9/12/01

IN RE: PETITION FOR SPECIAL HEARING

W/S Brenbrook Drive, SW Corner of Church Lane 2nd Election District 2nd Councilmanic District (3636 Brenbrook Drive)

Antbren LLC
Petitioners

- * BEFORE THE
- * DEPUTY ZONING COMMISSIONER
- * OF BALTIMORE COUNTY
- * CASE NO. 02-057-SPH

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter comes before this Deputy Zoning Commissioner as a Petition for Special Hearing filed by the legal owners of the subject property, Anthren LLC, requesting special hearing approval to allow the sale of used automobiles in a B.M. zone. The special hearing request involves property located at 3636 Brenbrook Drive.

Appearing at the hearing on behalf of the special hearing request were Tom Markides and Stanley Kaufman, appearing on behalf of the lessee of the property, Joseph Larson, appearing on behalf of Spellman & Larson, the civil engineers who prepared the site plan of the property and Richard Rubin and Hugh Bernstein, attorneys at law, representing the Petitioners. There were no protestants or others in attendance.

Testimony and evidence indicated that the property, which is the subject of this special hearing request, consists of 2.5 acres, more or less, zoned B.M. The subject property is located on the northwest corner of the intersection of Brenbrook Drive and Church Lane, in the Randallstown area of Baltimore County. The subject property is improved with a large automobile dealership building which at this time is vacant. The history of the property, as testified to by the persons in attendance, demonstrated that the subject property has always been used as an automobile sales dealership. The Petitioners would like to continue to utilize the subject property for automobile sales which, in this instance, would be operated by Mr. Tom

Date PECEIVED FOR FILING

Markides. Mr. Markides currently owns and operates Prestige Imports which is located a short distance from this site. He has outgrown his present dealership and wishes to locate to this property which will allow him more room to operate his business. Mr. Markides primarily deals in the sale of used automobiles. However, it should be noted that the value of the used vehicles that Mr. Markides sells, in most cases, far exceeds the value and cost of new cars today. Mr. Markides deals in hi-line automobiles such as Lamborghini's, Ferraris, Mercedes, BMW's and the like. His customer base involves individuals located over the entire United States. The special hearing request filed herein is to allow Mr. Markides to operate his automobile sales business from this property which is zoned B.M.

From a practical standpoint, I am persuaded that the proposed use is appropriate for this property and neighborhood. Photographs of the site were submitted which show this particular property and the surrounding locale. In my judgment, the proposed use is consistent with the other uses in the area, and clearly will not be detrimental to the health, safety and general welfare of the surrounding locale. The property has always been used for the sale of automobiles.

The issue in this case is not so much the impact of the proposed use, but its permissibility, pursuant to the Baltimore County Zoning Regulations (B.C.Z.R.). Several sections thereof need be evaluated to consider this Petition. As noted above, the property is zoned B.M. Section 233.2 of the B.C.Z.R. itemizes those uses permitted by right in the B.M. zone. Among the uses designated as permitted by right are "automobile sales room and adjoining outdoor sales area, provided that dismantled or junked cars unfit for operation on the highways shall not be stored outdoors." It is of note that this use contains no language describing the nature of the automobiles. That is, the use does not specify whether a sales room and outdoor sales area must be for "new" vehicles or whether "used" vehicles can be sold.

Description of the Control of the Co

Historically, the Zoning Office (the Department of Permits and Development Management {DPDM}), has always construed that section to be limited to only new vehicles. That construction is based on a use designated in Section 236.4 of the B.C.Z.R., which defines the special exceptions permitted in the B.R. zones. Therein, a designated use is "a used motor vehicle outdoor sales area, separated from a sales agency building." Since this use is identified in the B.C.Z.R., the Zoning Office has opined that, when these two uses are considered in conjunction with one another, that the use designated in Section 233.2 (i.e. automobile sales room and adjoining outdoor sales area...) is for new cars, only. The reasoning is that because the use defined in Section 236.4 designates used vehicles, the absence of such language in Section 233.2 must mean that the vehicles to be sold are new.

To say the least, this interpretation endorsed by DPDM is strained. Not only does the use designated in Section 233.2 not utilize either the words "new" or "used", but the uses described in Sections 233.2 and 236.4 above are clearly different. That is, certain restrictions on the use described in Section 236.4 relate only to an outdoor lot, without a building, whereas the use defined in Section 233.2 clearly requires some structure.

Complicating the issue is the definition of "service garage", as set out in Section 101 of the B.C.Z.R. The language therein defines that use as "a garage, other than a residential garage, where motor driven vehicles are stored, equipped for operation, repaired or kept for remuneration, hire or sale." (emphasis added) Thus, the sale of motor driven vehicles is a primary component of the service garage use. Service garages are permitted by right in the B.M. zone.

In my judgment, the proper approach is to consider each petition on a case by case basis.

In reviewing the record of this case, it is my judgment that the proposed use should be permitted.

It is clear to me that Mr. Markides operates a first class used car sales facility. The photographs of his current operation and the types of vehicles that he sells clearly demonstrate this. I have no problem approving of his request to utilize this property for the sale of

automobiles.

THEREFORE, IT IS ORDERED by the Deputy Zoning Commissioner for Baltimore County this Aday of September, 2001, that the Special Hearing Request to allow the sale of used automobiles as a principal use is an automobile sales room and adjoining outdoor sales area in a B.M. zone for property located at 3636 Brenbrook Drive, be and is hereby APPROVED.

IT IS FURTHER ORDERED, that the approval of the sale of used automobiles on this property shall not act as a precedent to any other similarly zoned properties. These matters must be considered on a case by case basis which shall take into account the particular property whereupon the sale of automobiles is proposed to take place and the properties which surround that site. Consideration should also be given to the Petitioners as to the type of automobile sales operation they conduct.

IT IS FURTHER ORDERED, that any appeal of this decision must be made within thirty (30) days of the date of this Order.

TIMOTHY M. KOTROCO

DEPUTY ZONING COMMISSIONER

FOR BALTIMORE COUNTY

TMK:raj

4

a/1/74

PETITION OF JACK ANTWERPEN	*	IN THE
AND ANTBREN, LLC		
3636 Brenbrook Drive	*	
Randallstown, Maryland 21133		
	*	CIRCUIT COURT
FOR JUDICIAL REVIEW OF THE DECISION		
OF THE County Board of Appeals of	*	
Baltimore County, Old Courthouse, Room 49		
400 Washington Avenue	*	FOR
Towson, Maryland 21204		
	*	
IN THE MATTER OF THE APPLICATION		
OF JACK ANTWERPEN, LEGAL OWNER/	*	BALTIMORE COUNTY
PETITIONER FOR A SPECIAL HEARING		
ON PROPERTY LOCATED ON THE W/S	*	
BRENBROOK DRIVE, SW CORNER		
CHURCH LANE	*	Case No. C-02-10732
(3636 BRENBROOK DRIVE)		
2nd ELECTION DISTRICT	*	
2nd COUNCILMANIC DISTRICT		
Case Number 02-057-SPH	*	

NOTICE OF APPEAL

To the Clerk:

*

Please note the appeal to the Court of Special Appeals, of Petitioners, Jack Antwerpen and Antbren, LLC, from all parts of this Honorable Court's Order dated May 18, 2004 (docketed on May 24, 2004), in the above-captioned case, as well as all parts of all other orders, rulings and judgments in the above-captioned case including, but not limited to, this Court's Memorandum Opinion (docketed on October 7, 2003), which affirmed the final Opinion and Order rendered by the County Board of Appeals of Baltimore County, dated September 5, 2002.

Respectfully submitted,

Nathan D. Adler

Neuberger, Quinn, Gielen, Rubin & Gibber, P.A.

One South Street, 27th Floor Baltimore, Maryland 21202 Telephone: (410) 332-8516

Facsimile: (410) 951-6039

nda@nqgrg.com

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of June, 2004, a copy of the foregoing Notice of Appeal was mailed, first-class, postage pre-paid to Peter Max Zimmerman, Esquire and Carole S. DeMilio, Esquire, People's Counsel for Baltimore County, Old Courthouse, Room 47, 400 Washington Avenue, Towson, Maryland 21204.

Nathan D. Adler

204024

IN THE CIRCUIT COURT FOR BALTIMORE COUNTY PETITION OF: Jack Antwerpen and Anthren, LLC 3636 Brenbrook Drive Randallstown, MD 21133 FOR JUDICIAL REVIEW OF THE OPINION OF * CIVIL ACTION THE COUNTY BOARD OF APPEALS No. <u>3-C-02-10732</u> OF BALTIMORE COUNTY OLD COURTHOUSE, ROOM 49 400 WASHINGTON AVENUE TOWSON, MARYLAND 21204 IN THE MATTER OF JACK ANTWERPEN, LEGAL OWNER/ PETITIONER FOR A SPECIAL HEARING ON PROPERTY LOCATED ON THE W/S BRENBROOK DRIVE, SW CORNER CHURCH LANE (3636 BRENBROOK DRIVE) 2ND ELECTION DISTRICT

CASE NO.: 02-057-SPH

2ND COUNCILMANIC DISTRICT

PROCEEDINGS BEFORE THE ZONING COMMISSIONER AND THE BOARD OF APPEALS OF BALTIMORE COUNTY:

TO THE HONORABLE, THE JUDGE OF SAID COURT:

And now comes the County Board of Appeals of Baltimore County and, in answer to the Petition for Judicial Review directed against it in this case, herewith transmits the record of proceedings had in the above-entitled matter, consisting of the following certified copies or original papers on file in the Department of Permits and Development Management and the Board of Appeals of Baltimore County:

2002 NOV 26 A 10: 56

CLERK OF THE COUNTY COURT

ENTRIES FROM THE DOCKET OF THE BOARD APPEALS AND DEPARTMENT OF PERMITS & LICENSES OF BALTIMORE COUNTY

02-057-SPH

August 2, 2001 Petition for Special Hearing Request filed by Richard Rubin,

Esquire, on behalf of Antbren, LLC - Jack Antwerpen -

Owner, to allow the sale of used automobiles as a principal use in an automobile sales room and adjoining outdoor sales area

in a BM zone.

August 9 Notice of Zoning Hearing

August 17 Entry of Appearance filed by People's Counsel for Baltimore

County

August 28 Publication in newspaper (Jeffersonian)

September 7 ZAC Summary of Comments

September 17 Hearing Held before the Deputy Zoning Commissioner

September 18 Findings of Fact and Conclusions of Law issued by the Zoning

Commission. Petition for Special Hearing Request

APPROVED.

September 28 Notice of Appeal received from Office of People's Counsel

May 21, 2002 Appelle Brief in Support of Affirming Zoning Commissioner's

Ruling and Notice of Entry of Appearance filed by Nathan D.

Adler, Esquire, on behalf of Antbren Motor Cars, Ltd.

(Nathan D. Adler, Esquire, and Hugh M. Bernstein, Esquire,

added; Richard Rubin, Esquire – removed)

June 3 Motion to Dimiss filed by Office of People's Counsel; and

People's Counsel Response to Petitioner's Memorandum

June 6 Antbren's Opposition to Motion To Dismiss Petition For

Special Hearing And Reply To Memorandum Of The People's Counsel filed by Nathan D. Adler, Esquire, Counsel for

Petitioner.

-- Board convened for argument only on People's Counsel

Motion to Dismiss

July 10 Board convened for deliberation

Unanimous decision – Motion to Dismiss – GRANTED

September 5 Ruling on Motion to Dismiss issued by the Board of Appeals

September 24 Petition for Judicial Review filed in the Circuit Court for

Baltimore County by Nathan D. Adler, Esquire, on behalf of

Jack Antwerpen and Antbren, LLC

October 1 Certificate of Notice sent to interested parties.

November 26 Transcript of Proceedings filed.

November 26 Record of Proceedings filed in the Circuit Court for Baltimore

County.

Record of Proceedings pursuant to which said Order was entered and upon which said Board acted are hereby forwarded to the Court.

Respectfully submitted,

Theresa R. Shelton, Legal Secretary

County Board of Appeals of Baltimore County

400 Washington Avenue, Room 49 Towson, MD 21204 (410) 887-3180

c. Nathan Adler, Esquire
Hugh M. Bernstein, Esquire
Jack Antwerpen
Peter Max Zimmerman / People's Counsel for Baltimore County
Timothy Kotroco, Deputy Zoning Commissioner
Arnold Jablon, Director/PDM

*IN THE CIRCUIT COURT FOR BALTIMORE COUNTY * PETITION OF: Jack Antwerpen and Antbren, LLC × 3636 Brenbrook Drive × Randallstown, MD 21133 CIVIL ACTION FOR JUDICIAL REVIEW OF THE OPINION OF * No. 3-C-02-10732 THE COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY * OLD COURTHOUSE, ROOM 49 400 WASHINGTON AVENUE TOWSON, MARYLAND 21204 IN THE MATTER OF * JACK ANTWERPEN, LEGAL OWNER/ PETITIONER FOR A SPECIAL HEARING ON PROPERTY LOCATED ON THE W/S BRENBROOK DRIVE, SW CORNER * CHURCH LANE (3636 BRENBROOK DRIVE) 2ND ELECTION DISTRICT 2ND COUNCILMANIC DISTRICT CASE NO.: 02-057-SPH

PROCEEDINGS BEFORE THE ZONING COMMISSIONER AND THE BOARD OF APPEALS OF BALTIMORE COUNTY:

TO THE HONORABLE, THE JUDGE OF SAID COURT:

, 7 -

And now comes the County Board of Appeals of Baltimore County and, in answer to the Petition for Judicial Review directed against it in this case, herewith transmits the record of proceedings had in the above-entitled matter, consisting of the following certified copies or original papers on file in the Department of Permits and Development Management and the Board of Appeals of Baltimore County:

ENTRIES FROM THE DOCKET OF THE BOARD APPEALS AND DEPARTMENT OF PERMITS & LICENSES OF BALTIMORE COUNTY

02-057-SPH

Petition for Special Hearing Request filed by Richard Rubin, August 2, 2001 Esquire, on behalf of Antbren, LLC – Jack Antwerpen – Owner, to allow the sale of used automobiles as a principal use in an automobile sales room and adjoining outdoor sales area in a BM zone. Notice of Zoning Hearing August 9 Entry of Appearance filed by People's Counsel for Baltimore August 17 County Publication in newspaper (Jeffersonian) August 28 ZAC Summary of Comments September 7 Hearing Held before the Deputy Zoning Commissioner September 17 Findings of Fact and Conclusions of Law issued by the Zoning September 18 Commission. Petition for Special Hearing Request APPROVED. Notice of Appeal received from Office of People's Counsel September 28 Appelle Brief in Support of Affirming Zoning Commissioner's May 21, 2002 Ruling and Notice of Entry of Appearance filed by Nathan D. Adler, Esquire, on behalf of Antbren Motor Cars, Ltd. (Nathan D. Adler, Esquire, and Hugh M. Bernstein, Esquire, added; Richard Rubin, Esquire – removed) Motion to Dimiss filed by Office of People's Counsel; and June 3 People's Counsel Response to Petitioner's Memorandum Antbren's Opposition to Motion To Dismiss Petition For June 6 Special Hearing And Reply To Memorandum Of The People's Counsel filed by Nathan D. Adler, Esquire, Counsel for Petitioner. -- Board convened for argument only on People's Counsel **Motion to Dismiss** Board convened for deliberation July 10 Unanimous decision – Motion to Dismiss – GRANTED

September 5 Ruling on Motion to Dismiss issued by the Board of Appeals

September 24 Petition for Judicial Review filed in the Circuit Court for

Baltimore County by Nathan D. Adler, Esquire, on behalf of

Jack Antwerpen and Antbren, LLC

October 1 Certificate of Notice sent to interested parties.

Transcript of Proceedings filed.

Record of Proceedings filed in the Circuit Court for Baltimore

County.

Record of Proceedings pursuant to which said Order was entered and upon which said Board acted are hereby forwarded to the Court.

Respectfully submitted,

Theresa R. Shelton, Legal Secretary
County Board of Appeals of Baltimore County
400 Washington Avenue, Room 49
Towson, MD 21204 (410) 887-3180

c. Nathan Adler, Esquire
Hugh M. Bernstein, Esquire
Jack Antwerpen
Peter Max Zimmerman / People's Counsel for Baltimore County
Timothy Kotroco, Deputy Zoning Commissioner
Arnold Jablon, Director/PDM

16/1/02

IN THE CIRCUIT COURT
FOR BALTIMORE COUNTY

PETITION OF:

Jack Antwerpen and Antbren, LLC 3636 Brenbrook Drive Randallstown, MD 21133

FOR JUDICIAL REVIEW OF THE OPINION OF *
THE COUNTY BOARD OF APPEALS
OF BALTIMORE COUNTY *
OLD COURTHOUSE, ROOM 49
400 WASHINGTON AVENUE *
TOWSON, MARYLAND 21204

IN THE MATTER OF
JACK ANTWERPEN, LEGAL OWNER/
PETITIONER FOR A SPECIAL HEARING
ON PROPERTY LOCATED ON THE W/S
BRENBROOK DRIVE, SW CORNER
CHURCH LANE
(3636 BRENBROOK DRIVE)
2ND ELECTION DISTRICT
2ND COUNCILMANIC DISTRICT

CASE NO.: 02-057-SPH

CERTIFICATE OF NOTICE

CIVIL ACTION

No. 3-C-02-10732

Madam Clerk:

Pursuant to the Provisions of Rule 7-202(d) of the Maryland Rules, the County Board of Appeals of Baltimore County has given notice by mail of the filing of the Petition for Judicial Review to the representative of every party to the proceeding before it; namely:

Nathan D. Adler, Esquire

Neuberger, Quinn, Gielen, Rubin & Gibber, One South Street, 27th Floor, Baltimore, Maryland 21202-3282

Hugh M. Bernstein, Esquire

Neuberger, Quinn, Gielen, Rubin & Gibber, One South Street, 27th Floor, Baltimore, Maryland 21202-3282

Peter Max Zimmerman

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

A copy of said Notice is attached hereto and prayed that it may be made a part hereof.

Theresa R. Shelton, Legal Secretary County Board of Appeals, Room 49

Old Courthouse, 400 Washington Avenue

Towson, MD 21204 (410-887-3180)

HEREBY CERTIFY that a copy of the foregoing Certificate of Notice has been mailed to: Nathan D. Adler, Esquire, Neuberger, Quinn, Gielen, Rubin & Gibber, One South Street, 27th Floor, Baltimore, Maryland 21202-3282; Hugh M. Bernstein, Esquire, Neuberger, Quinn, Gielen, Rubin & Gibber, One South Street, 27th Floor, Baltimore, Maryland 21202-3282, Peter Max Zimmerman, People's Counsel for Baltimore County, Old Courthouse, Room 47, 400 Washington Avenue, Towson, MD 21204, this 1st day of October, 2002

Theresa R. Shelton, Legal Secretary County Board of Appeals, Room 49

Old Courthouse, 400 Washington Avenue

Towson, MD 21204 (410-887-3180)



County Board of Appeals of Baltimore County

OLD COURTHOUSE, ROOM 49 400 WASHINGTON AVENUE TOWSON, MARYLAND 21204 410-887-3180 FAX: 410-887-3182

September 30, 2002

Nathan Adler, Esquire
Hugh M. Bernstein, Esquire
Neuberger, Quinn, Gielen,
Rubin & Gibber, P.A.
One South Street, 27th Flr.
Baltimore, MD 21202-3282

RE: Circuit Court Civil Action No. 3-C-02-10732

Petition for Judicial Review

Jack Antwerpen and Anthren, LLC
3636 Brenbrook Drive, Randallstown, MD

3636 Brenbrook Drive, Randallstown, MD 21133

Case No.: 02-057-SPH

Dear Messrs. Adler and Berstein:

In accordance with the Maryland Rules, the County Board of Appeals is required to submit the record of proceedings of the petition for judicial review which you have taken to the Circuit Court for Baltimore County in the above-entitled matter within sixty days.

The cost of the transcript of the record must be paid by you. In addition, all costs incurred for certified copies of other documents necessary for the completion of the record must also be at your expense.

The cost of the transcript, plus any other documents, must be paid in time to transmit the same to the Circuit Court within sixty days, in accordance with the Maryland Rules.

Enclosed is a copy of the Certificate of Notice.

Very truly yours,

Theresa R. Shelton

Legal Secretary

/trs

Enclosure

c: Jack Antwerpen

Peter Max Zimmerman / People's Counsel for Baltimore County

Timothy Kotroco, Deputy Zoning Commissioner

Arnold Jablon, Director/PDM



County Board of Appeals of Baltimore County

OLD COURTHOUSE, ROOM 49 400 WASHINGTON AVENUE TOWSON, MARYLAND 21204 410-887-3180 FAX: 410-887-3182

September 30, 2002

Peter Max Zimmerman Office of People's Counsel Old Courthouse, Room 47 400 Washington Avenue Towson, MD 21204

> RE: Circuit Court Civil Action No. 3-C-02-10732 **Petition for Judicial Review**

Jack Antwerpen and Antbren, LLC 3636 Brenbrook Drive, Randallstown, MD 21133 Case No.: 02-057-SPH

Dear Mr. Zimmerman:

Notice is hereby given, in accordance with the Maryland Rules, that a Petition for Judicial Review was filed on September 24, 2002, in the Circuit Court for Baltimore County from the decision of the County Board of Appeals rendered in the above matter. Any party wishing to oppose the petition must file a response within 30 days after the date of this letter, pursuant to the Maryland Rules.

Please note that any documents filed in this matter, including, but not limited to, any other Petition for Judicial Review, must be filed under Civil Action No. 3-C-02-10732.

Enclosed is a copy of the Certificate of Notice.

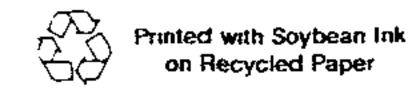
Very truly yours,

MINUS, Sletter

Legal Secretary

/trs Enclosure

> Nathan Adler, Esquire Hugh M. Bernstein, Esquire Jack Antwerpen Timothy Kotroco, Deputy Zoning Commissioner Arnold Jablon, Director/PDM



9/21/22

PETITION OF JACK ANTWERPEN	*	IN THE
AND ANTBREN, LLC		
3636 Brenbrook Drive	*	
Randallstown, Maryland 21133		
	*	CIRCUIT COURT
FOR JUDICIAL REVIEW OF THE DECISION		
OF THE County Board of Appeals of	*	16727
Baltimore County, Old Courthouse, Room 49		2-02-10732
400 Washington Avenue	*	FOR
Towson, Maryland 21204		
	*	
IN THE MATTER OF THE APPLICATION		
OF JACK ANTWERPEN, LEGAL OWNER/	*	BALTIMORE COUNTY
PETITIONER FOR A SPECIAL HEARING		
ON PROPERTY LOCATED ON THE W/S	*	
BRENBROOK DRIVE, SW CORNER		
CHURCH LANE	*	Case No.
(3636 BRENBROOK DRIVE)		
2nd ELECTION DISTRICT	*	
2nd COUNCILMANIC DISTRICT		
Case Number 02-057-SPH	*	

PETITION FOR JUDICIAL REVIEW

*

Petitioners, Jack Antwerpen and Antbren, LLC, by its undersigned counsel, respectfully seeks judicial review of the final Opinion and Order rendered by the County Board of Appeals of Baltimore County on September 5, 2002 in the above-captioned matter. A copy of the Opinion and Order is attached hereto as Exhibit 1. Petitioners were parties to the proceedings before the County Board of Appeals of Baltimore County.

2002 SEP 20 P 3: 40

BALTIMORE COUNTY

CC: atty & agency

(1)

Respectfully submitted,

Nathan D. Adler
Hugh M. Bernstein
Neuberger, Quinn, Gielen, Rubin & Gibber
One South Street, 27th Floor

Baltimore, Maryland 21202-3282

(410) 332-8550

Attorneys for Petitioner, Jack Antwerpen and Antbren LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this day of September, 2002, copy of the foregoing

Petition for Judicial Review was hand-delivered to:

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

and

Ms. Kathleen C. Bianco
Administrator
County Board of Appeals for Baltimore County
Old Courthouse
Room 49
400 Washington Avenue
Towson, Maryland 21204

Hugh M Bernstein

LAW OFFICES

NEUBERGER, QUINN, GIELEN, RUBIN & GIBBER, P.A.

27TH FLOOR

ONE SOUTH STREET

BALTIMORE, MARYLAND 21202-3282

(410) 332-8550

HUGH M. BERNSTEIN (410) 332-8592 (FAX NO.) (410) 951-6022

September 24, 2002

HAND DELIVERED

Clerk's Office Circuit Court for Baltimore County 401 Bosley Avenue Towson, Maryland 21204

Re:

Petition of Jack Antwerpen and Antbren, LLC

Dear Clerk:

Enclosed for filing in the above-captioned matter please find a Petition For Judicial Review in the above-captioned matter, along with our firm's check in the amount of \$110.00 to cover filing fees, and a Civil Case Information Report.

I have also enclosed an additional copy of the Petition and Civil Case Information Report for date-stamping. Thank you for your assistance in this matter.

Very truly yours,

Hugh M. Bernstein

HMB:cj Enclosure

cc:

Peter Max Zimmerman, Esquire

Ms. Kathleen C. Bianco

173250

7/5/02

IN THE MATTER OF
THE APPLICATION OF
JACK ANTWERPEN – LEGAL OWNER /
PETITIONER FOR A SPECIAL HEARING
ON PROPERTY LOCATED ON THE W/S
BRENBROOK DRIVE, SW CORNER
CHURCH LANE
(3636 BRENBROOK DRIVE)
2ND ELECTION DISTRICT
2ND COUNCILMANIC DISTRICT

- BEFORE THE
- * COUNTY BOARD OF APPEALS
- * OF
- * BALTIMORE COUNTY
- * Case No. 02-057-SPH

RULING ON MOTION TO DISMISS

On September 18,2001, Deputy Zoning Commissioner Timothy Kotroco granted a special hearing request by Antbren, LLC to allow the sale of used automobiles as a principal use in an automobile sales room and adjoining outdoor sales area in a B.M. zone for property located at 3636 Brenbrook Drive, which is owned by the Petitioner, Antbren. On September 28,2 001, People's Counsel for Baltimore County entered an appeal before this Board from the decision of the Deputy Zoning Commissioner.

On June 2, 2002, People's Counsel filed a Motion to Dismiss the Petition filed by Petitioners. The basis of the Motion was that, subsequent to the Order of the Deputy Zoning Commissioner, a bill which had been passed on September 4, 2001, Bill 71-01, became effective on October 19, 2001. This bill permits used car sales in a B.M. zone only by special exception and under a Planned Unit Development-Commercial (PUD-C). Petitioners filed a Brief in support of the Zoning Commissioner's ruling as well as a Brief in opposition to the Motion to Dismiss of People's Counsel. People's Counsel filed a response to Petitioners' Memorandum in Opposition to Motion to Dismiss, and oral argument was held before the Board on June 6, 2002. Nathan D. Adler, Esquire, and Hugh M. Bernstein, Esquire, and NEUBERGER, QUINN, GIELEN, RUBIN AND GIBBER, P.A., represented the Petitioners /Appellees (Antbren, LLC). People's Counsel, Peter M. Zimmerman, and Deputy People's Counsel, Carole Demilio,

appeared on behalf of the Office of People's Counsel. The Board publicly deliberated this matter on July 10, 2002.

Facts

Anthren, LLC, owns property at 3636 Brenbrook Drive in Baltimore County. The property is zoned B.M. (Business Major). The property contains both an automobile showroom and an adjoining outdoor sales area. It is currently vacant, but in the past the property was used only as a new car dealership.

Anthren intends to operate a used car dealership known as 3636 LLC, DBA Prestige

Imports at the site. Prestige currently operates at another site, but the business has outgrown the site. Prestige's inventory consists generally of cars manufactured by such makers as

Lamborghini, Lotus, Lexis, and Mercedes, which are less than 3 years old. The average sale price is \$30,000.00 per car or more. The current location is on Liberty Road in Baltimore

County approximately 1 mile from the proposed new site.

Section 233.2 of the *Baltimore County Zoning Regulations* (BCZR) sets forth those uses permitted by right in the B.M. zone. Among the uses designated as permitted by right are "automobile sales room and adjoining outdoor sales area, providing that the dismantled or junked cars unfit for operation on the highway shall not be stored outdoors." Historically, the zoning office (the Department of Permits and Development Management [DPDM]) has always construed that section to be limited to only new vehicles. This is based upon the use designated in § 236.4 of the BCZR which defines the special exceptions permitted in the B.R. zone. Among those special exceptions as a designated use is "a used motor vehicle outdoor sales area, separated from a sales agency building." This caused the zoning office to oppose the application

•

of Antbren, LLC for the used car operation in a B.M. zone. Antbren then filed a Petition for Special Hearing to obtain a ruling by the Deputy Zoning Commissioner.

In support of its position, Petitioners cite, among other cases, a case decided by this Board In The Matter Of The Application of G.D. & R.L., Ltd., Case No. 99-324-SPH, in which this Board held that a used car operation was allowed in a B.M. zone since the language of the current legislation did not appear to restrict the automobile dealership to a new car operation. That case was appealed by People's Counsel to the Circuit Court for Baltimore County in Civil Action No. 3-C-00-3846. The Court returned the case to the Board for clarification. The Board affirmed its earlier decision on March 25, 2001, and the case is back before the Circuit Court.

On September 4, 2001, the County Council passed Bill 71-01, which repealed § 233.2, Automobile Salesroom, and § 440.4C, and reenacted them with amendments to allow a new automobile sales facility and adjoining outdoor sales area in a B.M. zone and allowing, by special exception, a used motor vehicle outdoor sales area as part of a PUD-C in the B.M. zone. This legislation became effective October 19, 2001.

Petitioners contend that, under the rules of statutory construction, the "cardinal rule of statutory construction is to ascertain and effectuate the intention of the legislature." (Oaks v. Conners, 339 Md. 24, 35 [1995]) Petitioners contend that the plain language of the statute prior to the amendments made it clear that the reference to "automobile salesroom" was not to "new" automobile salesroom but referred to both new and used automobiles. They cite this Board's decision in G.D. & R.L., Ltd., supra, based on the same reasoning. However, the Department of Permits and Development Management (DPDM) always construed the section to be limited only to new vehicles. This obviously was the position of the County Council until the decision of the Board in G.D. & R.L. The notes to the Baltimore County Council Agenda of September 4, 2001

indicate that the Council intended to clarify the types of automobile sales facilities permitted in the business zones in the County. The notes indicate that "under current law, new automobile sales rooms are permitted in the B.M. (Business, Major) zones of the County as a matter of right while used car sales are permitted by special exception in the B.R. (Business, Roadside) zones of the County. In order to clarify the position of the Council and to allow used motor vehicle sales in the B.M. zone by special exception as part of a Commercial Planned Unit Development (PUD-C), the Council passed Bill 71-01.

Petitioners contend that they never sought a special exception but only a declaration by the Deputy Zoning Commissioner that what they were proposing to do was in conformance with the law. They contend that as long as the Zoning Commissioner was right, that is, that the operation of a used automobile facility was in conformity with the zoning regulations as of the time that the use began, Antwerpen's use is permissible, even after the amendment to the zoning regulations, because it became a lawful nonconforming use. They cite *Mayor and City Council of Baltimore v. Dembo, Inc.*, 123 Md.App. 527, 531 and *Lone v. Montgomery County*, 85 Md.App. 477, 496 (1991). These cases stand for the proposition that "a lawful nonconforming use is established if a property owner can demonstrate that before and at the time of the adoption of the zoning ordinance, he was using his land in a then-lawful manner for a use which by later legislation became non-permitted."

In support of its position, People's Counsel quotes Powell et al v. Calvert County, Md., et al, 368 Md. 400 (2002) and Marzullo v. Kahl, 366 Md. 158 (2001). They cite the language of Judge Cathell in the Powell case in which he stated, "In instances where there is ongoing litigation, there is no different 'rule of vested rights' for special exceptions and the like. Until all necessary approvals, including all final Court approvals, are obtained nothing can vest or even

begin to vest...In the case sub judice, a special exception approval, whose validity is being litigated, is not finally valid until all litigation concerning the special exception is final. Persons proceeding under it prior to finality are not 'vesting' rights; they are commencing at 'their own risk' so that they will be required to undo what they have done if they ultimately fail in the litigation process."

Decision

The Board has considered the Memoranda of Petitioners and People's Counsel, as well as the oral argument held on June 6, 2002. While the Board did interpret § 233.2 of the BCZR to allow the operation of a used car dealership in a B.M. zone in the G.D. & R.L. case (Case No. 99-324-SPH), that decision was contrary to a long-standing interpretation of County agencies. In addition, the decision was appealed by People's Counsel to the Circuit Court for Baltimore County and said appeal is still pending; therefore, the decision cannot be interpreted as being the law in effect at the time that the Petitioners sought clarification before the Zoning Commissioner. It is the Board's understanding that the building at 36 Brenbrook Drive is still unoccupied, and therefore the Petitioners cannot claim a nonconforming use since no utilization has been made of the building at this time for used car sales. However, even if the used car operation had been begun at the property, the Board would still find that the Petitioners acted at their own risk, and that, because of the pending appeal, they had no vested right in the operation of a used car dealership at that site.

The Board relies on the decision of Judge Cathell in the *Powell* case (*supra*) and finds that the new law effective October 19, 2001, in which the Council amended § 233.2 and § 440.4, is controlling. The appeal of Deputy Zoning Commissioner Kotroco's decision by the People's

Counsel brought the matter before the Board in a de novo posture. His ruling could not be effective pending the decision by this Board.

ORDER

THEREFORE, IT IS THIS 5th day of September , 2002 by the

County Board of Appeals of Baltimore County

ORDERED that Motion to Dismiss of People's Counsel is GRANTED; and it is further ORDERED that the Petition for Special Hearing is DISMISSED without prejudice to enable the Petitioners to file for relief under the current law.

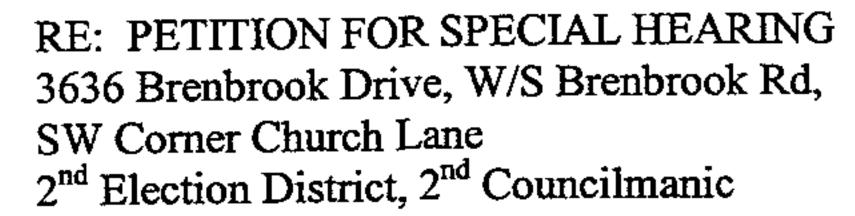
Any petition for judicial review from this decision must be made in accordance with Rule 7-201 through Rule 7-210 of the *Maryland Rules*.

COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY

Lawrence S. Wescott, Chairman

Margaret Worrall

Richard K. Irish



Legal Owner: Antbren LLC Petitioner(s)

- BEFORE THE
- COUNTY BOARD OF APPEALS
- * **FOR**
- BALTIMORE COUNTY
- Case No. 02-57-SPH

ANTBREN'S OPPOSITION TO MOTION TO DISMISS PETITION FOR SPECIAL HEARING AND REPLY TO MEMORANDUM OF THE PEOPLE'S COUNSEL

Appellee, Antbren Motor Cars, Ltd. ("Antbren"), by its undersigned attorneys, files this Opposition to Motion to Dismiss Petition for Special Hearing and Reply to Memorandum of the People's Counsel in the above-captioned case.

INTRODUCTION

People's Counsel argues that an amendment to the Zoning Code which became effective after the decision of the Zoning Commissioner but before this hearing is the applicable regulation under which this appeal must be decided. People's Counsel's argument is based upon the application of inapplicable law. People's Counsel relies upon cases holding that where a party obtains a special exception to the Zoning Code to do what would otherwise be impermissible under the Code and the law permitting the granting of such a special exception is amended during the pendency of an appeal, the amended law applies.

People's Counsel's argument, however, has no applicability to this case. This case does not involve the granting of a special exception. Rather, in this case, the Zoning Commissioner held that Antbren's use of the Property was a permissible use under the Code as it stood on the date of the original hearing and at the time Antbren undertook this use. The

Commissioner held that Antbren's use of the property was a lawful conforming use prior to the amendment of the Zoning Code. Thus, once the Code was amended, Antbren's use of the Property became a lawful non-conforming use which, under both the Zoning Code and the Due Process Clauses of the Maryland and Federal Constitutions, is permitted to continue. In other words, Antbren has a vested right to continue using the Property in the lawful manner it had before the amendment.

Thus, the only question before this Board is whether the Zoning Commissioner correctly held that Antbren's use of the Property was a permitted use under the Zoning Code as it stood at the time of the Commissioner's decision. If that decision was correct, Antbren had a vested right to continue using it in that fashion even after the amendment to the Code. If the Zoning Commissioner's decision was not correct, Antbren was never permitted to use the Property in this manner, either before or after the amendment. As discussed in Antbren's prior Memorandum, the Zoning Commissioner's decision was correct (as this Honorable Board has previously held in another, unrelated case) and Antbren is entitled to continue to use the Property in this manner.

FACTS

As described more fully in Antbren's prior memorandum, Antbren owns property at 3636 Brenbrook Road in Baltimore County, Maryland on which a high-end used automobile dealership operates (the "Property"). The Property is zoned B.M. – Business Major.

In preparing to open for business, it came to Anthren's attention that the Zoning Office was taking the position that a used automobile dealership was not permitted in a B.M. Zone. Because the Zoning Regulations in effect at that time clearly permitted automobile dealerships of all types (new or used) in a B.M. Zone, Anthren sought a special hearing to have



the use declared to be conforming with the Zoning Code. As discussed previously, the Zoning Code at that time provided that the following is a permitted use in a B.M. zone:

Automobile sales room and adjoining outdoor sales area, provided that dismantled or junked cars unfit for operations on the highways shall not be stored outdoors.

BCZR § 233.2 (prior to October 19, 2001). The Code at that time did not distinguish between new and used automobiles.

On September 11, 2001, the special hearing was held before Deputy Zoning Commissioner Timothy M. Kotroco. In his Opinion, Deputy Zoning Commissioner Kotroco stated that:

The issue in this case is not so much the impact of the proposed use, but its permissibility, pursuant to the Baltimore County Zoning Regulations (B.C.Z.R.). Several sections thereof need be evaluated to consider this Petition. As noted above, the property is zoned B.M. Section 233.2 of the B.C.Z.R. itemizes those uses permitted by right in the B.M. zone. Among the uses designated as permitted by right are "automobile sales room and adjoining outdoor sales area, provided that dismantled or junked cars unfit for operation on the highways shall not be stored outdoors." It is of note that this use contains no language describing the nature of the automobiles. That is, the use does not specify whether a sales room and outdoor sales area must be for "new" vehicles or whether "used" vehicles can be sold.

(See Decision of Deputy Zoning Commissioner Timothy M. Kotroco at 2.) Deputy Zoning Commissioner Kotroco found the County's interpretation "strained" "[t]o say the least." (Id. at 3.) Thus, he held that Antbren's use of the Property was permissible under the then-in-force Baltimore County Zoning Regulations. <u>Id.</u> at 4.

¹ In addition, Deputy Commissioner Kotroco found that the operation was "a first class used car sales facility" which "is appropriate for this property and neighborhood." (Id. at 2, 4.)





People's Counsel appealed the ruling. Subsequent to that appeal, the abovequoted portion of the Zoning Code was amended to disallow used automobile facilities in B.M. Zones. The amended code provides that only the following is a permissible use:

New Automobile sales facility and adjoining outdoor sales area, provided that dismantled or junked cares unfit for operation on the highway may not be stored outdoors.

BCZR § 233.2 This amendment did not become effective until October 19, 2001.2

ARGUMENT

People's Counsel argues that the amended version of BCZR § 233.2 applies and, therefore, regardless of Deputy Commissioner Kotroco's ruling, Anthren must obtain a special exception to operate a used automobile dealership on the Property. People's Counsel relies upon cases such as Powell v. Calvert County, Maryland, 368 Md. 400 (2002), and O'Donnell v. Bassler, 289 Md. 501 (1981), which hold that in the context of a special exception proceeding, if the Zoning Code changes after the special exception is granted, but before the appeal of that special exception is heard, the law in effect at the date of the appeal is the applicable law. These cases hold that while the appeal time for contesting the granting of such a special exception remains unexpired the owner of the property cannot obtain a vested right in any privilege granted by the special exception and the legislature is free to change the law to eliminate that privilege.

Thus, for example, in O'Donnell the property owner wished to operate a small commercial airfield on his property. This was a use permitted *only* by special exception. Thus, the owner applied for such and was granted a special exception. Various opponents then appealed that granting. While the appeal was pending, the law was amended such that special

² Under the amended version of the Zoning Code, a used automobile dealership would still be allowed in a B.M. Zone if a special exception is obtained.

exceptions for airfields were no longer permissible in the relevant area. The Court of Appeals held that the amended law applied because while the special exception (which was the only reason the owner would have been allowed to operate an airfield) was still subject to appeal, the owner could obtain no vested right to use the property as permitted by the special exception. Rather, knowing that the special exception was still subject to invalidation on appeal, the owner can only proceed at his own risk.

Similarly, in <u>Powell</u>, the owner of property wished to park excavation equipment on his property. As in <u>O'Donnell</u> this was permissible *only* by obtaining a special exception to the Zoning Code. After the owner was granted the special exception, an appeal was taken of that granting. While that appeal was pending, the Zoning Code was changed so that a special exception was not allowed for "outdoor storage in connection with commercial and/or industrial uses" in the relevant zone. Again, the Court of Appeals held that the amended law applied on appeal because the owner cannot obtain a vested right in the privilege granted by a special exception until all appeals times have expired.

Here, however, Antbren was never seeking a special exception. This was not a case like <u>Powell</u> or <u>O'Donnell</u> where Antbren needed special permission to operate. Thus, these cases have no applicability whatsoever. Here, Antbren sought only a *declaration* that what it was doing was in conformity with the Zoning Code because it realized there was some disagreement over this issue.³ The Zoning Commissioner agreed that Antbren's use was permissible under the Code. As long as the Zoning Commissioner was right -i.e. that the operation of the used automobile facility was in conformity with the Zoning Code as of the time

³Pursuant to § 500.7 of the Baltimore County Zoning Regulations, the Zoning Commissioner has the power to hold a hearing "to determine any rights whatsoever of any [interested] person in any property in Baltimore County insofar as they are affected by these regulations." That is all that Anthren sought here – a determination of its rights under the Code, not a special permission or special exception to do anything.

that use began - Antbren's use in that manner is permissible even after an amendment to the Zoning Code because upon amendment, the use became a lawful non-conforming use.

A lawful nonconforming use is established if a property owner can demonstrate that before and at the time of the adoption of the zoning ordinance, he was using his land in a then-lawful manner for a use which by later legislation became non-permitted.

Mayor & City Council of Baltimore v. Dembo, Inc., 123 Md. App. 527, 531 (1998); see also Lone v. Montgomery County, 85 Md. App. 477, 496 (1991).

The effect of a lawful nonconforming use is that as long as the use was permitted prior to the Code's amendment, the use may continue even if the amendment would no longer allow such a use. As the Baltimore County Zoning Code specifically provides:

A nonconforming use (as defined in Section 101) may continue except as otherwise specifically provided in these regulations, provided that upon any change from such nonconforming use to any other use whatsoever, or any abandonment or discontinuance of such nonconforming use for a period of one year or more, the right to continue or resume such nonconforming use shall terminate.

BCZR § 104.1.

The reason for this rule is that, as Maryland Courts have repeatedly recognized, once an owner begins using his property in a manner permitted by the Zoning Code (as opposed to one where special permission or exception from the Code is needed) that owner obtains a vested right to continue using the property in that manner and it is unconstitutional for a subsequent amendment to prevent him for such a continuation. The Court of Special Appeal recently explained this principle in <u>Dembo</u>:

One of the earliest Maryland cases discussing the right of a property owner with a legal use to continue that use after passage of a new zoning ordinance making the use non-permissible is Amereihn v. Kotras, 194 Md. 591, 71 A.2d 865 (1950). In

Amereihn, the Court of Appeals explained the rationale for recognizing nonconforming uses as follows:

If a property is used for a factory, and thereafter the neighborhood in which it is located is zoned residential, if such regulations applied to the factory it would cease to exist, and the zoning regulation would have the effect of confiscating such property and destroying a vested right therein of the owner. Manifestly this cannot be done, because it would amount to a confiscation of the property, and nonconforming use is a vested right and entitled to constitutional protection. Id, at 601, 71 A.2d at 865. Since 1950, Maryland courts have developed and refined the law regarding the respective rights of zoning authorities and owners of properties qualifying as nonconforming uses. See, e.g. Board of Zoning Appeals v. Meyer, 207 Md. 389, 114 A.2d 626 (1955) (holding that when a property owner at time of adoption of last comprehensive zoning was using land for use which by new legislative action became non-permitted, the owner has a lawful nonconforming use).

<u>Dembo</u>, 123 Md. App. at 537-38.

Thus, if the Zoning Commissioner's ruling that the use of the Property prior to October 19, 2001, constituted a lawful use under the then-applicable Zoning Code, then upon the amendment's becoming effective on October 19, 2001, the use became a lawful non-conforming use which the October 19, 2001 amendment could not constitutionally affect. If, on the other hand, Deputy Commissioner Kotroco's ruling was incorrect, then the use was not lawful prior to the amendment and remained unlawful after the amendment. Thus, it is only the correctness of that ruling that is before this Board. As described in Antbren's prior memo, that decision was absolutely correct. Indeed, as People's Counsel points out in its own memorandum, this very Board has already held that § 233.2 -- as it stood at the time of the ruling and at the time of Antbren's use of the property -- applied to both new and used automobile dealership.

CONCLUSION

People's Counsel's argument that the amended version of the Zoning Code are applicable to this hearing are misplaced. People's Counsel tries to apply the law relevant to appealing special exceptions to this case where there is no special exception at issue. In the hearing below, no special exception was sought or granted. Rather, what was determined was that Antbren's use of the Property complied with the then-existing zoning laws. Because that ruling was correct, upon the adoption of the amended version of the Zoning Code, Antbren's use became a lawful nonconforming use which those amendments could not make unlawful.

Respectfully submitted,

Nathan D. Adler

Hugh M. Bernstein

Neuberger, Quinn, Gielen, Rubin & Gibber, P.A.

One South Street, 27th Floor

Baltimore, Maryland 21202

(410) 332-8550

Attorneys for Petitioner, Antbren, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of June, 2002, a copy of the foregoing Brief was hand delivered to Peter Max Zimmerman, Esquire and Carole S. DeMilio, Esquire, People's Counsel for Baltimore County, Old Courthouse, Room 47, 400 Washington Avenue, Towson, Maryland 21204.

Nathan D. Adler

168072

RE: PETITION FOR SPECIAL HEARING 3636 Brenbrook Drive, W/S Brenbrook Rd, SW Corner Church Lane 2nd Election District, 2nd Councilmanic

Legal Owner: Antbren LLC Petitioner(s)

- BEFORE THE
- * ZONING COMMISSIONER

02 JU

- * FOR
- * BALTIMORE COUNTY
- * Case No. 02-57-SPH

PEOPLE'S COUNSEL RESPONSE TO PETITIONER'S MEMORANDUM

Procedural Background

Petitioner "Antbren, LLC (hereafter "Antbren") attempted to operate a used car business in a B.M. (Business Major) Zone. The zoning office opposed, holding to its long standing application of BCZR that a used car business is only permitted by special exception in the B.R. (Business Roadside) zone. Antbren filed a Petition for Special hearing to try to bend the law to its use.

The Deputy Zoning Commissioner granted the Petition and an appeal was immediately filed by People's Counsel.

Antbren filed a pre-hearing Memorandum with the County Board of Appeals ("CBA"). Its Memorandum addresses self-serving interpretations of definitions in BCZR 101 that are no longer applicable to the case. Its Memorandum fails to address Bill 71-01 which now applies to the instant case. Under Bill 71-01, a used car dealership is permitted in the B.M. zone by special exception and in accordance with Planned Unit Development–Commercial (PUD-C) requirements. It is not permitted by right in the B.M. zone.

People's Counsel opposes the Petition for Special Hearing for following reasons:

- Bill 71-01, codified in BCZR 233.2 and 440.4.C., enacted September 4, 2001 and effective 45 days hence, applies to the instant case under long-standing case law, more recently reiterated by the Court of Appeals in <u>Powell vs.</u>
 <u>Calvert County</u>, 368 Md. 400 (2002).
- 2. Anthren's interpretation of the prior law, however rendered obsolete to the instant case by Bill-71-01, nonetheless, is erroneous.

This Memorandum, which is submitted in conjunction with a Motion to Dismiss, addresses application of the newly enacted statutes referred to in paragraph 1 above.

In light of the current applicable law, the issues in Antbren's Memorandum are superfluous. However, in the interest of thoroughness, People's Counsel, in response thereto, attaches its Memorandum to the Circuit Court for Baltimore County in Case No. 3-C-00-3846. The decision in that case is pending.

In A Zoning Case, An Appeal To The CBA Is A New Case

In Baltimore County, an appeal to the CBA is *de novo*. See Baltimore County Charter, Article VI, Section 603 which states:

"... All hearings held by the board [County Board of Appeals] shall be heard *de novo*, unless otherwise provided by legislative act of the County Council, ... "

The CSA discussed a *de novo* proceeding in Mayer v. Montgomery County, 143 Md.App. 261 (2002):

A de novo proceeding is one that starts fresh, on a clean slate, without regard to prior proceedings and determinations. A true trial de novo... puts all parties back at 'square one' to begin again just as if the

adjudication appealed from had never occurred." [Citations omitted.] *Id.* at 281.

The Court also relied on the language in <u>Boehm v. Anne Arundel County</u>, 54 Md.App. 497 (1983):

"A trial or hearing 'de novo' means trying the matter anew the same as if it had not been heard before and as if no decision had been previously rendered. Thus, it is said that where a statute provides that an appeal shall be heard de novo such a hearing is in no sense a review of the hearing previously held." Id.

The decision of the ZC or DZC is obsolete once an appeal is filed with the CBA. Even if a permit is issued, development is at the risk of the developer.¹

Short of appellant's dismissing its appeal, the developer cannot proceed without an Opinion and Order of the CBA. Even in a case where the parties come to an agreement on the issues, the CBA must perform its duties and make findings of facts and law in a written opinion.

A New Law Applies To Cases Pending On Appeal

The Maryland appellate courts have consistently held that newly enacted zoning statutes apply to cases in the appeal process. It is our contention that Antbren must apply for a special exception and development under PUD-C to operate a used car business at this site.

Judge Rita Davidson, in O'Donnell v. Bassler, 289 Md. 501, 425 A2d 1003 (1981), stated:

¹ In recognition of the *de novo* status, the zoning office will not issue a permit to a developer upon a favorable decision by the ZC until the appeal period has expired.

"The central question presented is whether the law in effect at the time that a special exception use permit was granted or the law in effect at the time of the appeal is applicable." *Id.* 1007. "... An appellate court must apply the law in effect at the time a case is decided, provided that its application does not affect intervening vested rights." [Cases omitted.] Generally, in order to obtain a vested right in an existing zoning use that will be protected against a subsequent change in a zoning ordinance prohibiting that use, the owner must initially obtain a valid permit. Additionally, in reliance upon the valid permit, the owner must make a substantial beginning in construction and in committing the land to the permitted use before the change in the zoning ordinance has occurred. [Citations omitted.] The issuance of a permit that is invalidated upon direct judicial review, however, creates not vested right in an owner. [Citations omitted.]. . . More particularly, an owner who obtains a permit and begins construction before the expiration of an appeal period proceeds at his own risk." [Citations omitted.]

Antbren ignores the current law. The chronology is as follows:

- September 4, 2001 Bill 71-01 passed by the County Council.
- October 19, 2001 Effective Date of Bill.
- September 11, 2001 Antbren's Hearing before Deputy Zoning Commissioner ("DZC").
- September 18, 2001 Opinion and Order of DZC.
- September 28, 2001 People's Counsel files de novo appeal to CBA.

The purpose of Bill 71-01 is found in the attached "Baltimore County Council

Notes to the Agenda Legislative Session 2001" and excerpted here:

"Bill 71-01 proposes to amend the Zoning Regulations in order to clarify the types of automobile sales facilities permitted in the business zones of the County. Under current law, new automobile sales rooms are permitted in the BM (Business, Major) zones of the County as a matter of right, while used car sales are permitted by special exception in the BR (Business, Roadside) zones of the County. A recent decision by the County Board of Appeals has caused some confusion in this area. The Board has recently held that since there is no definition of the term 'automobile sales

room' in the Zoning Regulations, both new and used_car sales facilities are permitted as a matter of right in the BM zones of the County. . . . "
[Underlined emphasis added – all parenthesis in original.]

The bill also amends Section 440.4.C in order to permit a used motor vehicle sales area (currently permitted by special exception only in the BR zones) in the BM zones by special exception if it is part of a commercial planned unit development (PUD-C)."

The County Council disagreed with the CBA's interpretation that used car sales are permitted by right in the BM zone. With passage of Bill 71-01, the Council made it clear it prohibits the use in a BM zone by right (the relief requested in the instant case), and allows restricted use by Special Exception and PUD-C.

Anthren's interpretation was rejected by the Council when it stone walled the CBA's decision in the prior case. If the Council intended all along to permit a used car business by right in the B.M. zone, it need not have changed the law, and the CBA decision would have applied to the instant and future cases, unless reversed on appeal.

Moreover, Bill 71-01 is intended to apply to all pending cases. Occasionally, the Council will insert a "grandfather" provision to apply the prior law for petitions already in the pipeline. (See, for example, BCZR 1A08.3.C). Here, it is apparent the Council never intended the interpretation rendered by the CBA in the aforementioned pending Circuit Court case to apply, and would not hazard application of that reasoning to any pending or future case.

The Court Of Appeals Reaffirmed That Newly Enacted Zoning Statutes <u>Apply To Pending Litigation</u>

Judge Cathell of the Court of Appeals issued his opinion January 10, 2002,

reversing the Court of Special Appeals ("CSA") in <u>Powell, et al.</u> v. Calvert County, <u>Maryland et al.</u>, 368 Md. 400 (2002). The Court of Appeals applied the new law prohibiting the use, and held the Petitioner did not obtain vested rights.

* .

A brief review of the facts in <u>Powell</u> is helpful. The property owner filed a special exception for outdoor storage of construction equipment and materials, which was granted by the Board of Appeals. Opponents filed an appeal to the Circuit Court, which affirmed the Board. Opponents appealed to the CSA.

While the appeal was pending, the County Commissioners amended the zoning law to prohibit, in that zone, a special exception for "outdoor storage in connection with commercial and/or industrial uses" The CSA ruled that "because the state of the record prevents us from concluding whether there was substantial evidence supporting the Board's decision, we shall reverse the Circuit Court's judgment and instruct the court to vacate the Board's decision and remand the case to the Board for further proceedings." ² *Id.* 405. The Circuit Court duly vacated the Board's decision and remanded to the Board for further proceedings.

At the second go-around, the Board again granted the special exception. The Circuit Court affirmed in part, and further held vested rights prohibited application of the new law prohibiting the use. The Circuit Court also remanded in part on a factual issue unrelated to the new statute. The opponents did not wait for the second remand and took an immediate appeal to the CSA.

² The concern pertained to a site visit and how and when it was conducted.

The CSA (137 Md. 425 (2001)) affirmed the decisions of the Board and the Circuit Court granting the special exception. The CSA held that since the special exception was granted lawfully before a change in the law, the use was "vested," and the new law prohibiting the use did not apply. The Court of Appeals (CA) took interest in the CSA's reasoning and granted certiorari.

The Court of Appeals reversed the CSA and Judge Cathell succinctly explained again the law of vested rights at pages 409-410:

"In instances where there is ongoing litigation, there is no different 'rule of vested rights' for special exceptions and the like. Until all necessary approvals, including all final court approvals, are obtained nothing can vest or even begin to vest. . . . In the case sub justice, a special exception approval, whose validity is being litigated, is not finally valid until all litigation concerning the special exception is final. Persons proceeding under it prior to finality are not 'vesting' rights; they are commencing at 'their own risk' so that they will be required to undo what they have done if they ultimately fail in the litigation process."

The <u>Powell</u> case also refers to the language on vested rights in <u>Marzullo v Kahl</u>, 366 Md. 158 (2001) (a zoning case originating in Baltimore County) in reaffirming the consistent interpretation of vested rights by Maryland appellate courts.

Judge Cathell goes on to reject the CSA's opinion "that the special exception granted to petitioner by the Board was never declared 'unlawful or invalid.' It makes no difference. It was still in litigation. Even if the special exception was never 'declared' invalid, it was never a final valid special exception, which would qualify respondent to begin to vest rights in a zoning approval. As stated, *supra*, upon the Board's original granting of the special exception to respondent,

petitioners sought judicial review. Therefore, the 'valid permit' never took final effect because the litigation dealing with the special exception had not reached its final conclusion..." *Id.* 415.

A special exception lawfully granted at the time may be found illegal under a new law that takes effect while an appeal is pending. Vested rights do not apply until there is a final decision that cannot be appealed.

People's Counsel's position that Bill 71-01 applies to the instant case is even more compelling than the facts in <u>Powell</u>. Here, the case reached only the first administrative hearing level. A timely appeal was filed. The appeal before the CBA is *de novo*. It is tantamount to a new case.

Once an appeal is filed, the decision of the zoning commissioner is obsolete.

Conclusion

For the reasons stated herein, Antbren's Petition for Special Hearing should be dismissed without prejudice, or, in the alternative, remanded to the Deputy Zoning Commissioner for amendment, to conform to BCZR 233 and 440, after proper review by the Baltimore County agencies.

For the reasons stated herein, the interpretation of BCZR proposed by Antbren is erroneous as a matter of law, both on its face, and in light of Bill-71-01, including the Council's notes and legislative history.

PETER MAX ZIMMERMAN

People's Counsel for Baltimore County

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

CERTIFICATE OF SERVICE

CAROLE S. DEMILIC

BALTIMORE COUNTY COUNCIL NOTES TO THE AGENDA LEGISLATIVE SESSION 2001

Issued: August 23, 2001

Work Session: August 28, 2001

Legislative Day No. <u>16</u> September 4, 2001

TRUE COPY TEST:

THOMAS J. PEDDICORD, JR.

LEGISLATIVE COUNSEL/SECRETARY

The accompanying notes are compiled from unaudited information provided by the Administration and other sources.



Council

Bill 71-01 - Councilmembers Olszewski, Kamenetz and McIntire - Zoning Regs. - Automobile Sales

Bill 71-01 proposes to amend the Zoning Regulations in order to clarify the types of automobile sales facilities permitted in the business zones of the County.

Under current law, new automobile sales rooms are permitted in the BM (Business, Major) zones of the County as a matter of right, while used car sales are permitted by special exception in the BR (Business, Roadside) zones of the County. A recent decision by the County Board of Appeals has caused some confusion in this area. The Board has recently held that since there is no definition of the term "automobile sales room" in the Zoning Regulations, both new and used car sales facilities are permitted as a matter of right in the BM zones.

Bill 71-01 proposes to amend Section 233.2 of the Zoning Regulations (uses permitted by right in the BM zones of the County) by clarifying that <u>new</u> automobile sales facilities are permitted as a matter of right in the BM zones of the County.

The bill also amends Section 440.4.C. in order to permit a used motor vehicle outdoor sales area (currently permitted by special exception only in the BR zones) in the BM zones by special exception if it is part of a commercial planned unit development (PUD-C).

PETITION OF PEOPLE'S COUNSEL FOR IN THE **BALTIMORE COUNTY** FOR JUDICIAL REVIEW OF THE DECISION OF THE COUNTY BOARD CIRCUIT COURT OF APPEALS OF BALTIMORE COUNTY IN THE MATTER OF THE APPLICATION OF G.D. & R.L., LTD. FOR A SPECIAL HEARING FOR for property located on the N/S Baltimore National Pike, 478' East of centerline Johnny Cake Road (5538 Baltimore National Pike) 1st Election District, 1st Councilmanic District **BALTIMORE COUNTY** Rase No. 99-324-SPH before the County Board of Appeals of Baltimore County Civil No. 3-C-00-3846

PEOPLE'S COUNSEL'S MEMORANDUM ON REVIEW OF THE COUNTY BOARD OF APPEALS' "CLARIFICATION ON REMAND"

People's Counsel submits this memorandum to assist in judicial review of the County Board of Appeals (CBA) March 26, 2001 clarification in response to this Court's December 20, 2000 remand Order. The remand called for the CBA to analyze and decide whether the proposed facility qualifies as an "automobile sales room under the BCZR 233.2 listing of permitted uses in the Business Major Zone. It also required the CBA specifically to determine whether the "automobile sales room" listing includes used as well as new cars.

The CBA held an evidentiary hearing on February 14, 2001 to provide an opportunity for additional evidence and argument bearing on the Court's questions.

Gary Dickson, the principal of G.D. & R.L., and Carl Richards, Baltimore County Zoning Supervisor, testified at the hearing Provided additional description and detail 01 MAY 25 PM 3: 27

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about the operation, including photographs. Richards reviewed the history of the zoning office's practice and interpretation of the permissibility of used car operations under County zoning law, with particular focus on the Court's questions. The transcript of this hearing is hereafter denoted as Transcript II.

The CBA subsequently deliberated the matter and issued its opinion, which ended with the following conclusions set forth in the Order on pages 8-9 of its opinion reaffirming its earlier decision to approve the use:

- 1. "[T]hat the Board accepts Webster's Third International Dictionary of the English Language, Unabridged, definition of 'salesroom' as 'salesroom, also saleroom, a place where goods are displayed for sale;"
- 2. "[T]hat the term 'automobile sales room' as found in § 233 of the *Baltimore County Zoning Regulations* applies both to used automobile sales and new vehicle sales, provided there is an 'automobile sales room and adjoining outdoor sales area;' and
- 3. "[F]or the reasons as stated above, that Petitioner has met the requirements of the Baltimore County Zoning Regulations."

People's Counsel submits that the CBA Opinion and Order is again legally flawed.

In brief, the CBA's view that BCZR 233.2 embraces used as well as new car sales conflicts with the intent, context, interrelationship, and structure of the Business Zones, particularly the "used motor vehicle outdoor sales area, separated from sales agency building" special exception listing under the B.R. zone. At the very least, since the CBA recognized an "interpretative question" (Opinion, page 7, last paragraph), the CBA

should have respected the longstanding zoning office practice, which in 1992 was enshrined and published in the County Zoning Policy Manual, Sec. 270, authorized and included under the Code of County Zoning Regulations (Code Sec. 2-416, et seq.)

With respect to the automobile "sales room" determination, we agree with the CBA's use of the Webster's Dictionary definition (which we supplied). Based, however, on the undisputed physical facts, the CBA stretched the definition beyond the breaking point to find that Petitioner's proposal qualifies. While the CBA purported to make a **factual finding** on this matter, which ordinarily is subject to a deferential standard of review, the CBA actually arrived at an errant **legal conclusion**, based on the undisputed material physical facts.

Relevant Baltimore County Zoning Regulations

BCZR 102.1: "No land shall be used or occupied and no building or structure shall be erected, altered, located, or used except in conformity with these regulations."

BCZR 233.2 (B.M. Zone permitted use by right listing): "Automobile sales room and adjoining outdoor sales area, provided that dismantled or junked cars shall not be stored outdoors."

BCZR 236.4 (B.R. Zone special exception listing): "Used motor vehicle outdoor sales area, separated from sales agency building."

I. The New Car/Used Car Issue

A. Discussion of the Remand Proceeding and CBA "Clarification"

This is purely a legal issue, with the dimension here that there the evidence describes the longstanding administrative practice, interpretation, and published

manual/regulation. In this regard, Carl Richards' testimony is found at pages 33-45 of Transcript II.

Mr. Richards observed that the relevant regulations have been in place since 1955, and provided copies of the 1955 and subsequent publications. He began working in the office in 1966, and shortly thereafter acquired knowledge of the office's interpretation and practice:

"A. ... I think, even before I read it in the regulations, I can remember being taught that used cars were only permitted in the B.R. by special exception, and that's exactly what the regulations said, used car lot, and that's the way we were taught; that new car agencies could be located in B.M. and adjacent to that facility you could have used cars in conjunction with a franchise dealer in B.M., but a used car dealer by itself had to be located in a B.R. zone with a special exception." T.II, 36.

Richards recalled no previous case where the office's practice was challenged. T. II, 37.

Richards also observed, as to the meaning of "sales room":

"A. The sales room we would look at synonymous with the new car dealership, a franchise dealer."

"A. Because the...typically... used car is inherently not a sales building. You don't have a display inside typically of used cars.

So, we never really thought, when it says separate from sales agency [BCZR 236.4], I think in the regulations we consider that the dealership, that wording, to mean it was a dealership, and the used car lot permitted by special exception when it says separated."

Our interpretation is it's not part of the new car operation. It's a business by itself." T. II, 40-41.

Mr. Richards repeated that the wording has been the same since 1955, and that, with respect to the relationship between BCZR 233.2 and 236.4:

"A. ... We have always interpreted the sales agency building as being the franchise dealer where used cars would be permitted in the B.M. as part of that operation, but separate from that operation requiring a special exception."

"Q. Coming back to what Judge Fader focused on, again, the words automobile sales room and adjoining outdoor sales area, in Section 233.2, correspondingly, what is your office's specific understanding or practice with respect to automobile sales room?"

"A. It's a franchise dealer." T. II, 41.

Mr. Richards then reviewed the Chart on page 2-89 of the 1992 Zoning Policy Manual, which indicates the distinction between "automobile sales, new and used" permitted in the B.M. zone and "automobile sales, used cars only" permitted in the B.R. zone alone by special exception. He explained that this was done "... reflecting the office practice." T. II, 44. (As previously noted, the Policy Manual is prepared by the Department of Permits and Development Management — which includes the zoning office — and submitted to the County Council for review under the authority of Code Sec. 26-135. It then becomes part of the Code of County Regulations.)

Nevertheless, the CBA declared the 35-year zoning office practice to be in the category of "bureaucratic abuses or interpretation of the rules, regulations, that are inconsistent with the facts of the case." Opinion, page 5. It downplayed the chart in the Policy Manual as a "quick guide" despite its review and implicit approval by the County Council and its publication and general usage.

The CBA ultimately rejected the longstanding regulatory practice and published interpretation with this statement:

"It would have been a very easy matter for the County Council to have eliminated the problem by simply stating 'new' Automobile Sales Room in the

statute. They chose not to do so, which creates the interpretative question. Where there is doubt or confusion, the public is entitled to a favorable and reasonable interpretation that the statute includes both new and used automobiles and not simply 'inferences' drawn by the zoning officials. Where confusion and ambiguity exists, it is fundamental law that construction must go against the drafter of the regulation. The citizens of Baltimore County are entitled to know exactly how the regulation applies. It should not be a guessing game. In the instant case, they are entitled to read the statute as it is... and, there is no distinguishment between 'new' or 'used' cars." Opinion, pages 7-8.

The CBA's legal reasoning here is flawed, gratuitous, and misleading:

- 1) First of all, there was no "problem." Since the 1960s, the zoning office had implemented its reasonable interpretation and practice, without objection, and then incorporated it in the published Policy Manual, again without objection. There was never a "problem" until the Petitioner here created one by trying to bend the law to its use.
- 2) Secondly, it is inadequate to say that the Council could have "eliminated the problem" by inserting "new" into BCZR 233.2. Almost any piece of legislation may arguably be redrafted, refined, improved, or sharpened in some way. The object nevertheless is to discern the legislative intent based on the statute as enacted, and its context, history, and practice. Here, inserting the word "new" could actually inject a different problem because it might imply that new car sales rooms would be permitted, but without the customarily accessory used car adjuncts which accompany them. The CBA's drafting solution thus generates another kind of problem.
- 3) Thirdly, in concluding that where there is "doubt or confusion, the public is entitled to a favorable and reasonable interpretation," the CBA leaps to the

unwarranted assumption that "favorable to the public" means favorable to the Petitioner. That is wrong. If there is a problem the object is to discern the legislative intent, regardless of who is favored. Indeed, the zoning office interpretation here does serve the discernible public interest in controlling and limiting the proliferation of used car dealerships.

- 4) Fourthly, the CBA's follow-up statement that the existence of "confusion and ambiguity" brings into play the "fundamental law that construction must go against the drafter" is unsupported and illogical. The County Council, the representative body of government, is the drafter. The object is to determine the Council's intent, not to "go against" it.
- 5) Fifthly, there was no guessing game here. For over three decades, citizens had access to the zoning office to resolve questions of interpretation. It is part of the function of administrative agencies to interpret the statutes they administer in a variety of ways. Here, the previously unchallenged practice received a more formal imprimatur in the published Policy Manual. The CBA's decision here was, in this light, unfair to the members of the public who were subject to the longstanding practice and policy for many years.
- 6) Sixthly, the charge of unfairness is especially hollow because, while this litigation was pending, the Petitioner sought B.R. zoning in the year 2000 comprehensive zoning process. This would have placed Petitioner in position to obtain a special exception. But the County Council made a legislative decision to deny this request.

In contrast to the CBA's flawed reasoning, we presented legal arguments which the CBA disregarded. They are found in our earlier memoranda and, for the sake of convenience, are repeated in condensed form here:

B. Principles of Statutory Interpretation

The goal of statutory construction is to discern legislative purpose through review of language, history, and context. It comprises all relevant parts or sections of the legislation. It may involve pertinent canons of statutory construction.

In <u>Kaczorowski v. Baltimore</u>, 309 Md. 505, 513-16 (1987), the Court stated that legislation "... usually has some objective, goal, or purpose. It seeks to remedy some evil, to advance some interest, to attain some end." 309 Md., at 513. Judge Adkins wrote:

"Moreover, despite Kaczorowski's pleas that we examine the trees so closely that we do not see the forest, the plain-meaning rule does not force us to read legislative provisions in rote fashion and in isolation. What we are engaged in is the divination of legislative purpose or goal... The 'meaning of the plainest language' is controlled by the context in which it appears." 309 Md., at 514.

He referred to Justice Holmes' concept that "the general purpose is a more important aid than any rule which grammar or formal logic may lay down." *Ibid.* He gave examples where legislative history was critical to proper interpretation.

"The purpose, in short, determined in light of the statute's context, is the key. And that purpose becomes the context within which we apply the plain-meaning rule. Thus 'results that are unreasonable, illogical or inconsistent with common sense should be avoided... with the real legislative intention prevailing over the intention indicated by the literal meaning." 309 Md., at 516.

In Baltimore County Coalition Against Unfair Taxes v. Baltimore County, 321

Md. 184, 203-04 (1990), the Court wrote:

"Thus, we have said that a statute must be construed in context, because the meaning of the 'plainest language may be governed by the context in which it appears.'... In this regard, words in a statute must be read in a way that advances the legislative policy involved.... Courts may, therefore, consider not only the literal or usual meaning of those words, but their meaning and effect in the context in which the words were used, and in light of the setting, the objectives, and purpose of the enactment.... Moreover, in such circumstances, courts may consider the consequences that may result from one meaning rather than another, with real intent prevailing over literal intent."

Similarly, in Comptroller v. Jameson, 332 Md. 723, 733 (1993), the Court said:

"In addition, we look to the context surrounding the enactment of a statute to determine the intention of the legislature. For example, we recently said:

'When we pursue the context of statutory language, we are not limited to the words of the statute as they are printed in the Annotated Code. We may and often must consider other "external manifestations" or "persuasive evidence," including a bill's title and function paragraphs, amendments that occurred as it passed through the legislature, its relationship to earlier and subsequent legislation, and other material that fairly bears on the fundamental issue of legislative purpose or goal, which becomes the context within which we read the particular language before us in a given case."

As the Court stated concisely in <u>Stanford v. Maryland Police Training</u>, 346 Md. 374, 380 (1997):

"The statutory language is not read in isolation, but 'in light of the full context in which [it] appear[s], and in light of external manifestations of intent or general purpose available through other evidence."

See also Porter v. Bayliner, 349 Md. 609, 617 (1998).

In assessing context, moreover, a court "... will not read any part of a statute to be superfluous." Polomski v. Baltimore, 344 Md. 70, 83 (1996). In Montgomery County v. Buckman, 333 Md. 516, 523-4 (1994), the Court employed this rule to differentiate between two types of service-connected disability retirements and refused to fold one into the other. In County Commissioners v. Bell Atlantic, 346 Md. 160 (1997), the rule applied to determine the rights of public utilities under the Miss Utility Act.

Even where language is clear, it is helpful to review history. Here, the Zoning Office practice, embodied in the Policy Manual, reinforces the linguistic analysis below which shows the proposed outdoor used car display and sales area is permitted only by special exception in the B.R. zone. The practice of the Office of Planning corroborates and reinforces the understanding. This is not a case of bureaucratic abuse.

C. Permitted Uses under the BCZR

BCZR 102.1 states:

"No land shall be used or occupied and no building or structure shall be erected, altered, located, or used except in conformity with these regulations."

Each zoning classification includes a list of uses permitted by right and by special exception. The special exception uses are subject to hearing and review under BCZR 502.1.

In <u>Kowalski v. Lamar</u>, 25 Md.App. 493 (1975), Judge Rita Davidson reviewed the structure of BCZR zoning use classifications. She wrote:

"Any use other than those permitted and being carried on as of right or by special exception is prohibited." 25 Md.App., at 498.

D. The Structure and Language of the Business Zones

In 1955, the County Council comprehensively revised the zoning regulations and created the three main business zones still in force today: Business-Local, Business-Major, and Business-Roadside. BCZR 230, 233, 236. These zones are cumulative in their enumeration of permitted uses. BCZR 233.1, 236.1. The B.M. Zone incorporates all B.L. Zone uses, and adds its owns listing. The B.R. Zone, in turn, incorporates B.L. and B.M. and adds still another layer of uses. The B.R. Zone is thus the most intense or permissive of these zones.

The B.L. Zone lists as uses permitted by right, "Automobile accessory shop" and "Automobile parking lot" and, by special exception, subject to BCZR 270 and 502, "Fuel Service Station," "Garage, Service," and "Carwash." BCZR 230.9, 230.13. The B.M. Zone adds by right "Automobile sales room and adjoining outdoor sales area...," and designates "Garage, service" as permitted uses by right. BCZR 233.2. It also explicitly repeats the "Fuel Service Station" special exception, although this seems unnecessary. 233.4.

The B.R. zone in BCZR 236.4 reaffirms the "Fuel Service Station" and "Carwash" special exception uses, and goes on to add these new special exception uses: "Bus Terminal," "Theatre, drive-in," and the use most critical here:

"Used motor vehicle outdoor sales area, separated from sales agency building."

BCZR 236.4 also identifies these uses as subject to BCZR 270 and 502.

The diversity of automotive uses reflects the particularity of the Council's delineation of Business Zone uses. The Council, in its wisdom, plainly allocated outdoor used car sales areas to the B.R. zone only. These traditionally involved outdoor lots with small sales offices. They differ from "automobile sales rooms," which traditionally display new cars. They are "separate from sales agency buildings" which house franchised new car dealerships.

While some used car facilities with sales display rooms have appeared in the 1990s, the traditional outdoor lot which was standard in 1955 is still the prevailing mode. The proposed GD&RL used car lot is of the traditional type.

In sum, the overall structure and allocation of uses reflect the Council's choice to disallow used car lots in the B.M. zone. If viewed in isolation, it might be arguable that "automobile sales room and adjoining sales area" use extends to pure used car lots. But the specific identification of outdoor used motor vehicle sales areas contradicts such an argument and removes any doubt. To fold used car lots into "automobile sales room and adjoining sales areas" would render the more restrictive B.R. zone special exception provision superfluous.

The Court of Appeals faced a comparable question in Smith v. Miller, 249 Md. 390 (1968). Miller, the property owner, operated a sawmill, a permitted use on M-2 (general industrial) zoned land in Harford County. He sought, however, to move to land zoned A-1 (agricultural) and sought a conditional use, equivalent to a special exception. The Board of Appeals allowed the petition, on the basis that the proposal fit under the broad definition of "Processing of dairy products and farm products, riding stables,

kennels,..." Judge Singley described the reasoning, which parallels the argument here, at 249 Md. 393:

"The logic adopted by the Board is simple; timber is a farm product; a sawmill processes it; therefore, Mr. Miller is entitled to build a sawmill in an agricultural district."

The Court of Appeals reversed. It found that the Board's interpretation "... would open the county's agricultural district to any industrial development remotely connected with the processing of dairy and farm products without limitation..." *Ibid.* Significantly, Judge Singley continued (249 Md., 393-94), it:

"... would make meaningless the provision of the Ordinance which attempts to confine sawmills, flour and grain mills, grain drying and poultry feed manufacturing, meat packing, pickle, sauerkraut or sausage manufacturing, poultry slaughterhouses and vinegar manufacturing to a general industrial district."

The Court then discussed St. Clair v. Colonial Pipeline, 235 Md. 578 (1964), where the pipeline company sought conditional use approval of above-ground storage facilities for petroleum products in an agricultural district. The Board accepted the contention that this was a permitted conditional use under the rubric of "public utility structures and properties." In reversing, the Court underlined that above-ground storage of petroleum products was allowed as a conditional use only in the M-2 zone, and not in any other zone. The petitioner could not avoid or circumvent this specific intent by going to the more generally permitted "public utility" use. Judge Horney went on:

"The zoning ordinance does not specify the type of buildings classifiable as 'public utility structures,' but whatever the term was intended to embrace, it clearly does not include above ground petroleum storage facilities, and we so hold." 249 Md., at 394.

Subsequently, in <u>Arundel Supply Corp. v. Cason</u>, 265 Md. 371 (1972), Arundel argued that washing, screening, and batching sand and gravel fit within the scope of the permitted "gravel pit" use in the residential zone. Judge McWilliams wrote to reject this contention, and emphasized the special exception available in the industrial zone:

"The plausibility of what we have said is enhanced by the fact that under the 1949 ordinance washing, screening and batching required a highly restrictive special exception."

Indeed, in the Kowalski case, *supra*, the Court of Special Appeals rejected the idea that commercial fishing was a permitted accessory use in the Rural Deferred Planning Zone. Judge Davidson noted that some of the uses in question — berthing, launching, and maintenance of boats — might be allowed by special exception as a "boat yard" or "marina."

In sum, where a use is specifically identified and delineated in a zoning classification, especially by special exception, it is improper to slide it into a general use category in a more highly protected zone. Otherwise, it would subvert the purpose of the zoning scheme, and render the particular use delineation meaningless and nugatory.

E. Consistent Agency Practice; The Policy Manual

Carl Richards clarified, reinforced, and extended John Lewis' previous testimony as to zoning office understanding and practice which regards used car facilities as allowed only in the B.R. by special exception. The zoning office reasoning tracks the statutory construction argument above. It is both unfair and contrary to the case law for the CBA to cast the zoning office practice aside as a bureaucratic abuse.

The zoning office is the frontline agency responsible for implementation. As such, "... its interpretation of the provisions of the... Act is entitled to deference if it is 'based on a permissible construction of the statute." <u>Sugarloaf Citizens v. Maryland</u>

<u>Department of Environment</u>, 344 Md. 271, 313 (1996).

In Sugarloaf, Judge Eldridge cited Chevron v. Natural Resource Defense Council, 467 U.S. 837, 843-44 (1984). The Supreme Court followed Chevron in sustaining another agency interpretation in National Credit Union Administration v. First National Bank & Trust Co., 522 U.S. 479, 499 (1998). The U.S. Court of Appeals has cited Chevron and given deference to a variety of agency interpretations. Gatlin Oil Co. v. U.S., 169 F.2d 207, 210 (4th Cir. 1999); Branch Banking & Trust Co. v. F.D.I.C., 172 F.3d 317, 318 (4th Cir. 1999).

Recently, the Supreme Court relied on <u>Chevron</u> in approving agency interpretations of the Americans with Disabilities Act. <u>Bragdon v. Abbott</u>, 524 U.S. 624, 642 (1998). Then, in <u>Olmstead v. L.C. ex. rel. Zimring</u>, 119 S.Ct. 2176, 2186 (1999), the Court cited from <u>Bragdon</u>:

"It is enough to observe that the well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."

Here, as previously noted, the Council must review the Zoning Policy Manual. While the Table is a guide, it is approved by the Council. Unless the Manual is clearly inconsistent with the Zoning Regulations, it is entitled to great weight.

The Council is thus familiar with Zoning Office policy and practice. So, when the Council engages in comprehensive rezoning, one of its assumptions is that used car lots

are narrowly designated and limited to the B.R. zone. The Council has enacted the 1992, 1996, and 2000 comprehensive zoning ordinances with awareness of the Manual it had reviewed.

F. Summary

The CBA engaged in flawed reasoning to arrive at a faulty legal conclusion with respect to analysis of BCZR Sections 233.2 and 236.4. It disregarded the applicable principles of statutory construction presented here.

II. The "Sales Room" Issue

A. Background

We submitted, and the CBA accepted, the Webster's Third New International Dictionary definition for "salesroom." It applies by the terms of BCZR 101. In our letter to the CBA dated January 17, 2001, we argued:

"Judge Fader asks the meaning of the term 'automobile sales room' within the B.M. zone listing at issue. Does it intend a showroom or display area, or does it simply involve an office where there may be conversation and handling of transactional work?

If it means a show or display area, which better fits the common usage of the language, then GD & RL does not qualify. In this connection, we note that just about every sales business has some office area, and it is not necessary to give it a separate zoning description.

On the other hand, if all it requires is an office area of some kind, then every used car operation would qualify. This is illogical as a matter of language usage. It also goes against the Board's statement that its opinion should not be understood to embrace used car lots generally. Indeed, that would render superfluous the B.R. zone special exception for used car operations.

In order to test our argument, we reviewed Webster's Third New International Dictionary. Pursuant to BCZR Sec. 101, this is the

authoritative source for definitions of words not specifically defined in that section.

We found that the definition of 'salesroom' is: 'a place where goods are displayed for sale: SHOWROOM; esp: an auction room.' Correspondingly, the definition of 'showroom' is: '1) a room where merchandise is exposed for sale or where samples are displayed; 2) a room where a show is exhibited.'

Our further review of West's <u>Words and Phrases</u>, Volume 39 discloses that, under 'showroom' there is the following item: 'where use clause in lease provided for a "showroom" for automobiles, the term salesroom was implicit in the clause.' (Citation omitted). ...

It is thus clear beyond doubt that the word 'salesroom' is synonymous with 'showroom.' Because GD & RL's proposal lacks any showroom or room where goods are displayed for sale, or otherwise exposed or exhibited, the Petition fails. We also refer the Board to our summary of Gary Dickson's testimony on pages 1 to 3 of our Reply Memorandum, which confirms that the plans do not include a salesroom."

Dickson had admitted in the earlier hearing on December 8, 1999:

"A. We have a repair facility, three bays, and parking for people to come in and walk around a car and really see a car." T. I, 48.

"But, you know, we are going to have cars being repaired there too, and at the same time I don't believe in walking to a used car lot and have somebody move three cars to look at one." T. I, 48.

"Q. What exactly is your proposed use of this property?"

"A. To repair cars and for a used car lot." T. I, 52.

At the February 14, 2001 hearing, he answered in the affirmative that this testimony was still correct. T. II, 28-30.

B. New Testimony and Findings of Fact

Despite this testimony which tellingly omits any description of a sales room,

Petitioner focused at the remand hearing on his a sales office, a bulletin board with

photographs, a window between the office and the first of the three-bay garage, and the

opportunity from time to time for customers to view selected cars inside one of the bays.

The CBA described Gary Dickson's additional testimony as follows at pages 2-3 of the

Clarification:

"The site offers the sale of used cars and auto repair services. Mr. Dickson opined that he services what he sells. He holds a Department of Motor Vehicles (DMV) license for the sale of used cars and repairs made on the premises. There are three repair 'bays' on the site... [P]hotos, reviewed by the Board, reflect cars for sale on the outside lot, and there is an 18-foot by 15-foot sales room inside of the building with tables, chairs, computers, and other office equipment. There was a picture of Mr. Dickson's personal office, a bulletin board inside the premises demonstrating the cars for sale on the lot, a picture window from the sales office looking into the first bay from a 5-foot by 5-foot window facing the first bay, four photos reflecting cars in the first bay area looking from the first bay into the office, and two pictures looking from the sales room window into the lot. Mr. Dickson opined that from the showboard indicating those cars for sale, a customer can select a car that he/she is interested in; and the car can be brought into the premises for further examination. He explained that in the used car business customers are interested in viewing the car on the bay lift to examine the underbody and ask questions from the salesman or mechanic. The first bay closest to the sales room window is generally left open for this purpose, although it can be used for general repair work. The inside office is used to relate the history of the vehicle, and perform any required paperwork necessary to consummate the sale. Mr. Dickson indicated that at any given time between 20 and 25 used cars are for sale on the premises.

On cross-examination by Mr. Zimmerman, the witness indicated that 95 percent of his usual cars come from dealers, with the oldest being '88' or '89' models. At night, three of the newer cars are brought inside. Two of the three bays are equipped for service; one is just for washing cars. The first bay was equipped for service. The first bay closest to the window was

used to examine any used car before it was sold to the customer. Mr. Dickson stated there was one full-time sales person on the lot, in addition to himself if needed. He generally works, however, at his service station up the street."

C. The CBA's Conclusion; Its Legal Defects

Based upon these findings of fact, and accepting the Webster's Dictionary definition described earlier, the CBA arrived on page 6 at its decision that the facility was an "automobile sales room and adjoining outdoor sales area."

The CBA found the presence of a "sales room and showroom" based on:

- 1. "There is an area replete with desk, chairs, computers, and other business fixtures which are necessary to complete the paperwork of selling and buying a used car." Page 6.
- 2. Compared with 1955, there are innovations and "a different style of 'showmanship," including "an adjoining outdoor sales area' of relatively recent vintage;" a bay where cars can be inspected by customers and are "visible from the viewing area via the glass partition within the confines of the building." Pages 6-7.
- 3. "While noting that a 'showroom' is one normally accustomed in a 'new' car dealership, there is a 'showroom' present where photos are displayed; and a viewing area on the site where the cars can be viewed on an individual basis; and the customer is provided the opportunity to inspect the underside of the vehicle, along with the salesman and a mechanic if that is necessary." Page 7. Upon these findings, the CBA concluded on page 7:

"The Board concludes that within the Webster definition of a showroom, goods may be displayed in many formats. For example, real estate properties are frequently 'displayed' in photographs or computer fashion within the real estate office. The actual goods themselves may or may not be present. In this case, the photos of the cars are on display. The actual cars can be displayed on bay one of the premises. The massive changes in the marketing approach require that what may have been applicable in 1955 may not be relevant today. The Board finds, as fact, the method of both selling the vehicles and displaying the vehicles satisfy the requirements of § 233.2."

D. Analysis of the CBA's Findings and Conclusions

Despite the CBA's characterization of its conclusion as a finding of fact, the CBA has actually framed a legal conclusion around undisputed physical facts. If that legal conclusion proves incorrect, the decision must be reversed. Even if we describe it as a mixed issue of law and fact, there is a limit to the CBA's discretion, especially in its legal interpretation and use of language.

Here, we are dealing essentially with a language problem. The rule of law depends on integrity and consistency in the use of the English language. Whatever deference may be accorded to an agency's findings, an agency may not call something "white" which is black or "afternoon" which is evening. There is a boundary to every legal principle and to the proper use of the English language to describe a set of facts.

Let us keep in mind the Webster's Dictionary definition accepted by the CBA: "Salesroom, also saleroom, a place where goods are displayed for sale." The more complete definition was given in our January 17, 2001 letter:

"a place where goods are displayed for sale: SHOWROOM; esp: an auction room." Correspondingly, the definition of "showroom" is: "1) a room where merchandise is exposed for sale or where samples are displayed; 2) a room where a show is exhibited."

Let us also keep in mind that we are dealing here with an outdoor used car lot with twenty-five cars typically on the lot. Clearly, the outdoor lot is the main display area.

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The first prong, nevertheless, for the CBA's justification of its "sales room and showroom" conclusion is the sales office with a bulletin board of "display" photographs, as in a real estate office. This does not withstand scrutiny. A photographic display is simply not a display of goods, merchandise, or samples, as those terms are used in everyday language. No one refers to a real estate office as a "salesroom" or "showroom" on the basis of a display of photographs. Rather, the term refers to rooms where actual goods are displayed, as in new car showrooms or, for another example, furniture showrooms. To illustrate, no one would call a sales office with photographs of furniture items a "showroom." In the same vein, the CBA's logic would wrongly imply that an internet website is a "showroom."

The second prong of the CBA's justification is the first service bay, where cars may be brought for inspection on the underside or viewed through a glass partition in the office. This also does not withstand scrutiny. A bay is a bay. It is not a room. Rooms typically have four walls, not three walls and a door. A sample definition from the Funk & Wagnalls Standard Encyclopedic Dictionary (1972) includes this:

"room... 2. A space for occupancy or use enclosed on all sides, as in a building."

A "bay," on the other hand, includes the following:

"bay... 1. Archit. a. a bay window b. a principal part of division of a structure. 2. Any opening or recess in a wall..."

To put it simply, a bay is not a room. In the context of automobile land use, it is also not a display area. Rather, it is a service area. Indeed, it is usually considered dangerous for customers to enter service bays. Putting that aside, if Petitioner wishes to allow customers to get a look at the underside of a used car, that still does not turn a service bay into a showroom. Nor does it turn a sales office into a showroom when a customer takes a peek into the bay through a glass partition (an activity which seems superfluous since the customer may examine the car on the outside lot).

The third prong of the CBA's justification is that times have changed, and that massive changes in marketing require a new approach or understanding of the law. There is nothing in the record to suggest that the Petitioner's facility represents a 21st century "new wave" in the marketing of used cars. Rather, this is a typical outdoor used car lot where Petitioner is trying to fit the zoning category with a variety of arguments. If there are "massive changes" in the marketing of used cars which justify a change in approach to used car facilities, it is up to the County Council to consider and pass new legislation. Had the Council been particularly sympathetic to Petitioner's argument and situation, it could have approved the B.R. zoning he requested in the Comprehensive Map Process. If that had happened, this litigation would have ended, and Petitioner might have an approved special exception by now. But, unless and until the Council passes new legislation to allow Petitioner's use in the B.M. zone, this office is bound to defend existing law.

For all these reasons, the CBA's finding that Petitioner has an "automobile sales room" is in error, as a matter of law, and is otherwise an abuse of discretion. The CBA has stretched the English language beyond its breaking point. Once again, the legal

system depends on calling things by their right names. The Court should correct what amounts to a legal mistake of nomenclature based on the material physical facts.

Conclusion: Relationship Between "New Car/Used Car" and "Sales Room" Issues

While we have analyzed these issues separately, as is typical in legal analysis, we would be remiss if we did not add an observation about their interrelationship. As the CBA acknowledged, "a 'showroom' is one normally accustomed in a 'new' car dealership..." The use of the words "sales room" in BCZR 233.2 not only requires a showroom via Webster's Dictionary, but also implies a new car dealership. The same may be said for the differentiation in BCZR 236.4 of the "used motor vehicle outdoor sales area" from a "sales agency building," the latter normally having a showroom.

The bottom line is that the Council had in mind new car showrooms in BCZR 233.2 and outdoor used car lots in BCZR 236.4. The Zoning Office took this position as far back as anyone can remember, as early as the 1960s at least, and this position found expression in the Zoning Policy Manual. From 1955 until this case, no one ever asserted otherwise.

It is a fundamental element of law that it be applied with consistency. The CBA may have found this a hard case because Petitioner's proposal was supported by some neighbors and seemed inoffensive. The CBA may believe that the law is archaic and should allow uses such as proposed here. The problem is that where decisions are made, as a practical matter, based on the *ad hoc* judgment of what is good or bad in each case,

the agency becomes effectively a dictatorship. A dictatorship may appear benevolent in one case, but may be dangerous in another.

The CBA unfortunately has usurped the legislative function here and acted in excess of its delegated authority and function. This Court should reverse.

PETER MAX ZIMMERMAN

People's Counsel for Baltimore County

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 _____ day of May, 2001, a copy of the foregoing People's Counsel's Memorandum On Review of the County Board of Appeals' "Clarification on Remand" was mailed to Anthony J. DiPaula, Esq., 34 S. Main Street, Bel Air, MD 21014, attorney for GD&RL.

PETER MAX ZIMMERMAN

ON REMAND

IN THE MATTER OF FROM THE CIRCUIT COURT THE APPLICATION OF G.D.& R.L., LTD. FOR A SPECIAL

HEARING ON PROPERTY LOCATED FOR ON THE N/S BALTIMORE NATIONAL

PIKE, 478' E OF C/L JOHNNYCAKE RD BALTIMORE COUNTY

(5539 BALTIMORE NATIONAL PIKE) File No. 3-C-00-003846 1ST ELECTION DISTRICT

1ST COUNCILMANIC DISTRICT (Case No. 99-324-SPH)

PETITION OF People's Counsel for Baltimore County

CLARIFICATION OF THE BOARD ON REMAND FROM THE CIRCUIT COURT FOR BALTIMORE COUNTY PURSUANT TO THE ORDER OF THE HONORABLE JOHN F. FADER II, JUDGE

This case was remanded back to the Baltimore County Board of Appeals subsequent to a Petition for Judicial Review to the Circuit Court for Baltimore County by People's Counsel for Baltimore County. At the conclusion of the Circuit Court hearing held on October 31, 2000, The Honorable John F. Fader II remanded the case back to this Board for "clarification of its decision granting the petition of G.D. & R.L., Ltd., to use 5539 Baltimore National Pike as an 'automobile sales room and adjoining outdoor sales area' for used cars under Baltimore County Zoning Regulations (BCZR) Sec 233." Judge Fader indicated that the Board had not determined in its "Opinion and Order" what constitutes an "automobile sales room" nor any etiology of the definition, as used in the zoning regulations; and, hence, he could not determine whether the granting of the use was legally correct.

The Board, having reviewed Judge Fader's Order, determined at a public deliberation held on January 24, 2001, that it would be necessary to hold a limited public hearing to receive testimony and evidence to respond to Judge Fader's directive relative to the definition question,

Case No. 99-324-SPH /G.D. & R.L. Ltd. On Remand /Civil Action No. 3-C-00-003846

the construction of the premises, and the indoor usage of the building to address "the point which to me [Judge Fader] appears to be all important to inclusion vs. exclusion of the intended use in the zoning regulation." This was necessary since the scope of judicial review of an agency's factual determinations is extremely narrow. [Liberty Nursing Center v. Department of Health and Mental Hygiene, 330 Md. 433, 442, 624 A.2d 941, 945 (1993)]; and a reviewing court must defer to the agency's factual findings and inferences that are supported by substantial evidence. [United Parcel v. People's Counsel, 336 Md. 569, 577, 650 A.2d 226, 230 (1994).

On Wednesday, February 14, 2001, the Board held its public hearing. Representing the Petitioner was Anthony J. DiPaula, Esquire. Peter Max Zimmerman, People's Counsel for Baltimore County, participated at this proceeding. Both Mr. DiPaula and Mr. Zimmerman had written to the Board prior to the hearing relative to their opinions concerning the remand directed by Judge Fader. After brief opening statements, Mr. DiPaula called Mr. Gary Dickson. The other partner, Mr. Ray Lewis, who had been involved in the original case, had subsequently been killed in an automobile accident. Mr. Dickson is the sole principal of the new company, now known as Catonsville Motors, which he runs on a day-to-day basis.

The site offers the sale of used cars and auto repair services. Mr. Dickson opined that he services what he sells. He holds a Department of Motor Vehicles (DMV) license for the sale of used cars and repairs made on the premises. There are three repair "bays" on the site. Some repair work is farmed out. Petitioner's Exhibit No. 1(a)-(d) were submitted and discussed in detail by the witness. These photos, reviewed by the Board, reflect cars for sale on the outside lot, and there is an 18-foot by 15-foot sales room inside of the building with tables, chairs, computers, and other office equipment. There was a picture of Mr. Dickson's personal office, a bulletin board inside the premises demonstrating the cars for sale on the lot, a picture window



Case No. 99-324-SPH /G.D. & R.L. Ltd.
On Remand /Civil Action No. 3-C-00-003846

bay, four photos reflecting cars in the first bay area looking from the first bay into the office, and two pictures looking from the sales room window into the lot. Mr. Dickson opined that from the showboard indicating those cars for sale, a customer can select a car that he /she is interested in; and the car can be brought into the premises for further examination. He explained that in the used car business customers are interested in viewing the car on the bay lift to examine the underbody and ask questions from the salesman or mechanic. The first bay closest to the sales room window is generally left open for this purpose, although it can be used for general repair work. The inside office is used to relate the history of the vehicle, and perform any required paperwork necessary to consummate the sale. Mr. Dickson indicated that at any given time between 20 and 25 used cars are for sale on the premises.

On cross-examination by Mr. Zimmerman, the witness indicated that 95 percent of his usual cars come from dealers, with the oldest being "88" or "89" models. At night, three of the newer cars are brought inside. Two of the three bays are equipped for service; one is just for washing cars. The first bay was equipped for service. The first bay closest to the window was used to examine any used car before it was sold to the customer. Mr. Dickson stated there was one full-time sales person on the lot, in addition to himself if needed. He generally works, however, at his service station up the street.

Mr. Zimmerman called Mr. Carl Richards as a witness. He is the Zoning Supervisor for Baltimore County and responsible for zoning review matters. Mr. Richards was accepted as an expert in zoning by the Board. Mr. Richards reviewed the history of the zoning in question through the years. He has been associated with the zoning office since 1966. He opined that the applicable zoning regulations come under § 233 and § 236.4, and that these have not changed in

46 years since the zoning regulations were enacted by the County Council in 1955. It was his belief that § 233 covered new car sales, and § 236.4 covered the sale of used cars. He acknowledged that no Code definition of what constitutes as a "Sales Room" was present – but, again, because §. 236.4 specifically references the word "used," his office had always applied § 233 as referencing "new" cars, although that wording does not specifically appear in that section. He reviewed People's Counsel's Exhibit No. 1 (BCZR regulations "1969" – four pages) and People's Counsel's Exhibit No. 3, 1955 BCZR regulations, book #404.

Closing statements were offered by both counsel. The Board conducted a public deliberation immediately following a short recess to review the individual member's notes and evidence submitted at the hearing. At issue is a legal interpretation of § 233.2 of the BCZR (Business Major, B.M.), zone use regulations, BCZR 1955. The Petitioner operates out of a facility located in the B.M. zone. It is the position of People's Counsel that § 236 of the BCZR applies, Business Roadside (B.R.), zone use regulations, BCZR 1955. Some of the pertinent facts are clear and not in dispute.

- 1. There does exist on site an "outdoor sales area" where used cars are displayed for sale, and
- 2. There was no testimony or evidence that dismantled or junked cars unfit for operation on the highways are stored outdoors.

Section 233.2, as to what constitutes an "automobile sales room" is not specifically defined in the BCZR; and Webster's Third New International Dictionary of the English Language,

Unabridged, references "salestoom, also saleroom" as: "a place where goods are displayed for sale; showroom, esp: an auction room." The matter is further complicated in that the BCZR §

233.2 references "Automobile Sales Room," as compared to Webster's "salestoom." There is obviously confusion over the interpretation of the phrase, "automobile sales room" as it appears

in § 233 of the BCZR. The Zoning Commissioner found it to be confusing, the Board of Appeals found it to be confusing, and, as Judge Fader indicated, he had no idea what the term means. From a lay person's perspective, Mr. Dickson also found it to be confusing based on the zoning booklet he had obtained from the zoning office which led him to believe that proper zoning was in place and ultimately to his \$450,000 investment in the property, which mostly consisted of borrowed funds.

The etiology of the definition is indeed indefinite itself. The term has been in use since adopted by the County Council (see People's Counsel's Exhibit #3, BCZR 1955, Book #404, belonging to Mr. Carl Richards, Jr. and People's Counsel's Exhibit #1, BCZR 1969 regulations, book #331). For 45 years, the zoning department has construed § 233.2 as applying to new automobiles, and § 236.4 as applying to used motor vehicle sales. There is no legislative trail that recites precisely what the intent of the County Council was in passing the legislation. The present interpretation is simply one followed through the years by the zoning officials.

While the Board is appreciative of the comments made by People's Counsel relative to § 26-135, "Authority of the Director of Permits and Development Management" to "make, adopt, promulgate, and approve... such policies, rules, or regulations relating to or in connection with the zoning regulations as may be deemed necessary or proper to carry out and enforce the provisions of this Title and which are not inconsistent therewith," nevertheless, it is the responsibility of this Board to insure that the public interests are safeguarded against bureaucratic abuses or interpretation of the rules, regulations, that are inconsistent with the facts of the case. As it was stated in Petitioner's Exhibit No. 1, in the original hearing, § 270, "Use Chart": "This chart is intended as a quick guide to use regulations in Baltimore County. It is

only a table; and does not supersede the uses listed in each zoning classification in the BCZR (i.e., the tables are not the determining factor)."

The term "automobile sales room" is not defined in the BCZR. Webster references "showroom," also "salesroom," – a place where goods are displayed for sale; showroom, especially an auction room. § 233.2 references "Automobile Sales Room" (two capitalized words). The Board, lacking knowledge of the County Council's intent, concurs that a salesroom and showroom are synonymous under the present zoning law. The Board will accept Webster's as the source guide for the County Council's intent – even though poorly drafted and confusing in the minds of both lay people and professionals.

Having reached that conclusion, the Board is required to determine if the facts of the case support the presence of both "a sales room and showroom" on the premises. Clearly based on the testimony and photographs submitted by Mr. Dickson, there is a sales room where the business of selling used motor vehicles occurs. There is an area replete with desk, chairs, computers, and other business fixtures which are necessary to complete the paperwork of selling and buying a used car. It is at this point that the Board must comment concerning changes in the methodology in which used cars are sold at the present time. Back in 1955, purchasing such vehicles was a much less sophisticated matter. You simply went to the used car lot, looked at the offering, and went into a small building to finalize the transaction. On the subject site, innovations have been introduced. The testimony of Mr. Dickson and photos clearly demonstrate a different style of "showmanship." The photos reflect "an adjoining outdoor sales area" of relatively recent vintage with used automobiles for sale. (Petitioner's Exhibit No. 1)

Petitioner's Exhibits No. 2 and 3 reflect a show board in the interior of the premises of those cars for sale. The customer may select, while in the building, those cars on which he /she desires a

closer look, recognizing the fact that used cars require closer inspection from all views, including the underside. These vehicles can be moved inside for closer inspection in the first bay, or visible from the viewing area via the glass partition within the confines of the building.

(Petitioner's Exhibits 4A, 4B, 4C, and 5) While noting that a "showroom" is one normally accustomed in a "new" car dealership, there is a "showroom" present where photos are displayed; and a viewing area on the site where the cars can be viewed on an individual basis; and the customer is provided the opportunity to inspect the underside of the vehicle, along with the salesman and a mechanic if that is necessary.

The Board concludes that within the Webster definition of a showroom, goods may be displayed in many formats. For example, real estate properties are frequently "displayed" in photographs or computer fashion within the real estate office. The actual goods themselves may or may not be present. In this case, the photos of the cars are on display. The actual cars can be displayed on bay one of the premises. The massive changes in the marketing approach require that what may have been applicable in 1955 may not be relevant today. The Board finds, as fact, the method of both selling the vehicles and displaying the vehicles satisfy the requirements of § 233.2.

Judge Fader was also concerned, as was the Board, that § 233.2 makes no distinguishment between "new" and "used" cars. The zoning office takes the position that because § 236.4 specifically references "used motor vehicle outdoor sales area," by inference § 233.2 referencing "Automobile Sales Room" must necessarily apply to new automobiles to the exclusion of "used motor vehicles." It would have been a very easy matter for the County Council to have eliminated the problem by simply stating "new" Automobile Sales Room in the statute. They chose not to do so, which creates the interpretative question. Where there is doubt

or confusion, the public is entitled to a favorable and reasonable interpretation that the statute includes both new and used automobiles and not simply "inferences" drawn by the zoning officials. Where confusion and ambiguity exists, it is fundamental law that construction must go against the drafter of the regulation. The citizens of Baltimore County are entitled to know exactly how the regulation applies. It should not be a guessing game. In the instant case, they are entitled to read the statute as it is...and, there is no distinguishment between "new" or "used" cars.

Hence, the Board finds that both "new" and "used" automobiles are valid uses in the B.M. zone, provided there is an "Automobile Sales Room and Adjoining Outdoor Sales Area..." The Board concludes as a matter of fact that the present site meets the statutory requirement. The Board recognizes that People's Counsel is concerned over the interpretation which is given by this Board. However, if there is an intent on the part of the County Council to distinguish between the two regulations at issue, it could be very easily resolved by simply adding the term "new" in § 233.2, and if the sales room /showroom is an issue, that also can be very easily rectified by specifically defining what constitutes a sales room /showroom under § 101 of the BCZR.

ORDER

IT IS THEREFORE, for the reasons as stated above, this 25th day of March 2001 by the County Board of Appeals of Baltimore County

ORDERED that the Board accepts Webster's Third New International Dictionary of the English Language, Unabridged, definition of "salesroom as "salesroom, also saleroom, a place where goods are displayed for sale"; and it is further

ORDERED that the term "automobile sales room" as found in § 233 of the Baltimore

County Zoning Regulations applies to both used automobile sales and new vehicle sales,

provided there is an "automobile sales room and adjoining outdoor sales area"; and it is further

ORDERED, for the reasons as stated above, that Petitioner has met the requirements of the Baltimore County Zoning Regulations; and it is further

ORDERED that the Board will affirm its decision dated March 30, 2000, in which the subject Petition for Special Hearing was GRANTED.

COUNTY BOARD OF APPEALS OF BALTIMORE COUNTY

Lawrence S. Wescott, Chairman

Charles L. Marks

Nama M. Felling

Donna M. Felling

13/32

RE: PETITION FOR SPECIAL HEARING 3636 Brenbrook Drive, W/S Brenbrook Rd, SW Corner Church Lane 2nd Election District, 2nd Councilmanic

Legal Owner: Antbren LLC
Petitioner(s)

- * BEFORE THE
- * ZONING COMMISSIONER
- * FOR
- * BALTIMORE COUNTY
- * Case No. <u>02-57-SPH</u>

2 JUN -3 PN 5: 3

MOTION TO DISMISS

People's Counsel files a Motion to Dismiss Petition (or in the alternative, to remand to the Zoning Commissioner) to amend in compliance with BCZR 440.4.C. The grounds for the Motion are as follows:

- 1. Petitioner seeks relief to operate a used car dealership in the B.M. Zone.
- 2. The Deputy Zoning Commissioner (DZC) held a hearing in the instant case on September 11, 2001 and granted the Petition for Special Hearing in a written opinion and order dated September 19, 2001.
- 3. People's Counsel, pursuant to its Charter authority, filed a *de novo* appeal on September 28, 2001.
- 4. Out of concern for an interpretation of first impression, in a separate case before the County Board of Appeals in which the Board permitted the sale of used cars in a B.M. Zone, the County Council passed Bill 71-01, attached, on **September 4, 2001**.
- 5. The new law permits used car sales in a B.M. zone only by special exception and under Planned Unit Development-Commercial (PUD-C).
 - 6. Bill 71-01 became effective 45 days after passage, or October 19, 2001.

- 7. Under case law and statutes cited in the attached Memorandum, and particularly the recent Court of Appeals decision, <u>Powell vs. Calvert County</u>, 368 Md. 400 (2002), Bill 71-01, codified in BCZR 440.4.C, attached, applies to the instant case.
- 8. Petitioner must seek a special exception under BCZR 502.1, and comply with development under BCZR 440.1 (PUD-C).
 - 9. The decision of the DZC is nullified by the *de novo* appeal to the CBA.
- 10. To proceed under the Petition for Special Hearing is invalid; any decision by the CBA would be void in light of the applicability of BCZR 440.C.

WHEREFORE, PEOPLE'S COUNSEL moves to dismiss the Petition for Special Hearing, without prejudice, to enable Petitioner to file for relief under the current law, or, in the alternative, to remand the Petition for Special Hearing to the DZC to amend for Special Exception and PUD-C relief, provided, the procedures and review provided for a new Petition are followed.

Peter Max ZIMMERMAN

People's Counsel for Baltimore County

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 ______ day of _______ 2002 a copy of the foregoing People's Counsel's Motion to Dismiss was mailed to Nathan D. Adler, Esq. and Hugh M. Bernstein, Esq., Neuberger, Quinn, Gieler, 1 South Street, 27th Floor, Baltimore, MD 21202, attorney for Petitioner.

CAROLE S. DEMILIO

COUNTY COUNCIL OF BALTIMORE COUNTY, MARYLAND Legislative Session 2001, Legislative Day No. 15

Bill No. <u>71-01</u>

Councilmembers Olszewski, Kamenetz, McIntire & Moxley

By the County Council, August 6, 2001

A BILL ENTITLED

AN ACT concerning

Zoning Regulations - Automobile Sales

FOR the purpose of amending the Zoning Regulations to provide that new car sales are permitted as of right in the B.M. Zone, and to provide that used car outdoor sales areas are permitted in the B.M. Zone by Special Exception as part of a Commercial Planned Unit Development; and generally relating to car sales in the County's business zones.

By repealing and re-enacting, with amendments,

Section 233.2, automobile sales room use, and Section 440.4.C.

Baltimore County Zoning Regulations, as amended

- SECTION 1. BE IT ENACTED BY THE COUNTY COUNCIL OF BALTIMORE
- COUNTY, MARYLAND, that Section 233.2, automobile sales room use, and Section 440.4.C.
- of the Baltimore County Zoning Regulations, as amended, be and they are hereby repealed and 3

EXPLANATION:

CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.

[Brackets] indicate matter stricken from existing law. Strike out indicates matter stricken from bill.

Underlining indicates amendments to bill.

I re-enacted, with amendments, to read	as follows:
--	-------------

- Section 233. Business, Major (B.M.) Zone Use Regulations
- The following uses only are permitted (Section 233.3):
- 233.2

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19/12/2001

- [Automobile] NEW AUTOMOBILE sales [room] FACILITY and adjoining outdoor sales area, provided that dismantled or junked cars unfit for operations on the highways [shall] 6
- MAY not be stored outdoors. 7

14:53

- 8 Section 440. Planned Unit Development - Commercial (PUD-C)
- 440.4 Permitted uses. Subject to the design and performance standards and the procedures specified in this section, the following uses are permitted in a PUD-C, in areas 10 11 delineated on the map approved pursuant to Section 440.3 B:
 - C. Any use permitted by special exception by the underlying zone or district is permitted by special exception only in that underlying zone or district and is not permitted in any other zone or district which may be part of a PUD-C, EXCEPT THAT USED MOTOR VEHICLE OUTDOOR SALES AREAS ARE PERMITTED BY SPECIAL EXCEPTION AS PART OF A PUD-C IN THE B.M. ZONE.
- SECTION 2. AND BE IT FURTHER ENACTED, that this Act shall take effect forty-17 five days after its enactment. 18

607101.bil

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IN RE: **BEFORE** * **PETITION** THE *

OF BOARD OF APPEALS ANTBREN, LLC

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FOR

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* **BALTIMORE COUNTY**

Case No.: 02-57-SPH *

APPELLEE BRIEF IN SUPPORT OF AFFIRMING ZONING COMMISSIONER'S RULING

Appellee, Antbren Motor Cars, Ltd. ("Antbren"), by its undersigned attorneys, files this Brief in Support Affirming Zoning Commissioner's Ruling.

<u>INTRODUCTION</u>

At issue here is the interpretation of Baltimore County Zoning Regulation 233.2, the pertinent portion of which provided at that time of the ruling that the following is a permitted use in a B.M. zone:

> Automobile sales room and adjoining outdoor sales area, provided that dismantled or junked cars unfit for operations on the highways shall not be stored outdoors.

BCZR § 233.2. The Baltimore County zoning office below, and the People's Counsel for Baltimore County here (collectively, both of these parties will be referred to hereafter as the "County") have taken the position that the above-quoted language permits only automobile sales rooms for "new" automobiles and not "used" automobiles. This interpretation is incorrect for several reasons. First, the plain language of the regulation applies to all automobile sales rooms,

not only "new" automobile sales rooms. Second, the County's interpretation would nullify and render superfluous the second clause of the provision since "dismantled or junked cars unfit for operations on the highways" would only be a characteristic of a "used" automobile sales room. Finally, the County's interpretation results in the absurd situation whereby there is no area where a used car dealership with an adjoining sales room is permitted even though a used car dealership without an adjoining sales room is permissible in a B.R. zoned area.

FACTS

Anthren owns property at 3636 Brenbrook Road in Baltimore County (the "Property"). The Property is currently zoned B.M. (Business, Major). The Property has been used in the past alternatively as a used car dealership and a new car dealership.¹ The Property contains both an automobile showroom and an adjoining outdoor sales area.

3636 LLC, d/b/a Prestige Imports ("Prestige") is a limited liability company in the business of selling high end used automobiles. Prestige's inventory consists generally of cars manufactured by such makers as Lamborghini, Lotus, Lexus and Mercedes. Its inventory consists generally of cars that are less than three years old and the average sales price is \$30,000.00 per car or more. Prestige is currently located on Liberty Road in Baltimore County, approximately a mile and a half from the Property.

Anthren and Prestige desired to move Prestige's operation onto the Property.

However, the County refused to permit this, arguing that, despite what appears to be the clear

-2-

¹ At all times during Anthren's ownership of the property, it was used only as a new car dealership. The Property's use as a used car dealership occurred prior to Anthren's purchase.

language of the Baltimore County Zoning Regulation 233.2, a used automobile sales room and adjoining outdoor sales area is not permitted in a B.M. zone.

On September 11, 2001, a full evidentiary hearing was held on this issue before Deputy Zoning Commissioner Timothy M. Kotroco. Deputy Zoning Commissioner Kotroco found the County's interpretation "strained" "[t]o say the least." (See Decision of Deputy Zoning Commissioner Timothy M. Kotroco, attached hereto as Exhibit 1, at 3.)² Thus, he held that Antbren's proposed use of the Property was permissible under Baltimore County's zoning regulations. <u>Id.</u> at 4.

The People's Counsel for Baltimore County, who did not appear or present any evidence or argument at the hearing, have now appealed this ruling. For the reasons described below, however, this appeal is without merit. The plain language of the applicable zoning regulations clearly permit this use. To say that the County's contrary interpretation is "strained" is being far too kind. The County's interpretation has absolutely no basis in law or fact and the ruling of the Deputy Zoning Commissioner was absolutely and indisputably correct.

ARGUMENT

A. The Plain language of the regulation defeats the County's interpretation.

1. Statutory and regulatory interpretation.

A court or other tribunal interpreting the language of an administrative regulation is to apply the same rules applicable to the interpretation of a statute. Ward v. Dep't of Public

² In addition, Deputy Commissioner Kotroco found that the operation was "a first class used car sales facility" which "is appropriate for this property and neighborhood." (Ex. 1 at 2, 4.)

Safety & Correctional Serv., 339 Md. 343, 351 (1995). Those rules of statutory construction are well-settled in this State. "The cardinal rule of statutory construction is to ascertain and effectuate the intention of the legislature," (or in the case of a regulation, of the agency or body that propounded the regulation). Oaks v. Conners, 339 Md. 24, 35 (1995). First and foremost, a court should determine the legislative intent behind the statute by looking at the statute's plain language. Board of Trustees of the Maryland State Retirement & Pension Sys. v. Hughes, 340 Md. 1, 7-8 (1995); Ward, 339 Md. at 351. "It is well-settled that when the meaning of a statute - its legislative intent -- is at issue, the court's inquiry begins with the words of the statute, and ordinarily, also ends there. Tidewater v. Mayor & City Council of Havre De Grace, 337 Md. 338, 344 (1995).

"If the words of the statute, construed according to their common and everyday meaning, are clear and unambiguous and express a plain meaning, [the courts] will give effect to the statute as it is written." Jones v. State, 336 Md. 255, 261 (1994). Where the language of a statute is clear, the courts are not free to disregard the clear import of that language to create a legislative intention different from that clear language. Tidewater, 337 Md. at 345 (emphasis added.) Moreover, the words of the statute are to be given their natural and ordinary meaning. Montgomery County v. Buckman, 333 Md. 516, 523 (1994). Indeed, in conformity with this principle, § 101 of the Zoning Regulations provide:

Any word or term not defined in this section shall have the ordinarily accepted definition as set forth in the most recent edition of Webster's Third New International Dictionary of the English Language, Unabridged.

BCZR § 101.

• _ ;

Finally, a court or other tribunal is not entitled to add terms to a statute in order to make the statute express an intention not reflected in the statute's original form. <u>Federal Credit</u> <u>Union v. Motor Vehicle Admin.</u>, 346 Md. 437, 445 (1997).

The plain language of the regulation permits a used car dealership in a B.M. Zone.

As described above, the goal of regulatory interpretation is to determine the legislative or administrative intent behind the regulation. However, under well-settled principles of interpretation, that intent is to be gleaned from the language of the regulation, giving the words of the regulation their ordinary meaning and the interpreting tribunal is not to add words that do not exist in order to give the regulation a meaning it would not otherwise have.

There is nothing in the plain language of the statute that would support the County's interpretation. The statute refers to an "automobile sales room," not a "new automobile sales room." The common and ordinary usage of the term "automobile" refers to both new and used automobiles. There is simply nothing in the term which limits its meaning to "new" as opposed to "used" automobiles. Indeed, the Webster's Third New International Dictionary of the English Language, Unabridged, which is to be used as the definitional source of otherwise undefined terms in the Zoning Regulations, defines the term "automobile" as:

4-wheeled automotive vehicle designed for passenger transportation on streets and roadways and commonly propelled by an internal-combustion engine using a volatile fuel (as gasoline) – called also *car* or esp. Brit. *motorcar*.

This definition described both new and used cars. There is simply nothing in the term that would indicate a limitation to "new" automobiles.

The County's interpretation would require the violation of a cardinal rule of interpretation. In order to uphold that interpretation, this board would have to insert the word "new" into the regulation, thereby rewriting the regulation to provide:

New automobile sales room and adjoining outdoor sales area, provided that dismantled or junked cars unfit for operations on the highways shall not be stored outdoors.

Had the County Council meant only "new" automobile sales rooms, it was quite capable of saying so. It would have been quite simple to add the word "new" if that is what the Council intended. The Council's failure to do so speaks volumes. The failure to expressly limit the term "automobile" to *new* automobiles clearly indicates that the County Council meant no such limitation.³

C. The County's interpretation would render portions of the regulation meaningless.

Similarly, there is nothing in the remainder of the regulation that would indicate any legislative intention to limit § 233.2 to new automobiles. To the contrary, the remainder of the regulation indicates just the opposite – a clear legislative intent to include **both** new and used automobiles in § 233.2.

Notably, following the identification of "[a]utomobile sales room and adjoining outdoor sales area," § 233.2 expressly provides: "provided that dismantled or junked cars unfit

³ Subsequent to this ruling, the regulation was amended to add the word "new" and to permit used automobile dealerships only through the special exception process. However, at the time of this petition and ruling, the regulation placed no such limitations on the type of automobile dealership – rather it applied to both new and used automobile dealerships. Indeed, the fact that the regulation was subsequently amended to limit § 233.2 to new automobile dealerships is further evidence that prior to that time, the regulation was **not** limited. See <u>Lobardi v. Montgomery County</u>, 108 Md. App. 695, 703 (1996) ("a substantive amendment to an existing statute indicates an intent to *change* the meaning of that statute"; emphasis added).

for operations on the highways shall not be stored outdoors." Dismantled or junked cars unfit for operations on the highways are only characteristics of **used** automobile dealerships. A new car dealership would not have such cars since its stock is limited to new cars. Thus, if the clause "Automobile sales room and adjoining outdoor sales area" was meant to be limited solely to new car dealerships, there would be no need for the second clause prohibiting the outdoor storage of junked or dismantled cars.

It is another well-settled principle of interpretation that a regulation should not be interpreted so as to render any clause or portion of the regulation meaningless or superfluous.

DeBusk v. Johns Hopkins Hosp., 342 Md. 432, 445 (1996). However, the County's interpretation does just that.

D. If the County Council had intended to limit § 233.2 to new cars only, it was quite capable of doing so; its failure to provide an express limitation indicates that no such limitation was intended.

Similarly, no other portion of the Zoning Regulations permit the conclusion that § 233.2 was intended to be limited to new cars only. To the contrary, the rest of the Zoning Regulations also make abundantly clear that the County Council meant for § 233.2 to have the plain and ordinary meaning that its words impart.

The County's interpretation (according to a representative at the zoning desk) is based upon § 236 of the Zoning Regulations which provides that a permitted use in a B.R. Zone is a "Used motor vehicle outdoor sales area, separated from sales agency building" (emphasis added). According to the County, the fact that the term "used" was employed in this section, but not in § 233.2, must indicate that the Council, in § 233.2, meant something other than "used"—i.e., new. The County's reasoning is not logical.

What the County Council's use of the term "used" in § 236 indicates is that the Council knew quite well how to differentiate between "new" and "used" and that if it meant to limit a provision to one or the other, it was quite capable of doing so. The fact that in § 236, the Council was able to limit the application of that section to "used" cars through simple language, clearly shows that had it so intended, it could have just as easily limited § 233.2 to "new" ones through similarly simple language. Therefore, its use of the general term "automobile" without any modifying language indicates that the Council did **not** intend to limit the provision to only new cars.

E. The County's interpretation would lead to absurd results.

Moreover, the County's interpretation leads to an absurd result. Under that interpretation, there is no zone under which a used automobile lot which also has an attached indoor showroom, such as Antbren's, is permissible. Under § 236, the attached indoor showroom would preclude such a lot in a B.R. zone because § 236 limits permissible used car dealers in B.R. zones to those "separated from sales agency building[s]." Under the plain language of § 233.2, a lot with an indoor sales showroom should be allowed in a B.M. zone, however, under the County's interpretation, only **new** car dealerships are permitted in B.M. zones. Thus, there is the bizarre result that a used car lot that has no attached indoor sales showroom is permissible in a B.R. zone, but a far nicer and more desirable used car dealership with an indoor sales showroom is not permitted anywhere.

CONCLUSION

For the reasons stated above, the decision of the Deputy Zoning Commissioner should be affirmed and Antbren and Prestige should be permitted to operate a used car dealership at 3636 Brenbrook Road – an area designated for B.M. zoning.

Respectfully submitted,

Nathar D. Adler

Hugh M. Bernstein

Neuberger, Quinn, Gielen, Rubin & Gibber, P.A.

One South Street, 27th Floor

Baltimore, Maryland 21202

(410) 332-8550

Attorneys for Petitioner, Antbren, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this day of May, 2002, a copy of the foregoing Brief was mailed, first class, postage prepaid to Peter Max Zimmerman, Esquire and Carole S. DeMilio, Esquire, People's Counsel for Baltimore County, Old Courthouse, Room 47, 400 Washington Avenue, Towson, Maryland 21204.

Hugh M. Bernstein

154295.2

5/16/02

IN RE

*

* BEFORE THE

3636 BRENBROOK DRIVE

- * BOARD OF APPEALS
- * FOR
- * BALTIMORE COUNTY

*

* Case No. 02-057-SPH

* * * * * * * *

NOTICE OF ENTRY OF APPEARANCE

Please enter the appearance of Nathan D. Adler and Hugh M. Bernstein, as counsel for Respondents, Jack Antwerpen and Antbren, LLC, in the above-captioned appeal.

Respectfully submitted,

Nathan D. Adler

Hugh M. Bernstein

Neuberger, Quinn, Gielen, Rubin & Gibber One South Street, 27th Floor Baltimore, Maryland 21202-3201 (410) 332-8523

Attorneys for Jack Antwerpen and Antbren, LLC

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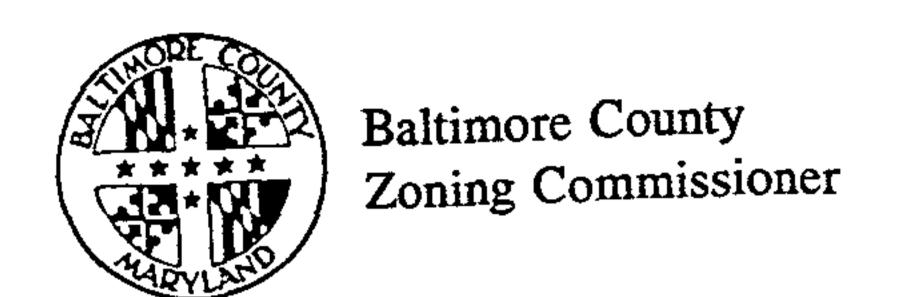
142155

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this Line day of May, 2002, a copy of the foregoing Notice of Entry of Appearance was mailed, first class, postage prepaid to Peter Max Zimmerman, Esquire and Carole S. DeMilio, Esquire, People's Counsel for Baltimore County, Old Courthouse, Room 47, 400 Washington Avenue, Towson, Maryland 21204.

Hugh M. Bernstein

158466.2



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

Fax: 410-887-3468

September 18, 2001

Richard Rubin, Esquire Hugh Bernstein, Esquire One South Street 27th Floor Baltimore, Maryland 21201

Re: Petition for Special Hearing

Case No.: 02-057-SPH

Property: 3636 Brenbrook Drive

Dear Messrs. Rubin & Bernstein:

Enclosed please find the decision rendered in the above-captioned case. The petition for special hearing has been granted in accordance with the enclosed Order.

In the event the decision rendered is unfavorable to any party, please be advised that any party may file an appeal within thirty (30) days from the date of the Order to the Department of Permits and Development Management. If you require additional information concerning filing an appeal, please feel free to contact our appeals clerk at 410-887-3391.

Very truly yours,

withy latroco

Timothy M. Kotroco

Deputy Zoning Commissioner

TMK:raj Enclosure

Copies to:

Joseph Larson, P.E. Spellman & Larson 105 W. Chesapeake Avenue Towson, MD 21204

Mr. Stanley Kaufman 6440 Baltimore National Pike Baltimore, MD 21228

Mr. Tom Markides 9330 Liberty Road Randallstown, MD 21133 , /17/01

IN RE:

BEFORE

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PETITION

THE

OF

BALTIMORE COUNTY

ANTBREN, LLC

BOARD OF

ZONING APPEALS

SFP I O

Case No.: 02-57-SPH

* * * *

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR RULING OF COMPLIANCE WITH ZONING REGULATIONS

Petitioner, Antbren Motor Cars, Ltd. ("Antbren"), by its undersigned attorneys, files this Brief in Support of its Petition for Ruling of Compliance With Zoning Regulations.

INTRODUCTION

At issue here is the interpretation of Baltimore County Zoning Regulation 233.2, the pertinent portion of which provides that the following is a permitted use in a B.M. zone:

Automobile sales room and adjoining outdoor sales area, provided that dismantled or junked cars unfit for operations on the highways shall not be stored outdoors.

BCZR § 233.2. The Baltimore County zoning office (the "County") has taken the position that the above-quoted language permits only automobile sales rooms for "new" automobiles and not "used" automobiles. This interpretation is incorrect for several reasons. First, the plain language of the regulation applies to all automobile sales rooms, not only "new" automobile sales rooms. Second, the County's interpretation would nullify and render superfluous the second clause of the provision since "dismantled or junked cars unfit for operations on the highways" would only

be a characteristic of a "used" automobile sales room. Finally, the County's interpretation results in the absurd situation whereby there is no area where a used car dealership with an adjoining sales room is permitted even though a used car dealership without an adjoining sales room is permissible in a B.R. zoned area.

FACTS

Anthren owns property at 3636 Brenbrook Road in Baltimore County (the "Property"). The Property is currently zoned B.M. (Business, Major). The Property has been used in the past alternatively as a used car dealership and a new car dealership.¹ The Property contains both an automobile showroom and an adjoining outdoor sales area.

3636 LLC, d/b/a Prestige Imports ("Prestige") is a limited liability company in the business of selling high end used automobiles. Prestige's inventory consists generally of cars manufactured by such makers as Lamborghini, Lotus, Lexus and Mercedes. Its inventory consists generally of cars that are less than three years old and the average sales price is \$30,000.00 per car or more. Prestige is currently located on Liberty Road in Baltimore County, approximately a mile and a half from the Property.

Anthren and Prestige would like to move Prestige's operation onto the Property. However, the County has refused to permit this, arguing that, despite what appears to be the clear language of the Baltimore County Zoning Regulation 233.2, a used automobile sales room and adjoining outdoor sales area is not permitted in a B.M. zone. As described below, the County's interpretation defies both the language of the regulation and the law of regulatory interpretation.

¹ At all times during Antbren's ownership of the property, it was used only as a new car dealership. The Property's use as a used car dealership occurred prior to Antbren's purchase.

ARGUMENT

- A. The Plain language of the regulation defeats the County's interpretation.
 - 1. Statutory and regulatory interpretation.

A court or other tribunal interpreting the language of an administrative regulation is to apply the same rules applicable to the interpretation of a statute. Ward v. Dep't of Public Safety & Correctional Serv., 339 Md. 343, 351 (1995). Those rules of statutory construction in are well-settled in this State. "The cardinal rule of statutory construction is to ascertain and effectuate the intention of the legislature," (or in the case of a regulation, of the agency or body that propounded the regulation). Oaks v. Conners, 339 Md. 24, 35 (1995). First and foremost, a court should determine the legislative intent behind the statute by looking at the statute's plain language. Board of Trustees of the Maryland State Retirement & Pension Sys. v. Hughes, 340 Md. 1, 7-8 (1995); Ward, 339 Md. at 351. "It is well-settled that when the meaning of a statute - its legislative intent -- is at issue, the court's inquiry begins with the words of the statute, and ordinarily, also ends there. Tidewater v. Mayor & City Council of Havre De Grace, 337 Md. 338, 344 (1995).

"If the words of the statute, construed according to their common and everyday meaning, are clear and unambiguous and express a plain meaning, [the courts] will give effect to the statute as it is written." <u>Jones v. State</u>, 336 Md. 255, 261 (1994). Where the language of a statute is clear, the courts are not free to disregard the clear import of that language to create a legislative intention different from that clear language. <u>Tidewater</u>, 337 Md. at 345 (emphasis added.) Moreover, the words of the statute are to be given their natural and ordinary meaning. <u>Montgomery County v. Buckman</u>, 333 Md. 516, 523 (1994). Indeed, in conformity

with this principle, § 101 of the Zoning Regulations provide:

Any word or term not defined in this section shall have the ordinarily accepted definition as set forth in the most recent edition of Webster's Third New International Dictionary of the English Language, Unabridged.

BCZR § 101.

Finally, a court or other tribunal is not entitled to add terms to a statute in order to make the statute express an intention not reflected in the statute's original form. Federal Credit Union v. Motor Vehicle Admin., 346 Md. 437, 445 (1997).

2. The plain language of the regulation permits a used car dealership in a B.M. Zone.

As described above, the goal of regulatory interpretation is to determine the legislative or administrative intent behind the regulation. However, under well-settled principles of interpretation, that intent is to be gleaned from the language of the regulation, giving the words of the regulation their ordinary meaning and the interpreting tribunal is not to add words that do not exist in order to give the regulation a meaning it would not otherwise have.

There is nothing in the plain language of the statute that would support the County's interpretation. The statute refers to an "automobile sales room," not a "new automobile sales room." The common and ordinary usage of the term "automobile" refers to both new and used automobiles. There is simply nothing in the term which limits its meaning to "new" as opposed to "used" automobiles. Indeed, the Webster's Third New International Dictionary of the English Language, Unabridged, which is to be used as the definitional source of otherwise undefined terms in the Zoning Regulations, defines the term "automobile" as:

4-wheeled automotive vehicle designed for passenger transportation on streets and roadways and commonly propelled by an internal-combustion engine using a volatile fuel (as gasoline) – called also *car* or esp. Brit. *motorcar*.

This definition described both new and used cars. There is simply nothing in the term that would indicate a limitation to "new" automobiles.

The County's interpretation would require the violation of a cardinal rule of interpretation. In order to uphold that interpretation, this board would have to insert the word "new" into the regulation, thereby rewriting the regulation to provide:

New automobile sales room and adjoining outdoor sales area, provided that dismantled or junked cars unfit for operations on the highways shall not be stored outdoors.

Had the County Council meant only "new" automobile sales rooms, it was quite capable of saying so. It would have been quite simple to add the word "new" if that is what the Council intended. The Council's failure to do so speaks volumes. The failure to expressly limit the term "automobile" to *new* automobiles clearly indicates that the County Council meant no such limitation.

C. The County's interpretation would render portions of the regulation meaningless.

Similarly, there is nothing in the remainder of the regulation that would indicate any legislative intention to limit § 233.2 to new automobiles. To the contrary, the remainder of the regulation indicates just the opposite – a clear legislative intent to include **both** new and used automobiles in § 233.2.

Notably, following the identification of "[a]utomobile sales room and adjoining outdoor sales area," § 233.2 expressly provides: "provided that dismantled or junked cars unfit for operations on the highways shall not be stored outdoors." Dismantled or junked cars unfit for

operations on the highways are only characteristics of **used** automobile dealerships. A new car dealership would not have such cars since its stock is limited to new cars. Thus, if the clause "Automobile sales room and adjoining outdoor sales area" was meant to be limited solely to new car dealerships, there would be no need for the second clause prohibiting the outdoor storage of junked or dismantled cars.

It is another well-settled principle of interpretation that a regulation should not be interpreted so as to render any clause or portion of the regulation meaningless or superfluous. DeBusk v. Johns Hopkins Hosp., 342 Md. 432, 445 (1996). However, the County's interpretation does just that.

D. If the County Council had intended to limit § 233.2 to new cars only, it was quite capable of doing so; its failure to provide an express limitation indicates that no such limitation was intended.

Similarly, no other portion of the Zoning Regulations permit the conclusion that § 233.2 was intended to be limited to new cars only. To the contrary, the rest of the Zoning Regulations also make abundantly clear that the County Council meant for § 233.2 to have the plain and ordinary meaning that its words impart.

The County's interpretation (according to a representative at the zoning desk) is based upon § 236 of the Zoning Regulations which provides that a permitted use in a B.R. Zone is a "Used motor vehicle outdoor sales area, separated from sales agency building" (emphasis added). According to the County, the fact that the term "used" was employed in this section, but not in § 233.2, must indicate that the Council, in § 233.2, meant something other than "used" – *i.e.*, new. The County's reasoning is not logical.

What the County Council's use of the term "used" in § 236 indicates is that the Council knew quite well how to differentiate between "new" and "used" and that if it meant to limit a provision to one or the other, it was quite capable of doing so. The fact that in § 236, the Council was able to limit the application of that section to "used" cars through simple language, clearly shows that had it so intended, it could have just as easily limited § 233.2 to "new" ones through similarly simple language. Therefore, its use of the general term "automobile" without any modifying language indicates that the Council did **not** intend to limit the provision to only new cars.

E. The County's interpretation would lead to absurd results.

Moreover, the County's interpretation leads to an absurd result. Under that interpretation, there is no zone under which a used automobile lot which also has an attached indoor showroom, such as Antbren's, is permissible. Under § 236, the attached indoor showroom would preclude such a lot in a B.R. zone because § 236 limits permissible used car dealers in B.R. zones to those "separated from sales agency building[s]." Under the plain language of § 233.2, a lot with an indoor sales showroom should be allowed in a B.M. zone, however, under the County's interpretation, only **new** car dealerships are permitted in B.M. zones. Thus, there is the bizarre result that a used car lot that has no attached indoor sales showroom is permissible in a B.R. zone, but a far nicer and more desirable used car dealership with an indoor sales showroom is not permitted anywhere.

CONCLUSION

For the reasons stated above, the County's determination should be overruled and Antbren and Prestige should be permitted to operate a used car dealership at 3636 Brenbrook Road – an area designated for B.M. zoning.

Respectfully submitted,

Richard Rubin

Hugh M. Bernstein

Neuberger, Quinn, Gielen, Rubin & Gibber, P.A.

One South Street, 27th Floor Baltimore, Maryland 21202

(410) 332-8550

Attorneys for Petitioner, Antbren, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of September, 2001, a copy of the foregoing Brief was hand delivered to Peter Max Zimmerman, Esquire and Carole S. DeMilio, Esquire, People's Counsel for Baltimore County, Old Courthouse, Room 47, 400 Washington Avenue, Towson, Maryland 21204.

Hugh M. Bernstein



REV 9/15/98

Petition for Special Hearing

to the Zoning Commissioner of Baltimore County

for the property located at	3636 Brenbrool	k Drive
	presently zoned	ВМ

Date 8-02-01

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

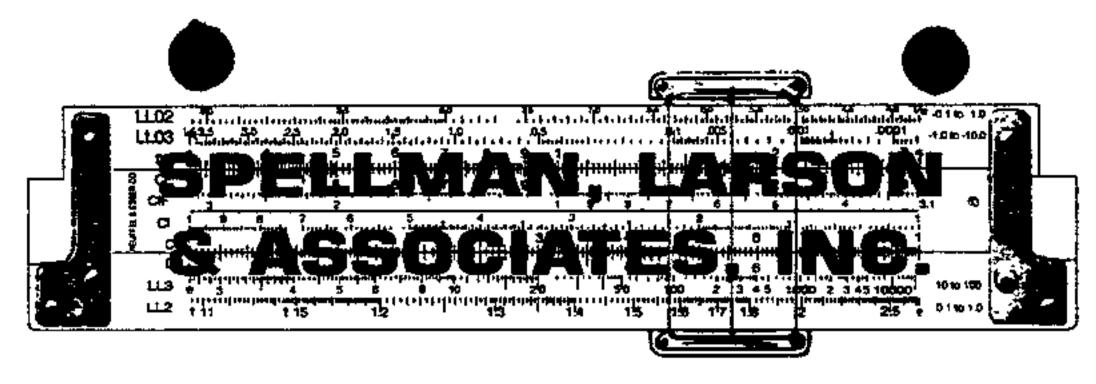
The sale of used automobiles as a principal use in an automobile sales room and adjoining outdoor sales area in a BM zone,

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:	<u>Legal Owner(s):</u>	
Name - Type or Print	Antbren LLC Bilacol M anduragen	
Signature Does Not Apply	% Jack Antwerpen =Owner	
Address Telephone No.	Name - Type or Print	
City State Zip Code	Signature 6631 Baltimore National Pike 410-747-3333	
Attorney For Petitioner: Richard Rubin	Address Baltimore, Maryland 21202	
Name - Type or Print	City State Zip Code	
Signature Signature	Representative to be Contacted:	
<u>Neuberger, Quinn, Gielen, Rubin & Gibber PA</u> Company	Richard Rubin Name	
1 South St., 27th Fl. 410-332-8509	1 South St., 27th Fl. 410-332-8509 Address Telephone No.	
Address Telephone No Balleimore, MD 21202		
Ballimore, MD 21202 City State Zip Code	Baltimore, MD 21202 City State Zip Code	
	OFFICE USE ONLY	
a.T.	ESTIMATED LENGTH OF HEARING 200/2	
Case No. 02-057-5PH	UNAVAILABLE FOR HEARING	

Reviewed By _





CIVIL ENGINEERS AND LAND SURVEYORS

105 W. CHESAPEAKE AVENUE TOWSON, MARYLAND 21204 TEL (410) 823-3535 / FAX (410) 825-5215

DESCRIPTION FOR ZONING NO. 3636 BRENBROOK DRIVE

BEGINNING for the same at a point on the west side of Brenbrook Drive, 70 feet wide, at the beginning of the cutoff connecting the west side of Brenbrook Drive and the south side of Church Road as widened to a width of 30 feet and running thence and binding on said cutoff north 47 degrees 42 minutes 45 seconds west 16.43 feet to the south side of Church Road and running thence and binding on the south side of Church Road by a curve to the right with a radius of 666.62 feet the distance of 106.85 feet (the cord of the arc bears north 89 degrees 06 minutes 03 seconds west 106.73 feet) thence leaving the south side of Church Road, as widened, and running south 06 degrees 12 minutes 05 seconds west 471.70 feet and south 22 degrees 44 minutes 55 seconds east 279.76 feet to the west side of Brenbrook Drive herein referred to and running thence and binding on the west side of Brenbrook Drive northwesterly by a curve to the left with a radius of 1040.00 feet the distance of 732.66 feet to the place of beginning.

CONTAINING 2.48 acres of land more or less.

PROPERTY LAND SURFILLIAM AND SURFILLIAM SURF

August 1, 2001

The Zeniag Commissioner of Baltimore County, by authority of the Zoning Act and Regulations of Baltimore County will hold a public hearing in Towson.

Maryland on the property identified herein as follows:

Case: #02-057-SPH". 1 3636 Brenbrook Drive W/S Brenbrook Road, SW W/S Brendrook Hoad, SW
Cor. Church Lane
2nd Election District
2nd Councilmanic District
Legal Owner(s): Anthren LLC,
Jack Antwerpen
Special Hearing: to allow
the sales of used automobiles as a principal use in an
automobile sales room and
adjoining outdoor sales
area

area. 😘

Hearing: Tuesday, September 11, 2001 at 2:00 p.m. in Room 407, County Courts Building, 401 Bosley Avenue.

LAWRENCE E. SCHMIDT

Zoning Commissioner for Baltimore County
NOTES: (1) Hearings are Handicapped Accessible; for special accommodations Please Contact the Zoning Commissioner's Office at (410) 897-4386

(410) 887-4386.

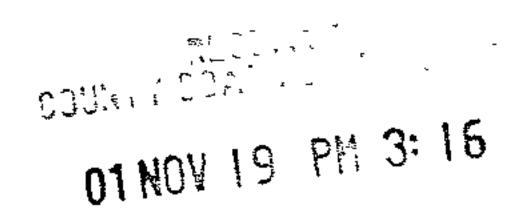
(2) For information concerning the File and/or Hearing, Contact the Zoning Review Office at (410) 887-3391.

JT/8/769 Aug28 C490287

CERTIFICATE OF PUBLICATION

<u>830</u> ,2001
THIS IS TO CERTIFY, that the annexed advertisement was published
n the following weekly newspaper published in Baltimore County, Md.,
once in each ofsuccessive weeks, the first publication appearing
on 828 , 2001 .
The Jeffersonian
The Jeffersonian Arbutus Times
☐ Catonsville Times
☐ Towson Times
Owings Mills Times
☐ NE Booster/Reporter
☐ North County News
S. Wilkings
LEGAL ADVERTISING

APPEAL SIGN POSTING REQUEST



CASE NO. 02-057-SPH

JACK ANTWERPEN – Legal Owner

W/s Brenbrook Drive, SW Corner Church Lane (3636 Brenbrook Drive)

2nd Election District

(Printed Name)

Appealed: 9/28/01

Attachment – (Plan to accompany Petition - Petitioner's Exhibit No.1)

24613 CERTIFICATE OF POSTING TO: Baltimore County Board of Appeals 400 Washington Avenue, Room 49 Towson, Maryland 21204 Attention: Kathleen Bianco Administrator RE: Case No. 02 - 057 - 5PHPetitioner/Developer: Petitioner/Developer:

SACK ANTWERPEN This is to certify that the necessary appeal sign(s) was posted conspicuously on property located at 3636 Brenbrook DR. The sign(s) was posted on 11/15, 2001. GARY C: FREUND

********COMPLETE AND RETURN BELOW INFORMATION

· PPEAL SIGN POSTING REQUEST

CASE NO. 02-057-SPH

JACK ANTWERPEN -Legal Owner

W/s Brenbrook Drive, SW Cor Church Lane (3636 Brenbrook Drive)

2nd Election District

Appealed: 9/28/01

Attachment – (Plan to accompany Petition - Petitioner's Exhibit No.1)

DEPARTMENT OF PERMITS AND DEVELOPMENT MANAGEMENT ZONING REVIEW

ADVERTISING REQUIREMENTS AND PROCEDURES FOR ZONING HEARINGS

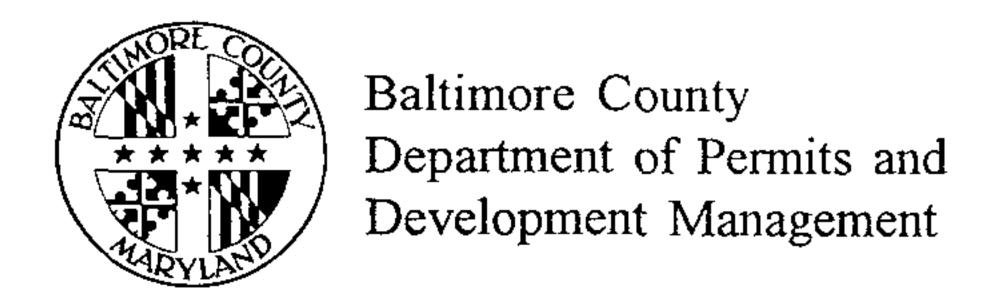
The <u>Baltimore County Zoning Regulations</u> (BCZR) require that notice be given to the general public/neighboring property owners relative to property which is the subject of an upcoming zoning hearing. For those petitions which require a public hearing, this notice is accomplished by posting a sign on the property (responsibility of the petitioner) and placement of a notice in a newspaper of general circulation in the County, both at least fifteen (15) days before the hearing.

Zoning Review will ensure that the legal requirements for advertising are satisfied. However, the petitioner is responsible for the costs associated with these requirements. The newspaper will bill the person listed below for the advertising. This advertising is due upon receipt and should be remitted directly to the newspaper.

OPINIONS MAY NOT BE ISSUED UNTIL ALL ADVERTISING COSTS ARE PAID.

Item Num	ber of Case Number: 22-057-574 -
Petitioner	ANTBREN ILC
Address of	r Location: 3636 Brenbrook Drive
DI 5405 I	
	FORWARD ADVERTISING BILL TO: Richard Rubin
Name: _	
	Richard Rubin

Revised 2/20/98 - SCJ



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

Fax: 410-887-5708

August 9, 2001

NOTICE OF ZONING HEARING

The Zoning Commissioner of Baltimore County, by authority of the Zoning Act and Regulations of Baltimore County, will hold a public hearing in Towson, Maryland on the property identified herein as follows:

CASE NUMBER: 02-057-SPH

3636 Brenbrook Drive

W/S Brenbrook Road, SW Cor. Church Lane 2nd Election District – 2nd Councilmanic District Legal Owner: Antbren LLC, Jack Antwerpen

Special Hearing to allow the sales of used automobiles as a principal use in an automobile sales room and adjoining outdoor sales area.

HEARING: Tuesday, September 11, 2001 at 2:00 p.m. in Room 407, County Courts

Building, 401 Bosley Avenue

Arnold Jablon Gりて Director

C: Richard Rubin, Neuberger Quinn Gielen Rubin & Gibber PA, 1 South Street, 27th Floor, Baltimore 21202
Jack Antwerpen, Antbren LLC, 6631 Baltimore National Pike, Baltimore 21207

NOTES: (1) THE PETITIONER MUST HAVE THE ZONING NOTICE SIGN POSTED BY AN APPROVED POSTER ON THE PROPERTY BY MONDAY, AUGUST 27, 2001

- (2) HEARINGS ARE HANDICAPPED ACCESSIBLE; FOR SPECIAL ACCOMMODATIONS PLEASE CALL THE ZONING COMMISSIONER'S OFFICE AT 410-887-4386.
- (3) FOR INFORMATION CONCERNING THE FILE AND/OR HEARING, CONTACT THE ZONING REVIEW OFFICE AT 410-887-3391.

TO: PATUXENT PUBLISHING COMPANY

Tuesday, August 28, 2001 Issue – Jeffersonian

Please forward billing to:

Richard Rubin
1 South Street, 27th Floor
Baltimore MD 21202

410 332-8509

NOTICE OF ZONING HEARING

The Zoning Commissioner of Baltimore County, by authority of the Zoning Act and Regulations of Baltimore County, will hold a public hearing in Towson, Maryland on the property identified herein as follows:

CASE NUMBER: 02-057-SPH

3636 Brenbrook Drive

W/S Brenbrook Road, SW Cor. Church Lane 2nd Election District – 2nd Councilmanic District Legal Owner: Antbren LLC, Jack Antwerpen

Special Hearing to allow the sales of used automobiles as a principal use in an automobile sales room and adjoining outdoor sales area.

HEARING: Tuesday, September 11, 2001 at 2:00 p.m. in Room 407, County Courts

Building, 401 Bosley Avenue

LAWRENCE E. SCHMIDT GDZ ZONING COMMISSIONER FOR BALTIMORE COUNTY

NOTES: (1) HEARINGS ARE HANDICAPPED ACCESSIBLE; FOR SPECIAL ACCOMODATIONS, PLEASE CONTACT THE ZONING COMMISSIONER'S OFFICE AT 410-887-4386.

(2) FOR INFORMATION CONCERNING THE FILE AND/OR HEARING, CONTACT THE ZONING REVIEW OFFICE AT 410-887-3391.



OLD COURTHOUSE, ROOM 49 400 WASHINGTON AVENUE TOWSON, MARYLAND 21204 410-887-3180 FAX: 410-887-3182

Hearing Room – Room 48 Old Courthouse, 400 Washington Avenue

March 19, 2002

NOTICE OF ASSIGNMENT

CASE #: 02-057-SPH

IN THE MATTER OF: Jack Antwerpen -Petitioner /Owner

3636 Brenbrook Drive

2nd Election District; 2nd Councilmanic District

9/17/2001 – D.Z.C.'s Order in which special hearing request was **GRANTED**.

ASSIGNED FOR:

THURSDAY, JUNE 6, 2002 at 10:00 a.m.

NOTICE:

This appeal is an evidentiary hearing; therefore, parties should consider the

advisability of retaining an attorney.

Please refer to the Board's Rules of Practice & Procedure, Appendix C, Baltimore County

Code.

IMPORTANT: No postponements will be granted without sufficient reasons; said requests

must be in writing and in compliance with Rule 2(b) of the Board's Rules. No

postponements will be granted within 15 days of scheduled hearing date unless in full

compliance with Rule 2(c).

If you have a disability requiring special accommodations, please contact this office at least one week prior to hearing date.

Kathleen C. Bianco Administrator

c:

Appellant

: Office of People's Counsel

Counsel for Petitioner /Legal Owner
Petitioner /Legal Owner

: Richard Rubin, Esquire : Jack Antwerpen

Nathan Adler Esg. Hugh Berustein Esg.

Lawrence E. Schmidt, Zoning Commissioner Pat Keller, Planning Director Arnold Jablon, Director /PDM







OLD COURTHOUSE, ROOM 49 400 WASHINGTON AVENUE TOWSON, MARYLAND 21204 410-887-3180 FAX: 410-887-3182

June 6, 2002

NOTICE OF DELIBERATION - Motion to Dismiss

IN THE MATTER OF:

Petition of: JACK ANTWERPEN – Legal Owner Case No. 02-057-SPH

The following date has been assigned for deliberation as to People's Counsel's Motion to Dismiss (argument received by the Board on 6/06/02):

DATE AND TIME

WEDNESDAY, JULY 10, 2002 at 9:30 a.m.

LOCATION

Hearing Room 48, Basement, Old Courthouse

Kathleen C. Bianco Administrator

c:

Appellant

: Office of People's Counsel

Counsel for Petitioner /Legal Owner

: Nathan D. Adler, Esquire Hugh M. Bernstein, Esquire

(replaced Richard Rubin, Esquire)

Petitioner /Legal Owner

: Jack Antwerpen

Lawrence E. Schmidt, Zoning Commissioner Pat Keller, Planning Director Arnold Jablon, Director /PDM

fyi: S.W.R.





wit

OLD COURTHOUSE, ROOM 49 400 WASHINGTON AVENUE TOWSON, MARYLAND 21204 410-887-3180 FAX: 410-887-3182

*** HEARING ROOM - Room 48 ***

Basement -Old Courthouse 400 Washington Avenue

APPEAL HEARINGS SCHEDULED FOR THE WEEK OF JUNE 03, 2002

TUESDAY

·6/04

10:00 am

Case No.: 01-506-XA

/HEARING

In the Matter of:

Albert Bierman – Mark McAllister – Legal Owner 1627 Eastern Boulevard, SE/s Eastern Boulevard and SW/S Seversky Court 15th Election District / 5th Councilmanic District

RE: To approve service garage per § 230.13 BCZR; VAR - rear yd setback; existing fences/ screening

WEDNESDAY

6/05

9:00 am

Case No.: 02-328-SPHXA

/HEARING

In the Matter of:

Patricia F. MacDonald — Legal Owner/Petitioner 105 Sudbrook Lane 3rd Election District; 2nd Councilmanic District

RE: Rehab and use of existing dwelling w/proposed bldg / Class B Office Building; $SE-Class\ B$ office building; $VAR-buffers\ and\ sign$

6/05

10:00 am

Case No.: 02-098-SPH

/HEARING

In the Matter of:

Constellation Power Source Generation, Inc. S/s Carroll Island Road, 840' E of c/l Beach Drive 10001 Carroll Island Road 15th Election District; 5th Councilmanic District

RE: Approval to amend previously approved SE and variance Case Nos. 4077 and 74-102-ASPH in order to construct a slag processing facility on property

THURSDAY-

6/06

10:00 am

Case No.: 02-057-SPH

/HEARING

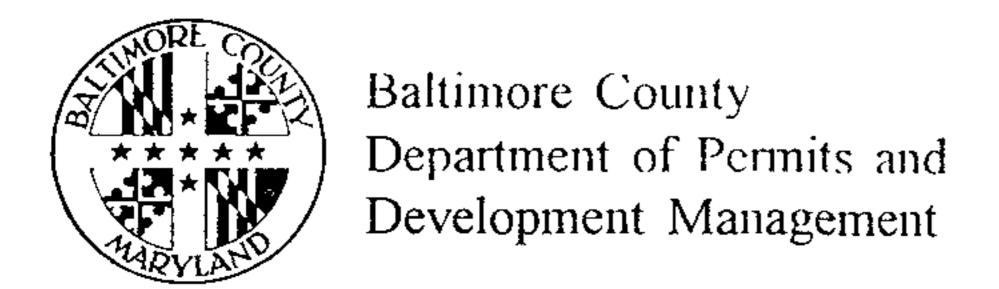
RECEIVED

In the Matter of:

Jack Antwerpen – Legal Owner 3636 Brenbrook Drive 2nd Election District; 2nd Councilmanic District

MAY 2 9 2002

Printed with Soybean In allow sale of used automobiles in B.M. zone



Development Processing County Office Building 111 West Chesapeake Avenue Towson, Maryland 21204

September 7, 2001

Richard Rubin Neuberger Quinn Gielen Rubin & Gibber PA 1 South Street, 27th Floor Baltimore MD 21202

Dear Mr. Rubin:

RE: Case Number: 02-057-SPH, 3636 Brenbrook Drive

The above referenced petition was accepted for processing by the Bureau of Zoning Review, Department of Permits and Development Management (PDM) on August 2, 2001.

The Zoning Advisory Committee (ZAC), which consists of representatives from several approval agencies, has reviewed the plans that were submitted with your petition. All comments submitted thus far from the members of the ZAC are attached. These comments are not intended to indicate the appropriateness of the zoning action requested, but to ensure that all parties (zoning commissioner, attorney, petitioner, etc.) are made aware of plans or problems with regard to the proposed improvements that may have a bearing on this case. All comments will be placed in the permanent case file.

If you need further information or have any questions, please do not hesitate to contact the commenting agency.

Very truly yours,

W. Carl Richards, Jr. らりて Supervisor, Zoning Review

W. Carl Brichard, Jr.

WCR: gdz

Enclosures

c: Jack Antwerpen, Antbren LLC, 6631 Baltimore National Pike, Baltimore 21207 People's Counsel

Sint a/11

BALTIMORE COUNTY, MARYLAND

INTER-OFFICE CORRESPONDENCE

TO:

Arnold Jablon, Director

DATE: September 5, 2001

Department of Permits and Development Management

FROM:

Arnold F. 'Pat' Keller, III

Director, Office of Planning

SUBJECT: Zoning Advisory Petition(s): Case(s) 02-056, 02-057, 02-062, & 02-069

The Office of Planning has reviewed the above referenced case(s) and has no comments to offer. For further questions or additional information concerning the matters stated herein, please contact Mark A. Cunningham in the Office of Planning at 410-887-3480.

Prepared by:

Section Chief:

AFK/JL:MAC

SFP - 5

Jan 1

BALTIMORE COUNTY, MARYLAND

INTEROFFICE CORRESPONDENCE

TO:

Arnold Jablon, Director

DATE: September 6, 2001

Department of Permits & Development Mgmt.

FROM:

Robert W. Bowling, Supervisor

Bureau of Development Plans Review

SUBJECT:

Zoning Advisory Committee Meeting

For August 13, 2001

Item Nos. 018, 019, 021, 022, 023, 025,

026, 028, 029, 030, 031, 032, 033,

035, and 057

The Bureau of Development Plans Review has reviewed the subject zoning items, and we have no comments.

RWB:HJO:jrb

cc: File



700 East Joppa Road Towson, Maryland 21286-5500 410-887-4500

August 14, 2001

Department of Permits and
Development Management (PDM)
County Office Building, Room 111
Mail Stop #1105
111 West Chesapeake Avenue
Towson, Maryland 21204

ATTENTION: Gwen Stephens

RE: Property Owner: 019-Cranbrook Plaza Enterprises

057 - Antbren LLC, Jack Antwerpen - Owner

Location: DISTRIBUTION MEETING OF August 6, 2001

Item No.: 057 & 019

Dear Ms. Stephens:

Pursuant to your request, the referenced property has been surveyed by this Bureau and the comments below are applicable and required to be corrected or incorporated into the final plans for the property.

- 4. The site shall be made to comply with all applicable parts of the Fire Prevention Code prior to occupancy or beginning of operation.
- 5. The buildings and structures existing or proposed on the site shall comply with all applicable requirements of the National Fire Protection Association Standard No. 101 "Life Safety Code", 1994 edition prior to occupancy.

REVIEWER: LIEUTENANT JIM MEZICK, Fire Marshal's Office PHONE 887-4881, MS-1102F

RECEIVED

AUG 2 0 2001

GPA 2F-MFER ROLLS THE PEDAMAN INCOMESON



Maryland Department of Transportation State Highway Administration

Parris N Glendening Governor John D. Porcari Secretary Parker F. Williams

Date: 8.10.01

Ms. Ronnay Jackson Baltimore County Office of Permits and Development Management County Office Building, Room 109 Towson, Maryland 21204

RE:

Baltimore County Item No.

266

Administrator

Dear. Ms. Jackson:

This office has reviewed the referenced item and we have no objection to approval as it does not access a State roadway and is not affected by any State Highway Administration projects.

Should you have any questions regarding this matter, please contact Larry Gredlein at 410-545-5606 or by E-mail at (lgredlein@sha.state.md.us).

Very truly yours,

Kenneth A. McDonald Jr., Chief Engineering Access Permits Division

1. 1. Bull

MEMO TO THE FILE

August 7, 2001

TO: Zoning Commissioner/Deputy Zoning Commissioner

FROM: John June Sullivan Jr., Planner II, Zoning Review

SUBJECT: Zoning Hearing, Case # 02-057-SPH

Mr. Joseph Larsen came to the office today to file this petition. I informed him that this office couldn't decline to accept any Special Hearing Petition if a property owner wishes to file one. However, I advised Mr. Larsen that this case would be difficult to win, as the use is clearly not permitted by the Zoning Regulations. I also pointed out that parking calculations and the number of spaces are not shown on the Plan. This Petition is not for non-conforming use but an interpretation of the Baltimore County Zoning Regulations by the petitioner's attorney, Richard Rubin. Mr. Larsen stated that Mr. Rubin insisted on filing all paper work as is! I also informed Mr. Larsen, that I remember speaking to a representative of the property owner about this site and thoroughly explained why a used car business could not be located at this site.

It is the position of the Zoning Office that the use of Used Cars is not permitted in a BM (Business Major) zone unless it adjoins a new vehicle franchise dealer. Aside from the use problem the form and content of the Petition does not meet our filing requirements.

BALTIMORE COUNTY, MARYLAND

Board of Appeals of Baltimore County Interoffice Correspondence

DATE:

January 22, 2008

TO:

Timothy Kotroco, Director

Permits & Development Management

Attn.: Donald T. Rascoe

FROM:

Linda B. Fliegel Board of Appeals

SUBJECT:

Jack Antwerpen

Case Nos.: 02-057-SPH

Circuit Court Case Nos.: 03-C-02-10732

On October 7, 2003 the Circuit Court issued a Memorandum/Opinion AFFIRMING the Board of Appeals decision to grant People's Counsels Motion to Dismiss. A Notice of Appeal was file to the COSA on June 1, 2004.

On September 13, 2005 the Court of Special Appeals issued a Mandate AFFIRMING the Board of Appeals and the Circuit Court for Baltimore County.





OFFICE OF PEOPLE'S COUNSEL

Room 47, Old CourtHouse 400 Washington Ave. Towson, MD 21204

(410) 887-2188

September 28, 2001

CAROLE S. DEMILIO
Deputy People's Counsel

PETER MAX ZIMMERMAN
People's Counsel

Arnold Jablon, Director
Department of Permits and
Development Management
111 W. Chesapeake Avenue
Towson, MD 21204

Hand-delivered

Re: PETITION FOR SPECIAL HEARING

3636 Brenbrook Drive, W/S Brenbrook Drive,

SW Corner Church Lane,

2nd Election District, 2nd Councilmanic

Antbren LLC, Petitioner Case No.: 02-57-SPH

Dear Mr. Jablon:

Please enter an appeal of the People's Counsel for Baltimore County to the County Board of Appeals from the Findings of Fact and Conclusions of Law dated September 18, 2001 of the Baltimore County Deputy Zoning Commissioner in the above-entitled case.

Please forward copies of any papers pertinent to the appeal as necessary and appropriate.

Very truly yours,

Peter Max Zimmerman

People's Counsel for Baltimore County

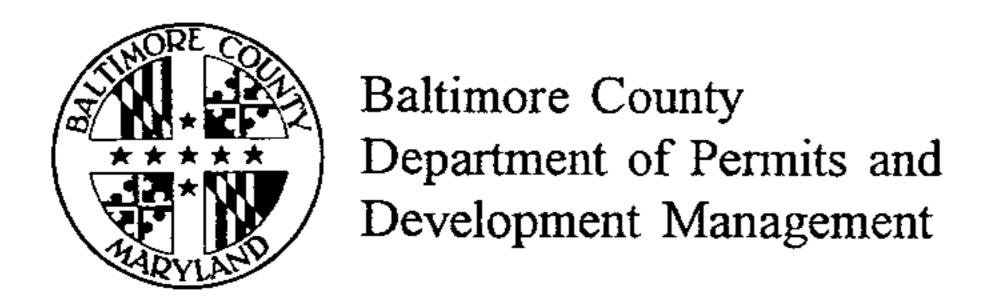
Carole S. Demilio

Deputy People's Counsel

PMZ/CSD/caf

SEP 28 2001

cc: Richard Rubin, Esq., Neuberger, Quinn, Gieler, 1 South Street, 27th Floor, Baltimore, MD 21202 Attorney for Petitioners



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

Fax: 410-887-5708

October 16, 2001

Richard Rubin, Esquire Neuberger, Quinn, Gieler 1 South Street 27th Floor Baltimore MD 21202

Dear Mr. Rubin:

RE: Case No. 02-057-SPH, Address 3636 Brenbrook Drive

Please be advised that an appeal of the above-referenced case was filed in this office on September 28, 2001 by Peter M. Zimmerman, Office of People's Counsel, Baltimore County, Maryland. All materials relative to the case have been forwarded to the Baltimore County Board of Appeals (Board).

If you are the person or party taking the appeal, you should notify other similarly interested parties or persons known to you of the appeal. If you are an attorney of record, it is your responsibility to notify your client.

If you have any questions concerning this matter, please do not hesitate to call the Board at 410-887-3180.

Sincerely,

Arnold Jablon 672

Director

AJ: gdz

c: Jack Antwerpen, Antbren LLC, 6631 Baltimore National Pike, Baltimore 21207 People's Counsel

APPEAL

Petition for Special Hearing
3636 Brenbrook Drive
W/S Brenbrook Drive, SW Corner Church Lane
2nd Election District — 2nd Councilmanic District
Jack Antwerpen - Legal Owner
Case No.: 02-057-SPH

Petition for Special Hearing (dated 08/02/01)

Zoning Description of Property

Notice of Zoning Hearing (dated 08/09/01)

Certification of Publication (The Jeffersonian issue 08/28/01)

Certificate of Posting (no copy in file posted)

Entry of Appearance by People's Counsel (dated 08/17/01)

Petitioner(s) Sign-In Sheet (1 sheet)

Protestant(s) Sign-In Sheet (None)

Citizen(s) Sign-In Sheet (None)

Zoning Advisory Committee Comments

Petitioners' Exhibits:

1. Plat to Accompany Petition for Special Hearing

Protestants' Exhibits: (None)

Miscellaneous (Not Marked as Exhibits):

• Photographs (10 pictures)

Deputy Zoning Commissioner's Order (dated 09/17/01 - APPROVED)

Notice of Appeal received on 09/28/01 from Office of People's Counsel, Baltimore County, Maryland

c: Richard Rubin, Esquire, Neuberger Quinn Gieler, 1 South Street, 27th Floor, Baltimore 21202
Jack Antwerpen, Antbren LLC, 6631 Baltimore National Pike, Baltimore 21207
People's Counsel of Baltimore County, MS #2010
Timothy Kotroco, Deputy Zoning Commissioner
Arnold Jablon, Director of PDM

01 OCT 17 AM 11: 36

Baltimore 21202

APPEAL

Petition for Special Hearing
3636 Brenbrook Drive
W/S Brenbrook Drive, SW Corner Church Lane
2nd Election District — 2nd Councilmanic District
Jack Antwerpen - Legal Owner
Case No.: 02-057-SPH

Petition for Special Hearing (dated 08/02/01) Zoning Description of Property / Notice of Zoning Hearing (dated 08/09/01) Certification of Publication (The Jeffersonian issue 08/28/01) Certificate of Posting (no copy in file posted) Entry of Appearance by People's Counsel (dated 08/17/01) Petitioner(s) Sign-In Sheet (1 sheet) Protestant(s) Sign-In Sheet (None) Citizen(s) Sign-In Sheet (None) Zoning Advisory Committee Comments Petitioners' Exhibits: 1. Plat to Accompany Petition for Special Hearing Protestants' Exhibits: (None) Miscellaneous (Not Marked as Exhibits): Photographs (10 pictures) Deputy Zoning Commissioner's Order (dated 09/17/01 - APPROVED) Notice of Appeal received on 09/28/01 from Office of People's Counsel, Baltimore County, Maryland Nathan Adler and Hugh Bernstein Richard Rubin, Esquire, Neuberger Quinn Gieler, 1 South Street, 27th Floor, C:

Jack Antwerpen, Antbren LLC, 6631 Baltimore National Pike, Baltimore 21207

People's Counsel of Baltimore County, MS #2010

Timothy Kotroco, Deputy Zoning Commissioner

Arnold Jablon, Director of PDM

Case No. 02-057-SPH

In the Matter of: Jack Antwerpen - Legal Owner /Petitioner

SPH – Approval to allow sale of used automobiles in a B.M. Zone.

9/17/2001 - -DZ.C.'s decision in which Petition for Special Hearing was GRANTED.

3/19/2002 - Notice of Assignment sent to following; scheduled for hearing on Thursday, June 6, 2002 at 10 a.m.:

Office of People's Counsel
Richard Rubin, Esquire
Jack Antwerpen
Lawrence E. Schmidt, Zoning Commissioner
Pat Keller, Planning Director
Arnold Jablon, Director /PDM

- 5/21/02 Appellee Brief in Support of Affirming Zoning Commissioner's Ruling and Notice of Entry of Appearance filed by Nathan D. Adler, Esquire, on behalf of Anthren Motor Cars, Ltd. (Nathan D. Adler, Esquire, and Hugh M. Bernstein, Esquire; removed Richard Rubin, Esquire)
- 6/03/02 Motion To Dismiss filed by Office of People's Counsel; People's Counsel Response to Petitioner's Memorandum also filed this date.
- 6/05/02 Letter from Hugh Bernstein, Esquire, Counsel for Petitioner; confirming telephone conversation; by agreement of counsel, to argue People's Counsel Motion to Dismiss; if hearing required on the merits, to be assigned to another date; only motion hearing on 6/06/02.
- 6/06/02 Anthren's Opposition to Motion to Dismiss Petition for Special Hearing and Reply to Memorandum of the People's Counsel filed by Nathan Adler, Esquire, Counsel for Petitioner.
 - --- Board convened for argument only on People's Counsel's Motion to Dismiss (Wescott, Worrall, Irish). Concluded argument; Deliberation assigned for 7/10/02; notice to be sent.
 - -- Notice of Deliberation sent to parties; assigned for Wednesday, July 10, 2002 at 9:30 a.m. (on Motion to Dismiss only; further hearing on merits to be assigned only if needed, based on outcome of Motion hearing).
- 6/27/02 Letter from N. Adler, Esquire with Supplemental Brief of Anthren LLC in opposition to People's Counsel's Motion to Dismiss.
- 7/02/02 Letter in Opposition filed by D. Demilio.
 - -- Letter to Mr. Adler; returning Supplemental Brief; record closed on 6/06/02; no further filings to be accepted by Board. Mr. Adler's cover letter retained for file, as well as Ms. Demilio's letter.
- 7/10/02 Board convened for deliberation; unanimous decision Motion to Dismiss GRANTED. Written Opinion and Order to be issued; appellate period to run from date of Written Order.

BOARD OF APPEALS OF BALTIMORE COUNTY

MINUTES OF DELIBERATION

IN THE MATTER OF: Jack Antwerpen

Case No.: 02-057-SPH

DATE: July 11, 2002

BOARD/PANEL: Richard K. Irish RKI

Margaret Worrall
Lawrence S. Wescott
LSW

RECORDED BY: Theresa R. Shelton / Legal Secretary

PURPOSE: To deliberate the Motion to Dismiss with regards to the Special Hearing filed by legal owner, Jack Antwerpen, requesting special hearing to allow the sales of used automobiles as a principal use in an automobile sales room and adjoining outdoor sales area in a B.M. zone.

PANEL MEMBERS DISCUSSED THE FOLLOWING:

- Ordinance language used and new Circuit Court case
- dealership building unoccupied
- vesting rights
- when a law is passed during litigation that law rules
- difference by right vs. difference by special exception
- need to proceed under special exception (PUD)

FINAL DECISION: Unanimous decision by the Board Members to GRANT the Motion to Dismiss.

NOTE: These minutes, which will become part of the case file, are intended to indicate for the record that a public deliberation took place that date regarding this matter. The Board's final decision and the facts and findings thereto will be set out in the written Opinion and Order to be issued by this Board.

Respectfully submitted,

Theresa R. Shelton

County Board of Appeals

Hurun B. Shelton

RE: PETITION FOR SPECIAL HEARING 3636 Brenbrook Drive, W/S Brenbrook Rd, SW Corner Church Ln 2nd Election District, 2nd Councilmanic

Legal Owner: Antbren LLC Petitioner(s)

* BEFORE THE

* ZONING COMMISSIONER

* FOR

* BALTIMORE COUNTY

* Case No. 02-57-SPH

* * * * * * * * *

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. All parties should copy People's Counsel on all correspondence sent/ documentation filed in the case.

Peter Max Zimmerman PETER MAX ZIMMERMAN

People's Counsel for Baltimore County

arole 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 17th day of August, 2001 a copy of the foregoing Entry of Appearance was mailed to Richard Rubin, Esq., Neuberger, Quinn, Gieler, 1 South Street, 27th Floor, Baltimore, MD 21202, attorney for Petitioner(s).

PETER MAX ZIMMERMAN





OFFICE OF PEOPLE'S COUNSEL

Room 47, Old CourtHouse 400 Washington Ave. Towson, MD 21204

(410) 887-2188

PETER MAX ZIMMERMAN People's Counsel

July 2, 2002

CAROLE S. DEMILIO Deputy People's Counsel

Lawrence S. Wescott, Esquire Baltimore County Board of Appeals Old Courthouse, Room 49 Towson, Maryland 21204

RE: Antbren, LLC, Case No 02-57-SPH

Dear Mr. Chairman:

We oppose Petitioner filing the Supplemental Brief in the aforementioned matter for the following reasons:

- 1. It has been the policy of the CBA to restrict Briefs to one per side, filed simultaneously.
- 2. Petitioners filed a Memorandum prior to the hearing in the case and People's Counsel filed a Memorandum in response.
- 3. In addition, People's Counsel filed a Motion to Dismiss, and Petitioners filed an Answer to Motion.
- 4. The matter was scheduled for hearing on June 6, 2002. On or about June 5th, Petitioners requested a postponement due to a conflict with their witness.
- 5. In lieu of postponement, People's Counsel agreed to limit the hearing on June 6th to the Motion and Answer on the legal issue.
- 6. Oral arguments were presented by Counsel as the June 6th hearing and the CBA held the matter for public deliberation.

- 7. Petitioner is in error that People's Counsel cited a case for the first time at the hearing; Petitioner did not identify the case, but all cases cited at the hearing were discussed in People's Counsel 's Memorandum. A Petitioner must be prepared to address all cases at the oral argument.
- 8. Public Deliberation are scheduled for July 10th; to allow Petitioner's Supplemental Memorandum would encourage endless Memorandum up to the date of the Public Deliberation, be prejudicial to the parties regarding who gets "the last word", render oral argument. superfluous, and be unfair to the CBA who must give due diligence to the memoranda filed.

For these reasons, Petitioner's Supplemental Memorandum should not be accepted by the CBA.

Very truly yours,

PETER MAX ZIMMERMAN

People's Counsel for Baltimore County

CAROLE S. DEMILIO

Deputy People's Counsel

Nathan D. Adler cc: Hugh M. Berstein

Neuberger, Quinn, Gielen, Rubin & Gibber, P.A. One South Street, 27th Floor

Baltimore, Maryland 21202



OLD COURTHOUSE, ROOM 49 400 WASHINGTON AVENUE TOWSON, MARYLAND 21204 410-887-3180 FAX: 410-887-3182

July 2, 2002

COPY VIA FAX ORIGINAL AND ENCLOSURE VIA US MAIL

Hugh M. Bernstein, Esquire NEUBERGER, QUINN, GIELEN, RUBIN & GIBBER, P.A. 27th Floor, Commerce Place One South Street Baltimore, MD 21202-3201

Re: Case No. 02-057-SPH (Jack Antwerpen --Petitioner)

In the Matter of: Antbren LLC

Dear Mr. Bernstein:

Your Supplemental Brief of Anthren LLC in Opposition to People's Counsel's Motion to Dismiss was received on June 27, 2002. On July 2, 2002, the Office of People's Counsel filed a letter in opposition to your Supplemental Brief.

The Board did, in fact, conclude the hearing in this case on June 6, 2002, and the record closed. In addition, the Board's policy regarding supplemental filings has been to reject same once the record has been closed and public deliberation scheduled.

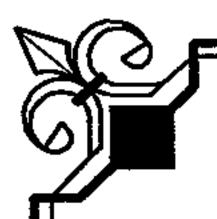
Therefore, in keeping with the Board's policy, I am herewith returning to you the enclosed Supplemental Brief, which cannot be placed in the subject file nor become a part of the record in this matter.

Very truly yours,

Kathleen C. Bianco Legal Administrator

Enclosure

c: People's Counsel for Baltimore County



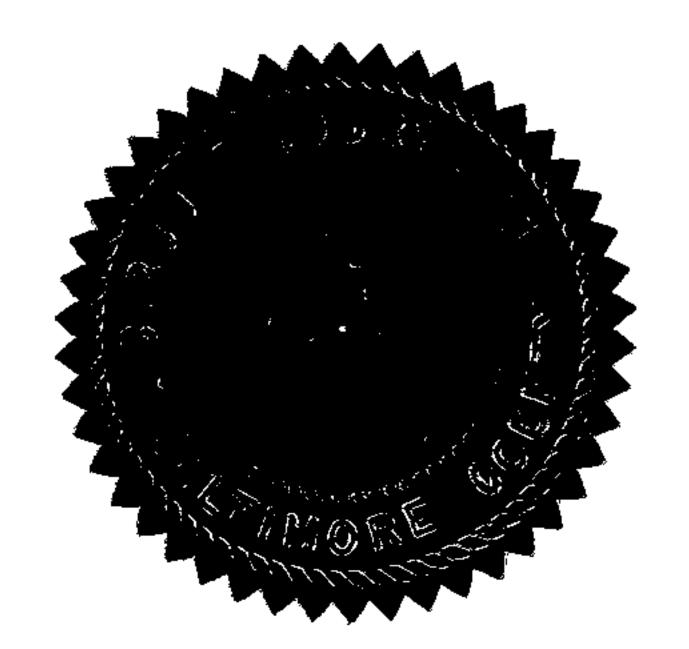


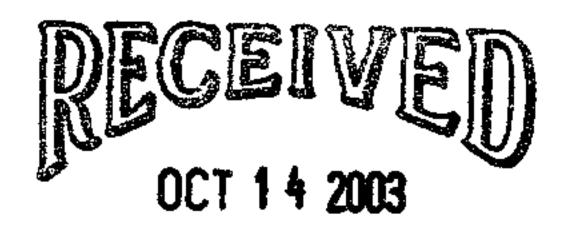
STATE OF MARYLAND, BALTIMORE COUNTY, TO WIT:

I HEREBY CERTIFY THAT THE AFOREGOING IS A TRUE							
PHOTOCOPY OF THE ORIGINAL_	CASE HISTORY						
	· · · · · · · · · · · · · · · · · · ·						
TAKEN FROM THE RECORDS OF	THE CIRCUIT COURT FOR						
BALTIMORE COUNTY AS RECOR	DED IN CASE						

IN TESTIMONY WHEREOF, I HERETO SET MY HAND AND AFFIX
THE SEAL OF THE CIRCUIT COURT FOR BALTIMORE COUNTY

THIS 10 DAY OF October 2003





BALTIMORE COUNTY BOARD OF APPEALS

CLERK OF THE CIRCUIT COURT
FOR BALTIMORE COUNTY





CIRCUIT COURT FOR BALTIMORE COUNTY

Suzanne Mensh

Clerk of the Circuit Court County Courts Building 401 Bosley Avenue

P.O. Box 6754

Towson, MD 21285-6754

(410)-887-2601, TTY for Deaf: (800)-735-2258 Maryland Toll Free Number (800) 938-5802

10/10/03 Case Number: 03-C-02-010732 AE

Date Filed: 09/24/2002 Status: Closed/Active

Judge Assigned: To Be Assigned,

Location:

In The Matter of: Jack Antwerpen, et al

CASE HISTORY

OTHER REFERENCE NUMBERS

Description Number

Administrative Agency 02-057-SPH
Case Folder ID C02010732V01

INVOLVED PARTIES

Type Num Name(Last.First.Mid.Title)	Disposition Addr Update Addr Str/End	Entered
PET 001 Antwerpen. Jack	BT DO 10/07/03 Party ID: 0528819	09/25/02
Capacity : Legal Owner Mail: 3636 Brenbrook Drive Randallstown, MD 21133	09/25/02	
Attorney 0001783 Bernstein, Hugh M Funk & Bolton Pa 36 South Charles Street 12th Floor Baltimore, MD 21201 (410)659-7700	Appear. 09/25/2002	09/25/02
0015358 Adler. Nathan D	Appear: 09/25/2002	09/25/02

03-C-02-010732 Date: 10/10/03 Time: 13:09 Page: 2

Neuberger, Quinn, Gielen, Rubin & Gibber, P.A.

One South Street

27th Floor Commerce Place Baltimore, MD 21202-3282

(410)332-8516

Disposition

Addr Str/End

BT DO 10/07/03

09/25/02

Party ID: 0528820

Capacity : Legal Owner

002 Antwerpen L L C

PET

Mail: 3636 Brenbrook Drive 09/25/02

Randallstown. MD 21133

Attorney 0001783 Bernstein, Hugh M Appear 09/25/2002 09/25/02

Funk & Bolton Pa

36 South Charles Street

12th Floor

Baltimore, MD 21201

(410)659-7700

0015358 Adler. Nathan D Appear: 09/25/2002 09/25/02

Neuberger, Quinn, Gielen, Rubin & Gibber, P.A.

One South Street

27th Floor Commerce Place Baltimore, MD 21202-3282

(410)332-8516

RES 001 County Board Of Appeals For Baltimore County The BT DO 10/07/03 09/25/02

Party ID 0528824

Mail 400 Washington Avenue 09/25/02

Old Courthouse Room 49 Baltimore, MD 21204

Attorney. 0804268 Demilio, Carole S Appear: 10/04/2002 10/04/02

Deputy Peoples Counsel
Old Courthouse Room 47
400 Washington Ave
Towson, MD 21204

(410)887-2188

CALENDAR EVENTS

03-C-02-010732 Date: 10/10/03 Time: 13:09 Page: 3

Date Time Dur Event Description Text SA Jdg Day Of Notice User ID

Result ResultDt By Result Judge Rec

03/18/03 09:30A 01H Civil Non-Jury Trial Y TBA 01 /01 KLS GB

Postpone 12/30/02 F

04/07/03 09 30A 01H Civil Non-Jury Trial Y SS 01 /01 GB

Conclude 04/07/03 C S Souder Y

Stenographer(s): Linda K Lindsey

JUDGE HISTORY

JUDGE ASSIGNED Type Assign Date Removal RSN
TBA To Be Assigned, J 09/25/02

DOCUMENT TRACKING

Num/Seq Description	Filed	Entered	Party	Jdg Ruling	Closed	User	r ID
0001000 Petition for Judicial Review	09/24/02	09/25/02	PET001	TBA	10/07/03	CS	JBJ
0001001 Answer	10/02/02	10/04/02	RES001	TBA	10/07/03	MI	JBJ
0002000 *Transcript of Record from Adm Agency	11/26/02	12/04/02	000	TBA	10/07/03	MJ	JBJ
0003000 Notice of Transcript of Record Sent	12/04/02	12/04/02	PET001	TBA	12/04/02	MJ	MJ
0004000 Notice of Transcript of Record Sent	12/04/02	12/04/02	RES001	TBA	12/04/02	MJ	MJ
0005000 Scheduling Order	12/17/02	12/17/02	000	TBA	12/17/02	KLS	KLS
0006000 Memorandum Filed by PET001-Antwerpen, Jack, PET002-		01/02/03 L L C.	PET001	TBA	01/02/03	ΜŢ	ΜI
0006001 Answer	02/05/03	02/11/03	RES001	TBA	10/07/03	MI	JBJ
0006002 Reply Memorandum Filed by PET001-Antwerpen, Jack, PET002-		03/26/03 L L C,	PET001	TBA	10/07/03	CS	JBJ
0007000 Request for Hearing Filed by PET001-Antwerpen, Jack, PET002-		01/02/03 L L C,	PET001	TBA	10/07/03	ΜI	JBJ
0008000 Memorandum Filed by PET001-Antwerpen, Jack, PET002-		01/02/03 L L C.	PET001	TBA	01/02/03	MI	ΜŢ
0009000 Request for Hearing Filed by PET001-Antwerpen, Jack, PET002-		01/02/03 L L C,	PET001	TBA	10/07/03	ΜI	JBJ

03-C-02-010732 Date: 10/10/03 Time: 13:09 Page:

Filed Entered Party Jdg Ruling Closed User ID Num/Seq Description 01/03/03 01/03/03 000 TBA 01/03/03 GB GB 0010000 Scheduling Order 10/07/03 KD JBJ 0011000 Open Court Proceeding 04/07/03 04/07/03 000 SS

April 7,2003 Hon Susan Souder Case reviewed by the Court. Ruling held sub-curia. Opinion and Order to be filed.

0012000 Memorandum Opinion Affirming CBA 10/07/03 10/07/03 000 SS Affirmed 10/07/03 JBJ JBJ

decision

to grant People's Counsel Motion to Dismiss

TICKLE

Code	Tick	le Nar	ne	Status	Expires	#Days	AutoExpire	GoAhead	From	Туре	Num	Seq
1ANS	1st	Answei	r Tickle	CLOSED	10/02/02	0	no	no	DANS	D	001	001
1ANS	1st	Answei	r Tickle	CLOSED	02/05/03	0	no	no	DANS	D	006	001
1YRT	0ne	Year ⁻	Tickle (Jud	CLOSED	09/24/03	365	no	no	DAAA	D	001	000
EXPU	Exhi	bit P	ickup Notic	OPEN	12/06/03	30	no	no			000	000
SLMM	Set	List I	Motions Mar	CLOSED	09/20/05	999	yes	no	DRHR	D	007	000
SLTR	Set	List	For Trial	Done	10/02/02	0	yes	yes	1ANS	T	001	001
SLTR	Set	List	For Trial	CANCEL	12/30/02	0	yes	no	CIVI	S	000	000
SLTR	Set	List H	For Trial	CANCEL	02/05/03	0	yes	no	1ANS	Т	006	001

EXHIBITS

Line # Marked Code Description SpH Sloc NoticeDt Disp Dt Dis By Offered By RES 001 County Board Of Appeals For B 000 I BOX 344/CBA TRANSC B

DIFFERENTIATED CASE MANAGEMENT

TRACKS AND MILESTONES

Description: EXPEDITED APPEAL TRACK Custom: Yes R1 Track

Assign Date 12/17/02 Order Date 12/17/02

Start Date . 12/17/02 Remove Date

03-C-02-010732 Date: 10/10/03 Time: 13:09 Page: 5

Milestone Scheduled Target Actual Status

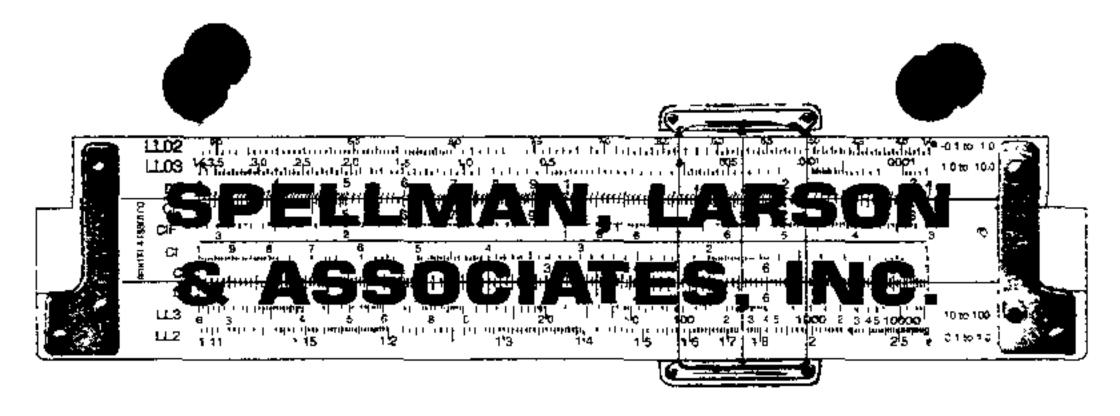
Motions to Dismiss under MD. Rule 2-322(01/01/03 10/07/03 CLOSED All Motions (excluding Motions in Limine 02/26/03 10/07/03 CLOSED TRIAL DATE is 04/07/03 03/17/03 04/07/03 REACHED

I hereby certify that the aforegoing docket is a true copy of the Civil records of the Clerk of the Circuit Court for Baltimore County IN TESTIMONY WHEREOF I hereunto subscribe my name and affix the Seal of the Circuit Court for Baltimore County, MD, this date 10/10/2003

Suzanne Mensh

Clerk of the Circuit Court





ROBERT E SPELLMAN, P L S JOSEPH L. LARSON

CIVIL ENGINEERS AND LAND SURVEYORS

105 W. CHESAPEAKE AVENUE TOWSON, MARYLAND 21204 TEL (410) 823-3535 / FAX (410) 825-5215 10'. George 500 Me 8/3/01

Mr. Carl Richards

August 3, 2001

Zoning Supervisor Department of Permits and Development Management Baltimore County

HAND DELIVERED

Re: 3636 Brenbrook Road

Item No. 057 Job No.201044

Dear Carl,

My office has just filed a Petition for Special Hearing for the above captioned property, which was accepted for filing and is currently being processed.

Unfortunately, there are certain serious time constraints that are associated with this Zoning Petition that require me to respectfully request your consideration to afford us as early a Hearing date as possible.

It is of the utmost importance to my client that we proceed to this Hearing with dispatch, whereby I would appreciate your cooperation to accelerate the scheduling process to set a date for our Hearing at your earliest convenience.

Very truly yours,

Jøseph L\ Larson, President SPELLMAN, LARSON & ASSOC., INC.

cc: Stanford Hess Richard Rubin LAW OFFICES

NEUBERGER, QUINN, GIELEN, RUBIN & GIBBER, P.A.

27TH FLOOR

ONE SOUTH STREET

BALTIMORE, MARYLAND 21202-3282

(410) 332-8550

HUGH M BERNSTEIN (410) 332-8592 (FAX NO) (410) 951-6022

June 27, 2002

VIA HAND DELIVERY

Ms. Kathleen C. Bianco, Adminstrator Baltimore County Board of Appeals Old Courthouse, Room 49 Towson, Maryland 21204

Re: Petition of Antbren, LLC, Case No. 02-57-SPH

Dear Ms. Bianco:

Thank you for taking the time to speak with me yesterday regarding the above-captioned matter. As I was describing in our conversation yesterday, a few days before the hearing in this matter, the People's Counsel filed a Motion to Dismiss. We wrote a responsive paper as quickly as possible and submitted it just before the hearing. At the hearing, however, People's Counsel cited a case for the first time which they argued supported their position. Since we had not heard of the case before, we could not address it at the hearing. Therefore, we are requesting permission to file the attached supplemental brief to address that issue. A copy of this letter and the proposed supplemental brief are also being sent to People's Counsel.

Very truly yours,

Augh M. Bensten / NOA

Hugh M. Bernstein

HMB:cj Enclosure

cc: Carole S. DeMilio, Esquire (w/ enclosures)

169158

2 JHH 27 PH 3: 53

LAW OFFICES

NEUBERGER, QUINN, GIELEN, RUBIN & GIBBER, P.A.

27TH FLOOR

ONE SOUTH STREET

BALTIMORE, MARYLAND 21202-3282

(410) 332-8550

HUGH M BERNSTEIN (410) 332-8592 (FAX NO.) (410) 951-6022

September 10, 2001

HAND DELIVERED

Mr. Timothy Kotroco Zoning Commissioner's Office County Courts Building 401 Bosley Avenue, Room 405 Towson, Maryland 21204

Re:

In Re Petition of Antbren, LLC

Before the Baltimore County Board of Zoning Appeals

Case No. 02-57-SPH

Dear Mr. Kotroco:

I am enclosing herewith for filing in the above-captioned matter Petitioner's Brief In Support of Petition For Ruling Of Compliance With Zoning Regulations, which case is scheduled for hearing tomorrow.

If you have any questions, please give me a call. Thank you for your assistance in this matter.

Very truly yours,

Hugh M. Bernstein

HMB:cj Enclosure

cc:

Peter Max Zimmerman, Esquire

Carole S. Demilio, Esquire

156446

SEP 10

LAW OFFICES

NEUBERGER, QUINN, GIELEN, RUBIN & GIBBER, P.A.

27TH FLOOR

ONE SOUTH STREET

BALTIMORE, MARYLAND 21202-3282

(410) 332-8550

HUGH M BERNSTEIN (410) 332-8592 (FAX NO) (410) 951-6022

June 5, 2002

Ms. Kathleen C. Bianco, Adminstrator Baltimore County Board of Appeals Old Courthouse, Room 49 Towson, Maryland 21204

Re: Petition of Anthren, LLC, Case No. 02-57-SPH

Dear Ms. Bianco:

Pursuant to your request, I am writing to confirm our conversation of earlier regarding my discussion with People's Counsel and a partial postponement of tomorrow's hearing in the above-referenced case. I spoke with Deputy People's Counsel Carole DeMilio regarding tomorrow's hearing. We agreed that we would argue People's Counsel's Motion to Dismiss tomorrow and the factual presentation, if still necessary, will be postponed to a later date. It is my understanding that this is agreeable to the Board of Appeals.

Thank you for your assistance in this matter and if you have any questions please feel free to call me.

Very truly yours,

Hugh M. Bernstein

HMB:cj Enclosure

cc: Carole DeMilio, Esquire

168109

LAW OFFICES

NEUBERGER, QUINN, GIELEN, RUBIN & GIBBER, P.A.

27TH FLOOR

ONE SOUTH STREET

BALTIMORE, MARYLAND 21202-3282

(410) 332-8550

NATHAN D. ADLER (410) 332-8516

FAX NO.

(410) 951-6039

E-MAIL ADDRESS.

NDA@NQGRG.COM

3

May 16, 2002

Clerk, County Board of Appeals for Baltimore County Old Courthouse Room 49 400 Washington Avenue Towson, Maryland 21204

> Re: In re: Petition of Antbren, LLC Case No. 02 57 SPH

Dear Sir/Madam:

Enclosed for filing in the above-captioned matter please find an original and one copy of the Appellee Brief in Support of Affirming Zoning Commissioner's Ruling, and a Notice of Entry of Appearance. Please file the original and return the copy to me, date-stamped, in the enclosed self-addressed, stamped envelope.

Of course, should you have any questions at all regarding this matter, please feel free to contact me.

Very truly yours,

Mathan D. Adler Mathan D. Adler

NDA:Imd Enclosures

cc: Peter Max Zimmerman, Esquire (w/enclosure)

Carole S. DeMilio, Esquire (w/enclosure)

Section 233 Business, Major (B.M.) Zone Use Regulations [BCZR 1955]

BM

The following uses only are permitted (Section 233.3):

233.1. Uses permitted in B.L. Zone.

233.2³ Animal boarding place, Class A [Bill No. 85-1967⁴]

Automobile sales room and adjoining outdoor sales area, provided that dismantled or junked cars unfit for operations on the highways shall not be stored outdoors⁵

Boatyard [Bill Nos. 64-1963; 85-1967]

Bowling alleys

Carpentry, electrical, plumbing, heating, sheet metal, electroplating and painting shops

Catering hall [Bill No. 110-1993]

Clothes cleaning and dyeing where not more than two units with combined capacity of not more than 50 pounds are employed

Commercial beach, with provision of adequate parking area, and permitting dressing facilities, snack bar, picnic area and boat rental [Bill Nos. 64-1963; 85-1967]

Commercial recreation enterprises, including dance halls, skating rinks and others which, in the judgment of the Zoning Commissioner, are similar, but excluding merry-go-rounds and freak shows, shooting galleries and penny arcades

Community building, swimming pool or other structural or land use devoted to civic, social, recreational and educational activities [Bill Nos. 64-1963; 85-1967; 26-1988]

Funeral establishment [Bill No. 43-1970]

Garage, service

Golf course, country club or other outdoor recreation clubs; also quasi-public camp, including day camps, but no such uses shall be located on less than five acres, and no building, parking lot or out-of-water marine craft storage thereon shall be located within 60 feet of any residential property line [Bill Nos. 64-1963; 85-1967]

Hotel

Machinery sales store

Marina [Bill Nos. 64-1963; 85-1967]

Nightclub⁶

Printing, lithographing or publishing plant, employing not more than 25 persons Secondhand store⁷

2-59 7-25-2001

Editor's Note: All of the provisions of this subsection that are not followed by bracketed historical references were reenacted without substantive amendment by Bill No. 85-1967. The entries indicated in this section as originally having been added by Bill No. 64-1963 were, according to a literal reading of that bill, to have been added to "[Section]...232.2, title 'B.M. zone'...". However, Section 232.2 regulates side yards, not uses, and is part of the regulations of the B.L. zoning classification, not the B.M. classification.

⁴ Editor's Note: This bill also repealed "Animal hospital," which originally followed.

⁵ Editor's Note: "Billiard and pool rooms," which followed this item, was repealed by Bill No. 61-1967.

⁶ Editor's Note: "Pawnshop," which originally followed, was repealed by Bill No. 112-1995.

⁷ Editor's Note: "Tavern," which originally followed, was repealed by Bill No. 85-1967.

Section 236 Business, Roadside (B.R.) Zone Use Regulations [BCZR 1955]

BR

The following uses only are permitted:

Uses permitted and as limited in the B.M. Zone.

236.2 Animal boarding place, Class A [Bill No. 85-1967]

Animal boarding place, Class B [Bill No. 85-1967]

Bottling establishment, soft drink

Brewery, Class 7, if within the urban rural demarcation line [Bill No. 185-1995]

Greenhouse

Laboratory

Motel or motor court

Printing, lithographing or publishing plant employing over 25 persons

Volunteer fire company

The following uses when located at least 50 feet from the residential zone boundaries at the ends of the commercially zones frontages: [Resolution, November 21, 1956]

Building materials storage and sales yard

Farm implements, sales and service

Feed and grain sales and storage

Kennel

Lumberyard

Public utility storage yard

Stone or monument works

Storage of inflammable liquids and gases underground (see Baltimore County Building Code for requirements)

Tire retreading or recapping

236.4 Special exceptions. The following uses when permitted as special exceptions (Sections 270 and 502):10

Airport

Amusement park

Arcade, subject to the provisions of Section 423B [Bill No. 29-1982]

Automotive-service station, subject to the provisions of Section 405 [Bill Nos. 40-1967; 85-1967]¹¹

Bus terminal

Car wash [Bill Nos. 108-1964; 85-1967]

Cemetery (Section 401)

Contractor's equipment storage yard

2-65 7-15-2000

Editor's Note: "After-hours club," which originally followed, was repealed by Bill No. 36-2000.

Editor's Note: The entry entitled "Boat yard," which originally followed, was omitted from the draft of Bill No. 85-1967 through the copying of an apparently incomplete list of special exceptions as it appeared in a post-1955 edition of the zoning regulations. It is assumed, therefore, that the omission of the entry from the bill as enacted was inadvertent. (No intent regarding the regulation of boat yards is reflected in either the title of the bill or in any record pertaining to the bill.) The words "and/or marine railway" were previously repealed by Bill No. 64-1963.

Drive-in restaurant [Bill Nos. 40-1967; 85-1967]

Excavations, controlled (Section 403)¹²

Golf driving range, miniature golf and baseball batting range

Heliport, Type I [Bill No. 85-1967]

Heliport, Type II [Bill No. 85-1967]¹³

Living quarters in a commercial building

Moving and storage establishments [Bill No. 18-1976]

Pawnshop [Bill No. 112-1995]

Poultry, commercial killing of

Public utility uses other than those noted in Sections 200.11,¹⁴ 230.9 and 236.3 (Section 411)

Racetrack, commercial

Riding stable, commercial

Sanitary or rubble landfills (Section 412) [Bill No. 97-1987]

Shooting range

Signs, outdoor advertising, subject to Section 450 [Bill No. 89-1997]¹⁵

Sludge disposal facility – co-landfilling (Section 412A.2.A) [Bill No. 46-1982]

Sludge disposal facility - composting (Section 412A.2.B) [Bill No. 46-1982]

Sludge disposal facility - handling in general (Section 412A.2.C) [Bill No. 46-1982]

Sludge disposal facility - incineration (Section 412A.2.D) [Bill No. 46-1982]

Sludge disposal facility - landspreading (Section 412A.2.E) [Bill No. 46-1982]

Storage of inflammable liquids and gases aboveground (see Baltimore County Building Code for requirements)

Striptease business [Bill No. 137-1990]

Theater, drive-in

Trailer park (Section 414)

Truck stops [Bill No. 18-1976]¹⁶

Used motor vehicle outdoor sales area, separated from sales agency building

2-66 7-15-2000

Editor's Note: "Filling station," which originally followed, was repealed by Bill No. 85-1967.

Editor's Note: "Hospital, Class B," which originally followed, was repealed by Bill No. 37-1988.

Editor's Note: Section 200.11 [BCZR 1955] was repealed by Bill No. 100-1970. It read as follows: "Public utility uses as follows:

[&]quot;a. Telephone and telegraph lines.

[&]quot;b. Electric light and power lines, including transformers and transformer banks, when located on poles, on or contiguous to public highways, alleys, rear lot lines, railroad rights-of-way or if carrying less than 35,000 volts.

[&]quot;c. Conduits, cables; gas, sewer, storm drain, and water mains, all located underground.

[&]quot;d. Railroad."

Editor's Note: A previous entry for outdoor advertising signs was inserted in the draft of Bill No. 85-1967 through the copying of an apparently erroneous entry in a post-1955 edition of the zoning regulation. It is assumed, therefore, that the inclusion of the entry in the bill as enacted was inadvertent. (No intent regarding the regulations of outdoor advertising signs is reflected in either the title of the bill or in any record pertaining to the bill.) Pursuant to Bill No. 212-1992, the deletion of outdoor advertising signs in the BR Zone shall not affect or apply to any special exception granted prior to the effective date of Bill No. 87-1991, or to any petition for special exception filed prior to the effective date of Bill No. 87-1991.

Editor's Note: "Truck terminal," which originally followed, was repealed by Bill No. 19-1976.

795 A.2d 96

Larry POWELL et al.

CALVERT COUNTY, Maryland et al.
No. 45 Sept. Term, 2001.

Court of Appeals of Maryland.

Jan. 10, 2002.

Reconsideration Denied March 6, 2002.

J., held that landowner never obtained a final valid exception vested right to store his materials on the property. prior to change in the zoning law, and, thus, never obtained a petition for writ of certiorari. The Court of Appeals, Cathell, 750, affirmed in part and reversed in part. Homeowners filed ed. The Court of Special Appeals, 137 Md.App. 425, 768 A.2d sion petitioned for judicial review. The Circuit Court, Calvert County, Robert H. Mason, J., remanded. Homeowners appealapproved special exception. Homeowners in nearby subdivivacated and remanded. Board amended earlier opinion rural district zone. Thereafter, the Court of Special Appeals materials in connection with a commercial or industrial use in amended the county board of appeals' grant of special exception, cou district zone sought special exception to permit outdoor storof construction materials. After the trial court affirmed Landowner who operated excavating business in rural zoning ordinance to prohibit outdoor storage and nty ೧೪

Reversed and remanded.

. Zoning and Planning 546

In instances where there is ongoing litigation, there is no different "rule of vested rights" for special exceptions to a zoning ordinance, for until all necessary approvals, including all final court approvals, are obtained, nothing can vest or even begin to vest; even after final court approval is reached,

POWELL v. CALVERT COUNTY [368 Md. 400 (2002).]

401

additional actions must sometimes be taken in order for rights to vest.

Zoning and Planning ⇐⇒546

exception was in effect at time of the change special exception effectively nullified decision special exception initially granted, but subsequently vacated, the special exception was, at all times, in litigation, even if the his materials on the property, given that landowner's right to district zone and, thus, never obtained a vested right to store rials in connection with a commercial or industrial úse in rural change in the zoning law prohibiting outdoor storage of mateappeals to grant it and, never declared "unlawful or invalid"; Landowner never obtained a final valid exception prior to therefore, no in law. form of special of county board vacation of the

Zoning and Planning \$\sim 546

Special exception approval to subsequent change in a zoning ordinance, whose validity is being litigated, is not finally valid until all litigation concerning the special exception is final; persons proceeding under such approval prior to finality are not "vesting" rights, but are commencing at "their own risk" so that they will be required to undo what they have done if they ultimately fail in the litigation process.

Douglas C. Meister (Robert H. Rosenbaum of Meyers, Rodbell & Rosenbaum, P.A., on brief), Riverdale, for petitioners.

John C. Richowsky, Friendship, for respondents.

Argued before BELL, C.J., ELDRIDGE, RAKER, WILNER, CATHELL, HARRELL,* and BATTAGLIA, JJ.

Judge Harrell participated in the oral argument, but did not participate in the decision and the adoption of the opinion.

CATHELL, Judge.

the Board for further proceedings. vacated the decision of the Board, and remanded the case to Appeals, which reversed the decision of the Circuit for Calvert County, which affirmed the decision of the Board. Petitioners then filed an appeal with the Court of Special titioners filed a petition for judicial review in the Circuit Court including Larry Powell and Susan Mulvaney, petitioners. the special exception over the protests of various neighbors, special exception with the Calvert County Board of Appeals (hereinafter Board). In February of 1997 the Board granted James W. Graner, respondent, filed an application for Court, Pe-

the Circuit Court affirmed the Board in part and remanded judicial review in the Circuit Court. After a hearing was held, part of the case to the Board for further proceedings. applied for by respondent. Petitioners filed a petition ment on the record, once again granted the special exception On September 12, 1999, the Board, after making a statefor

granted. Petitioners present two questions for our review: ing in part the decision of the Circuit Court. peals. The Court of Special Appeals affirmed all of the decisions of the Board, thereby, affirming in part and revers-Petition for Writ of Certiorari to this Court, which Petitioners filed an appeal with the Court of Special Ap-Petitioners filed we

- is vacated, the use of the property pursuant to the ultimateuse under the doctrine of vested rights? ly vacated special exception served to vest the rights to that administrative agency decision granting a special exception "I. Did the lower court err by holding that when an
- tive agency grant of a special exception based on the lower II. Did the lower court err by affirming the administra-

the record to support the finding?" dence of a required finding, when there was no evidence in court's finding that prescribing a condition special exception was a substitute for substantial evi-င် the grant of

obtained a vested right to use his property for the storage of Court of Special Appeals. We answer yes to question I and reverse the decision of the We hold that respondent had not

Facts

business since 1981. more than twenty years and respondent has t business has been conducted on a portion of County that is zoned RUR-Respondent owns a fourteen-acre parcel of -Rural District.2 oeen running the the property for land in Calvert An excavating

to park excavation equipment on the premises, for his business on the property. In 1986, respondent was granted a special exception by the Board that permitted him under the Calvert County Zoning Ordinance (hereinafter Zon-In Ordinance) that permitted respondent to 1984, respondent received a home occupation permit locate the office Subsequently,

. .

1000 1000

RUR-Rural District

.-

This primary district is intended to protect and preserve areas of the County which are presently rural or agricultural in character and use. The purpose of this district is to provide for a full range of agricultural activities, and to allow low density residential development for those who are willing to live in more remote locations and to assume the costs of providing many of their own services and amenities. This district is also intended for the purposes of managing watersheds and water supplies; to provide for spacious development; to protect forest, wetland, and scenic areas; to protect fish and wildlife; to promote forestry, the growing of crops and grazing. Furthermore, it is intended that in this district there shall be no basis, under this Ordinance, for recourse against the effects of any reasonable farming or forestry operation, as permitted in this district, and conducted in a reasonable manner in effects of any reasonable farming or forestry operation, as permitted in this district, and conducted in a reasonable manner in accordance with good husbandry or forestry practices, including but not limited to noise, odor, vibration, fumes, dust or glare."

As stated in respondent's brief, although the case caption states that the respondents are Calvert County and the Calvert County Board of Appeals, neither has participated in the judicial review process of the Board of Appeals. Respondent has been part of the proceedings in the Circuit Court for Calvert County and the resulting appeal in the Court of Special Appeals. the င္

on May 11, 2001, states: The "Purpose and Intent of Districts" section of the Calvert County Zoning Ordinance, which was adopted on May 8, 1984 and last revised

respondent began to store construction equipment and materials such as top soil and gravel.

granted respondent thirty days to file for the special excepallowed only by way of a special exception in a RUR zone, storage of materials were not valid nonconforming uses.3 forming use; therefore, the injunctive relief requested injunctive relief in the District Court of Maryland sitting in Circuit Court found the storage of materials to be a District associated with the excavating business was a valid noncontion of the Zoning Ordinance. In 1994, the Board of County Calvert County. The District Court found that the land use County issued several citations to respondent claiming viola-Commissioners for Calvert County brought an action seeking Court, finding that the screening of topsoil and The County appealed to the Circuit Court for Calvert complaints from respondent's The Circuit Court reversed the decision of neighbors, Calvert The and was the use the

Respondent filed an application for a special exception with the Board. In February of 1997 a hearing was held before the Board. At the end of the hearing, the Board granted the special exception. A petition for judicial review was filed by petitioners in the Circuit Court for Calvert County. The Circuit Court affirmed the decision of the Board and petitioners filed an appeal with the Court of Special Appeals.

On December 5, 1998, while the appeal was pending with the Court of Special Appeals, the Board of County Commissioners of Calvert County amended the Zoning Ordinance. Resolution Number 47–98 amended the Zoning Ordinance so that a special exception was not allowed for "outdoor storage in connection with commercial and/or industrial uses" and "machinery and equipment in connection with excavating and/or contracting businesses" in a RUR district. This amendment repealed the section under which respondent had obtained initial approval from the Board of Appeals and the Circuit Court for his special exception.

The court reversed the judgment of the Board's decision. Calvert County with instructions to vacate the decision of the deficient record from which the court was unable to determine Special Appeals held that this lack of evidence resulted in a whether the parties were advised of the visit." The Court of occurred, who attended, what" was not any evidence in the record about "when the inspection Specifically, the Court of Special Appeals held that there was insufficient evidence in the record about a site visit to respondent's property prior to the hearing before the Board." There and remand the case to the Board for further proceedings." judgment and instruct the court to vacate the Board's decision the Board's decision, we shall reverse concluding whether there was substantial evidence supporting held that "[b]ecause the state of the record prevents us from ordinance deleting the special exception provision at issue, the Court of Special Appeals, in an unreported the Board's decision was based on substantial evidence. On April 23, 1999, after the County Apparently, the Circuit Court was said then vacated the Circuit Court for the circuit or observed, and had amended opinion (Powell I), court's

On September 2, 1999, the Board, at its regular public meeting, addressed respondent's request for a special excep-

: :

^{3.} Insofar as we are aware, the issues of the "intensification" or "extension" of the non-conforming uses were not presented. They are not presented in the instant appeal. The doctrines "intensification" of non-conforming uses and "extension" of non-conforming uses are explained in County Commissioners of Carroll County v. Zent, 86 Md.App. 745, 753-58, 587 A.2d 1205, 1209-11 (1991).

[.] At the time of the hearing, Zoning Ordinance 3-3.10.J provided for a special exception for storage of material and/or equipment for a commercial use in a RUR zone, it states:

^{&#}x27;J. Outdoor Storage in Connection with Commercial and Industrial Uses, (special exception in the RUR District, conditional in the ECTC District), provided that the material and/or equipment stored is not visible from adjoining properties or the road."

^{5.} We presume that the zoning ordinance of Calvert County may be amended by resolution. The parties do not contend to the contrary. Normally, zoning ordinances are amended by ordinances.

the opinion of the Court of Special Appeals. included the clarifications that the Board felt were required by granted was no longer available. time of its final decision, which was that the special exception The Board did not consider the ordinance as it existed at Board filed revised findings of fact and conclusions, which ant to the law as it existed at the time of the original hearing. fact with amendments. The findings of fact were adopted the special exception was then approved by the Board pursufor new evidence or allow any party to comment on property and then proposed to the circumstances surrounding its site visit to respondent's proceedings. Instead, the Board made some statements about Court of Special Appeals's opinion, did not reopen the record The Board, stating that it was strictly following adopt its previous findings of On October 18, 1999, and the the the the

the purpose of addressing the home occupation permit. special exception under the prior law. The last issue presentdence in the on the first two issues and remanded the case to the Board ed to the Circuit Court by petitioners was whether the Board this issue. Therefore, the Circuit Court affirmed the Board premises, which was a condition for the previous granting of had properly considered whether respondent resided provided ample evidence so that there was substantial nance. The Circuit Court also found that respondent the home occupation permit and the special exception. granted, respondent tected him from the Ordinance so that a special exception could not grant the special exception. Circuit Court found that the Board failed to properly consider ion and Order on June 2, 2000. In its opinion, the Circuit Court found that although there was a change, to the Zoning Review of the September 2, 1999 decision of Court for Calvert County, On November 16, 1999, petitioners filed, in the record to support the Board's granting of had obtained a vested right which intervening change in the Zoning Ordi-2000. In its opinion, the Circuit a Petition Requesting Judicial The Circuit Court filed an Opinthe have been Board to no Circuit The the еијhad prothe for.

Petitioners appealed the decision of the Circuit Court to the Court of Special Appeals. On March 9, 2001, the Court of

Special Appeals filed an opinion (Powell v. Calvert County, 137 Md.App. 425, 768 A.2d 750 (2001) (Powell II)) which affirmed all of the decisions of the Board, thereby affirming in part and reversing in part the Circuit Court. Petitioners filed a Petition for Writ of Certiorari to this Court, which we granted. Powell v. Calvert County, 364 Md. 534, 774 A.2d 408 (2001).

Discussion

Petitioners contend that the 1998 amendment to the Zoning Ordinance should have been applied to respondent's application for a special exception after the Court of Special Appeals (Powell I) reversed the decision of the Circuit Court with instructions for that court to vacate the decision of the Board and remand the case to the Board for further proceedings. On remand, the Board, even though the 1998 amendment was in effect, still granted the special exception based on the Zoning Ordinance prior to the 1998 amendment.

The Court of Special Appeals, in examining the prospective versus the retroactive application of the 1998 amendment determined that the 1998 amendment had a retroactive application, making it effective against pending cases from the date of its inception. The Court of Special Appeals stated:

"In the case before us, the amendment provided that it was effective as of December 8, 1998. As was true in Holland, [7] it contained no other provision with respect to prospective or retroactive application. Unlike the amendment in Holland, however, the amendment before us does

^{5.} Powell I and Powell II were heard by two completely different panels of judges.

^{7.} Holland v. Woodhaven Building & Development, Inc., 113 Md.App. 274, 687 A.2d 699 (1996), involved a change in the ordinance during an applicant's subdivision approval process. Washington Suburban Sanitary Commission v. Riverdale, 308 Md. 556, 520 A.2d 1319 (1987), was not a zoning or property case, it involved changes in provisions relating to immunity from tort liability. Neither involved special exceptions, variances or the like. See Luxmanor Citizens Association'v. Burkart, 266 Md. 631, 296 A.2d 403 (1972), which we discuss infra.

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land that its terms operate retroactively. We cautioned in Hol-

while zoning cases are not exempt from the principles of ordinarily will apply retrospectively by their very terms. Such in rem changes to the status of property necessarily changes in zoning laws, such as zoning reclassifications, construction will raise the question of whether the changes interfere with the property owner's vested rights. set forth in Riverdale Fire Company,

its effective date, the outside storage of construction materioriginal) (citations omitted). The amendment Holland, 113 Md.App. at 286-87, 687 A.2d 699 (emphasis in als was not a use permitted by special exception, absent was tantamount to a change in zoning classification. As of vested rights." in this case

Powell v. Calvert County, 137 Md.App. 425, 435-36, 768 750, 756 (2001). A.2d

spondent had obtained a vested right to use his property outdoor storage. The Court of Special Appeals then examined whether The Court of Special Appeals stated:

special exception was vacated. Thus, even though the result in [Town of Sykesville v.] West Shore [Communications, holding is not on point. Inc.] was the same "In the case before, us, the Board's decision issuing the as the result we reach in this case,

issuance of a special exception, on the one hand, and no difference, for purposes of the issue before us, between a and there was no violation of the zoning ordinance. become 'unlawful' because the Board acted within its powers Board approved the special exception. before use that only comes case, there was a lawful use in existence amendment of the zoning ordinance. When existing illegal use that becomes legal when a special excepamendment of the tion is issued and the use continues in existence. In each The use, originally unlawful, became Sn on the prior occasion, we did not rule into existence pursuant to and after It did not thereafter When the case was lawful when prior We see `&

POWELL v. CALVERT COUNTY [368 Md. 400 (2002).]

tion was never declared invalid. with the standard for appellate review. sion and its amended opinion that is now before us complies sufficiency of the evidence. As we shall explain below; the evidence was legally sufficient to support The special excepthe Board's deci-

should have, directed the court to remand remand to the circuit court, we record was insufficient for meaningful appellate review. Board without vacating its existing decision. In the case before us, on the first appeal, could have, , we held that the the case to the and perhaps

appeal based on an error of law, his rights of vested rights. however, in that had we reversed the Board's action on this declared unlawful or invalid within the meaning of the rule In any event, we hold that the special exception was never The applicant did proceed at his own risk, would not have

omitted). Powell, 137 Md.App. at 440–42, 768 A.2d at 758–59 (citations

case in which rights were found to have vested, tions, Inc., 110 Md.App. 300, 305, 677 A.2d 102, reached, additional actions must sometimes be taken in order Special Appeals noted the standard for "vesting" in the zoning for rights to vest. In Sykesville v. West Shore Communicacourt approvals, are obtained, nothing can vest or even begin is no different "rule of vested rights" for special exceptions and the like. Until all necessary approvals, including all final vest. [1-3] In instances where there is ongoing litigation, there Additionally, even after final court approval is 104 (1996), a the Court of

struction must permit." intention to continue with the ment must be undertaken in good faith, through to completion; and 3) the commen some significant and visible construction; 2) the commence-"1) there must be the actual physical commencement of be pursuant to a validly construction issued building ncement to wit, with the and to carry it of con-

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In the case sub judice, a special exception approval, whose validity is being litigated, is not finally valid until all litigation concerning the special exception is final. Persons proceeding under it prior to finality are not "vesting" rights; they are commencing at "their own risk" so that they will be required to undo what they have done if they ultimately fail in the litigation process. We hold that respondent never obtained a final valid exception prior to the change in the law and, perefore, never obtained a vested right. In our recent case further examined the doctrine of vested rights when we fluoted Prince George's County v. Sunrise Development Limited Partnership, 330 Md. 297, 312–13, 623 A.2d 1296, 1303–04 (1993):

"The third stream of cases involves the issue of vested rights, per se. By a per se vested rights case we mean one invoking '[t]hat doctrine, which has a constitutional foundation [and which] rests upon the legal theory that when a property owner obtains a lawful building permit, commences to build in good faith, and completes substantial construction on the property, his right to complete and use that structure cannot be affected by any subsequent change of the applicable building or zoning regulations.' Prince George's County v. Equitable Trust Co., 44 Md.App. 272, 278, 408 A.2d 737, 741 (1979).

The first case in this Court squarely raising that doctrine is Richmond Corp. v. Board of County Comm'rs for Prince George's County, 254 Md. 244, 255 A.2d 398 (1969). There the developer owned commercially zoned land abutting residentially zoned land. The developer had expended large sums of money in acquisition of the property and in preparing plans, leases and specifications for a shopping center on the commercially zoned tract that would utilize the residentially zoned tract for parking. Before there was any construction on the ground, the zoning ordinance was amended to require a special exception for parking on residentially zoned property as auxiliary to a commercial use. In rejecting a contention that the developer had vested rights under

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the earlier zoning, we borrowed from the law of nonconforming uses the concept of public knowledge in the neighborhood of the use, saying:

owner "vested right" vised that the land is being devoted the land involved so that the neighborhood may be adproceed under that permit or certificate to exercise it on where required by the applicable ordinance and (2) must the zoning ordinance prohibiting constitutionally protected against a subsequent change in well as Chayt v. Board of Zoning Appeals, 177 Md. 426, 9 such use was known in the neighborhood." mining the existence of a nonconforming use "is whether A.2d 747 (1939), established as one of the tests for deter-Feldstein v. LaVale Zoning Board, 246 In Maryland it is A.2d 731, Council v.] Shapiro [, 187 Md. 623, must (1) obtain a permit or occupancy certificate 734 (1967), indicating that in the existing zoning use which will be established that in order to obtain a or limiting that use, the 51 A.2d 273 (1947)] as to that use. See Md. 204, 210, 227 [Mayor & City

254 Md. at 255-56, 255 A.2d at 404.

In Rockville Fuel & Feed Co. v. Gaithersburg, 266 Md. 117, 291 A.2d 672 (1972), we said that 'such a "vested right" could only result when a lawful permit was obtained and the owner, in good faith, has proceeded with such construction under it as will advise the public that the owner has made a substantial beginning to construct the building and commit the use of the land to the permission granted.' Id. at 127, 291 A.2d at 677; see also County Council for Montgomery County v. District Land Corp., 274 Md. 691, 337 A.2d 712 (1975)."

Marzullo at 192-93, 783 A.2d at 188-89 (alterations in original). Furthermore, in O'Donnell v. Bassler, 289 Md. 501, 508, 425 A.2d 1003, 1007 (1981), we stated:

"Generally, in order to obtain a vested right in an existing zoning use that will be protected against a subsequent change in a zoning ordinance prohibiting that use, the owner must initially obtain a valid permit. Additionally, in reliance

stance, will be applied to matters and proceedings taking place after the effective date of the change in the law. Chief Judge Brune, for the Court, aptly stated the rule in Beechwood Coal Co. v. Lúcas, 215 Md. 248, 254, 137 A.2d 680, 683 (1958), as follows:

impair existing substantive rights but only to alter the procedural machinery involved in the enforcement of those rights, such legislation is usually construed as operating on all proceedings instituted after its passage, whether the right accrued before or after that date.' (Emphasis supplied.)

316, 142 A.2d 550 (1958) and Janda, supra. The appellants do not contend that the amendment requiring four affirmative votes for granting a special exception must be applied to a decision made after its enactment, but rather that the ordinance must be applied to invalidate a decision of the Board made some six and one-half months prior to its enactment.

The appellants are correct in pointing out that the petitioners had acquired no vested right to use the subject property for a medical clinic prior to the effective date of the amendatory legislation. They argue that the application of the general rule, i.e., that we apply the zoning law existing at the time of the appeal rather than when the case was decided below, should result in the nullity of the board's decision. This, is correct when there is no vested right involved if the change in the law subsequent to the decision in the lower court makes the case moot because the prior statutory basis for the action below has been removed by statute."

Id. at 644, 296 A.2d at 410. The change in the law in the instant case was substantive, not procedural.

Under the facts of the case at bar, respondent had not obtained a "valid permit" or in this case, a valid special exception. After respondent was granted the special excep-

POWELL v. CALVERT COUNTY [368 Md. 400 (2002).]

dent could not have then obtained a valid special exception. His right to the special exception was, at all times, in litiga-At no time was respondent proceeding under a effect and should have been applied by the Board. Responthe time of the new proceeding, the 1998 amendment was in sion of the Calvert County Board of Appeals and to remand to reversed; case remanded with instructions to vacate the deci-Board to stated: "Judgment of the Circuit Court for ing whether there was substantial that the state of the record prevented the court from concludreview in the Circuit Court and then appealed tion Special Appeals. Board for further proceedings bу Upon remand to the Board, the prior the administrative grant the special exception had been vacated.8 The Court of Special Appeals (Powell, I) held entity, petitioners consistent evidence. decision of the with this opin-Calvert County "valid permit." to the Court of sought judicial The mandate At

court in $Powell\ I$ should have remanded the case to the Board not have any form of a final special exception at this point. decision of the Board. This effectively nullified the decision of Appeals (Powell D), the decision of the court was to vacate the effect because the litigation dealing with the special exception had not reached its final conclusion. 'At the Court of Special judicial review. Therefore, the "valid permit" never took final approval. invalid, it litigation. would qualify respondent to begin to "unlawful or invalid." of the special exception Board to grant the special exception and respondent did granted Court of Special Appeals opines that the special excep-As stated, supra, upon the Board's Even if the special exception was never "declared" was the Court to petitioner by the Board was never a final valid special exception, which of Special Appeals contends that the It makes no difference. to respondent, petitioners sought vest rights in a original grantnever declared It was still in zoning n

^{8.} Vacate is defined as "[t]o nullify or cancel; make void; invalidate the judgment. Cf. overRule," Black's Law Dictionary 1546 (Bryan A. Garner ed., 7th ed., West 1999).

of that court claims the prior panel of that court should have done and what the prior panel actually did are two different things.¹⁰ The prior panel of that court directed the Circuit Court to vacate the decision of the Board and to remand the case to the Board for further proceedings. Upon the case being remanded, the 1998 amendment to the law was in effect and should have been applied by the Board. Respondent was never storing his materials under a final, valid special exception. He started out storing his materials unlawfully and he never obtained a special exception clear of litigation that would have allowed him to store his materials under a valid special exception. Therefore, he never satisfied the criteria for a vested right.

Conclusion

We hold that respondent did not obtain a vested right to store his materials on his property because he never obtained a final, valid special exception, as he did not obtain a special exception that was free of all pending litigation.

REVERSED. CASE REMANDED TO THAT COURT WITH DIRECTIONS TO REVERSE THE JUDGMENT OF THE CIRCUIT COURT FOR CALVERT COUNTY AND REMAND THE CASE TO THAT COURT WITH DIRECTIONS TO VACATE THE DECISION OF THE CALVERT COUNTY BOARD OF APPEALS AND REMAND THE CASE TO THE BOARD FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS IN THIS COURT AND IN THE COURT OF SPECIAL APPEALS TO BE PAID BY RESPONDENT GRANER.

ATTORNEY GRIEVANCE v. BRUCE [368 Md. 417 (2002).]

795 A.2d 106

ATTORNEY GRIEVANCE COMMISSION OF MARYLAND

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Charles Antonio BRUCE, Jr.

Misc. Docket AG, No. 46, Sept. Term, 2001.

Court of Appeals of Maryland.

April 3, 2002.

ORDER

This matter came before the Court on Joint Petition of the Attorney Grievance Commission of Maryland and Respondent to suspend the Respondent by consent. Upon consideration of said Petition, it is this 3rd day of April, 2002,

ORDERED, that the Respondent, Charles Antonio Bruce, Jr., be and he is indefinitely-suspended from the practice of law in the State of Maryland, effective immediately; and it is further

ORDERED, that the Clerk of this Court shall remove the name of Charles Antonio Bruce, Jr. from the register of attorneys in this Court and certify that fact to the Clients' Security Trust Fund and the Clerks of all the judicial tribunals in this State in accordance with Maryland Rule 16-713.

We note that even if the Court of Special Appeals had not vacated the decision of the Board but had only remanded the case, our holding would be the same. As the Court of Special Appeals held in Powell II, supra, the Board on remand should have applied the 1998 amendment.

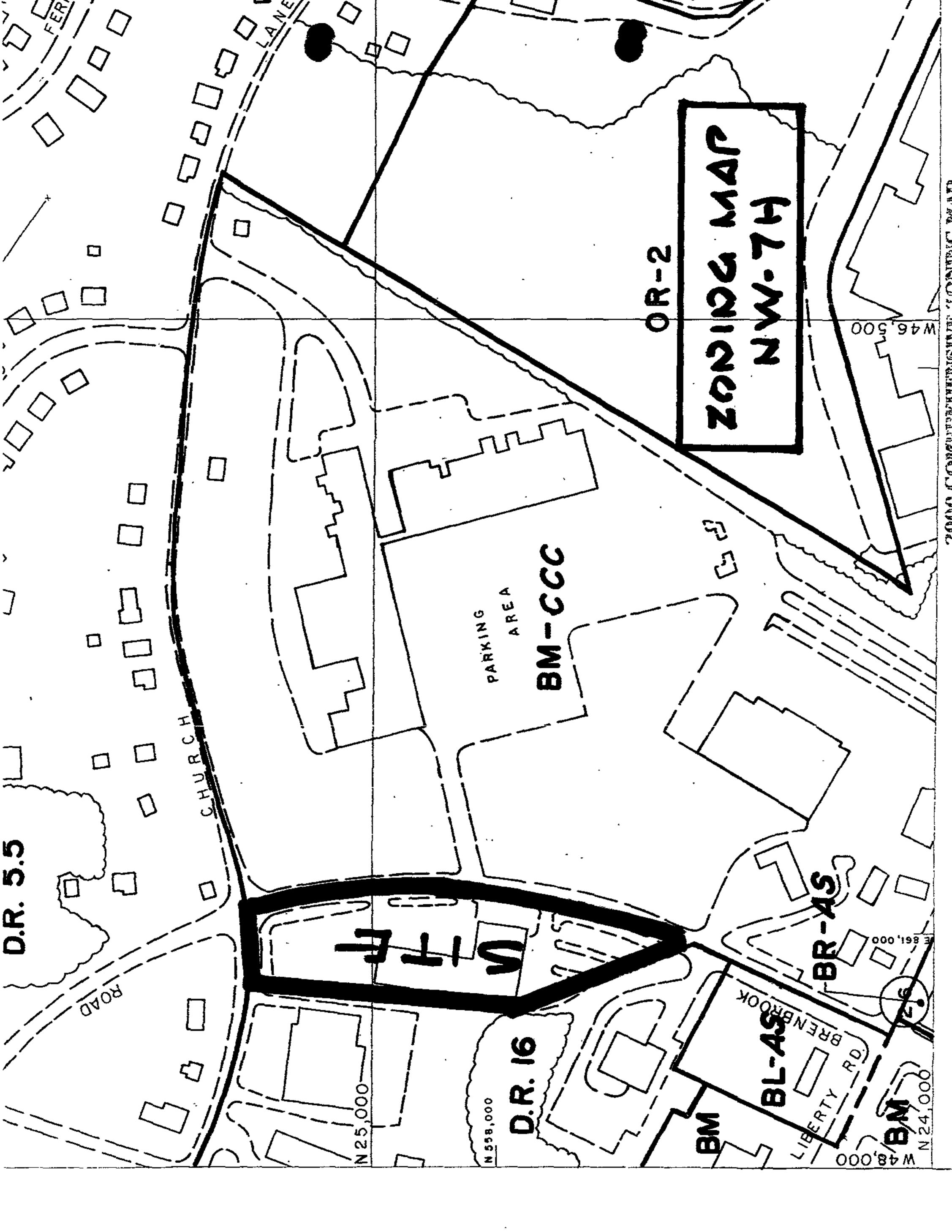
As stated, see footnote 5, Powell I and Powell II were heard by two
completely different panels of judges.

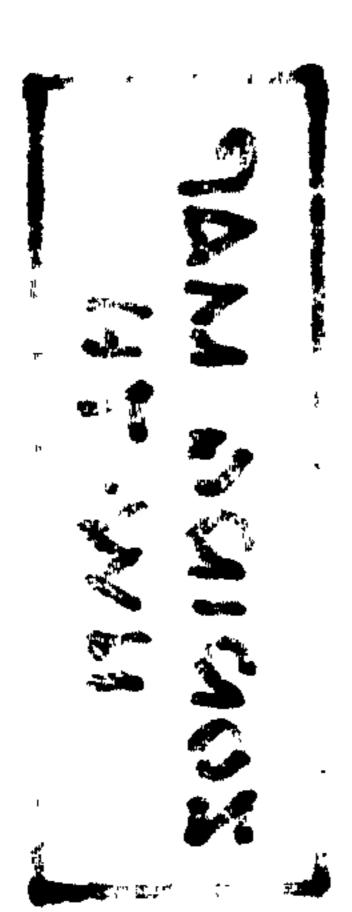
Case Number	02-051-SPH

PLEASE <u>PRINT</u> LEGIBLY

PETITIONER'S SIGN-IN SHEET

Name	Address	City, State	Zip Code
JOSEPH LARSON	105 W. Chesapeake Ave	lowson, Md	21204
RICHARD RUBIN	One South Street, 27 Floor	Balto. Md.	21201
	One South Street 27 Floor	Balto. Md.	91901
STAULEY KAVEMAN	6440 BALTO NATL PIKE	BALTO MD	21228
TOM MARKIDES	9330 LIBERTY Rd.	Randallster	2/133
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Baltimore County Zoning Commissioner Office of Planning Suite 405, County Courts Bldg. 401 Bosley Avenue Towson, Maryland 21204

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PRESTIGE

FORTS







IN THE MATTER OF * BEFORE THE

THE APPLICATION OF * COUNTY BOARD OF APPEALS

JACK ANTWERPEN - LEGAL OWNER * OF

PETITIONER FOR A SPECIAL * BALTIMORE COUNTY

HEARING ON PROPERTY LOCATED * CASE No. 02-057-SPH

ON THE W/S BRENBROOK DRIVE * June 6, 2002

SW CORNER CHURCH LANE

(3636 BRENBROOK DRIVE)

2nd ELECTION DISTRICT

2nd COUNCILMANIC DISTRICT

The above-entitled matter came on for hearing before the County Board of Appeals of Baltimore County at the Old Courthouse, 400 Washington Avenue, Towson, Maryland 21204, at 10 o'clock a.m., June 6, 2002.

