

IN THE MATTER OF
THE APPLICATIONS OF
JOSEPH G. HOLTER AND
WINSOME HOMES, INC. –
LEGAL OWNERS

FOR SPECIAL HEARING
AND VARIANCE

Lots 2, 3, 4 & 5 of
Karinvale and Tract A
of the Holter Property
(Zoning Commissioner Case
No. 00-161-SPHA)

and

FOR VARIANCE

(Zoning Commissioners Case
No. 00-456-A)

BEFORE THE
COUNTY BOARD OF
APPEALS OF
BALTIMORE COUNTY
Case No.: 00-161-SPHA
00-456-A ✓

* * * * *

CONSENT ORDER

An appeal was filed with this Board by Perry Hall Farms Joint Venture (“Perry Hall Farms”), Protestant, after the Zoning Commissioner of Baltimore County granted a Petition for Special Hearing and Petition for Variance in Case No. 00-161-SPHA filed by Petitioners Joseph G. Holter, Beverleigh A. Holter (now deceased), and Winsome Homes, Inc. In the Petition for Special Hearing, Petitioners requested an interpretation of Baltimore County Zoning Regulations (“B.C.Z.R.”) Section 259.7.C regarding whether building permit authorizations had been properly issued by the Director of the Department of Permits and Development Management. In addition, Petitioners filed a Petition for Variance, seeking approval of a residential building to arterial road setback of twenty-five (25) feet in lieu of the permitted forty (40) feet for Lot 5 of the Karinvale subdivision.

A second appeal was filed with this Board by Perry Hall Farms after the Zoning Commissioner granted Petitioners' Petition for Variance in Case No. 00-456-A. The Petition for Variance sought relief from B.C.Z.R. Sections 259.7.D and E to permit the issuance of four (4) authorizations for four (4) residential building permits.

The parties have requested that this Board consolidate the appeals in Case No. 00-161-SPHA and in Case No. 00-456-A. The request to consolidate these cases is, therefore, hereby GRANTED.

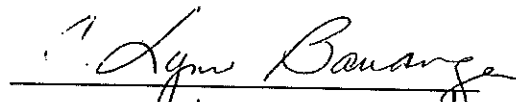
Petitioners and Perry Hall Farms have negotiated in an effort to reach an agreement with regard to the disposal of Case Nos. 00-161-SPHA and 00-456-A. After such negotiations, the parties have advised this Board that they have entered into an Agreement, which is attached to this Consent Order. It is the intent of the parties that the Agreement be incorporated into any decision of the Board of Appeals and will be binding on and inure to the benefit of all parties to the Agreement and their successors and assigns for a period of fifteen (15) years from its effective date. The parties have submitted a Consent Order for the Board's signature intended to carry out the terms of the Agreement. The request for a Consent Order is hereby GRANTED.

Therefore, IT IS ORDERED this 21st day of March 2001, by the County Board of Appeals of Baltimore County, that the Zoning Commissioner's Order in Case No. 00-161-SPHA, regarding the Petition for Special Hearing only, is hereby VACATED, rendering that portion of the decision null and void. The Order in Case No. 00-161-SPHA with regard to the Petition for Variance remains in effect and, with the withdrawal of the appeal by Perry Hall Farms is now final.

AND, it is hereby ORDERED, as agreed by the parties, that the appeals to the Petition for Variance in Case No. 00-161-SPHA and the Petition for Variance in Case No. 00-456-A are WITHDRAWN in accordance with the terms of the above-described Agreement.

COUNTY BOARD OF APPEALS
FOR BALTIMORE COUNTY


Lawrence S. Wescott, Chairman


C. Lynn Barwanger


Lawrence M. Stahl

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AGREEMENT

This is an agreement between Perry Hall Farms Joint Venture (hereinafter "Perry Hall Farms"), Joseph G. Holter (hereinafter "Holter"), Winsome Homes, Inc. (hereinafter "Winsome Homes"), and John R. Clark, individually and as an Authorized Agent of and the President of Winsome Homes, Inc. (hereinafter "Clark").

INTRODUCTION

A. Perry Hall Farms is the developer of a major residential subdivision known as "Perry Hall Farms" located south of the intersection of Cross Road and Forge Road in Baltimore County.

B. Winsome Homes and Holter are developing a five-lot subdivision known as "Karinvale" located along Holter Road in Baltimore County, one of the lots (Lot 1) containing Holter's dwelling.

C. The parties are aware of the plans to develop the respective properties and have reviewed the land use and zoning regulations concerning such development. The parties want assurance that they can develop their properties without interference and/or objection by the others with respect to development, permitting, zoning, or other governmental approvals.

D. The parties recognize that Clark is the President of Winsome Homes. Perry Hall Farms desires Clark's participation in this Agreement as an additional party, to be bound by the terms of this Agreement individually with respect to the promises, obligations, and responsibilities of Winsome Homes and other terms and conditions of this

Agreement. Accordingly, to induce Perry Hall Farms to enter into this Agreement, Clark agrees to be bound individually as described in this paragraph.

E. Perry Hall Farms Joint Venture is made up of two entities: JTL Corporation, General Partner, and John T. Lupton Trust, Limited Partner. These parties agree to be bound by the terms of this Agreement with respect to the promises, obligations, and responsibilities of Perry Hall Farms as evidenced by the signature of David S. Gonzenbach as agent for these entities.

AGREEMENT

Accordingly, Perry Hall Farms, Holter, Winsome Homes, and Clark, in consideration for the mutual promises, responsibilities, and undertakings stated herein, agree, as follows:

1. Perry Hall Farms has taken an appeal from the decision of the Zoning Commissioner for Baltimore County on the Petition for Special Hearing and the Petition for Variance in Case No. 00-161-SPHA. Perry Hall Farms has also taken an appeal from the decision of the Zoning Commissioner for Baltimore County on the Petition for Special Variance in Case No. 00-456-A. After execution of this Agreement, the parties agree that Perry Hall Farms will withdraw its appeal in Case No. 00-456-A. The parties further agree that Holter and Winsome Homes will withdraw their Petition for Special Hearing in Case No. 00-161-SPHA, leaving the Petition for Variance only remaining in that case. Perry Hall Farms agrees simultaneously to withdraw its appeal relating to the variance portion of the decision in Case No. 00-161-SPHA. The parties agree jointly to request that the Baltimore County Board of Appeals remand the case back to the Zoning Commissioner

with instructions to vacate the special hearing portion of the decision only, leaving the variance relief in tact, or to pursue whatever procedural avenues are necessary to obtain the same result.

2. With the dismissal of the appeals referenced in Paragraph 1 and the withdrawal and vacation of the special hearing relief in Case No. 00-161-SPHA, Perry Hall Farms hereby agrees not to directly or indirectly, or through any surrogates, affiliates, or any other related party, object, oppose, or otherwise interfere with the development of the Karinvale subdivision (or the development of any other property in which Holter, Winsome Homes, or Clark have now or in the future acquire an interest), including but not limited to, any hearings, appeals, or any other action before or involving any governmental, administrative, or judicial body, at any level, where the development of Holter, Winsome Homes, or Clark's property is an issue or under consideration. Perry Hall Farms further hereby covenants not to sue Holter, Winsome Homes, or Clark or participate in any governmental, administrative, or judicial proceeding that would adversely impact the development of Holter, Winsome Homes, or Clark's property. Perry Hall Farms hereby releases and waives any right it has or would have to contest or object to any governmental, administrative, or judicial approval of the development of Holter, Winsome Homes, or Clark's property.

3. With the dismissal of the appeals referenced in Paragraph 1 and the withdrawal and vacation of the special hearing relief in Case No. 00-161-SPHA, Holter, Winsome Homes, and Clark, and each of them, hereby agree not to directly or indirectly, or through any surrogates, affiliates or any other related party, object, oppose, or otherwise interfere with the development of Perry Hall Farms subdivision (or the development of any

other property in which Perry Hall Farms has now or in the future acquires an interest), including, but not limited to, any hearings, appeals, or any other action before or involving any governmental, administrative, or judicial body, at any level, where the development of Perry Hall Farms' property is an issue or under consideration. Holter, Winsome Homes, and Clark, and each of them, further hereby covenant not to sue Perry Hall Farms or to participate in any governmental, administrative, or judicial proceeding that would adversely impact the development of Perry Hall Farms' property. Holter, Winsome Homes, and Clark, and each of them, hereby release and waive any right they have or would have to contest or object to any governmental, administrative, or judicial approval of the development of Perry Hall Farms' property.

4. This Agreement will expire by its own terms fifteen (15) years from its effective date.

5. In the event of any breach of this Agreement by any party, the non-breaching party or parties will be entitled to reasonable expenses, including reasonable attorney's fees, incurred in remedying the breach or in recovering damages for such breach. This Agreement is enforceable by injunctive relief, specific performance, and action for the recovery of damages incurred, including, but not limited to, any damages related to delay in the development of the properties in question.

6. This Agreement is to be construed, interpreted, and applied in accordance with Maryland law.

7. The Agreement is binding on and shall inure to the benefit of the parties and their respective representatives, successors, and assigns.

8. Any individual signing on behalf of a corporate entity warrants and represents that he has the authority to do so and to bind the corporation.

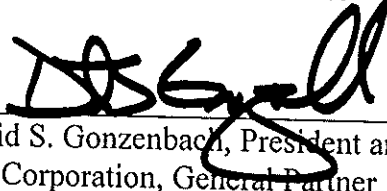
9. This document embodies the complete agreement between the parties, and there are no other promises, agreements, representations, or warranties except as stated herein. Any amendments or modifications to this Agreement must be in writing and signed by all parties.

10. This Agreement may be executed in separate counterparts.

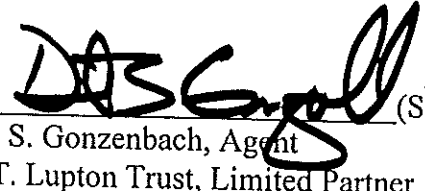
CONCLUSION

ACCORDINGLY, this Agreement (comprising six (6) pages, including signatures) is signed and sealed, and shall be effective as of the date of the latest signature below ("the effective date"), as follows:

Perry Hall Farms Joint Venture

BY:  (SEAL)
David S. Gonzenbach, President and Agent
JTL Corporation, General Partner

9-18-00
Date

BY:  (SEAL)
David S. Gonzenbach, Agent
John T. Lupton Trust, Limited Partner

9-18-00

Date

Joseph G. Holter (SEAL)
Joseph G. Holter

10-12-2000

Date

Winsome Homes, Inc.

BY: John R. Clark (SEAL)
John R. Clark, President

10/12/2000

Date

John R. Clark (SEAL)
John R. Clark, Individually

10/12/2000

Date

4/6/00

IN RE: PETITIONS FOR SPECIAL	*	BEFORE THE
HEARING and VARIANCE		
SW/Corner Holter Road and Old	*	ZONING COMMISSIONER
Philadelphia Road		
(Lots 2, 3, 4 and 5 in Karinvale	*	OF BALTIMORE COUNTY
and Tract A of Holter Property)		
11th Election District - 5th	*	Case No. 00-161-SPHA
Councilmanic District		
Winsome Homes, Inc and Joseph.	*	
G. Holter, <i>et ux</i> - Petitioners	*	

* * * * *

MEMORANDUM IN SUPPORT OF REQUEST FOR RECONSIDERATION

INTRODUCTION:

For the purpose of this Memorandum, the Petitioners adopt the Summary contained in page 1 through the second full paragraph of page 5 in the Findings of Fact and Conclusions of Law.¹ Additionally, the evidence showed that the Director of Permits and Development Management ("PDM") and the Director of the Office of Planning for Baltimore County both felt that they were bound by the County's Memorandum of Agreement and Amended Memorandum of Agreement with Perry Hall Farms ("PHF") regarding the issuance of authorizations. (See Petitioners' Post-Hearing Memorandum, page 8.) Also, the Director of PDM's waiting list for authorizations contains only one entry, that is, a request for four authorizations by the Petitioners.

ISSUES:

The Zoning Commissioner raised several issues regarding his authority to order the Director of PDM to issue authorizations to the Petitioners. They are:

¹Hereinafter the March 23, 2000 Findings and Fact and Conclusions of Law shall be referred to as "Order".

1. Does the Zoning Commissioner have the authority to make determinations regarding anti-trust law and the Amendment to Memorandum of Agreement between Perry Hall Farms and Baltimore County, Maryland?

2. Is it retroactive application of the Baltimore County Zoning Regulations if four authorizations are withdrawn from Perry Hall Farms based upon the Zoning Commissioner's statutory interpretation?

3. Are the twenty-six excess authorizations issued to PHF vested?

4. Is Baltimore County, Maryland estopped from withdrawing the authorizations from Perry Hall Farms?

5. Does the Zoning Commissioner have authority to order the Director of PDM to withdraw the excess authorizations from Perry Hall Farms and make them available to others?

DISCUSSION:

Although it is heartening to have the Zoning Commissioner's finding that exemptions must be used prior to requesting authorizations, his self-imposed limitations in fashioning a remedy leave the Petitioners without any meaningful relief. The Petitioners believe that the record evidence and applicable law fully support the issuance of an order which finds that the Zoning Commissioner has authority and the ability to provide a remedy that results in the Petitioners receiving four authorizations for building permits.

The Petitioners had asked the Zoning Commissioner to find that Section 259 of the Baltimore County Zoning Regulations ("BCZR") did not apply to the first 600 building permits that Perry Hall Farms would require to build out its development. They reasoned that general rules of statutory interpretation required such a result because the Director of PDM had refused to issue

authorizations to the Petitioners based upon Baltimore County's Amendment to Memorandum of Agreement with PHF. It was argued that the Agreement, as it pertained to exemptions, was void because it violates Maryland's anti-trust statute and attempts to establish a policy outside the County's statutory guidelines.

The Zoning Commissioner determined that he is only empowered to construe, interpret and apply Baltimore County Zoning Regulations. (Order, Page 12). He determined that he had no authority to set aside matters of contract, nor to make findings whether the Amendment to Memorandum of Agreement violated the Anti-trust Act. However, judicial decisions, not only authorize, but require administrative officers to make such decisions when the administrative proceeding is the exclusive venue for a determination of legal issues and a finding of facts is necessary.

Maryland's legislature has given charter counties the power to establish a county board of appeals to render decisions under any law, ordinance or regulation of the county council. Maryland Annotated Code, Article 25A, Section 5 (U). The Board is empowered to make the decisions originally or upon review of an administrative officer's action. In Baltimore County, that officer is the Zoning Commissioner. If a party is dissatisfied with an adjudicatory order, the Court is empowered to modify or reverse the decision if it is found not to be in accordance with law. (*ibid*).

Maryland's enabling legislation contemplated a broad review of applicable state and local law by the Zoning Commissioner. It authorized Baltimore County to enact laws relating to zoning and planning so that the State's policies pertaining to zoning and planning controls could be implemented by the local government. Clearly, the Zoning Commissioner is entitled to consider more than local laws when he makes his determination.

Powers granted to the County are to be construed so that they do not preempt or supercede the regulatory authority of any State department or agency under any public general law, but there is no prohibition against applying those laws concurrently. (Article 25A, Section 5(X)(2).

The Zoning Commissioner of Baltimore County has promulgated rules of practice and procedure which identify his proceedings as quasi-judicial in nature. (Rules of Practice and Procedure before the Zoning Commissioner/Hearing Officer of Baltimore County, Rule 2L). Also, proceedings before him would be guided by the State's Administrative Procedure Act, State Government Article, Section 10-213 *et seq*, of the Annotated Code of Maryland.

It has been said that the prefix "quasi-judicial" is descriptive of the judicial faculty assigned to administrative agencies and public officers not a part of the judiciary. (1 Am Jur 2d, Administrative Law, Section 161, fn 16). The agency's administrative power has to do with carrying of laws into effect, their practical application to current affairs by way of management and oversight, including investigation, regulation, and control in accordance with an execution of the principals prescribed by the lawmaker. (*ibid* Section 160).

Although the Zoning Commissioner does not have the right to declare that Perry Hall Farms and the County guilty of anti-trust violations, and cannot adjudicate the rights of the parties under the Amendment to Memorandum of Agreement ("AMOA"), he has the authority to consider the anti-trust and contractual issues in this proceeding. In fact, the Order did address the Agreement, and found that its attempted guidance as to the proper interpretation of BCZR Section 259 was ineffectual. Only the Zoning Commissioner has the authority to interpret the regulation. (Order, page 7). In addition, the Order found that contracting parties efforts to set forth a limitation on the Director of PDM's authority to issue authorizations was illegal "contract zoning", and that such

contract zoning is null and void. (Order, page 10). Likewise, he could have found that the effect of the AMOA's reference to exemptions was against public policy due to the anti-competitive results. Having made these determinations, combined with his finding that PHF possesses twenty-six excess exemptions, the Commissioner should have ruled that the issuance of twenty-six authorizations to PHF was unauthorized and was void *ab initio*.

The AMOA between Baltimore County, Maryland and PHF was contrary to public policy because it violates anti-trust laws. It has been said that a zoning ordinance provision cannot be used as the basis for authorizing an operation which is forbidden under a state statute. (Backus v. County Bd. of Appeals for Montgomery Co., 224 Md 28, 166 A2d 241, 244 (1960)). In Backus the Court of Appeals found that a local zoning ordinance pertaining to a dental clinic that was enacted pursuant to Article 25A, Section 5 (X), could hardly be justification for maintaining a position that the legislature intended the repeal of the general law relating to the practice of dentistry. The Zoning Commissioner cannot permit operations forbidden by the general law, (*ibid*). The Court found that the Board of Dental Examiners had to determine whether it could properly authorize a course of conduct forbidden by the general law. To decide the question, it was necessary to construe both the local law and applicable statutes. (*ibid*).

Further support for the position that the administrative body must consider all applicable rules and regulations is supported by the general principal that administrative agencies may, and must necessarily, make initial decisions of judicial questions of law incidental and necessary to their determinations. An agency vested with power to hear all questions arising under the statute has the right to hear and determine questions of law as well as fact. Thus, administrative agencies may

construe a statute, particularly statutes administered by them, and may apply the rules of the common law and in some instances the rules of equity. (1 Am Jur 2d, Section 185).

Even though an administrative agency lacks the authority to issue a declaratory judgment or ruling on the constitutionality of the statute, this does not mean that an agency official, in the course of rendering a decision falling within the agency's jurisdiction, must ignore applicable law simply because the source of that law is a state or federal constitution. (Insurance Comm. v. Equitable Life Assurance Soc. of the U.S., 339 Md 596, 664 A2d 862, 872 (1995)). As stated above, the Zoning Commissioner's Rules of Practice require him to be guided by the Administrative Procedure Act in the conduct of his proceedings. Under that act, a constitutional error in an administrative decision, as well as "other error of law" is included among the grounds for judicial review of administrative decisions. (*ibid*; Article 48A, Section 40(4); State Government Article, Section 10-222(h)). In Insurance Comm. v. Equitable, the Court stated that the Commissioner was obligated to apply the relevant law including the applicable constitutional provision. (Insurance Comm. v. Equitable, at 873). The Court went on to state that where a party is not challenging the validity of a statute as a whole, but is arguing that the statute as applied to a particular situation is unconstitutional, and where the legislature has provided an administrative remedy, the constitutional issue must be raised and decided in the statutorily prescribed administrative and judicial review proceedings. (*ibid* at 874, 876). Also, where a constitutional challenge to a statute, regardless of its nature, is intertwined with the need to consider evidence and render findings of fact, and where the legislature has created an administrative proceeding for such purpose, the Court of Appeals has required that the matter be initially resolved in administrative proceeding. (*ibid* 876). Thus, the Zoning Commissioner not only was authorized to consider applicable statutes, he must do so. There

is no dispute that the Petitioners' sole course of action was to submit a request for administrative relief, and that findings of facts and an analysis of applicable laws was required.

After having made his findings that exemptions should be utilized prior to issuance of authorizations, the Zoning Commissioner declined to issue a directive that the "authorizations previously issued to Perry Hall Farms be revoked and replaced with exemptions to the extent numerically permitted."² He hesitated to issue such a directive because he did not know whether his ruling should be applied "retroactively". (Order page 12).

The issue of retroactive application of regulations only applies when there has been a previous determination regarding interpretation or the regulation has been changed. (2 Am Jur 2d, Section 238). When a new regulation is passed or when a statute is for the first time considered by the Courts, the new rulings are not retroactive, but they are in fact the first correct application of the law. In fact, interpretations by rulings may be deemed, like judicial decisions, to necessarily have retroactive effect, and it has been held that interpretative regulations are no more retroactive in their operation than is a judicial determination construing and applying a statute to a case in hand. (*ibid*).

Even if a regulation is changed after a building permit is issued, the local government is authorized to revoke any permit, approval or any other form of permission that is consistent with the new legislation. (United Parcel v. People's Counsel, 336 Md 569, 650 A2d 226, 232 (1994)). The mere issuance of a permit where the permittee has not commenced the work or incurred substantial expense, does not create a vested right, or estop the municipal authorities from revoking the permit. (Mayor & City Council of Balto. v. Shapiro, 187 Md 623, 634, 51 A2d 273, 279 (1947)).

²Exemptions are an entitlement available to PHF. They are presently available to PHF under the terms of BCZR 259, thus there would be no need to issue exemptions to PHF if twenty-six authorizations were withdrawn.

If it is determined that the issuance of authorizations for building permits was *ultra vires* because it was mandated by the AMOA, the authorizations would have been void *ab initio* because they would have violated laws forbidding anti-trust activity and would have been a void effort to contract away the County's police power under its zoning regulations. A municipality may not contract away the exercise of its zoning powers. A contract which violates these principals is void *ab initio* and is *ultra vires*. (Chesapeake Outdoors Enter., Inc. v. Mayor & City Counsel of Balto., 89 Md App 54, 597 A2d 503, 508 (1991)).

Therefore, there is no retroactivity because the Zoning Commissioner's decision was the initial interpretation of the statute, and the authorizations were invalidly issued and a nullity.

Are the twenty-six Excess Authorizations Issued to PHF Vested?

The mere issuance of a permit, where the permittee has not commenced the work or incurred substantial expense on the faith of it, does not create a vested right or estop the municipal authorities from revoking it. Mayor & City Council of Balto. v. Shapiro, 187 Md 623, 634, 51 A2d 273, 279 (1947)). The Court of Appeals in Colwell v. Howard County, quoted approvingly from 2 Rathkopf, the Law of Zoning and Planning, when it stated "The landowner will be held to have acquired a vested right to continue the construction of a building or structure and to initiate and continue a use despite a restriction contained in an ordinance where, prior to the effective date of the ordinance, in reliance upon a permit theretofore validly issued, he has, in good faith, made a substantial change of position in relation to the land, made substantial expenditures or has incurred substantial obligations. (Colwell v. Howard County, 31 Md App 8, 354 A2d 210, 215, cert. denied 278 Md 719 (1976)).

Perry Hall Farms submitted no evidence at the hearing to suggest that it has taken any action, expended any funds, or has incurred any obligations as they pertain to the twenty-six excess authorizations that it currently has.³ Obviously, it could not produce such evidence. By definition, Perry Hall Farms has the ability to build every one of the 1142 units in its subdivision without any reliance on continued possession of the twenty-six authorizations. If they are distributed to others, Perry Hall Farms will suffer no loss, prejudice or inconvenience and Baltimore County would have honored its Memorandum of Agreement "to make available a number of authorizations for building permits necessary to build-out the PHF development". (Petitioners' Exhibit 4, Memorandum of Agreement, p. 5). The only detriment they will experience is the inability to market twenty-six exemptions to others who are constrained by the current inability to obtain authorizations from Baltimore County.

Is Baltimore County, Maryland Estopped From Withdrawing Four Authorizations From Perry Hall Farms?

Ordinarily, the doctrine of estoppel does not apply against the state or its agencies with respect to performance of governmental functions. (ARA Health Svcs., v. Dept. of Public Safety & Corr. Svcs., 334 Md 85, 685 A2d 435, 440 (1996); Mariott v. Cole, 115 Md App 493, 694 A2d 123, 130 (1997), reconsideration denied, (June 25, 1997) and cert. denied, 347 Md 254, 700 A2d 1215 (1997)). In the rare occasions where estoppel may be a valid defense, the officers must have acted within the scope and in the course of their authority. (City of Balto. v. Chesapeake Marine Ry. Co.,

³PHF is limited to the issuance of 600 building or grading permits until the entire portion of Honeygo Boulevard located within the limits of the PHF Plan are completed and the acceptance of same by Baltimore County. They are to be completed no later than October 2000. (Petitioners' Exhibit 4, Memorandum of Agreement, p. 3).

233 Md 559, 197 A2d 821, 830-832 (1964)). In the Chesapeake Marine Railway Company case an assistant city solicitor wrote a letter to the corporation stating that a street was private property. The city issued permits permitting the corporation to build a fence and pier, but neither the letter nor the permit was sufficient to establish an estoppel. The Court found that these acts were by subordinate city officials who were without authority to bind the city. The Court stated that it is a fundamental principal of law that all persons dealing with the agent of a municipal corporation are bound to ascertain the nature and extent of his authority. It quoted with approval a passage in Gontrum v. Mayor & City Council of Balto., 182 Md 370, 35 A2d 128, which states:

“Generally, no estoppel as applied to a municipal corporation can grow out of dealings with public officers of limited authority where such authority has been exceeded, or where the acts of its officers and agents were unauthorized or wrongful. No representation, statement, promises or acts of revocation by officers of a public corporation can operate to estop it to assert the invalidity of a contract where such officers were without power to enter into such a contract on behalf of the corporation. ***

In Reese on Ultra Vires, paragraph 192, it is stated: ‘Every person is presumed to know the nature and extent of the power of municipal officers and therefore cannot be deemed to have been deceived or misled by acts done without legal authority.’” (182 Md, p. 378, 35 A2d, p. 131).

Additionally, the Court refused to find there was an estoppel because the corporation had complete knowledge of the background, facts, and circumstances relating to the status of the street. Their total knowledge was at least equal to the city. (City of Baltimore v. Chesapeake Marine Co., p. 832, where knowledge of both parties is equal, an estoppel will not be held to have arisen. (*ibid*, p. 832, 833).

Perry Hall Farms made no effort to ask for the Zoning Commissioner to interpret BCZR Section 259 to see if it was entitled to have authorizations issued prior to exhausting its exemptions. Apparently, there was communication and correspondence between Perry Hall principals, their counsel and County representatives, including an Assistant County Attorney, Director of PDM and Director of Planning. As stated above, PHF has done nothing in reliance upon the issuance of twenty-six authorizations, but even if it had, it would not be entitled to depend upon assurances given by the subordinate county officials who had no authority to issue binding interpretations of Honeygo Area regulations.

Finally, if a policy has not been incorporated into an ordinance, the city is not bound by it. Even if the policy was contained in a resolution, it cannot be the predicate for estoppel if the policy runs contrary to the city's code requirements. City of Hagerstown, et al v. Long Meadows Shopping Ctr. et al, 264 Md 481, 287 A2d 242, 247 (1972)). Therefore, the policy statement as to exemptions contained in the Memorandum of Agreement between Perry Hall Farms and Baltimore County cannot serve as the basis for a finding of estoppel.

A related concept is laches. It is defined as an inexcusable delay, without necessary reference to duration, in the assertion of a right, and, unless mounting to the statutory period of limitations, mere delay is not sufficient to constitute laches, if the delay has not worked a disadvantage to another. (Salisbury Beauty School v. St. Board of Cosmetologists, 268 Md 32, 300 A2d 367, 385 (1973)). So long as the position of the parties is not changed and there is no prejudice from the delay, laches are inapplicable. (*ibid*). Given that Perry Hall Farms has not suffered any prejudice or injury as a result of a delay in the interpretation of BCZR Section 259, the doctrine of laches would not provide a reason to preserve the excess authorizations.

Does the Zoning Commissioner Have Authority to Order the Director of PDM to Withdraw the Excess Authorizations from Perry Hall Farms and Make Them Available to Others?

Article 25 A, Section 5, Annotated Code of Maryland provides for the enactment of laws to establish a Board of Appeals and for decisions by the Board for the issuance, denial, modification or revocation of any permit, approval, or any other form of permission. (United Parcel v. People's Counsel, 336 Md 569, 650 A2d 226, 232 (1994)). The Board of Appeals' authority as to zoning matters has been delegated to the Zoning Commissioner. Therefore, the Zoning Commissioner's Authority is concurrent and equivalent to the Board's with regard to findings of fact and conclusions of law. The Director of DPM is authorized to administer the Honeygo Area authorization issuance process. Decisions about the proper interpretation of the statute, and resolution of issues involving entitlement to authorizations is preserved in the office of Zoning Commissioner.

There is no question that a municipality has the right to revoke authorizations, even if they have been validly, issued if there has been a change in the regulation or if the grant was not consistent with law. (See Mayor & City Council of Balto. v. Shapiro, (*supra*) and Cromwell v. Ward, (*supra*)). Also, the owner of an invalid permit would derive no benefit from a permit that is invalidated after direct judicial review, as the mere issuance of a permit does not create a vested right in an owner. O'Donnell v. Bessler, 289 Md 501, 425 A2d 1003, 1007 (1981)).

As the Order notes, BCZR 500.7 bestows upon the Zoning Commissioner the power to conduct such other hearings and pass such orders thereon as shall, in his discretion, be necessary for the proper enforcement of all zoning regulations. The Board of Appeals has the right to revoke permits (United Parcel, *supra*), and pursuant to BCZR 500.10, any county department has the right

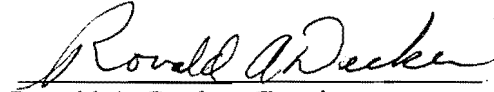
to appeal the Zoning Commissioner's decision. Thus, it can be concluded that the Zoning Commissioner has the authority to issue orders to require departments to perform certain acts or to refrain from doing so if he finds that the zoning regulations require otherwise. If the Order remains unchanged, Petitioners could never receive relief for any actions that have been taken in the past by a County official acting under the authority of the Zoning Regulations. The Zoning Commissioner would be constrained to providing prospective relief only. There is nothing in the statute, local laws, or regulations which supports such a limitation on the Zoning Commissioner's authority. In fact, the Zoning Commissioner is obligated to enforce zoning regulations. To do so, he has the authority to order subordinate county employees to perform their duties in conformance with applicable laws.

CONCLUSION:

Winsome Homes, Inc. and Mr. and Mrs. Holter have faithfully complied with all regulations and have been stymied in their effort to obtain authorizations so that homes can be built on the four lots which are the subject of this proceeding. The difficulty has arisen out of the implementation of new Honeygo regulations that was complicated by a Baltimore County, Maryland agreement with Perry Hall Farms. But for the agreement, authorizations would have been issued to the Petitioners. They were denied the applications because of an administrative error made by the Department of Permits and Development Management. Maryland case law and statutes give the Zoning Commissioner the authority to issue orders necessary to correct the mistake by ordering that four authorizations be issued to the Petitioners. When PHF obtained excess authorizations, it did so on the basis of an improper contract provision; therefore, the issuance was void *ab initio*. Even if the Commissioner hesitates to accept that they are nullities, he can still determine that his findings

regarding the proper interpretation of the statute require a withdrawal of the authorizations as they are not vested, estoppel does not apply, and enforcement is not retroactive.

Respectfully submitted,



Ronald A. Decker, Esquire
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4111 E. Joppa Road, Suite 201
Baltimore, Maryland 21236
Tel # (410) 529-4600*Fax# (410) 529-6146

Attorney for Petitioners

CERTIFICATE OF SERVICE

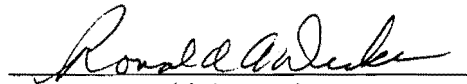
I HEREBY CERTIFY that a copy of the foregoing Memorandum in Support of Request for Reconsideration was mailed on 6th day of April, 2000, by first class mail, postage prepaid, to the following:

Robert A. Hoffman, Esquire
Venable, Baetjer and Howard, L.L.P
Post Office Box 5517
210 Allegheny Avenue
Towson, Maryland 21285-5517

Peter Max Zimmerman
People's Counsel for Baltimore County
Old Courthouse, Room 47
400 Washington Avenue
Towson, Maryland 21204

Arnold Jablon, Director
Permits and Development Management
County Office Building
111 W. Chesapeake Avenue
Towson, Maryland 21204

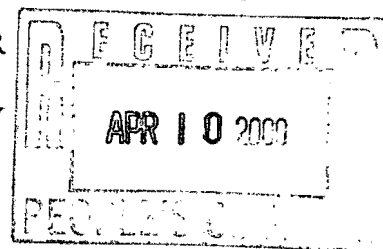
Mr. Steven Rosen
3722 Birchmere Court
Owings Mills, Maryland 21117


Ronald A. Decker

4/6/00

IN RE: PETITIONS FOR SPECIAL
HEARING and VARIANCE
SW/Corner Holter Road and Old
Philadelphia Road
(Lots 2, 3, 4 and 5 in Karinvale
and Tract A of Holter Property)
11th Election District - 5th
Councilmanic District
Winsome Homes, Inc and Joseph
G. Holter, *et ux* - Petitioners

BEFORE THE
ZONING COMMISSIONER
OF BALTIMORE COUNTY
Case No. 00-161-SPHA



* * * * *

MOTION FOR RECONSIDERATION

Joseph G. Holter, Beverleigh A. Holter and Winsome Homes, Inc., Petitioners, move for reconsideration of the Zoning Commissioner's Finding of Fact and Conclusions of Law entered in this case on March 23, 2000 as it pertains to the issuance of building permit authorizations and in support thereof state:

1. The Petitioners requested an interpretation of Baltimore County Zoning Regulation (BCZR) Section 259.7.C to determine whether building permit authorizations had been issued properly by the Director of Permits and Development Management (PDM).
2. After a review of the legislative history of Honeygo Area legislation, several exhibits, and an agreement between Perry Halls Farms ("PHF") and Baltimore County, Maryland, the Commissioner determined that the Director of PDM should have required PHF to use its 600 available exemptions prior to the award of authorizations.
3. PHF has twenty-six authorizations that are not needed because it has twenty-six exemptions available.

4. The Commissioner found that the agreement between Perry Hall Farms and the County as it pertained to the issuance of authorizations and the use of exemptions was “contract zoning”, and found that it is illegal for the zoning authority to contract away its future use of police power and contract zoning is null and void.

5. The Commissioner found that the memorandum agreement provisions pertaining to the use of exemptions and authorizations was an apparent attempt to clarify the BCZR by contractual means, but only the Zoning Commissioner is empowered to construe, interpret and apply the zoning regulations.

6. Despite the finding in paragraphs 1 through 5 above, the Zoning Commissioner refused to revoke four authorizations previously issued to Perry Hall Farms because of his concerns about limits on his authority to make determinations regarding anti-trust law, the County’s Agreement with PHF, estoppel, vesting and retroactive rule making. He raises a question regarding the ability to order the Director of PDM to implement an appropriate remedy.

7. Petitioners respectfully state that the Zoning Commissioner can and must address these issues.

WHEREFORE, Petitioners request that the Zoning Commissioner reconsider his Finding of Fact and Conclusions of Law and enter an order which finds that the Director of PDM has twenty-six authorizations available for issuance to qualified applicants, and that four should be issued to the Petitioners.

Respectfully submitted,



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Tel # (410) 529-4600 *Fax# (410) 529-6146
Attorney for Petitioners

CERTIFICATE OF SERVICE

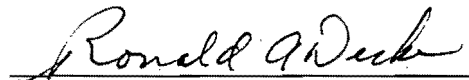
I HEREBY CERTIFY that a copy of the foregoing Request for Reconsideration was mailed on this 6th day of April, 2000, by first class mail, postage prepaid, to the following:

Robert A. Hoffman, Esquire
Venable, Baetjer and Howard, L.L.P.
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People's Counsel for Baltimore County
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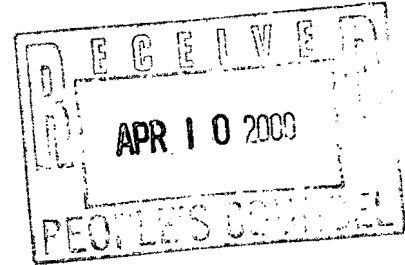
FAX (410) 529-6146

E. SCOTT MOORE
(1926-1992)

ROBERT E. CARNEY, JR.
RICHARD E. LATTANZI
JUDITH L. HARCLERODE
RONALD A. DECKER
ROBERT J. BRANNAN

LISA M. L. EISEMANN

April 6, 2000



Officer of Zoning Commissioner
Suite 405, County Courts Building
401 Bosley Avenue
Towson, Maryland 21204

Re: PETITIONS FOR SPECIAL HEARING AND VARIANCE
SW/Corner Holter Road & Old Philadelphia Road
(Lots 2, 3, 4 and 5 in Karinvale and Tract A of Holter Property)
11th Election District - 5th Councilmanic District
Joseph G. Holter, *et ux* - Petitioners
Case No. 00-161-SPHA

Gentlemen:

Enclosed please find Motion for Reconsideration and Memorandum in Support of Request for Reconsideration in the above-captioned matter.

Very truly yours,

Ronald A. Decker

RAD/slm

cc: Mr. & Mrs. Joseph G. Holter
Mr. John Clark, Winsome Homes, Inc.
Robert A. Hoffman, Esquire
Mr. Steven Rosen
Mr. Arnold Jablon, Director, PDM
Mr. Lawrence E. Schmidt, Zoning Commissioner

9/13/00

IN RE: PETITIONS FOR SPECIAL HEARING * BEFORE THE
AND VARIANCE – SW/Corner Holter Road *
and Old Philadelphia Road * ZONING COMMISSIONER
(Lots 2, 3, 4 & 5 of Karinvale and Tract A *
of the Holter Property) * OF BALTIMORE COUNTY
11th Election District *
5th Councilmanic District * Case No. 00-161-SPHA
Joseph G. Holter, et ux *
Petitioners *

* * * * *

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter comes before the Zoning Commissioner for consideration of Petitions for Special Hearing and Variance for the property known as Lots 2, 3, 4 and 5 of the residential subdivision known as Karinvale, and Tract A of the Holter property, located in the Honeygo community of eastern Baltimore County. The Petitions were filed by the owners of the subject property, Joseph G. and Beverleigh A. Holter, and the Developer, Winsome Homes, Inc., through their attorney, Ronald A. Decker, Esquire. The Petitioners request a special hearing to determine whether the Director of the Department of Permits and Development Management (PDM) erroneously granted excess building permit authorizations to Perry Hall Farms Joint Venture, under Section 259.7.C of the Baltimore County Zoning Regulations (B.C.Z.R.) when exemptions were available to that subdivision under Section 259.7.C, and whether such authorizations were in violation of Section 259.7.I of the B.C.Z.R. because they were granted to Perry Hall Farms by a contract agreement prior to the existence of approved record plats. In addition, the Petitioners request variance relief from Section 259.9.B.4.b of the B.C.Z.R. to permit a residential building to arterial road setback of 25 feet in lieu of the required 40 feet for Lot 5 of Karinvale, also known as 11347 Holter Road. The subject property and requested relief are more particularly shown on the site plan submitted and accepted into evidence as Petitioner's Exhibit 1.

Appearing at the requisite public hearing held for this case were Joseph G. Holter, property owner, John R. Clark on behalf of Winsome Homes, Inc., Developer, and Ronald A.

Decker, Esquire, attorney for the Petitioners. Appearing in opposition to the request was Stephen Rosen on behalf of Perry Hall Farms, who was represented by Robert A. Hoffman, Esquire and Patricia A. Malone, Esquire.

As is the situation with many of the most difficult and intricate cases which come before this Zoning Commissioner, the facts surrounding the issues raised in the Petitions filed herein are not in dispute. Rather, it is the interpretation of the relevant portions of the Baltimore County Zoning Regulations (B.C.Z.R.) that is at issue. Limited witness testimony was offered at the hearing in this case; however, a series of documents marked as Petitioner's Exhibits 1 thru 21 were submitted at the hearing. Additionally, both sides were provided the opportunity to submit briefs on the issues raised subsequent to the hearing. Well-written memoranda from both parties were indeed submitted and have been reviewed and considered by this Zoning Commissioner.

BACKGROUND

During the 1980s, the Honeygo area of eastern Baltimore County (Perry Hall/White Marsh) was recognized by County officials as a designated growth area and fertile for development. Nonetheless, the Baltimore County Council recognized the lack of existing public facilities in this area and the need for orderly and controlled growth and development. The County recognized these issues when it enacted the Baltimore County Master Plan, 1989-2000, on February 5, 1990. Later, it imposed a building moratorium on residential development in that area, pending passage of a specific plan for Honeygo (see Bill No. 114-94, codified as Section 26-560 of the Baltimore County Code).

In 1994, the County Council passed Bill No. 176-94, which defined the Honeygo area and created the "H" and "H1" zoning overlay districts. This geographic area encompasses land bounded by Belair Road on the west, Gunpowder Falls on the north, Philadelphia Road on the east, and a combination of Chapel Road and Honeygo Road on the south. Additionally, the Council divided the Honeygo area into four sub-areas, known as Bean Run, Belair Road, Bird River, and Honeygo Road. In order to control the pace of development in those areas, the Council provided that building permits within these sub-areas were not to be issued except as authorized by the

Director of the Department of Permits and Development Management (PDM). Development of the area was to be controlled and to coincide with the installation of public facilities and infrastructure.

Originally, Bill No. 176-94¹ empowered the Director of PDM to issue up to 300 "authorizations" for building permits to be used anywhere in the Honeygo area, and 300 "authorizations" to be used specifically within the Bean Run sub-area. The subject property, as well as the development known as Perry Hall Farms, are located in the Bean Run sub-area. Thus, initially there were a total of 600 authorizations that could be utilized for development in the Bean Run area. Each authorization would permit the connection of one residential dwelling to the sewer system to be installed in the area. This legislation was enacted, no doubt to insure that adequate sewers and public facilities existed as development was built out.

In addition to empowering the director of PDM to issue up to 600 authorizations within the Bean Run sub-area, Bill No. 176-94 provided for certain exemptions from the requirement that authorizations be obtained as a prerequisite to obtaining a building permit. These exemptions would permit sewer connections for certain properties which would not count against the number of authorizations provided. Exemptions were provided for the following: additions, renovations, or accessory structures; applications for building permits made in the Honeygo area for up to 300 dwelling units on any property which had an unexpired County Review Group (CRG) plan that was approved prior to May 18, 1992; minor subdivisions; commercial buildings; any lot of record not part of a recorded subdivision; institutional buildings; and, up to 425 density units on any property zoned D.R.10.5, other than those properties with an unexpired CRG plan as of May 18, 1992. Thus, between the 300 "exemptions" and 600 "authorizations", Bill No. 176-94 permitted up to 900 total connections.

In 1997, by the enactment of Bill No. 40-97, these limits were increased. The total number of authorizations for both the Honeygo area and the Bean Run sub-area were increased from 300 each to 400 each (800 total), and the exemptions were increased to permit up to 600

¹ Bill No. 179-94 was codified as Section 259.4 et seq. of the B.C.Z.R.

connections. Thus, under Bill No. 40-97, there was created a total of 800 authorizations which could be utilized within the Bean Run sub-area, and 600 exemptions available to a qualified property with an unexpired CRG plan, for a total of 1400 connections.

Subsequently, additional legislation was enacted by the County Council, including Bills Nos. 126-97 and 73-99. Bill No. 126-97 permitted exemptions to be transferred to any property within the sub-area upon approval of the Director of PDM. Under Bill No. 73-99, the application of the area-wide authorizations was altered so that any authorizations issued within a sub-area would be subtracted from the total number of authorizations available in the Honeygo area at large. However, neither of these subsequent Bills amended the number of connections permitted as either authorizations or exemptions.

Since the enactment of this legislation, authorizations and exemptions have been issued, recognized, and/or awarded by the County. On April 11, 1997, the Director of PDM granted 36 authorizations to Mr. & Mrs. Holter and Mr. Clark for development of the "Holter Property". Deducting these 36 authorizations from the 800 available as described above, a balance of 764 available authorizations remained at that time. Thereafter, on July 29, 1998, Perry Hall Farms requested, and was granted, 261 authorizations (103 for Section I and 158 for Section II). A deduction of those authorizations from the number available left 503 authorizations remaining.

On January 27, 1999, the Developers of the subdivision known as Glenside Farms requested and received 191 authorizations. These authorizations reduced the total number of authorizations remaining to 312. On that same date, Perry Hall Farms requested 545 building permits. In that only 312 authorizations remained, these were granted to Perry Hall Farms, and the balance (233) needed were permitted as exemptions. That is, the Perry Hall Farms subdivision, consisting of 1,142 density units, had 600 exemptions available to it because it indeed had an unexpired CRG plan approved prior to May 18, 1992.

The County awarded the remaining number of authorizations available to Perry Hall Farms and granted the balance of permits needed as exemptions. Thus, as of January 27, 1999, the 800 authorizations permitted by law had been depleted and Perry Hall Farms had utilized 233 of

the 600 exemptions recognized by law. Thus, at that time, there were 367 exemptions remaining. On March 19, 1999, Perry Hall Farms requested and received an additional 336 "exemptions" (building permits). Thus, after that approval, 31 exemptions were remaining of the 600 total. Perry Hall Farms later utilized 5 additional exemptions, transferring them to another project (the Ruppert property) as is permitted by law. Thus, at present, there are 26 exemptions available and all of the authorizations are depleted.

It is of note that there was no testimony or evidence presented to this Zoning Commissioner suggesting that any entity other than Perry Hall Farms is entitled to the 600 exemptions allowed by law. That is, the record of this case contains no evidence identifying any other projects with pre-existing CRG plans or that fall within any of the criteria listed as the basis for granting an exemption. As noted above, the subject property is located within the Bean Run sub-area, as is the Perry Hall Farms subdivision.

In June 1999, Mr. Clark on behalf of Winsome Homes, Inc. requested 4 authorizations (building permits) for Lots 2, 3, 4 and 5 that are part of the Karinvale subdivision. In response thereto, Mr. Jablon's office denied his request. Their explanation indicated that the supply of authorizations had been exhausted. Moreover, as noted above, the Petitioners fit within none of the categories which would enable them to obtain building permits as exemptions.

Thus, the issue in the instant case can be framed quite simply. The Petitioners contend that Perry Hall Farms should have been required to utilize its 600 exemptions prior to using authorizations. The Petitioners further contend that permitting Perry Hall Farms to utilize authorizations first, rather than exemptions, is illegal and unfair. Under the Petitioners' theory, had Perry Hall Farms been required to utilize its exemptions first, authorizations would remain available at this time for use by other Developers, including the Petitioners.

For their part, Perry Hall Farms contends that it and Baltimore County acted properly. Perry Hall Farms avers that the law does not require that exemptions be utilized first. Perry Hall Farms contends that its acquisition of authorizations was "fair and square" and that its retention of

26 exemptions at the present time is appropriate. The issue thus framed, attention is next turned to the arguments of the parties.

JURISDICTION OF THE ZONING COMMISSIONER

The parties disagree as to a threshold issue relating to the resolution of this matter; to wit, the jurisdiction of the Zoning Commissioner. As noted above, the Petitioners have filed the Petition for Special Hearing, seeking a resolution of the issue relating to the granting of the exemptions, viz a viz authorizations. For its part, Perry Hall Farms contends that this issue is improperly before the Zoning Commissioner. Citing United Parcel Service, Inc. v. People's Counsel of Baltimore County, 336 Md. 569 (1994), Perry Hall Farms contends that Mr. Jablon's denial of the Petitioners' request for authorizations is "an action of an administrative officer," as defined in the Maryland Annotated Code, Article 25A, Section 5U, and the Baltimore County Code, Charter, Section 602D. As such, the Petitioners contend that the Protestants should have filed an appeal of Mr. Jablon's decision to the County Board of Appeals. Simply stated, Perry Hall Farms argues that the decision of Director Jablon in July 1999 was an appealable event. In that more than 30 days have passed since that time and no appeal was filed, Perry Hall Farms considers the case closed. Perry Hall Farms also notes Director Jablon's written reaffirmation of his earlier decision, by subsequent letter of July 29, 1999. It is argued by Perry Hall Farms that an appeal from neither of these actions/decisions was made, thus, the instant Petitions cannot be entertained.

In my judgment, Perry Hall Farms' reliance upon the UPS case is misplaced and this matter is properly before the Zoning Commissioner. I explain. The Office of the Zoning Commissioner is a statutorily created position.² The duties of the Office of the Zoning Commissioner are specifically enumerated in the Charter, the Baltimore County Code, and the B.C.Z.R. Likewise, the position of the Director of PDM is a statutorily created position. Director Jablon's authority is also set out in the Baltimore County Code.³

² See Md. Code Ann., Article 25A, Section 5(x); Baltimore County Charter, Section 522; Baltimore County Code Section 26.3

³ See Baltimore County Code, Section 26-135

The regulation under consideration in this case, as enacted through the Bills set forth and described above, is codified in Sections 259.4 through 259.9 of the B.C.Z.R. Although portions of these zoning regulations empower actions by the Director of PDM, as opposed to the Zoning Commissioner, the legislation itself has been codified as part and parcel of the B.C.Z.R.

Section 500.7 of the B.C.Z.R. provides, in part, "the said Zoning Commissioner shall have the power to conduct such other hearings and pass such Orders thereon as shall, in his discretion, be necessary for the proper enforcement of all zoning regulations, subject to the right of appeal to the County Board of Appeals as hereinafter provided. The power given hereunder shall include the right of any interested person to petition the Zoning Commissioner for a public hearing after advertisement and notice, to determine the existence of any purported nonconforming use on any premises, or to determine any rights whatsoever of such person and any property in Baltimore County insofar as they are affected by these regulations." (emphasis added)

This language makes it abundantly clear that it is the Zoning Commissioner, and not the Director of DPDM, who has the sole authority and prerogative to interpret and construe the B.C.Z.R. Although it is indeed the Director of PDM who is authorized to grant authorizations, the question here runs deeper. Specifically, how is Section 259 of the B.C.Z.R. to be construed and interpreted? This judgment is strictly within the province of the Zoning Commissioner and not any other governmental official. Thus, through its filing of the Petition for Special Hearing, the Petitioners exercised the appropriate avenue to seek relief and interpretation of the relevant zoning regulations. Neither the County Code or the B.C.Z.R. abrogate the jurisdiction of the Zoning Commissioner. Although the Director of PDM is authorized to "administer" the zoning Code (Section 26-3(d), Baltimore County Code), and "to make, adopt, promulgate and amend...such policies, rules or regulations" relating to the B.C.Z.R. (Section 26-135, Baltimore County Code), the Director is not authorized to interpret or construe the B.C.Z.R. That authority is vested solely to the Zoning Commissioner.

This was indeed recognized by Mr. Jablon in his written correspondence on this issue. As noted above, Mr. Clark initially wrote to PDM seeking authorizations on June 10, 1999.

Mitchell J. Kellman, a Planner II and designee of Mr. Jablon, responded by letter of July 8, 1999, setting out the Director of PDM's position that all authorizations had been utilized and that there were none available. Mr. Clark then obtained Counsel, who wrote for clarification of this position, on July 21, 1999. In response, Mr. Jablon personally responded, setting out his rationale for the position that no authorizations were available. Mr. Jablon concluded by stating "Should you disagree with this interpretation, you may proceed to file a special hearing before the Zoning Commissioner." In my judgment, this was both sound and correct advice which the Petitioners have exercised.

Should the position of Perry Hall Farms be adopted, an absurd result could be reached. Can an individual seek an interpretation of the B.C.Z.R. from any County employee and upon issuance of such opinion, would all interested parties thereafter be bound if a timely appeal was not filed? Perry Hall Farms' position, taken to its illogical conclusion, could result in an unappealable "action" authored by an unauthorized employee of Baltimore County and thus, said action would be binding. Surely, this should not be the case. The simple fact of the matter before me is that it is the Zoning Commissioner who possesses the authority to decide this issue and that such an interpretation should be sought, as was done here, by the Petition for Special Hearing. Director Jablon recognized this conclusion, as do I. Director Jablon's view of the B.C.Z.R. is his opinion, only; it is not the definitive interpretation of a provision thereof. The Zoning Commissioner makes that ruling, subject, of course, to appeal to the County Board of Appeals and Courts of this State.

Moreover, another point raised in Petitioners' memorandum has merit. As noted in that memorandum, the action taken by Director Jablon was not an exercise of his authority under the zoning regulations. Rather, he was merely reporting to the Petitioners a position that had been taken by Baltimore County as it related to its contractual agreement with Perry Hall Farms. Director Jablon's letter to the Petitioner was not a ruling, Order, or a decision in the context of Section 25(c). As noted by Petitioners' counsel, it is not Mr. Jablon's reporting of the County's position which is being challenged by the Petitioners, but the alleged ultra-vires acts of the County that are being challenged.

Finally, the UPS case can be factually distinguished from the scenario presented here.

In UPS, there was no doubt that the Zoning Commissioner was the County official vested with jurisdiction to consider the question presented. As noted above, the individual who has issued the

Order from which the Protestants believe an appeal would be taken, is not authorized to do so.

AUTHORIZATIONS V. EXEMPTIONS

Having determined that the Zoning Commissioner has the authority to consider the issue presented, attention is next turned to the specific question presented. This is a most difficult question. Indeed, as pointed out by Perry Hall Farms, there is no language within the Honeygo legislation (Section 259, B.C.Z.R.) which requires that exemptions be depleted prior to the issuance of authorizations. It is just as obvious, however, that the reverse is true. Indeed, the legislation and relevant sections of the B.C.Z.R. are silent on whether authorizations should be utilized first, and exemptions second; or, vice versa.

A review of the legislative history of the Bills at issue is not helpful. There were no documentary exhibits introduced on this issue at the hearing. Additionally, this Zoning Commissioner's research and review as to the legislative history of these Bills uncovers no material which is of assistance.

Director Jablon's opinion that exemptions need not be utilized appears to be primarily based upon the contractual arrangements made by and between Perry Hall Farms and Baltimore County. As discussed extensively in Petitioners' memorandum, Perry Hall Farms contracted with Baltimore County under a Memorandum of Agreement, dated April 21, 1997 (Petitioner's Exhibit 4). Essentially, that agreement provided that the County would make available of the necessary number of authorizations to permit development of the Perry Hall Farms property in exchange for certain acts by Perry Hall Farms.

Baltimore County and Perry Hall Farms later found it necessary to amend their agreement to expedite construction of the Bean Run sewer interceptor across another property in the area owned by the Schwartz family. An Amendment to the Memorandum of Agreement was executed on October 9, 1997 (Petitioner's Exhibit 3). Interestingly, that amendment provides in

Paragraph 2, that Perry Hall Farms can utilize authorizations prior to utilizing any exemptions.

The insertion of this language in the Memorandum of Agreement was an apparent attempt to clarify the B.C.Z.R., by contractual means.

Although I do not dispute the well-meaning intentions of both the County officials and the principals of Perry Hall Farms who entered into these agreements, their actions, in my judgment, represent "contract zoning" and thus, are not the basis upon which the B.C.Z.R. should be interpreted. It is illegal for the zoning authority to contract away its future use of police power and contract zoning is null and void (see People's Counsel v. Beechwood One Ltd. Partnership, 107 Md. App. 627 (1995)). A governmental entity cannot surrender or impair its obligation to independently and impartially consider its zoning regulations and procedures established by law. By definition, illegal, or "contract zoning" is not only the zoning of a property for consideration, but the contracting away of the County's authority as sovereign. Thus, although this Zoning Commissioner obviously does not have such authority to void or set aside the contracts between Perry Hall Farms and Baltimore County, I will not recognize their existence as a basis for interpreting the issue presented. They are, in my judgment, of questionable validity.

It is the cardinal rule of statutory interpretation that the words used in any legislation are to be given their natural and usual meaning, considered with reference to the aim and objective of the statute. (See Chesapeake Industrial Leasing Co. v. Comptroller, 331 Md. App. 428 (1993)). A statute must be interpreted reasonably and with reference to the legislative purpose, aim or policy as reflected in that statute. (Department of Economic and Employment Development v. Lilley, 106 Md. App. 744 (1995)). Moreover, in order to ascertain and effectuate legislative intention, an examination of the language of the statute, itself, is the primary tool used. (Klingenberg v. Klingenberg, 342 Md. App. 316 (1996)).

This is a difficult case in that the statute is silent as to whether authorizations or exemptions need be utilized first. The regulation itself does not address this point, nor, as noted above, does information available regarding the legislative history of these enactments. Moreover, the issue is so narrow as to provide little *stare decisis*. This Zoning Commissioner was unable to

uncover other cases on this point. Nonetheless, the choice of the words used by the legislature is of note. The legislature provided for certain "exemptions" and "authorizations" to permit the issuance of building permits as outlined above.

An exemption has been defined as "a release from some burden or obligation." (see State v. Exxon Corporation, 676 So 2nd, 783 (1996)). In essence, an exemption is a favor conferred, frequently by government, in the regulation of certain activities. There can be exempt employees from certain labor law requirements. There are exemptions from taxes, and exempt property from the reach of creditors or in the bankruptcy court. Indeed, there are certain exempt corporations, persons, or entities from various law and regulation. The B.C.Z.R. also directs that the reader consult Webster's Third New International Dictionary to define any word used therein for which a specific definition is not provided. The definitions in Webster's are consistent with the case law. "Exempt" means, "excepted from the operation of some law or obligation." An "exemption" means, "the state of being exempt."

It seems clear that the use of the term "exemption" establishes a class of individuals or subjects which is beyond the reach of the regulation at issue. In construing statutes and regulations, exemptions are most frequently set out initially to determine the breadth and applicability of the subject matter under consideration. After such exemptions are determined and identified, then the applicability of the statute or regulation under consideration is further defined and delineated to those who are not "exempt".

Under this scheme, it would be a reasonable assumption that exemptions should be utilized first. It was easy to identify those projects which had a validly existing CRG plan or other basis and would be entitled to the 600 exemptions so created when the subject legislation was enacted. The identity of those entities which might acquire the authorizations was indeed unknown and would be determined subsequently by a "race to the Courthouse."

This fact buttresses the conclusion that exemptions should be applied first in that they are known and exist at the time the legislation is drafted; and that authorizations, which are

awarded only after the Bill and pursuant to the policies and procedures established therein, should be issued thereafter.

Based on the aforementioned, it is therefore this Zoning Commissioner's interpretation of Section 259 of the B.C.Z.R. that the Director of PDM is required to issue exemptions first, prior to authorizations. In an instance where a particular entity, such as Perry Hall Farms, is entitled to both exemptions and authorizations, the exemptions, should be utilized beforehand, prior to the issuance of any authorizations.

As stated hereinabove, the authority and jurisdiction of the Zoning Commissioner is limited. Indeed, the Office of the Zoning Commissioner is empowered to construe, interpret and apply the zoning regulations, only. I have no authority to set aside matters of contract, including the Memorandum of Agreement and Amendment to Agreement thereto. Additionally, I make no finding as to whether the Memorandum of Agreement violates Maryland's Anti-Trust Act, as requested by the Petitioners. A Judge of the Circuit Court may do so, not I. Nonetheless, it is my duty to interpret the zoning regulations, which I have done so as set out above.

Having reached this conclusion, it would seem a simple matter for this Zoning Commissioner to direct that the authorizations previously issued to Perry Hall Farms be revoked and replaced with exemptions, to the extent numerically permitted. However, I hesitate to issue such a directive. Although my interpretation (subject to appeal) should be hereafter applied in the administration of Section 259.4 et sec of the B.C.Z.R., whether it should be applied retroactively is questionable. Key issues remain. Having issued authorizations to Perry Hall Farms, is Baltimore County now estopped from revoking and replacing them with exemptions? Was Perry Hall Farms prejudiced by the County's previous administration of this Section? Are the authorizations issued to Perry Hall Farms vested, as that concept is defined by law? The record of this case is silent on the issues of estoppel, vesting, and prejudice, etc. Moreover, the implications of the contracts between Perry Hall Farms and Baltimore County are beyond the jurisdiction of the Zoning Commissioner.

To the narrow questions presented, whether the Zoning Commissioner has jurisdiction to consider the intent of the Petition for Special Hearing, and whether exemptions should be issued prior to authorizations, I answer both in the affirmative. However, I decline to require the Director of PDM to remedy the present situation based upon an insufficient record to support such a requirement.

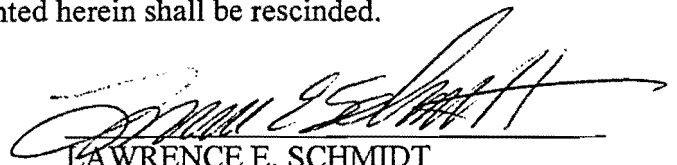
Turning to the Petition for Variance, same will also be granted. As noted at the hearing and within the Petitioners' Memorandum, the request here is for similar relief as was granted for other properties. I am persuaded, for the reasons set out in Petitioners' Memorandum, that variance relief should be granted and complies with the requirements of Section 307 of the B.C.Z.R. Thus, the Petition for Variance shall also be granted.

Pursuant to the advertisement, posting of the property, and public hearing on these Petitions held, and for the reasons set forth above, the relief requested shall be granted.

THEREFORE, IT IS ORDERED by the Zoning Commissioner for Baltimore County this 23rd day of March, 2000 that Section 259.7.C of the Baltimore County Zoning Regulations (B.C.Z.R.) requires that for any project which is entitled to "exemptions" (as defined therein), such "exemptions" shall be utilized before "authorizations" (as defined therein) are awarded, and as such, the Petition for Special Hearing be and is hereby GRANTED; and,

IT IS FURTHER ORDERED that the Petition for Variance seeking relief from Section 259.9.B.4.b of the B.C.Z.R. to permit a residential building to arterial road setback of 25 feet in lieu of the required 40 feet for Lot 5 of Karinvale, known as 11347 Holter Road, in accordance with Petitioner's Exhibit 1, be and is hereby GRANTED, subject to the following restriction:

- 1) The Petitioners may apply for their building permit and be granted same upon receipt of this Order; however, Petitioners are hereby made aware that proceeding at this time is at their own risk until the 30-day appeal period from the date of this Order has expired. If an appeal is filed and this Order is reversed, the relief granted herein shall be rescinded.


LAWRENCE E. SCHMIDT
Zoning Commissioner
for Baltimore County

LES:bjs

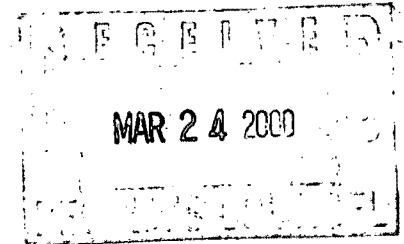


Baltimore County
Zoning Commissioner

Suite 405, County Courts Bldg.
401 Bosley Avenue
Towson, Maryland 21204
410-887-4386
Fax: 410-887-3468

March 23, 2000

Ronald A. Decker, Esquire
Moore, Carney, Ryan and Lattanzi, LLC
4111 E. Joppa Road, Suite 201
Baltimore, Maryland 21236



RE: PETITIONS FOR SPECIAL HEARING AND VARIANCE
SW/Corner Holter Road & Old Philadelphia Road
(Lots 2, 3, 4 and 5 in Karinvale and Tract A of Holter Property)
11th Election District – 5th Councilmanic District
Joseph G. Holter, et ux - Petitioners
Case No. 00-161-SPHA

Dear Mr. Decker:

Enclosed please find a copy of the decision rendered in the above-captioned matter. The Petitions for Special Hearing and Variance have been granted, in accordance with the attached Order.

In the event any party finds the decision rendered is unfavorable, any party may file an appeal to the County Board of Appeals within thirty (30) days of the date of this Order. For further information on filing an appeal, please contact the Zoning Administration and Development Management office at 887-3391.

Very truly yours,

LAWRENCE E. SCHMIDT
Zoning Commissioner
for Baltimore County

LES:bjs

cc: Mr. & Mrs. Joseph G. Holter, 11340 Philadelphia Road, White Marsh, Md. 21162
Mr. John Clark, Winsome Homes, Inc., 2820 Reckord Road, Fallston, Md. 21047
Robert A. Hoffman, Esquire and Patricia A. Hoffman, Esquire
Venable, Baetjer & Howard, 210 Allegheny Avenue, Towson, Md. 21204
Mr. Steven Rosen, 3722 Birchmere Court, Owings Mills, Md. 21117
Mr. Arnold Jablon, Director, PDM; OP; People's Counsel; Case File



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IN RE: PETITIONS FOR SPECIAL * BEFORE THE
HEARING and VARIANCE *
SW/Corner Holter Road and Old * DEPUTY ZONING COMMISSIONER
Philadelphia Road *
(Lots 2, 3, 4 and 5 in Karinvale * OF BALTIMORE COUNTY
and Tract A of Holter Property) *
11th Election District - 5th * Case No. 00-161-SPHA
Councilmanic District *
Winsome Homes, Inc and Joseph. *
G. Holter, *et ux* - Petitioners *

* * * * *

PETITIONERS' POST-HEARING MEMORANDUM

INTRODUCTION

Winsome Homes, Inc., Joseph G. Holter and Beverleigh A. Holter have received subdivision approval for a five-lot subdivision known as "Karinvale". The plat is recorded among the Land Records of Baltimore County in Plat Book 71, folio 113. Lots 2 through 5 are located along Holter Road and Lot 1 is a lot that contains Mr. and Mrs. Holter's dwelling. The subdivision is within the Honeygo Area that was established by Baltimore County Zoning Regulation 259.4, *et seq* pursuant to Bill No. 176-1994. The Bill provides that the area is created to ensure that the development of infrastructure will coincide with the approval of building permits. (Baltimore County Zoning Regulation 259.)¹ Certain design standards were included in the regulations as well.

The Petitioners filed a request for a variance from BCZR 259.9.B.2.C to permit a residential building to arterial road setback of 25' in lieu of the required 40' for Lot 5, Karinvale. This lot is located at the intersection of Holter Road and Philadelphia Road. An identical variance had been granted by the Zoning Commissioner for Lot 36, Holter Property, which is on the opposite side of Holter Road from Lot 5, Karinvale. The approval was given in Case No. 97-284-A.

The Petitioners requested a special hearing in an effort to obtain authorizations for building permits for Lots 2-5, Karinvale. Under the Baltimore County Zoning Regulations, building permits can only be obtained within the Honeygo Area if the Director of the Department of Permits and Development Management (PDM) approves the issuance of authorizations for building permits.

¹Baltimore County Zoning Regulations shall hereafter referred to as BCZR.

(BCZR 259.7.B.) There are certain exemptions to the approval process that are contained in BCZR 259.7.C.1-7. The Petitioners requested authorizations for building permits on June 10, 1999. They were advised that there were no authorizations available, and that the request would be placed on a waiting list. (Petitioners' Exhibit No. 1). The Petitioners had been made aware of the fact that Perry Hall Farms, which had 600 exemptions from the authorization process, had applied for and received authorizations that they did not need for build-out of their subdivision. Perry Hall Farms contains 1,142 units, thus only has a need for 542 authorizations when combined with their 600 exemptions. Despite this, the Director of PDM issued 573 authorizations to Perry Hall Farms.

On July 21, 1999, the Petitioners identified the excess authorizations in a letter to the Director. A request was made for 31 building permit authorizations to be withdrawn from Perry Hall Farms and that they be re-issued to persons on the waiting list. (Petitioners' Exhibit No. 2). This request was denied. Mr. Arnold Jablon, Director of PDM, sent a letter to Petitioners' counsel on July 29, 1999 which stated that there is no requirement for exemptions to be used prior to the issuance of authorizations. He explained that Perry Hall Farms Joint Venture, the Schwartz Family Limited Partnership and official designees of Baltimore County had entered into an Amendment to Memorandum of Agreement dated October 9, 1997 which stated that any remaining authorizations may be applied for by Perry Hall Farms prior to utilizing any of its building permit exemptions ((Petitioners' Exhibit No. 3). In that letter, the Director stated that the Petitioners could proceed to file for a special hearing before a Zoning Commissioner if they disagreed with his position.

Petitioners have asked the Zoning Commissioner to interpret the provisions of BCZR 259 to determine whether the Amendment to Memorandum of Agreement ("AMOA") between Baltimore County, Maryland and private developers controls the issuance of authorizations to the Petitioners and Perry Hall Farms. It is believed that the portions of the AMOA that address exemptions and authorizations are contrary to county and state public policy, provide the opportunity for Perry Hall Farms to restrain trade and establish a monopoly within the Bean Run Sub-area of the Honeygo Area, that the provisions violate the principle that a governmental entity may not contract away the exercise of its zoning powers, and that the Memorandum of Agreement establishes a policy to be used in interpreting the BCZR without following the requirements of the Baltimore County Code. As a result

of these errors, the issuance of 31 excess authorizations for building permits to Perry Hall Farms is a nullity, and those authorizations are available for issuance to the Petitioners.

DISCUSSION

A. VARIANCE

Mr. John R. Clark, President of Winsome Homes, Inc., testified on behalf of the Petitioners in support of the Request for Variance. He explained that his company had developed a subdivision known as Holter Property along Old Philadelphia Road in White Marsh. Holter Road provides access to the 36-lot subdivision. Winsome Homes, Inc. had obtained a variance from BCZR 259.9.B.2.C for Lot 36, Holter Property, to permit an arterial road setback of 25' in lieu of the required 40' at Holter and Philadelphia Road. That lot is directly across the street from Lot 5 which is the subject of the pending variance petition.

M&H Development Engineers, Inc. prepared the site plan that accompanied the Petition for Variance. It was admitted as Exhibit 21. The Plan depicts the location of Lots 36 and Lot 5. Mr. Clark explained that imposition of the 40' setback is onerous. A house constructed on the lot would be much smaller than those in the rest of the neighborhood, and would result in placing the driveway too close to the intersection of Holter Road and Philadelphia Road. If the variance is granted, the house could be constructed so that the driveway would be further removed from Philadelphia Road. He opined that the variance would not be a threat to safety, and that it would enhance the safety of the homeowner. The request is consistent with the regulations because the home to be built on the lot will be similar in size and quality to those in the neighborhood. There is a subdivision north of the Holter property which is not subject to the Honeygo Area Zoning Regulations, and has built homes that are less than 40' from Philadelphia Road. Finally, having to adhere to the zoning regulation would result in a practical difficulty. The hardship that would result if the variance is not granted is the result of special circumstances and conditions that are peculiar to the land which is the subject of the variance request. Application of the regulation would unduly restrict the use of the land due to the special conditions unique to the parcel. Therefore, the Petitioners request that the Zoning Commissioner grant the same relief as that permitted in Case No. 97-284-A which dealt with Lot 36, Holter Property.

B. REQUEST FOR AUTHORIZATIONS FOR BUILDING PERMITS

Several factors have to be considered in determining whether authorizations for building permits are or should be available to the Petitioners. They are:

1. Is the Director of PDM required to deduct available exemptions from authorization requests?
2. Did the Memorandum of Agreement ("MOA") and Amendment to Memorandum of Agreement ("AMOA") between Perry Hall Farms Joint Venture, Schwartz Family Limited Partnership and Baltimore County, Maryland dated April 27, 1997 and October 9, 1997, respectively, control the issuance of authorizations and the use of exemptions for properties in the Bean Run Sub-area of the Honeygo Area?
3. Did Baltimore County's determination that the Memorandum of Agreement and Amendment to Memorandum of Agreement precluded a statutory interpretation that would require exemptions to be used before authorizations were issued violate requirements of Baltimore County code regarding the establishment of a policy?
4. Is the Memorandum of Agreement, as amended, against state policy because it violates Maryland's Anti-trust Act by unreasonably restraining trade and creating a monopoly for the exclusion of competition?
5. What is the effect of Bill 73-99 on Petitioners' request for authorizations and the issues in this case?
6. Does the Zoning Commissioner have the authority to address issues raised by the Petitioners and to provide relief, or should an appeal have been filed with the Board of Appeals to consider the Director of PDM's July 29, 1999 letter?

Baltimore County created a system of building permit authorizations and exemptions for certain properties in 1994 when it passed Bill No. 176-1994 establishing the Honeygo Area and the H and H1 Overlay Districts. The Honeygo Area was established to implement the Honeygo Area Plan, an amendment to Baltimore County's Master Plan 1989-2000. The Honeygo Area encompasses land bound by Belair Road on the west, the Gunpowder Falls on the north, Philadelphia Road on the east, a combination of Chapel Road and Honeygo Run on the south. Within the Honeygo Area there are the Bean Run Sub-area, Belair Road Sub-area, Bird River Sub-area, and

Honeygo Run Sub-area. The subject property is within the Bean Run Sub-area. Threshold limits for authorizations for building permits have been established for the Honeygo Area in each sub-area. There are a limited number of authorizations available within the area and sub-area which will be increased as certain improvements are made and facilities are provided (BCZR 259.7). If there are valid requests for authorizations, and none are available, the Director of PDM will establish a waiting list (BCZR 259.7.L). Authorizations will be granted to those on the waiting list as they become available. (BCZR 259.7.M).

The threshold limits do not apply to: additions, renovations or accessory structures; applications for building permits made in the Honeygo Area for 600 dwelling units on any property which has an unexpired CRG Plan that was approved prior to May 18, 1992; minor subdivisions; commercial buildings; any lot of record not part of a recorded subdivision; institutional buildings; and up to 425 density units on any property zoned D.R.10.5 other than those properties with an unexpired CRG Plan as of May 18, 1992 (BCZR 259.7.C).

The Perry Hall Farms subdivision, consisting of 1,142 units, has 600 exemptions available to it because it has an unexpired CRG Plan that was approved prior to May 18, 1992. Five of their exemptions have been transferred to a property at Cross and Forge Roads (Petitioners' Exhibit No. 15). Perry Hall Farms now has 26 exemptions available to it (*id.*), (Petitioners' Exhibit No. 16).

The Holter Property requested 36 authorizations for building permits. They were issued on April 11, 1997. Subsequently, Perry Hall Farms Joint Venture ("PHF"), Schwartz Family Limited Partnership, Guidice Family LLC and Glenside Farm LLC and Baltimore County, Maryland entered into a Memorandum of Agreement to facilitate construction of a sewer interceptor to serve properties in the Honeygo Area and to coordinate development of the subject property. That Memorandum of Agreement was dated April 21, 1997 ("MOA"). A copy was admitted into evidence as Petitioners' Exhibit No. 4. In Paragraph D.1, the County agreed to make available 191 authorizations for building permits for the Schwartz Property and to make available "a number of authorizations for building permits necessary to build-out the PHF Development provided for in the PHF Plan as part of the area threshold limits outlined in BCZR Section 259.7.D."

To carry out the terms of its agreement, Baltimore County enacted Bill No. 40-97 (Petitioners' Exhibit No. 5) to increase Honeygo Area exemptions from 300 to 600 dwelling units, increase area authorizations from 300 to 400 and increase Bean Run Sub-area authorizations from 300 to 400. Thus, the total of 1,400 building permits could be issued to meet the needs of Perry Hall Farms, Schwartz Family, and to recognize the 36 authorizations that have already been granted to the Holter Property.

The parties to the Memorandum of Agreement later found it necessary to provide the means to expedite construction of the Bean Run sewer interceptor across the Schwartz property. They entered in an Amendment to Memorandum of Agreement dated October 9, 1997 ("AMOA") which gave approval to the transfer of 191 exemptions from PHF to Schwartz upon the effective date of the Bill that had been introduced, and transfer them back to PHF upon Schwartz obtaining 191 authorizations for building permits. The AMOA contained provisions in which the County agreed and confirmed that 400 Honeygo Area authorizations were in addition to the 400 authorizations for the Bean Run Sub-area, and that any and all remaining area or sub-area authorizations could be applied for by PHF prior to PHF utilizing any of its exemptions (Attachment to Petitioners' Exhibit No. 3). Although Bill No. 126-97, which permitted transfer of exemptions upon approval of the Director of PDM was not enacted until November 6, 1997 (Petitioners' Exhibit No. 6), the AMOA included a statement in paragraph 1 that the County approves the transfers.²

Bill 73-99, which was introduced on August 2, 1999 reduced from 1,000 to 575 the number of Honeygo Area authorizations that will be available in the third group of authorizations, created exemptions for up to 425 density units on any property zoned D.R.10.5, and added a provision requiring authorizations issued in any Sub-area to be subtracted from the total number of authorizations available in the Honeygo Area (BCZR 259.7.C.7, 259.7.D.3, 259.7.N). Other changes in Bill No. 73-99 are not germane to this proceeding.³

²As a result, the County granted approval through a private agreement of something that was not permissible at the time of the Agreement. Exemptions could not be transferred prior to the enactment of Bill 126-97.

³By changing the Honeygo Area authorizations, there are a total of 2,175 area-wide authorizations and 3,355 sub-area authorizations permitted.

The Honeygo legislation required a record of issued authorizations to be kept. Petitioners' Exhibit No. 9, the Director of PDM's compilation of Honeygo Area Unit Authorizations, shows the number of authorizations issued to each applicant in the column headed "#Units App.", and the date of issuance is in the column "Letter Sent". The table contains a note that states "Perry Hall Farms has all available authorizations by amended memorandum". It also states that, as of April 13, 1999, Perry Hall Farms had 31 exemptions left.

On January 27, 1999, 312 of the requested 545 authorizations were granted to Perry Hall Farms (Petitioners' Exhibit No. 13). Although Perry Hall Farms had requested 545 authorizations, and only 312 were issued, the Director of PDM did not include the balance of 233 on the waiting list. The only entry on that list is the request by Karinvale to obtain 4 authorizations (Petitioners' Exhibit No. 9, page 2).

It is interesting to note that the Cross and Forge Road property is not included on the waiting list even though the owner's engineer, Morris & Ritchie Associates, Inc.'s July 20, 1999 letter to PDM (Petitioners' Exhibit No. 14) asked for five authorizations. That letter was an attachment to a letter from Perry Hall Farms' counsel which requested transfer of five exemptions from Perry Hall Farms to the Cross and Forge Road Property. Mr. Jablon approved the request, and apparently, decided that it is not appropriate to issue authorizations to properties which have exemptions available to them, absent the constraints of the AMOA.

When the Petitioners asked for four authorizations for building permits, a planner responded by a letter dated July 8, 1999 saying that the request will be placed on a waiting list until authorizations become available (Petitioners' Exhibit No. 1). The Petitioners responded to the Director's office by stating that it was unnecessary to issue 31 authorizations to Perry Hall Farms, and that those should be available for issuance to those on the waiting list (Petitioners' Exhibit No. 2). Mr. Arnold Jablon, Director of PDM, wrote a letter on July 29, 1999 rejecting the assertion that exemptions had to be used first, and relied upon the AMOA's provision that Perry Hall Farms would not have to use any of its exemptions prior to applying for authorizations. Mr. Jablon confirmed that Perry Hall Farms had 31 exemptions remaining for Perry Hall Farms even though all authorizations had been exhausted (Petitioners' Exhibit No. 3). Had Mr. Jablon felt that he had the discretion to ignore the AMOA, he probably would have granted the exemptions; but given the existence of the

contract, he merely relayed the decision that had previously been made by representatives of Baltimore County.

Mr. Jablon's response is consistent with the position taken by the Baltimore County Office of Planning on March 30, 1998. In a letter directed to the engineer for a property owner in the Bean Run Sub-area, Arnold F. "Pat" Keller, III, Director of the Office of Planning, stated that the 400 Honeygo Area authorizations had been designated for use by Perry Hall Farms, and the 400 Bean Run Sub-area authorizations had also been committed to Perry Hall Farms. (Petitioners' Exhibit No. 17). He made this statement despite the fact that only 36 authorizations had been issued. The two directors had reached the same conclusion about the availability of authorizations being governed by the private agreement between the County and the developer that they had signed. Unfortunately, they did not carry out the terms of BCZR 259.7.Q which requires the Director of PDM and the Director of the Office of Planning to establish procedures to assure that building permits in the area are issued in conformance with regulations. They felt bound by the policy that had been established by the County in the MOA and AMOA. Mr. W. Carl Richards, Jr., Zoning Supervisor, Zoning Review, Development Processing expressed his concern to Mr. Jablon that Mr. Keller had informed a developer that there were no authorizations available at a time when PDM's records showed that only 36 authorizations for Bean Run had been issued. (Petitioners' Exhibit No. 18). Mr. Jablon apparently felt powerless to address the situation.

Mr. Keller's letter caused some concern within his own department. Karin Brown, Community Planner, Office of Planning, wrote a memorandum to Douglas N. Silber, Assistant County Attorney, on May 28, 1998 that sets forth her Department's position that all 800 area and sub-area authorizations had been allocated to Perry Hall Farms, leaving zero authorizations until commencement of Honeygo Boulevard Phase II and Honeygo Water Main. Ms. Brown asked Mr. Silber to clarify the purpose of the October 9, 1997 AMOA and the implications concerning available authorizations, (Petitioners' Exhibit No. 19). There was no response to Ms. Brown's memorandum. Presumably, the Office of Law saw no need to correct the position taken by the Director of Office of Planning that the issuance of authorizations would be pursuant to the private agreement rather than the zoning regulations.

Seven categories of property and improvements are identified in the BCZR 259.7.C as not being subject to the threshold limits on authorizations for building permits. No conditions are imposed upon those who are entitled to the exemptions, nor is there a requirement to receive government approval before being eligible to obtain a building permit without securing an authorization. Counsel for Perry Hall Farms stated during the public hearing that exemptions do not "belong" to his client until they are requested from the Director of PDM. Perry Hall Farms would have us believe that the regulations require the owner of an institutional building, a commercial building or anyone who wanted to renovate a structure, to communicate with the Director of PDM so that an exemption could be issued. Similarly, Perry Hall Farms ostensibly would have to seek issuance of its 600 dwelling unit exemptions before getting building permits. Perry Hall Farms' counsel referred to no authority for that position.

The Honeygo Area zoning regulations give the Director of PDM a very narrow area of involvement; he is limited to issuance of authorizations if there is an approved subdivision plat and water and sewer facilities are available to the property. If the authorization cannot be issued because the threshold limit has been met, the Director is required to maintain a waiting list so that authorizations can be issued when certain capital projects are completed. All properties which are covered by the exemption language are free of the threshold limits as a matter of right.

If Perry Hall Farms is correct in its contention that those entitled to exemptions can obtain authorizations for building permits, all of those entitled to exemptions can apply for authorizations within the Honeygo Area and have them issued by the Director of PDM. They would have no use for the authorizations; however, they could hoard them to achieve whatever purpose they desire. In like manner, Perry Hall Farms could carry out its intention to exhaust "all available authorizations under both area and sub-area limitations" before utilizing any of its building permit exemptions (See Petitioners' Exhibit No. 12, A. Hoffman, Esquire letter to Department of PDM dated February 19, 1998). Perry Hall Farms has requested 1,142 authorizations, and although they do not appear on the official waiting list, the statute requires the Director of PDM to issue authorizations to those who have qualified for authorizations but have not been able to obtain them because of the threshold limits. Perry Hall Farms would control 1,142 of the 2,175 Honeygo Area authorizations and would have 600 exemptions to market under the terms of BCZR 259.7.C.2. A

because of the threshold limits. Perry Hall Farms would control 1, 142 of the 2,175 Honeygo Area authorizations and would have 600 exemptions to market under the terms of BCZR 259.7.C.2. A major portion of responsibility for development of Honeygo Area would be the hands of a private individual rather than Baltimore County.

Although the regulations are silent as to the use of exemptions, Perry Hall Farms' position would result in a monopoly existing in the Bean Run sub-area except for Glenside Farms and the Holter Property. All development in the sub-area would be under the control of Perry Hall Farms for the foreseeable future. Four hundred authorizations were made available in the Bean Run Sub-area under BCZR 259.7.E.1.a. After the Forge Road and Cross Road capital projects identified in the regulations are commenced, an additional 650 authorizations will be available. Since 800 authorizations have already been issued in the Bean Run Sub-area, there will only be 250 available for issuance. These would go to Perry Hall Farms because the Director was unable to issue 569 authorizations requested by Perry Hall Farms (Petitioners' Exhibit No. 9 and 16). They would be able to secure the final 200 authorizations under BCZR 259.7.E.1.c as well.

There is no justification for permitting Perry Hall Farms to control development in the Bean Run Sub-area and potentially profit from the sale of their exemptions. The Director of Planning and Director of PDM have determined that the MOA and AMOA control the issuance of authorizations and use of exemptions in the Bean Run Sub-area. They have advised parties that they are constrained by those documents. Mr. Jablon has refused to provide authorizations to the Petitioners because Baltimore County has entered into an agreement which deprives him of the opportunity to exercise his authority to interpret the zoning regulations requirement as to exemptions. See Petitioners' Exhibit No. 3 in which Mr. Jablon reported that he was not able to grant the authorizations due to the terms contained in the AMOA.

Petitioners state that the portion of the AMOA which usurps the Director's power is a nullity. Where the developer enters into an express and legally binding contract with the ultimate zoning authority which bargains away its future use of its police power, such contract zoning is null and void. People's Counsel v. Beachwood I Limited Partnership, 107 MdApp 627, 670 A2d 484, 505 (1995). Any governmental entity cannot surrender or impair its obligation to independently and impartially consider the application with procedures established by law. It cannot contract away its

Chesapeake Outdoor Enterprises, Inc. v. Mayor and City Council of Baltimore, 89 MdApp. 54, 597 A2d 503, 508 (1991). Due to the AMOA, Mr. Jablon did not have a choice to issue 31 exemptions that were not needed by Perry Hall Farms, his authority to act had been taken away.

There are three reasons for the rule declaring that contract zoning is null and void: (1) Zoning based on offers or agreements with the owners disrupts the basic plan, and thus is subversive of the public policy reflected in the overall legislation, (2) that the resulting “contract” is nugatory because a municipality is not able to make agreements which inhibit its police powers, and (3) that restrictions in a particular zone should not be left to extrinsic evidence. Baylis v. City of Baltimore, 219 Md 164, 148 A2d 429, 433 (1959). The County Council had enacted a bill which granted the Director of PDM the authority to implement provisions regarding issuance of authorizations. Despite this delegation, Baltimore County entered into a contract with Perry Hall Farms that deprived the Director of his right to enforce the regulations. An agency’s rules and regulations conferring substantive rights or important procedural benefits and safeguards cannot be disregarded. Failure to follow its own policies and procedures will nullify the action taken. Board of Education of Baltimore County v. Ballard, 67 MdApp 235, 507 A2d 192, 196 (1986).

County public policy is offended by the AMOA’s provisions regarding exemptions. As explained above, the County Council established the number of exemptions and authorizations in Phase I to permit build-out of Perry Hall Farms, Glenside Farms and Holter Property. If Perry Hall Farms is permitted to preserve its exemptions and obtain authorizations, it will have control of building permits beyond that envisioned by the County Council and diminish the construction of quality housing.

State public policy is offended by the failure to require exhaustion of exemptions before receiving authorizations for building permits because Commercial Law Article 11-20(a)(1) states that a person may not by contract, combination, or conspiracy with one or more other persons, unreasonably restrain trade or commerce, and under (a)(2) may not monopolize, attempt to monopolize, or combine or conspire with one or more other persons to monopolize any part of the trade or commerce within the state, for the purpose of excluding competition. Given the existence of the current provisions regarding the requirement to issue authorizations to those who have requested them, in the order of the requests, Perry Hall Farms would have a monopoly in the Bean

Run Sub-area that would restrain trade if it is not required to utilize all exemptions available to it.

Baltimore County's agreement with Perry Hall Farms that exemptions would not have to be used before applications for authorizations were submitted, precluded the Director of PDM from interpreting the provisions of BCZR 259. In effect, the County established a rule to be used in the future administration of zoning regulations. The County cannot do this by contract. In effect, the policy was created without following the requirements of Baltimore County Code, Section 2-420. This section requires notice, publication, and an opportunity to comment on proposed regulations. Regulations are defined as policies, rules or regulations and means a statement or amendment or repeal of a statement that:

- a) has general application;
- b) has future effect;
- c) is adopted by a department or office to detail or carry out a law that the department or office administers;
- d) is in any form including:
 - 1) a guideline
 - 2) a rule
 - 3) a standard
 - 4) a statement of interpretation;
 - 5) a statement of policy.

Correspondence from the Director of Planning to a prospective developer and the Director of PDM's letter to the Petitioners disclose that they felt they were bound by the Memorandum of Agreement and Amended Memorandum of Agreement in their efforts to implement BCZR 259.7. The position taken by Baltimore County in the contract was applied generally to all developers, affected future decisions, was adopted by the County to carry out the zoning regulations, and established a standard that exemptions would not have to be used prior to receiving authorizations. The departments which participate in signing the Agreement have authority to issue regulations, therefore, are considered departments under Section 2-417(b). Since Baltimore County

did not follow its own regulations in establishing the policy, it is a nullity. Board of Education of Baltimore County v. Ballard, *supra*.⁴

During the hearing, the Zoning Commissioner asked if Bill 73-99, which amended the Honeygo Area Zoning Regulations would control the decisions to be made in this proceeding. That Bill was enacted after Perry Hall Farms and the Petitioners submitted their requests for authorizations. Generally, zoning regulations can be changed, and a property owner bound by the changes, unless the right has become vested in a property owner. Rockville Fuel and Feed Company v. City of Gaithersburg, 266 Md 117, 291 A2d 672, 677 (1972). Vesting occurs by getting a building permit and substantial beginning of construction. (*id* at 676). However, the owner of an invalid permit would derive no benefit after it is invalidated through judicial review. Thus, beginning construction within the appeal period is at the owner's peril. O'Donnell v. Bassler, 289 Md 501, 425 A2d 1003, 1007 (1981). Zoning can be changed by a municipality, and if done prior to substantial construction, the changes are effective and a permit can be revoked. Mayor and City Council of Baltimore v. Crane, 277 Md 198, 352 A2d 786, 790 (1976).

Petitioners feel that the changes made to the regulations by Bill 73-99 would not adversely affect their request for four authorizations for building permits. At the time the legislation was enacted, the County Council knew that 800 authorizations had been granted by the Director of PDM, and it had modified the regulations by Bills 40-97 and 126-97 to permit full development of the Perry Hall Farms, Glenside Farms and Holter Property subdivisions. Although BCZR 259.7.N requires sub-area authorizations that are issued to be subtracted from Honeygo Area authorizations, this provision must be interpreted in light of conditions that existed at the time of enactment and consistent with the regulations in their entirety. Prior to enactment, the Honeygo Area had 2,600 authorizations and 600 CRG exemptions, for a total of 3,200 building permits. After enactment, there are 2,175 authorizations, 600 CRG exemptions and 425 D.R. 10.5 exemptions, for a total of 3,200. The number of authorizations for Bean Run Sub-area stayed constant at 1,250. The total of

⁴Perry Hall Farms will not be damaged by a declaration that 26 exemptions are nullities. The MOA states that they cannot obtain more than 600 building or grading permits until the completion of Honeygo Boulevard improvements (MOA, paragraph A.7.b) and they will have 1142 exemptions and authorizations remaining.

authorizations and exemptions for all sub-areas remained constant at 3,880.⁵ As can be seen, sub-area authorizations exceeded area authorizations by 680 before enactment of the Bill, and exceeded the area authorizations by 680 after enactment. It would be illogical to assume that sub-area authorizations cannot be issued as the described sub-area capital projects are completed merely because the Honeygo Area capital projects remained open. Also, if the Honeygo Area authorizations were construed to be a cap on the number of authorizations available in all sub-areas, this would be contrary to the County Council's clear intent to have more authorizations in the sub-areas than are permitted by Honeygo Area authorizations. If the County Council wanted the total number of Honeygo Area and the total of the four sub-area authorizations be equal, it would have made them the same, or simply established one set of authorizations.

Taking all of the factors into consideration, it appears that the County Council intended authorizations to be made available within each sub-area as projects are completed, and that they did not intend to withdraw the authorizations that had been issued. Authorizations that are granted within the sub-areas would be offset against Honeygo Area authorizations that will eventually be issued. As the sub-area authorizations issued, the Honeygo Area authorizations will be decreased. If it is to be determined that 26 authorizations issued to Perry Hall Farms are a nullity because of the reasons stated above, those 26 authorizations would be available to those on the waiting list.

Finally, the Zoning Commissioner asked the parties to address whether the Special Hearing is the appropriate vehicle to use to decide the issues in this case. This concern arose out of Perry Hall Farms' position that the Petitioners should have filed an appeal to the Director's July, 1999 failure to issue authorizations to the Petitioners. The action taken by the Director was not an exercise of his authority under the zoning regulations. He was merely reporting to the Petitioners a position that had been taken by Baltimore County in its contract with Perry Hall Farms. Since the letter was not a ruling, order, or decision of the Director, there was no grounds for an appeal to the Board of Appeals. The actions that the Petitioners are challenging are Baltimore County's attempts to: (1)

⁵Honeygo Sub-area authorizations were reduced by 425. Since there was a creation of 425 D.R. 10.5 exemptions, it can be presumed that the sub-area authorizations that were lost in the Honeygo Run Sub-area reflect the fact that the D.R. 10.5 exemptions are located within that sub-area.

contractually issue authorizations for building permits prior to Perry Hall Farms obtaining subdivision approval; (2) establish a policy without following the requirements of the County Code; and (3) participate in "contract zoning" which bargained away the Director of PDM's ability to exercise his discretion in carrying out the terms of the zoning regulations. The *ultra vires* acts of the County are being challenged, not Mr. Jablon's report of those actions.

In conclusion, the Petitioners request the Zoning Commissioner to determine that the Honeygo regulations require exemptions to be utilized before authorizations for building permits may be obtained by an owner of property, that efforts by Baltimore County to predetermine the policies to be implemented in the issuance of authorizations for building permits were nugatory, and that 26 authorizations which were issued pursuant to terms in the Memorandum of Agreement and Amended Memorandum of Agreement are null and void. If these recommendations are accepted, 26 authorizations will be available for issuance to the Petitioner and others who meet the regulations' requirements.

In addition, Petitioners request that the variance to permit a setback of 25' instead of 40' to an arterial road be granted. The evidence in this proceeding shows that Petitioners have met their burden by showing that conditions peculiar to Lot 5, Karinvale, make application of the regulations burdensome, would not permit the Petitioners to increase the safety of the homeowners that will occupy the lot in question, and that its petition is fully consistent with the intent of applicable zoning regulations.

Respectfully submitted,



Ronald A. Decker, Esquire
Moore, Carney, Ryan & Lattanzi, L.L.C.
4111 E. Joppa Road, Suite 201
Baltimore, Maryland 21236
Tel # (410) 529-4600*Fax# (410) 529-6146

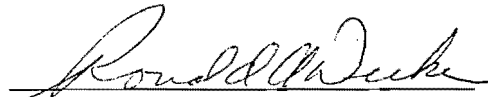
Attorney for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Post-Hearing Memorandum was mailed on 11th day of February, 2000, by first class mail, postage prepaid, to Robert A. Hoffman, Esquire and to Peter Max Zimmerman, People's Counsel.

Robert A. Hoffman, Esquire
Venable, Baetjer and Howard, L.L.P.
Post Office Box 5517
210 Allegheny Avenue
Towson, Maryland 21285-5517

Peter Max Zimmerman
People's Counsel for Baltimore County
Old Courthouse, Room 47
400 Washington Avenue
Towson, Maryland 21204


Ronald A. Decker

60/PMZ

MOORE, CARNEY, RYAN AND LATTANZI, L.L.C.

ATTORNEYS AT LAW

4111 E. JOPPA ROAD, SUITE 201

BALTIMORE, MARYLAND 21236

(410) 529-4600

FAX (410) 529-6146

E. SCOTT MOORE
(1926-1992)

ROBERT E. CARNEY, JR.

RICHARD E. LATTANZI

JUDITH L. HARCLERODE

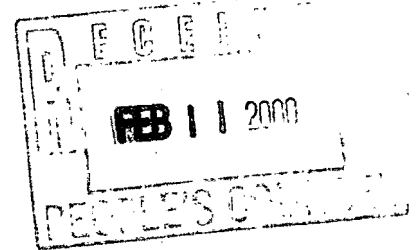
RONALD A. DECKER

ROBERT J. BRANNAN

LISA M. L. EISEMANN

February 11, 2000

Mr. Lawrence E. Schmidt, Zoning Comm.
for Baltimore County
County Courts Building, Suite 405
401 Bosley Avenue
Towson, Maryland 21204



Re: Petitions for Special Hearing and Variance
SW/Corner Holter Rd & Old Philadelphia Rd
(Lots 2, 3, 4 and 5 in Karinvale and Tract A
of Holter Property)
11th Election District - 5th Councilmanic
District
Joseph G. Holter, et ux - Petitioners
Case No. 00-161-SPHA

Dear Mr. Schmidt:

Enclosed please find original and one copy of Petitioner's Post-Hearing Memorandum for filing in the above-captioned case.

Thank you for your assistance in this matter.

Very truly yours,

Ronald A. Decker

RAD/slm

cc: Mr. John R. Clark, President
Winsome Homes, Inc.

Enclosures

RE: PETITION FOR SPECIAL HEARING
PETITION FOR VARIANCE
11341-11347 Holter Road, Corner NW/S Old
Philadelphia Rd & SW/S Holter Rd
11th Election District, 5th Councilmanic

Legal Owner: Joseph G. & Beverleigh A. Holter
Petitioner(s)

* BEFORE THE
* ZONING COMMISSIONER
* FOR
* BALTIMORE COUNTY
* Case No. 00-161-SPHA

* * * * *

ENTRY OF APPEARANCE

Please enter the appearance of the People's Counsel in the above-captioned matter. Notice should be sent of any hearing dates or other proceedings in this matter and of the passage of any preliminary or final Order.

Peter Max Zimmerman

PETER MAX ZIMMERMAN
People's Counsel for Baltimore County

Carole S. Demilio

CAROLE S. DEMILIO
Deputy People's Counsel
Old Courthouse, Room 47
400 Washington Avenue
Towson, MD 21204
(410) 887-2188

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of November, 1999 a copy of the foregoing Entry of Appearance was mailed to Ronald A. Decker, Esq., 4111 E. Joppa Road, Suite 201, Baltimore, MD 21236, attorney for Petitioners.

Peter Max Zimmerman

PETER MAX ZIMMERMAN



Petition for Special Hearing

to the Zoning Commissioner of Baltimore County

for the property located at Lots 2, 3, 4 and 5 in Karinvale
which is presently zoned DR-3.5H

This Petition shall be filed with the Department of Permits and Development Management. The undersigned, legal owner(s) of the property situate in Baltimore County and which is described in the description and plat attached hereto and made a part hereof, hereby petition for a Special Hearing under Section 500.7 of the Zoning Regulations of Baltimore County, to determine whether or not the Zoning Commissioner should approve whether or not the Director of Baltimore County Department of Permits and Development Management ("PDM") erroneously granted excess building permit authorizations to Perry Hall Farms Joint Venture under Baltimore County Zoning Regulation ("BCZR") 259.7 when Perry Hall Farms ("PHF") had exemptions available under BCZR 259.7C to meet its needs, and whether such authorizations were in violation of BCZR 259.7I because they were granted to PHF by a contract agreement prior to the existence of approved record plats.

The Petitioners have applied for authorizations for four building permits on vacant lots that are part of an approved subdivision known as Karinvale which is recorded in
(See Continuation Sheet)

Property is to be posted and advertised as prescribed by the zoning regulations.

I, or we, agree to pay expenses of above Special Hearing, advertising, posting, etc. and further agree to and are to be bounded by the zoning regulations and restrictions of Baltimore County adopted pursuant to the zoning law for Baltimore County.

I/We do solemnly declare and affirm, under the penalties of perjury, that I/we are the legal owner(s) of the property which is the subject of this Petition.

Contract Purchaser/Lessee:

Name - Type or Print _____
Signature _____
Address _____ Telephone No. _____
City _____ State _____ Zip Code _____

Attorney For Petitioner:

Ronald A. Decker, Esquire
Name - Type or Print _____
Signature Ronald A. Decker
Moore, Carney, Ryan and Lattanzi, L.L.C.
Company
4111 E. Joppa Road, Suite 201 (410) 529-4600
Address _____ Telephone No. _____
Baltimore, Maryland 21236
City _____ State _____ Zip Code _____

Legal Owner(s):

Joseph G. Holter
Name - Type or Print _____
Signature Joseph G. Holter
Beverleigh A. Holter
Name - Type or Print _____
Signature Beverleigh A. Holter
11340 Old Philadelphia Road
Address _____ Telephone No. _____
White Marsh, Maryland 21162
City _____ State _____ Zip Code _____

Representative to be Contacted: Winsome Homes, Inc.

By: _____
Name John R. Clark, President
2820 Reckord Road (410) 893-9936
Address _____ Telephone No. _____
Fallston, Maryland 21047
City _____ State _____ Zip Code _____

OFFICE USE ONLY

ESTIMATED LENGTH OF HEARING 2-3 hours

UNAVAILABLE FOR HEARING 11/16, 23, 30; 12/2, 17,
30

Case No. 00-161-SFHA

Reviewed By WJR Date 10/20/99

Petition for Special Hearing

Lots 2-5, Karinvale

(CONTINUATION SHEET)

Baltimore County Plat Book No. 71, folio 113. The request was denied on July 8, 1999 by a representative of the Director of Permits and Development Management. A copy of the letter is attached. Subsequently, counsel for the Petitioners asked the Director to grant the four authorizations because Perry Hall Farms possessed exemptions from the authorization process which they could use to meet their needs. It was argued that the Director should withdraw thirty-one authorizations from Perry Hall Farms and make them available to others who request them, first come, first served. See the attached July 21, 1999 letter to Arnold Jablon, Director, PDM.

On July 29, 1999 Mr. Jablon responded by letter in which he confirmed that thirty-one exemptions remained available for Perry Hall Farms; however, he refused to grant the requested relief because of an October 9, 1997 Amendment to Memorandum of Agreement ("Amendment to MOA") between the partners of Perry Hall Farms Joint Venture, the Schwartz Family Limited Partnership and the official designees of Baltimore County, including Mr. Jablon. The Amendment to MOA is attached hereto. The County committed all remaining area authorizations and Bean Run Subarea authorizations to Perry Hall Farms, and stated that they could be applied for by Perry Hall Farms prior to its utilizing any of its building permit exemptions.

Apparently, the Director of PDM has interpreted the right to apply for authorizations as a Baltimore County policy or regulation which requires him to issue the authorizations to Perry Hall Farms. This interpretation could lead to a conclusion that Baltimore County, Perry Hall Farms Joint Venture and the Schwartz Family Limited Partnership cooperated to prevent others from building houses in Honeygo; because all authorizations which were available on October 9, 1997 were committed to Perry Hall Farms, even if they were not needed, and they were granted contrary to BCZR 259.71 because authorizations were granted to PHF prior to the existence of an approved record plat.

Finally, the Director has erroneously adhered to a "policy" which has not been implemented as set forth in Baltimore County Code, Article VIII, Sec. 2-416, et seq. The Director relied upon the Amendment to MOA when he interpreted BCZR 259, but the terms of the Amendment of MOA as to exemptions and authorizations are nullities as to the issuance of authorizations since they were implemented without the scrutiny that is mandatory under the Baltimore County Code.

The Petitioners have complied with all requirements of the Baltimore County Code and zoning regulations, but are not being permitted to obtain building permit authorizations because thirty-one have been issued to a developer who does not need them. This is contrary to the public interest and results in the granting of a monopoly to one developer.

#161

#101



Petition for Variance

to the Zoning Commissioner of Baltimore County

for the property located at Lot 5, Karinvale - 11347 Holter Road

which is presently zoned D.R. 3.5H

This Petition shall be filed with the Office of Zoning Administration & Development Management.

The undersigned, legal owner(s) of the property situate in Baltimore County and which is described in the description and plat attached hereto and made a part hereof, hereby petition for a Variance from Section(s) 259.9.B.4.b to permit a residential building to arterial road setback of 25 feet in lieu of the required 40 feet.

of the Zoning Regulations of Baltimore County, to the Zoning Law of Baltimore County; for the following reasons: (indicate hardship or practical difficulty) The existing setback causes a practical difficulty in that it prevents flexible use of the building envelope for the ultimate construction of a house on the lot when taking into consideration adjacent lots and road configuration. Very similar concerns resulted in the granting of the same variance in Case No. 97-284-A for Lot 36, Holter Property Subdivision, which is also a corner lot across the street from the subject lot.

Property is to be posted and advertised as prescribed by Zoning Regulations.

I, or we, agree to pay expenses of above Variance advertising, posting, etc., upon filing of this petition, and further agree to and are to be bound by the zoning regulations and restrictions of Baltimore County adopted pursuant to the Zoning Law for Baltimore County.

Contract Purchaser/Lessee:

N/A

(Type or Print Name)

Signature

Address

City

State

Zipcode

Attorney for Petitioner:

Ronald A. Decker, Esquire

(Type or Print Name)

Signature

(410) 529-4600

4111 E. Joppa Road, Suite 201

Address

Phone No.

Baltimore, Maryland 21236

City

State

Zipcode

I/We do solemnly declare and affirm, under the penalties of perjury, that I/we are the legal owner(s) of the property which is the subject of this Petition.

Legal Owner(s):

Joseph G. Holter

(Type or Print Name)

Signature

Beverleigh A. Holter

(Type or Print Name)

Signature

11340 Old Philadelphia Road

Address

Phone No.

White Marsh, Maryland 21162

City

State

Zipcode

Name, Address and phone number of legal owner, contract purchaser or representative to be contacted.

Name

Address

Phone No.

OFFICE USE ONLY

ESTIMATED LENGTH OF HEARING

unavailable for Hearing

the following dates

Next Two Months

ALL

OTHER

REVIEWED BY:

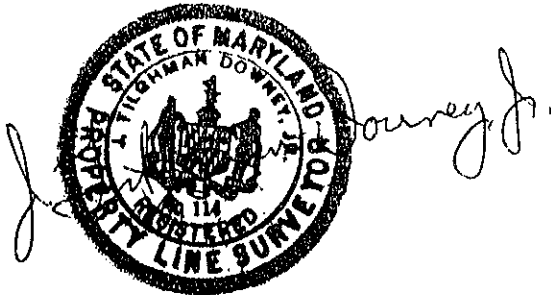
DATE

10/20/99



ZONING DESCRIPTION FOR "KARINVALE"

Beginning at a point formed by the southwest intersection of Holter Road, which is a 50' right-of-way and Old Philadelphia Road, which is a future 80' right-of-way. Being Lot Nos. 2,3,4 and 5 in the subdivision of "Karinvale" as recorded in Baltimore County Plat Book No. 71, folio 113, containing 0.774 of an acre, more or less. Also known as #11341 Holter Road, #11343 Holter Road, #11345 Holter Road and #11347 Holter Road, respectively and located in the 11th. Election District, 5th. Councilmanic District.



J. Tilghman Downey, Jr.

*M&H Development Engineers, Inc.
200 E. Joppa Road
Shell Building, Room 101
Towson, MD 21286
(410)828-9060*

161

IN RE: PETITION FOR VARIANCE
NW/S Old Philadelphia Road,
SW of Lloyd Avenue
(11350 Old Philadelphia Road)
15th Election District
7th Councilmanic District

Joseh G. Holter, Vince Holter,
and Mary H. Drescher - Petitioners

* BEFORE THE
* DEPUTY ZONING COMMISSIONER
* OF BALTIMORE COUNTY
* Case No. 97-284-A

* * * * *

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter comes before the Deputy Zoning Commissioner as a Petition for Variance for that property known as 11350 Old Philadelphia Road, located between 13 Mile Lane and Lloyd Avenue in White Marsh. The Petition was filed by the owners of the property, Joseh G. Holter, Vince Holter, and Mary H. Drescher, and the Contract Purchasers, Winsome Homes, Inc., by John R. Clark, President, through their attorney, David M. Meadows, Esquire. The Petitioners seek relief from Section 259.9.C.4 of the Baltimore County Zoning Regulations (B.C.Z.R.) to permit garage doors which face the street to be located 0 feet from the front side of the building in lieu of the required 18 feet for Lots 2-5, 7-19, 22-31, and 34-36; and from Section 259.9.B.2.c of the B.C.Z.R. to allow a side building face to arterial roadway setback of 25 feet in lieu of the required 40 feet for Lot 36. The subject property and relief sought are more particularly described on the site plan submitted which was accepted and marked into evidence as Petitioner's Exhibit 3.

Appearing at the hearing on behalf of the Petition were Mary H. Drescher, co-owner of the property, Lee Drescher, John Clark, Winsome Homes, Inc., Contract Purchaser, Vincent J. Moskunas, Professional Engineer with M & H Development Engineers, Inc., who prepared the site plan for this property, Rich Vornadore, a representative of Ryan Homes, Build-



Post-it* Fax Note	7871	Date	# of pages
To	Ron Decker	From	JOHN CLARK
Co./Dept.	MCRL	Co.	
Phone #	410-529-4600	Phone #	410-893-9986
Fax #	410-529-6146	Fax #	410-803-0611

Development Processing
County Office Building
111 West Chesapeake Avenue
Towson, Maryland 21204
pdmlandacq@co.ba.md.us

July 8, 1999

John R. Clark, President
Winsome Homes, Inc.
2820 Reckord Road
Fallston, MD 21047

Dear Mr. Clark:

RE: Permit Authorizations, "Karinvale" Subdivision, S.M. No.71, folio 113,
11th Election District

Thank you for your letter of June 10, 1999 to Arnold Jablon, Director of Permits and Development Management. This correspondence has been referred to me for reply.

Please be advised that the Department of Permits and Development Management is in receipt of the recorded plat of Karinvale and certification from your engineer verifying that the referenced subdivision has public utilities which exist in Holter Road.

In response to your request and pursuant to Sections 259.7.I and 259.7.L of the Baltimore County Zoning Regulations, your subdivision will be placed on a waiting list on file with this office until authorizations become available within the Bean Run subarea and Honeygo area.

I trust that the information set forth in this letter is sufficiently detailed and responsive to the request. If you need further information or have any questions, please do not hesitate to contact me at 410-887-3391.

Sincerely,

Mitchell J. Kellman
Planner II
Zoning Review

MJK:ggg

Come visit the County's Website at www.co.ba.md.us



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on Recycled Paper

161

MOORE, CARNEY, RYAN AND LATTANZI, L.L.C.

ATTORNEYS AT LAW

4111 E. JOPPA ROAD, SUITE 201

BALTIMORE, MARYLAND 21236

(410) 529-4600

FAX (410) 529-6146

E. SCOTT MOORE
(1926-1992)

ROBERT E. CARNEY, JR.

RICHARD E. LATTANZI

JUDITH L. HARCLERODE

RONALD A. DECKER

LISA M. L. EISEMANN

July 21, 1999

Arnold Jablon, Esquire, Director
Dept. Of Permits & Development Mgmt.
Baltimore County, Maryland
County Office Building
111 W. Chesapeake Avenue
Towson, Maryland 21204

Re: Building Permit Authorizations for Karinvale

Dear Mr. Jablon:

Winsome Homes, Inc. and Mr. and Mrs. Joseph Holter requested the issuance of four building permit allocations for lots in the Karinvale subdivision. Mr. Mitchell J. Kellman responded on your behalf, and stated that the request would be placed on a waiting list until authorizations become available within the Bean Run subarea and Honeygo area. It appears that there is no need for the request for authorizations to be withheld.

Baltimore County Zoning Regulation 259.7 C states that building permits for up to 600 dwelling units may be issued on any property, without regard to the Honeygo area authorization provisions, if there is an unexpired CRG plan that was approved prior to May 18, 1992. Subsection 259.7 D permits you to issue up to 400 authorizations in the Honeygo area, and subsection 259.7 E permits you to issue up to 400 authorizations in the Bean Run subarea. As you know, Perry Hall Farms and Karinvale are in the Bean Run subarea.

A review of Baltimore County's Honeygo Area Unit Authorizations spreadsheet, revised April 13, 1999, discloses that authorizations have been granted to Perry Hall Farms beyond what they need. A copy of the spreadsheet is attached. Perry Hall Farms has requested 1,142 authorizations. They have 600 lots that can have building permits without authorizations; therefore, they only need 542 authorizations issued by your office. They have received 573. This consists of 103 for Section 1, 158 for Section 2, and 312 for Sections 4 and 5. Thus, 31 authorizations have been issued to Perry Hall Farms which are unnecessary. This has caused a lack of authorizations available for other lot owners

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Arnold Jablon, Esquire, Director
July 20, 1999
Page Two of Two

on the waiting list may cause delays of several years, and gives Perry Hall Farms a de facto monopoly on development in the Bean Run subarea.

I respectfully request that you withdraw the issuance of 31 building permit authorizations from Perry Hall Farms, and re-issue them to persons who have made requests for them in the order in which the requests were received by your office.

I look forward to your positive respond to this request. If you feel that you are not able to comply, I would appreciate receiving an explanation of the reasons for your decision.

Thank you for your attention to this letter.

Very truly yours,



Ronald A. Decker

RAD/slm
cc: Mr. & Mrs. Joseph Holter
Mr. John Clark, President
Winsome Homes, Inc.

#161



Baltimore County
Department of Permits and
Development Management

Director's Office
County Office Building
111 West Chesapeake Avenue
Towson, Maryland 21204
410-887-3353
Fax: 410-887-5708

July 29, 1999

Ronald A. Decker, Esquire
Moore, Carney, Ryan, and Lattanzi, L.L.C.
4111 E. Joppa Road, Suite 201
Baltimore, MD 21236

Dear Mr. Decker:

RE: Building Permit Authorizations for "Karinvale", 11th Election District

Thank you for your letter of July 21, 1999 regarding building permit authorizations for the "Karinvale" subdivision. Along with your correspondence, you submitted a copy of the authorization tabulations kept on file with the Office of Permits and Development Management.

You have expressed your opinion that an increase of authorizations has been granted to Perry Hall Farms beyond what they actually need. Your assumption could be true if the Baltimore County Zoning Regulations required exemptions (for building permits) to be utilized before authorizations; however, the law does not set that requirement or practice.

Pursuant to the Amendment to Memorandum of Agreement dated October 9, 1997 between the partners of the Perry Hall Farms Joint Venture, the Schwartz Family Limited Partnership, and the official designees of Baltimore County; any or all remaining area or subarea authorizations may be applied for by Perry Hall Farms prior to Perry Hall Farms utilizing any of the building permit exemptions. A copy of this memorandum is enclosed. Since all 800 authorizations (400 from the Bean Run Subarea and 400 from the Honeygo Area) have been utilized and vested by Holter, Perry Hall Farms; and Glenside Farms, Perry Hall Farms can then draw from the 600 exemptions.

#161

Ronald A. Decker, Esquire

Page 2

July 29, 1999

After calculating Perry Hall Farm's requested building permits from the 600 exemptions (which were utilized after authorizations), 31 exemptions remain (which are not authorizations) for Perry Hall Farms.

Should you disagree with this interpretation, you may proceed to file a special hearing before the Zoning Commissioner.

Very truly yours,



for

Arnold Jablon
Director

AJ:rsj

Enclosure

101

JAN-15-99 11:46 FROM: Venable/Toussan

ID:

AMENDMENT TO MEMORANDUM OF AGREEMENT

WHEREAS, Perry Hall Farms Joint Venture ("PHF"), Schwartz Family Limited Partnership ("Schwartz"), and Baltimore County, Maryland ("County") are among the parties to a Memorandum of Agreement, dated April 21, 1997 (the "MOA");

WHEREAS, PHF, Schwartz and the County desire to amend portions of the MOA to address certain conditions contained in the MOA and to resolve other outstanding issues; and

WHEREAS, by virtue of Section 259.7.C.2 of the Baltimore County Zoning Regulations (Bill No. 40-97), up to 600 building permit exemptions are granted to properties that have an unexpired CRG plan approved prior to May 18, 1992. PHF has an unexpired vested CRG plan that was approved prior to May 18, 1992 and therefore qualifies for these exemptions (the "PHF Building Permit Exemptions").

NOW, THEREFORE, for the consideration of \$1.00 and such other good and valuable consideration exchanged, the adequacy and receipt whereof is hereby acknowledged, it is agreed as follows:

1. In order to expedite construction of the Bean Run Sewer Interceptor across the Schwartz property, Schwartz has requested and PHF hereby agrees to transfer 191 of the PHF Building Permit Exemptions from PHF to Schwartz, upon the effective date of Bill No. 126 - 97, which was introduced on October 6, 1997. Schwartz agrees to transfer back the Building Permit Exemptions upon Schwartz obtaining 191 authorizations and the vesting of those authorizations. In the event that a lesser number of authorizations is obtained, the number of exemptions to be transferred back shall be reduced accordingly. The County approves the proposed transfers.

2. PHF and Schwartz have further requested and the County has further agreed, and does hereby confirm that the 400 authorizations for the Honeygo Area Threshold Limits under Section 259.7.D.1.d of Bill No. 40-97 were originally available in addition to the 400 authorizations for the Bean Run Sub-Area Threshold Limits under Section 259.7.E.1.a (2), and that any or all remaining area or sub-area authorizations may be applied for by PHF prior to PHF utilizing any of the PHF Building Permit Exemptions.

3. Based upon paragraphs 1 and 2 above, the parties agree that the condition precedent contained in Section E.1 of the MOA has been satisfied by virtue of this Amendment, and that the County may record the easements referred to in Section B. 1 of the MOA.

4. Except as expressly provided herein, the provisions and obligations of the MOA continue to remain in full force and effect.

WHEREFORE, each of the parties have caused this document to be executed under seal by their respective duly authorized officials and representatives, dated for convenience the 1st day of October, 1997.

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WHEREFORE, each of the parties have caused this document to be executed under seal by their respective duly authorized officials and representatives, under seal, as of the date first above written.

Attest/ Witness

PERRY HALL FARMS JOINT VENTURE

By: JTL-Perry Hall Associates

Limited Partnership

By: JTL Corporation, General Partner

By: [Signature] (Seal)

David S. Chambers, President

Paul W. Richards Vice President

By: Hampton-Perry Hall Associates

Limited Partnership

By: Hampton-Perry Hall, Inc., General Partner

By: [Signature] (Seal)

Edward P. Parnes, Vice President

SCHWARTZ FAMILY LIMITED
PARTNERSHIP

By: [Signature] (Seal)

General Partner

[Signatures Continued on Following Page]

Aug-03-99 03:48P john r. clark

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JAN-15-98 11:46 FROM: Venable/Toussan

00/02/1997 10:10

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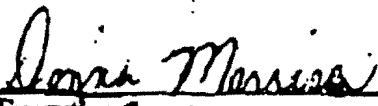
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BALTO CO LAW OFFICE

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BALTIMORE COUNTY, MARYLAND

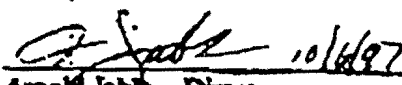

Executive Secretary

By:  (Seal)
Robin L. Churchill
Administrative Officer

Reviewed and Approved:


Charles R. Olsen, Director
Department of Public Works


Arnold F. Keller, III, Director
Office of Planning

 10/6/97
Arnold Jablon, Director
Department of Permits and Development
Management

Approved for legal form and sufficiency*
(Subject to execution by a duly authorized County
administrative official and County Council, if indicated)

 10/7/97
Office of the County Attorney

*Approval of legal form and sufficiency does not convey
approval or disapproval of substantive merits of transaction.
Approval is based upon correct documents. All modifications
and amendments require re-approval.

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