARYLAND