

95-211-SPH

8819 Orchard Tree Lane

9th E.D.

4th C.D.

Legal Owner : Paul M. Pardew

Petitioner(s) : ZADM-Enforcement

2-16-95

Zoning Commissioner hearing set for this date at 11:00 am.

3-2-95

ORDERED BY ZONING COMMISSIONER LAWRENCE E. SCHMIDT that, pursuant to the Petition for Special Hearing, approval as to whether the business operation at the aforementioned property is an "After Hours Club" as defined in the Baltimore County Zoning Regulations (BCZR), be and is hereby GRANTED; and, IT IS FURTHER ORDERED that the Petition for Special Hearing as it relates to the requirement that the property owner obtain approval for said use by a Petition for Special Exception, and be a 1,000 ft. from a residential property, be and is hereby DENIED, as premature.

Any appeal from this decision must be filed, in writing, within thirty days from the date of this Order to the County Board of Appeals.

2/16

IN RE: PETITION FOR SPECIAL HEARING *	BEFORE THE
(8819 Orchard Tree Lane)	
9th Election District *	ZONING COMMISSIONER
4th Councilmanic District	
Paul M. Pardew, Property Owner*	OF BALTIMORE COUNTY
John M. Giorgelli, Proprietor	
Baltimore Co. Zoning Admin *	CASE No. V 95-211-SPH
& Dev. Mgt., Enforcement Div.	
Petitioner *	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter comes before the Zoning Commissioner as a Petition for Special Hearing for the property located at 8819 Orchard Tree Lane in Towson. The case is presented to this Zoning Commissioner in somewhat of an unusual posture in that the Petition for Special Hearing relief is not filed by the property owner. Rather, the Petition is filed by the Baltimore County Zoning Administration and Development Management Office (ZADM), Enforcement Division. The Petition presents two issues; namely, whether the business operation at the aforementioned property is an "After Hours Club" as defined in the Baltimore County Zoning Regulations (BCZR) and, if so, whether said use may continue without the benefit of a special exception and a variance to allow same within 1,000 ft. of a residentially used dwelling.

Appearing at the requisite public hearing held for this case was Kevin R. Connor, an inspector in the Enforcement Division of ZADM. Mr. Connor was present to explain the reasons behind the filing of the Petition for Special Hearing and to present the County's position. Appearing as interested persons was John A. Giorgelli, proprietor of Club 101, Inc., the business on the site and that corporation's counsel, Edward J. Covahey, Jr. Also present was Wayne Skinner on behalf of the Towson-LochRaven Community Council.

The facts presented regarding the subject property and uses thereon were largely not in dispute. The subject property is known as 8819 Orchard

Tree Lane and is located near the intersection of Joppa Road and Loch Raven Boulevard in Towson. The property is zoned B.R. and is improved with a commercial building which has been on the site for many years. Mr. Giorgelli indicated that he is President and major stockholder of Club 101, Inc., a tenant of this building and proprietor of the business which has been brought into question. Mr. Giorgelli testified that, approximately two years ago, he recognized the lack of facilities available in Baltimore County to cater to the late night crowd for socializing and dancing. He, therefore, incorporated the business known as Club 101 and went into operation in March of 1993. The nature of the club is to operate a late night facility. The Club is open some Thursdays and most Fridays and Saturdays from 11:00 P.M. to 5:00 A.M. There is a dance floor and a disc jockey set up to provide entertainment. There are also some pool tables and similar amusement devices.

Owing to the liquor laws of Baltimore County and the State which prohibit late night sales of alcohol, the facility does not have a liquor license or sell liquor. Moreover, food is not sold, although a small independent food vendor operates in the front of the building. An admission fee is paid by the patrons who use the facility to socialize and listen and dance to the music provided. Patrons are allowed to bring in alcoholic beverages.

Mr. Giorgelli testified that prior to his going into business, he extensively investigated the propriety of this use both individually and through his counsel. He checked with the Liquor Board and was advised that since liquor was not sold there was no violation of any of that Board's requirements or regulations. He also spoke with the Fire Department, the Health Department and ZADM in Baltimore County. He was assured by all of these agencies that such a use was not violative of any County codes, laws or regulations. He attempted, in fact, to purchase a trader's license or other

license to legitimize the business but was advised by County agencies that no such license was required. Thus, the business went into operation and has continued for approximately two years.

As could be anticipated, many of the neighbors in the subject locale object to the operation of the business. In that the Club is open during late evening/early morning hours, the noise and traffic associated with the operation are objected to by some. Complaints were received by ZADM's Enforcement Division and Mr. Connor indicated that he has visited the site on a couple of occasions. He corroborated Mr. Giorgelli's description of the activities which occur thereon. He also described the large dancing floor and DJ setup. He admitted that he saw nothing unlawful or illegal and has brought the subject Petition to clarify the use of the subject property and whether same is violative of the BCZR.

Club 101 is not the only after hours club in Baltimore County. Other copy cat businesses have sprung up since Mr. Giorgelli went into business. The mushrooming of these businesses and their validity pursuant to the BCZR has resulted in other cases before the Zoning Commissioner's office and enactment of legislation by the Baltimore County Council.

The first case which came before this office was also before this Zoning Commissioner. That case was filed by Scott M. Curliner and William B. England, Jr. (case No. 94-290-SPH). The matter was filed in early 1994 and a decision was rendered by this Zoning Commissioner on March 29, 1994.

The Petition brought in that case sought an interpretation that after hours clubs as described in the testimony presented are permitted uses in certain zones and a determination of what zones are appropriate to permit such uses. Although a specific property was not the subject of that Petition, testimony was received about the activities that go on at these clubs. The activity described in the body of that opinion is similar to the

facts as were presented by Mr. Giorgelli and Mr. Connor in the instant case. At the time the case was held and considered, there was no definition of "After Hours Clubs" in the BCZR. Moreover, as is well settled, the Zoning Commissioner must consider all cases in context of the law then in effect at the time the decision is rendered. See Yorkdale Corporation v. Powell, 237 Md. 121 (1964).

Upon consideration of the evidence and testimony presented in the Culiner case, I held that the use described constituted a night club under the BCZR as it existed at that time. I noted that an after hours club was not an identified use in the BCZR and that the Court of Special Appeals, in Kowalski v. Lamar, 25 Md. App. 493 (1975), held that any use other than that permitted by the zoning ordinance and being carried on as of right or by special exception is prohibited. In the Culiner case, I determined that the proposed operation most closely fit the definition of a night club in the BCZR. As noted in that opinion, night clubs are not permitted in an M.L. zone.

The second case which came before this office related to the same property which is the subject of the instant Petition. That Petition was also filed by the Enforcement Division of ZADM. That Petition named Paul M. Pardew, property owner and John A. Giorgelli, tenant, as interested persons. The Petitioner sought a determination of whether or not the Club 101 use was an after hours club and whether same was permitted in a B.R. zone. In fact, the relief requested there was similar to the interpretation requested at this time.

That case came in for hearing before Deputy Commissioner, Timothy M. Kotroco. Deputy Kotroco's opinion and Order dated September 7, 1994 did not directly answer the question presented. Rather, he granted a preliminary Motion to Dismiss submitted by Mr. Giorgelli's counsel, Edward Covahey.

Specifically, Deputy Commissioner Kotroco held that since the Petition was filed in July of 1994, prior to the enactment of relevant legislation by the County Council in August, that consideration of the alleged violation of the BCZR was premature. Moreover, Deputy Commissioner Kotroco dismissed the action without prejudice, reserving to ZADM the right to file a new Petition for Special Hearing should they deem it appropriate in the future.

Also relevant to the issue presented, is the enactment of Bill 85-94 by the Baltimore County Council. This Bill, which took effect on August 8, 1994, amended the BCZR to provide a definition of after hours clubs and, in fact, regulated same. The definition added to the zoning regulations defined an after hours club as a "Commercial establishment whose principal business is the provision of live or recorded entertainment with or without a dance floor, which is open primarily between 11:00 P.M. and 4:00 A.M., and which does not have a Baltimore County liquor license. An after hours club is not a night club as defined in the zoning regulations or the building code of Baltimore County, Maryland". The legislation went on to provide that an after hours club was permitted in a B.R. zone only by special exception. Moreover, the Bill required that any after hours club located in a B.R. zone be situated at least 1,000 ft. from any residentially used structure.

Having recited this factual and legislative/hearing history, it is now appropriate to answer the questions presented by the subject Petition. In answer to the first question; namely, Is the subject property being used as an after hours club?, it is manifestly apparent that the answer must be in the affirmative. Clearly, the operation of the Club 101 is exactly what the Council envisioned when they enacted Bill 85-94. The facility, as described by Mr. Giorgelli and Mr. Connor, fits precisely the new definition of an after hours club. The business is open during the late evening hours, does

not have a liquor license, provides live entertainment and has a dance floor. Just as a rose by any other name is still a rose, Mr. Giorgelli's operation by any other name is an after hours club.

This is not inconsistent with the prior rulings of this office. As noted above, Mr. Kotroco declined to answer the precise question presented in the prior case regarding this property. Rather, he granted Mr. Covahey's Motion to Dismiss and held that the matter was premature for consideration at that time.

My prior decision in the Curliner/England case is also not a bar to this conclusion. As noted above, the Commissioner must consider each case in accordance with the regulations in effect at that time. When the Curliner/England case was heard, there was no definition of an after hours club in Baltimore County. Now that a definition has been so created and enacted by the legislature, it must be considered and applied in this case. Thus, it is clear that the business operated by Mr. Giorgelli is an after hours club.

In answer to the second question, whether same requires a special exception and need be located more than 1,000 ft. from a residential structure, the answer is "not yet". The legislation enacted by the Council defining after hours clubs (Bill 85-94) provided that any after hours club lawfully operating prior to the effective date of the Bill (August 6, 1994) which is violation of the requirements of said legislation shall be permitted to continue for a period not to exceed one year. That is, the Council clearly enacted a one year sunset provision, allowing after hours clubs a period of one year to comply with the new legislation.

As noted above, Bill 85-94 became effective on August 8, 1994. Thus, after hour clubs which are in violation of the provisions of that legisla-

tion have until August 9, 1995 to either come into compliance or to cease operations.

Moreover, it is clear that this sunset provision is applicable here. As noted above, the proposed use is indeed an after hours club which brings same within the purview of Bill 85-94. Moreover, it was stipulated that indeed the Club is in violation of the requirements contained therein, namely, that no special exception has been obtained and that the use is within a 1,000 ft. of a residential structure. The sole question open for a debate is whether Mr. Giorgelli's after hours club was "lawfully operating" prior to the effective date of the Act. I believe it was for a number of reasons. First, as Mr. Giorgelli testified and Mr. Connor corroborated, the business owner in this case expended great efforts and no doubt expense to legitimize this use before opening. His testimony was uncontradicted that he left no stone unturned in an effort to ensure that the business could legally operate. He checked with County and State agencies and received assurances from them that the business could properly operate. As Mr. Connor commented, he does not believe that the use is violative of any State or County ordinance, save the provisions of Bill 85-94 when they become effective as to this use on August 9, 1994.

Moreover, the use of the word "lawful" by the Council and the interpretation of that term is of note. In Germenko v. Public Services Commission, 226 Md. 295, (1961), the Court determined that lawful implied "that an Act is authorized, sanctioned or, at any rate, not forbidden by law", i.d. @ pg. 367. Although no licenses were obtained, even though same were requested, I believe that Mr. Giorgelli's use is, at the least, not forbidden by law. That is, irrespective of the fact that Mr. Giorgelli had no governmental permission to conduct the business, per se, it is apparent that the

business was not forbidden by any law, rule, regulation or standard when it opened.

It is also significant that the case file contains a copy of a permit for interior renovation of the building in 1987-88. Although this permit did not, in any way, address the proposed use as an after hours club, it is significant that the structure on the site was properly permitted by the Baltimore County Department of Permits and Licenses. Thus, it can be argued that the permit which allowed original construction and subsequent renovation to the building constitutes a tacit authorization or sanction of the use of that building for any purposes other than those illegal.

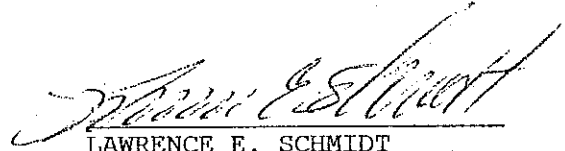
Based on the foregoing analysis, it is clear, therefore, that the subject business is indeed an after hours club. However, by its terms, the provisions of Bill 85-94 are not applicable thereto until August 9, 1995. Thus the Petition for Special Hearing should be granted in part and denied in part and there can be no finding of violation at the present.

Pursuant to the advertisement, posting of the property, and public hearing on this Petition held, and for the reasons given above, the Petition for Special Hearing should be granted in part and denied in part.

THEREFORE, IT IS ORDERED by the Zoning Commissioner of Baltimore County this 2nd day of March, 1995 that, pursuant to the Petition for Special Hearing, approval as to whether the business operation at the aforementioned property is an "After Hours Club" as defined in the Baltimore County Zoning Regulations (BCZR), be and is hereby GRANTED; and,

IT IS FURTHER ORDERED that the Petition for Special Hearing as it relates to the requirement that the property owner obtain approval for said use by a Petition for Special Exception, and be a 1,000 ft. from a residential property, be and is hereby DENIED, as premature.

Any appeal from this decision must be filed, in writing, within thirty days from the date of this Order to the County Board of Appeals.

A handwritten signature in cursive script, appearing to read "Lawrence E. Schmidt", written over a horizontal line.

LAWRENCE E. SCHMIDT
Zoning Commissioner for
Baltimore County

LES:mmn