ORIGINAL

	Multi-Page TM					
	Page 2		Page 4			
1 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21	LAWRENCE S. WESCOTT, Chairman MARGARET WORRALL RICHARD K. IRISH NATHAN D. ADLER, Esquire HUGH M. BERNSTEIN, Esquire On behalf of Petitioners/Appellees CAROLE S. DEMILIO, Esquire Deputy People's Counsel On behalf of Baltimore County	2 0 3 E 4 5 E 7 8 9 10 8 11 th 12 th 13 th 14 1 15 1 16 17 N 19 20 F	Page of the argument today and that, depending upon the outcome of the argument on the disposition of the Motion to Dismiss, we will then determine whether or not any further nearing will be necessary. Is that basically correct? MS. DEMILIO: That is correct, Mr. Wescott. Mr. Bernstein and Mr. Adler requested a postponement of this case because one of their witnesses was not able to appear, and after a discussion we decided that perhaps it would be wise to just go ahead with the legal matter nummarily on the Motion to Dismiss, and if there's a need for further hearing, I would agree to a postponement on the merits of the case so they would have an opportunity to bring the owner of the property as their witness. THE CHAIRMAN: Very good. Okay. Is that your understanding, Mr. Adler? MR. ADLER: Yes, it is. Thank you. THE CHAIRMAN: All right. Motion to dismiss. Ms. Demilio? Ms. DEMILIO: Yes. This is a motion filed by People's Counsel in this matter. Our position in this case is very simply that the petitioner cannot operate a			
1	Page 3 PROCEEDING	1 u	Page 5			
2	* * * *	2	Rather, he must conform with the current			
3	THE CHAIRMAN: Good morning, ladies and	3 E	Baltimore County law which requires a used car dealershp			
4	gentlemen. This is the regular meeting of the County		o operate in the B.M. zone only by special exception and			
	Board of Appeals of Baltimore County in Case No. 02-057-		inder the PUD-C regulation, which is the planned unit			
6	SPH, in the matter of Jack Antwerpen, petitioner/owner,	6 d	levelopment for commercial use.			
7	3636 Brenbrook Drive, 2nd Election District, 2nd	7	I believe the Board probably has read the file			
8	Councilmanic District, and it is an appeal from the Deputy	8 a	nd I will assume that they're familiar generally with the			
9	Zoning Commissioner's order in which a special hearing	9 f	acts in the case.			
10	request was granted.	10	My memorandum, and I will give a brief synopsis,			
11	Will counsel please state their appearance, for		will state here that September 4, 2001, the County			
1	the record.		Council passed Bill 71-01, which I believe the Board has			
13			n its file, it was to take effect forty-five days after			
1	Chairman. Nathan Adler, on behalf of Jack Antwerpen and		he passage, which meant it took effect October 2001.			
i	Antbren Motor Cars, Limited. I'm here this morning with my colleague Hugh Bernstein.	15 16 c	Antbren I believe I'm pronouncing it correctly the petitioner here proceeded with their			
17			pecial hearing request, and that is to operate a used car			
1 .	Counsel for Baltimore County.	•	lealership in the B.M. zone.			
19		19	The Zoning Commissioner granted the petition for			
	Dismiss and various responses, a number of memoranda. My understanding is that we are going to have	20 s	special hearing in the decision on September 18. People's Counsel filed an appeal on September 28. And as of now,			
1			— — — — — — — — — — — — — — — — — — —			

- 1 this matter is before the Board, and the new law which I 2 believe was passed October 19, 2001, is effective.
- Traditionally, in Baltimore County, used car
- 4 dealerships are only permitted to operate in the B.R. zone
- 5 by special exception. In fact, that's the reason why the
- 6 petitioner in this case sought a special hearing relief,
- 7 because the zoning office, as well as our office, has
- 8 always interpreted the zoning regulations in that matter.
- Therefore, they were not given a permit to
- 10 operate by right in this business major, or B.M. zone.
- The zoning regulations clearly state, or stated 12 in the past, that the used car dealerships are relegated
- 13 to the B.R. zone by special exception.
- The petitioners in this case proposed a different 14
- 15 interpretation of the definition of used car dealership,
- 16 showroom, and various other matters, and contended they
- 17 were permitted to operate by right in this zone.
- The Zoning Commissioner granted that petition for 18
- 19 special hearing, and we took an immediate appeal. We took
- 20 an appeal because the new law was in effect then, or the
- 21 new law had been passed, and we assumed to be in effect.

- 1 the matter at hand. It doesn't matter whether the
 - 2 petitioner is required to obtain a special exception or
 - 3 whether he's required to obtain a permit or whether he
 - 4 comes in under a special hearing relief or whether it's a

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Page 9

- 5 variance, for that matter.
- The prevailing law in Maryland, and reiterated in
- 7 Powell, once an appeal is filed, the decision of the
- 8 previous administrative board or the court is not final.
- Therefore, if the petitioner would proceed, he
- 10 would do so at his own risk. And once the decision is
- 11 final, then the petitioner can proceed with the proper
- 12 authority.
- But if, in the interim, while the matter is in 13
- 14 litigation and there's no final order, the law has
- 15 changed, the petitioner is subject to that new law. It
- 16 applies to the substantive matter. And that's what Judge
- 17 Cathell made very clear here again in the Powell case.
- So it doesn't matter whether we are operating 18
- 19 under a special exception or special hearing or a
- 20 variance, or any type of permit, a permit isn't final and
- 21 valid until all the litigation is completed.

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- Our position is that, on appeal of a case, in
- 2 other words, when there's not a final decision by either
- 3 the Zoning Commissioner or Board of Appeals, or any court
- 4 for that matter, the law in effect at the time of the
- 5 appeal controls.
- We believe this is clearly stated, and has been
- 7 the law in Maryland for sometime, and I think I cited the
- 8 O'Donnell case in my brief, which indicated that the law
- 9 in effect at the time of an appeal is the law that
- 10 applies.
- Recently, Judge Cathell, in the Powell versus 11
- 12 Calvert County case, reiterated the position. This is the
- 13 case that I've also relied on and cited in my Motion to
- 14 Dismiss and in the memorandum.
- Judge Cathell said in that case in instances 15
- 16 where there's ongoing litigation, there's no different
- 17 rule of vested rights for special exceptions and the like.
- 18 Until all necessary approvals including all final court
- 19 approvals are obtained, nothing can vest or even begin to
- 20 vest.
- 21 I think that that case is really controlling for

So I'd like to give some different examples of

- 2 vested rights or nonconforming uses, both areas of the law
- 3 which come into play in this case, to show you how it
- 4 differs from the instant case.
- Take the issue of vested rights. The petitioner
- 6 seeks relief to operate to use his property in a certain
- 7 way and receives a permit or receives court approval or
- 8 administrative agency approval to operate, and that
- 9 decision was not appealed within the proper time limit,
- 10 which is usually a thirty-day time limit.
- The petitioner then proceeds under the permit or
- 12 under that court decision with substantial construction.
- 13 And at that time, then, if the law changes, the new law
- 14 will not apply, generally speaking, because the petitioner
- 15 is vested, that is, he had a final decision from either
- 16 the court or a valid permit issued that was not under
- 17 appeal.
- He proceeded under that appeal or permit with
- 19 substantial construction and, therefore, the law, the new
- 20 law that comes into effect, did not deny him the right to
- 21 use that property in the manner approved under the old

1 law.

That's traditionally vested rights, and that's

3 been applied for many years by the appellate courts in

4 Maryland, and there are several cases on that that we have

5 used over and over again, but that's when vested rights

6 will apply.

Then I'd like to take an example. When you have

8 vested rights, you have someone in the process of

9 instituting a use or conducting a use at the site that's

10 not completed, the use isn't operational before the new

11 law takes effect, but the courts and the general law is to

12 protect that property owner who proceeded with the final

13 order or final permit validly, and if there's substantial

14 construction, then the new law does not apply, and you can

15 proceed under the old law. That's not the case here.

The second example I want to give you is 16

17 non-conforming use cases, and I know the Board generally

18 is familiar with those cases. In the situation for a

19 nonconforming use, the property owner operates a use

20 either under a special exception by permit, by permitted

21 use in a zone. The use is up and running, the use is

So there was never any final approval of this

2 used car dealershp in the B.M. zone at this site. The

3 appeal from the Zoning Commissioner by our office was a de

Page 12

Page 13

4 novo appeal.

That means we are starting all over again at this

6 level. So once a de novo appeal is filed, for all

7 practical purposes, the decision of the Zoning

8 Commissioner or the deputy Zoning Commissioner is moot, or

9 obsolete. It has no bearing. It has no effect on the

10 case whatsoever, except in a rare circumstance where the

party taking the appeal would dismiss the appeal.

Then the only order that would be standing would 12

13 be the Zoning Commissioner's order. But even if the

14 parties reach an agreement on appeal, and that has

15 happened on occasion, and I know this Board has addressed

16 those situations, the Board independently must still make

17 its own finding on the issues in the case.

So if the parties present or stipulate to the 18

19 facts, the parties present an agreement, the Board

20 nonetheless must make its own finding and issue its own

21 order. That's because, on appeal, the decision of the

Page 11

1 conducted at the site, and the law changes.

That property owner is not required to

3 discontinue the use. He can continue the use as

4 nonconforming provided he complies with the nonconforming

5 regulations, indefinitely.

So a use that is up and running, lawfully

approved under a final order, and it's being conducted and

8 already existing at that place, is not affected by a

9 change in the law. It becomes a nonconforming use. And

10 as long as the property owner continues to operate under

11 the permission given by order or permit, whatever, that

12 use can continue. That is not the case here.

What we have here by contract is a property owner

14 that sought a special hearing to operate a used car

15 dealership in a B.M. zone, which is not a stated permitted

16 use in the regulations.

So the zoning office does not allow a permit for

18 this use. The property owner then went to the Zoning

19 Commissioner for a special hearing. The special hearing

20 was granted, but the appeal was filed, so the order was

21 not final.

13

Zoning Commissioner or Deputy Zoning Commissioner is void

2 or obsolete or moot, whatever the word is that you want to

3 use, but it has no effect or authority whatsoever.

Otherwise, in the case that's on appeal, the

5 Board of Appeals, after hearing, must reach a conclusion

6 on the facts and the law, and that is the order that's in

7 effect subject to an appeal.

So if the Board of Appeals in a de novo appeal

9 reaches an entirely different decision from the Zoning

10 Commissioner, or reaches perhaps the same decision with

11 conditions, it is that Board of Appeals' order that

12 applies. If there's no appeal, that's the final order,

13 and that's how the property owner must proceed.

14 So the status of this case at this point, because

15 of the de novo appeal that was propery taken, is there is

16 no order of the Zoning Commissioner in effect which allows

17 the petitioner to operate a used car dealership in this

18 B.M. zone.

Now we are before the Board, and the County 19

20 Council's law which becomes effective in October is now,

21 in effect, the law. And what that law says is that you

1 cannot operate a used car dealership in the B.M zone by

- 2 right. You must obtain a special exception, and you must
- 3 comply with the land use development, commercial
- 4 regulations.
- And I don't think the Board sees too many of
- 6 these PUDs because they're basically planning tools used
- 7 by the planning office to regulate the appearance, the
- 8 type of buildings, the location of buildings, within
- 9 commercial development.
- Those things are generally worked out with the 10
- 11 planning office, but any development under a PUD, the
- 12 petitioner must work hand-in-hand with the planning office
- 13 to do so.
- 14 Now, why did the County Council change the law?
- 15 Well, the argument made by the petitioner in this case was
- 16 made sometime in 2001 in a totally separate case, and in
- 17 that decision, the Board of Appeals, that panel,
- 18 interpreted the zoning regulations to allow a used car
- 19 dealership in the B.M. zone.
- 20 The County Council got wind of that. They felt
- 21 that there was a need for clarification because,

- Page 16 So our position is that the new law applies to
 - 2 this case. We are in a whole new case here. The law in

 - 3 effect applies to the Board of Appeals, and that is Bill
 - 4 71-03, which is codified and currently in the zoning 5 regulations.
 - It doesn't matter whether we are coming in on a
 - 7 special exception, on a special hearing, and I think Judge
 - 8 Cathell made that very clear in the Powell case when he
 - 9 referred to the Marzullo case, which did address that
 - 10 vested right.
 - The Marzullo case originated in Baltimore County.
 - 12 We often refer to it as the snake case. In that case,
 - 13 there was no request for a special exception. The
 - 14 petitioner in that case went to the zoning office, the
 - 15 building permit office, and asked for a permit to build a
 - 16 reptile barn, and proceeded with construction.
 - The neighbors in the area objected to that use, 17
 - 18 felt it wasn't permitted under the agricultural zone, and
 - 19 filed a petition for special hearing which the Zoning
 - 20 Commissioner.
 - The Zoning Commissioner denied the petition and 21

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- 1 traditionally, a used car dealership was never permitted
- 2 in the B.M. zone.
- In the Council's own notes, they say that a car
- 4 used car dealership is only permitted in the B.R. by
- 5 special exception, and a new car dealership was permitted
- 6 in B.M. zone by right.
- The Board of Appeals' decision in the prior case
- 8 created some confusion, so the County Council stepped in
- 9 and said, This is the law, This is the way it's going to
- 10 operate. In its Bill 71-01, the County Council did not
- 11 grandfather any cases that weren't currently pending,
- 12 which would have been the instant case here, the
- 13 petitioner's case.
- They did not make or say that any -- as sometimes 14
- 15 they do with the law -- they did not say that any used car
- 16 dealership approved by the Zoning Commissioner or the
- 17 Deputy Zoning Commissioner is exempted from the new law.
- All they said, This is how used car dealerships 18
- 19 can operate in the B.M. zone, by special exception and not
- 20 by right, and they have to develop under the PUD-C
- 21 regulations.

I said that Mr. Kahl, who had built the barn operation, was

- 2 legal. An appeal was taken to this Board by People's
- 4 Counsel and by the citizens in the area. This Board
- 5 reversed the Zoning Commissioner's decision, and the case
- 6 went on up on appeal and ended up in the Court of Special
- 7 Appeals.
- In that case, Mr. Kahl had interpreted the zoning
- 9 regulations in the manner that he thought were proper that
- 10 he favored, similar to the parties here. The case
- 11 proceeded under a special hearing, not a special
- 12 exception.
- But Judge Cathell, who also ruled in the Marzullo 13
- 14 case, said, when addressing vested rights, he said
- 15 generally in the absense of bad faith on the part of
- 16 remitting officials, applicants for permits involving
- 17 interpretation accept the afforded interpretation at their
- 18 own risk. Therefore, respondent -- Mr. Kahl, in that
- 19 case -- did not obtain a vested right to conduct his
- 20 business on the property.
- 21 That's the same situation essentially we have

1 here. The parties want to proceed under their own

- 2 interpretation. The zoning office in this case wouldn't
- 3 even let them go that far. They said, You need a special
- 4 hearing.
- The special hearing is tantamount to a special
- 6 exception in the way it's treated by the zoning
- 7 regulations. It proceeds through the administrative
- 8 process in much the same fashion.
- And a special hearing relief is not final if
- 10 there is pending litigation. A valid appeal was taken and 10
- 11 the special hearing relief was not final.
- If the developer wants to proceed or the property
- 13 owner wants to proceed, they do so at their own risk.
- So this is not a case where you're trying to beat 14
- 15 the cloth and whoever runs out there and gets established 15 final because it was still in litigation.
- 16 and gets a permit and starts construction first can beat
- 17 any change in the law.
- That is not the way it operates, and that's why, 18
- 19 in my experience dealing with appellate cases in zoning
- 20 matters, you don't see that many vested rights cases, and 20
- 21 that's because a developer knows he's proceeding at his

- 1 case, but in that situation there's a special exception
 - 2 request that was approved, and it went up to the Court of
 - 3 Special Appeals, which remanded it back for further
 - 4 comment and finding by the Board of Appeals.
 - In the interim, a new law was passed which
 - 6 prohibited that special exception in that zone.
 - When that case was remanded to the Board for the
 - 8 second time, the parties opposing took an immediate appeal
 - 9 to the Court of Appeals.
 - The Court of Appeals said it doesn't matter if
 - 11 there was a valid approval at the time the special
- 12 exception was granted, that is, at the time the Board
- 13 granted the special exception, that use was permitted by
- 14 special exception in the zone, but that matter was not
- Once the new law took effect, and if the 16
- 17 petitioner was not grandfathered under the new law, then
- 18 the new law would apply, and that's exactly the case you
- 19 have here.
 - I think the County Council is really sending a
- 21 clear message in that regard, anyhow. It's saying we do

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- 1 own risk, even if he was approved below by the Zoning
- 2 Commissioner, even the Board of Appeals. If he proceeds
- 3 with a permit and if it's reversed, then he can't continue
- 4 that use, or if the building is illegal, he has to take
- 5 down the building.
- So you don't see that many vested rights cases,
- 7 because the developer knows unless there's a final
- 8 decision, he's going at his own risk.
- And I think that's what Judge Cathell makes very
- 10 clear as well, and there is really no distinction between
- 11 whether there's a special exception request, a variance
- 12 request, a special hearing request.
- The law that applies is the same in all of those 13
- 14 cases, and that's if there's pending litigation, you don't
- 15 have a final order. If you proceed, you do so at your own
- 16 risk.
- And if there's a change in the law, the law that
- 18 applies, the new law applies at the time of the appeal on
- 19 substantive matters.
- That's exactly what we have here. I don't know 20
- 21 if the Board has had an opportunity to read the Powell

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- 1 not want used car dealerships in the B.M. zone by right.
- 2 We'll permit them by special exception. And in order to
- 3 be fair to the public, we'll have a hearing in this
- 4 matter, and we do want some input from the planning
- 5 office, because we want to make sure that what's developed
- 6 there is compatible with the surrounding area.
- So our position in this case is no reflection on
- 8 the merits of the special exception that the petitioner is
- 9 seeking to complete. It's no reflection on this
- 10 petitioner.
 - What we are saying is, and what I've said
- 12 informally in conversation with counsel and our
- 13 position remains -- is this particular petition for
- 14 special hearing is invalid now because of the new law, and
- 15 it is to be dismissed, but we are readily agreeable to
- 16 having it dismissed without prejudice, or even remanded in
- 17 some fashion to the Zoning Commissioner so that the
- 18 petitioner can amend and request a special exception under
- 19 this B.M. zone for a used car dealership.
- To be honest, I haven't looked in detail at the 20
- 21 merits of the case, but I want to make it clear to the

1 Board that our appeal was taken because of the new law

- 2 that took effect and under the legal interpretation of the
- 3 law, not on the special exception.
- I don't think it's the policy of our office to
- 5 try to sandbag a petitioner and say go get a special
- 6 exception, and then we appeal that special exception or
- 7 oppose that special exception.
- I haven't looked at it here, but I do think that
- 9 the petitioner should proceed under the proper authority,
- 10 and that really was our main concern in this case.
- So I think, looking at the Marzullo case and the 11
- 12 Powell case, that the meaning of the law is very clear.
- 13 Vested rights apply if you're in the process of
- 14 establishing your use and the law changes, but that's not
- 15 the case here. We have pending litigation.
- 16 A nonconforming use applies when you have a use
- 17 conducted at the site which was legally obtained, legally
- 18 established, and is no longer legal now because the law
- 19 changed.
- 20 A nonconforming use will protect that use. That
- 21 can be ongoing. That was legally granted, even though the

- 1 in a B.M. zone.
- We filed a special hearing in this case for a
- 3 declaration that what we were doing was permissible, and

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- 4 the Zoning Commissioner held that we had a useful, a
- 5 conforming use of this property prior to the amendment of
- 6 the zoning code in this case, and that once the code was
- 7 amended, what had been a permissible use of the
- 8 property -- and the Zoning Commissioner confirmed that in a
- 9 declaration in this case -- then became a nonconforming
- 10 use of the property, which was now vested at this point.
- I want to back up just a little bit to put a
- 12 little bit of facts in this case, to give the court an
- 13 appreciation. As Mr. Wescott noted and counsel have
- 14 agreed, depending upon the disposition of the Motion to
- 15 Dismiss, we'll have an evidentiary hearing, but let me
- 16 tell you very briefly what the Zoning Commissioner found
- 17 in this case, which is that this is not your typical used
- 18 car dealership.
- This is a high-end, used car dealership where
- 20 they sell Lexus, Lamborghinis, Ferraris, Maseratis. Last
- 21 week, for example, they sold a 2002 Maserati with 500

- 1 law was changed. That's not the case here either.
- There's no legal authority for this petitioner to
- 3 operate. We're in a de novo appeal, and now the new law
- 4 must apply, and we believe the motion should be granted to
- 5 dismiss this petition for special hearing without
- 6 prejudice and let the petitioner proceed under the current
- 7 law in Baltimore County which was passed under Bill 71-91.
- 8 Thank you.
 - THE CHAIRMAN: Thank you. Mr. Adler?
- MR. ADLER: Thank you, Mr. Wescott. Good 10
- 11 morning. Most respectfully, I read the Motion to Dismiss
- 12 when we received it on Tuesday afternoon, and we put
- 13 together a paper we filed this morning and gave copies to
- 14 counsel as well.
- 15 It's our position that the People's Counsel in
- 16 this case is trying to take a square peg and fit it into a
- 17 round hole.
- Here's the issue in this case, which
- 19 distinguishes us from the cases cited by People's Counsel.
- 20 In this case, the Zoning Commissioner held under a special
- 21 hearing that our client's use was permissible as a right

- I miles on it for \$97,500. This is what my client tells me.
- 2 This is not your typical used car dealership.
- In fact, I will proffer to the court that I
- 4 purchased two Dodge vehicles from a dealership located in
- 5 the exact same location, a new car dealership, in the last
- 6 couple of years, and I walked into this dealership, it
- 7 looks a lot better than that new dealership ever looked.
- 8 It's an amazing dealership.
- They are selling high-end vehicles. Their
- 10 average sales price is at least \$30,000, and in many cases
- 11 it's higher than that. This is not your typical used car
- 12 dealership, and that's what the Zoning Commissioner found.
- I think the Court needs to recognize that when 13
- 14 they are looking at this particular case because, as the
- 15 Zoning Commissioner said, although this is permitted as of
- 16 right in a B.M. zone, or was before the amendment came
- 17 into place, nevertheless, they said if we look on a
- 18 case-by-case basis, this looks like a first-class
- 19 operation.
- He said in his decision in this case -- I'd like 20
- 21 to quote from page two of his decision -- which he said

1 the issue in this case is not so much the impact of the

- 2 propsed use, but its permissibility. And when we filed
- 3 for a special hearing in this case, we wanted to get the
- 4 blessing of the Zoning Commissioner, and that what we were
- 5 doing was permissible.
- We believed it was permissible. We believed it
- 7 conformed with what the zoning regulations provided and,
- 8 in fact, the Board of Appeals, as counsel has noted,
- 9 recognized in another case -- and I have copy of it for
- 10 every one of you, if I may -- this is from another case of
- 11 the Board of Appeals which is now up to the Circuit Court,
- 12 which I only found out about this when it was attached to
- 13 People's Counsel's memo, but on page seven of this
- 14 decision, the Board of Appeals discusses the distinction
- 15 between new cars and used cars, and the Board of Appeals
- 16 held that in the instant case they are entitled to read
- 17 the statute as it is, and there is no distinction between,
- 18 quote, unquote, new, or quote, unquote, used cars.
- 19 This County Board of Appeals held in a prior
- 20 decision that in a B.M. zone under this particular
- 21 regulation that our client was entitled to do what they

- 1 permission, and not special exception to do anything in 2 this case.
- Now, what is the effect of this new amendment
- 4 that kicks in if you have got a permitted use, if you're
- 5 doing what the Code says you're allowed to do, and the
- 6 County Council changes the law?
- In that case, we cited authority in our paper
- 8 which says a lawful nonconforming use is established if a
- 9 property owner can demonstrate that before and at the time
- 10 of the adoption of the zoning ordinance he was using his
- land in a then lawful manner for a use which by later
- 12 legislation becomes non-permitted.
- 13 That's the case in Mayor and City Council of
- 14 Baltimore versus Denbow, which is a recent 1998 case. In
- 15 that case, what happened is someone was running an adult
- 16 entertainment business in Baltimore City. The law was
- 17 changed where they zoned it out, and one of the issues in
- 18 that case was whether or not he was permitted to continue
- 19 running that particular business.
- What the court held in that case is that he had 20
- 21 established what was permitted under the old regulations

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- 1 want to do, and it is on appeal in front of the Circuit
- 2 Court.
- I understand Judge Fader has not yet issued a
- 4 decision in that case, but we were simply coming before
- 5 the Zoning Commissioner for a declaration.
- We did not file for a special exception, and the
- distinction is crutial, because a special exception asks
- 8 the Zoning Commissioner to make what the word said, "an
- 9 exception." The zoning regulations provide something, and
- 10 we want to do something different.
- In our case, you file for a specal hearing, and
- 12 the form itself says you're asking the Zoning Commissioner
- 13 to make a declaration.
- 14 The Code provides, the zoning regulations
- 15 provide, in 500.7, the Zoning Commissioner has the power
- 16 to hold a quote, hearing, quote, to determine any rights
- 17 whatsoever of any interested person in any property
- 18 property of Baltimore County insofar as they are affected
- 19 by these regulations, unquote.
- And that's all we have asked in this case. A 20
- 21 determination of our rights under the code, not special

and, therefore, that became a nonconforming use.

- And in our case, what we were doing in a B.M.
- 3 zone was permitted. Not only did our client think it was
- 4 permitted, but the County Board of Appeals, this body,
- 5 thought it was permitted to do what we were doing.
- Then the law changes and the County Council
- 7 sticks in the word "new," in the same paragraph as
- 8 "automobiles." It didn't say that beforehand. And, in
- 9 fact, Judge Fader, in the decision which I just handed to
- 10 you, the reason the County Board of Appeals issued this
- 11 decision in this case is that Judge Fader sent it down for
- 12 a remand, and he said, Explain to me essentially why the
- 13 zoning regulations in this case just said the word
- 14 "automobile." It doesn't say "new." It doesn't say
- 15 "used."
- The County Board of Appeals in that case then 16
- said, You're right, there is no distinction, it's a
- 18 permitted use.
- 19 And that's what happening in this particular
- 20 case. What our clients were doing in this case was a
- 21 permitted use, and then the law changes, and at that point

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1 we are vested.

The law is that Maryland Courts have repeatedly recognized that once an owner begins using his property is

4 in a manner permitted by the zoning code, as opposed to

5 one where special permission or some sort of exception is

6 required, then the owner obtains a vested right to

7 continue using his property in that manner.

8 And it's unconstitutional at that point to say

9 what you were doing, it was permitted under the zoning

10 regulations, and I'm going to zone you out,

11 You can't do that. And they're different

12 mechanisms of how you get rid of nonconforming uses, I'm

13 sure the Board is familiar with those, how you can have it

14 disappear over a course of amoritization over many years,

15 but you can't zone out a conforming use, say guess what,

16 we're going to change the rules of the game on you.

In fact, in that case, the '98 case which we

18 talked about, the Court said, one of the earliest Maryland

19 cases, is discussing the rights of a property owner with a

20 legal use -- and that's what we have in this case. We

21 have a legal use -- to continue that use after passage of

1 entitled as of right to run a used car dealership in a

2 B.M. zone?

3 And he said, As of right. And that's what our

4 petitioner's case said as well. It was never our position

5 that we were asking for an exception, special exception,

6 to allow to do something which we weren't permitted to do.

7 It has been our position consistently throughout

8 the entire process that what we were permitted to do in

9 this instance which was to run a used car dealership in a

10 B.M. zone, and everyone that's looked at this, the County

11 Board of Appeals and the Zoning Commissioner, in all these

12 cases, has held that's true.

13 That's the case. And that's really the

14 interesting issue, which is the County Council,

15 recognizing that, changed the law and said we realize that

16 under the old zoning regulations what my client was doing,

17 they were permitted to do, so we are going to change the

18 law. And we cite authority in our paper which talks about

19 when a legislative body changes the law, that's one of the 20 statutory rules of construction, that you look at that and

21 say they are changing the law because they realize, under

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1 a new zoning ordinance making the use non-permissible, and

2 they cited a 1950 case, and in that case the Court said

3 the property was used for a factory and, therefore -- the

4 neighborhood in which it was located was zoned

5 residential -- if such regulations apply to the factory,

6 it would then have to cease to exist, you'd have to shut

7 down the factory, and the zoning regulations would have

8 the effect of confiscating such property and destroying

9 the vested rights therein of the owner.

The Court of Appeals in that case said you can't

11 do that, you can't change the rules of the game. What

12 this body has held, not only in this particular case, but

13 the other case I just handed to you, is that in a B.M.

14 zone, our client was permitted to do as of right -- and I

15 just got yesterday actually a copy of the transcript from

16 the Zoning Commissioner, and I don't know if the Board,

17 County Board of Appeals would like it, I have copies for

18 counsel if they'd like -- but the first word out of the

19 Deputy Zoning Commissioner's question to the attorney for

20 our client was, Are you appealing here? Is this a special

21 hearing for a special exception? Or do you believe you're

1 the old law, for example, in our particular instance, we

2 were allowed to do what we were allowed to do, and they

3 want to make it clear that that's not going to be the

4 case.

Now, I will, very briefly, talk about why what we

6 were permitted to do under the old law, we were permitted

7 to do, and that is because the regulations used to state

8 automobile salesroom and adjoining outdoor sales area

9 provided that the dismantling of junk cars unfit for

10 operations on the highway shall not be stored outdoors,

11 and that was 233.2, and what the Zoning Commissioner held

12 in this case, and what the County Board of Appeals held in

13 other cases, and the Zoning Commissioner held essentially,

14 as far as I know, everyone who's ever looked at this held, 15 is because that particular regulation did not say the word

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16 "new," therefore, it meant "new" or "used cars," because

17 the regulations, those zoning regulations say, that if you

18 have a word and you don't know what it means, you turn to

19 Webster's.

In this case, Webster's defines, "automobile,"

21 and it doesn't distinguish between a "new automobile" and

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- 1 a "used automobile."
- 2 It just defines automobile as a four-wheel
- 3 automotive vehicle designed for passenger transportation
- 4 and, therefore, everybody that's looked at this, I mean
- 5 body, meaning the Zoning Commissioner and the County Board
- 6 of Appeals, has held that a used car dealership can be
- 7 used as of right in a B.M. zone.
- 8 The other reason is because the rest of that
- 9 passage talks about having dismantled or junked cars which
- 10 are unfit for operations on the highway, you can't have in
- 11 the B.M. zone. And those are characteristic of a used car
- 12 dealership, not a new car dealership.
- New car dealerships do not typically have junked
- 14 cars unfit for operation and, therefore, once again, the
- 15 bodies that have looked at this have again said this must
- 16 mean both new and used cars.
- The bottom line here is that the Zoning
- 18 Commissioner's ruling that the use of this property prior
- 19 to October 19, 2001 constitutues a lawful use under the
- 20 then applicable zoning code, and then the minute it became
- 21 affective 5 October 2001, this use at that point

- 1 dream cars. This is not your typical used car lot. And
- 2 we respectfully request the Motion to Dismiss be denied
- 3 for all those reasons. Thank you.
- 4 THE CHAIRMAN: Thank you. Ms. Demileo?
- 5 MS. DEMILEO: A few moments to reply. First of
- 6 all, there is nothing in the legislation, the prior zoning
- 7 law or this current law, that differentiates between
- 8 high-end used cars and low-end used cars, so it doesn't
- 9 matter, for zoning purposes, if you're selling
- 10 Lamborghinis or some -- I don't want to name a name brand
- 11 in case somebody is driving that -- but there is no
- 12 differentiation.
- It doesn't matter how attractive or how much
- 14 money a car cost. The County Council recently, in 2001,
- 15 never differentiated between them.
- Secondly, as far as I know, there's no used car
- 17 dealership operating in a B.M. zone in Baltimore County,
- 18 and it is noteworthy that the Council never cited one or
- 19 never cited an example of one.
- What that tells you is that there's no authority
- 21 to operate the used car dealership in the B.M. zone by

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- 1 transforms into a lawful nonconforming use as a result of
- 2 that amendment.
- 3 That's what the Commissioner in this case, the
- 4 Deputy Zoning Commissioner beld, and what the County Board
- 5 of Appeals held in the other case, that what we were doing
- 6 in this particular case was permitted as of right in a
- 7 B.M. zone and, therefore, when the amendment kicked in in
- 8 this case, all it changed was it turned us from being a
- 9 conforming use under the then present zoning regulations
- 10 to a nonconforming use under the present zoning
- 11 regulations and, accordingly, we respectfully ask the
- 12 Motion to Dismiss be denied, that we be permitted to
- 13 present an evidentiary case which will show this is not
- 14 your typical used car dealership at all, it is a very
- 15 high-end, very sophisticated dealership where people
- 16 purchase vehicles, for example, from all over the county,
- 17 on the internet, and purchase essentially their dream
- 18 cars.
- I mean, when you go to this lot, you will see
- 20 what is in this very nice showroom, which they put a
- 21 substantial amount of money into fixing up. These are

1 right, and that's why the petitioner in this case filed a

- 2 petition for special hearing. He couldn't come in and
- 3 begin operation.
- 4 He may want to call it a declaration or a
- 5 blessing or a clarification, but the bottom line is that
- 6 he wouldn't be able to operate unless he had authority
- 7 from the administrative agencies or final authority to do
- 8 so.
- 9 So he had no right to proceed under the prior
- 10 cases which are under appeal, or no right to proceed under
- 11 the Zoning Commissioner's case, because there is no
- 12 authority.
- 13 If it were by right, then he would not need a
- 14 petition for special hearing. For instance, the bowling
- 15 alley is permitted by right in the B.M. zone. Well,
- 16 nobody that wants to operate a bowling alley has to file a
- To hobody that wants to operate a bowning after has to the
- 17 petition for special hearing.
- We'd be inundated with cases before the Zoning
- 19 Commissioner and also before this Board if every use
- 20 permitted by right had to file a petition for special
- 21 hearing.

Those uses which the petitioner wants to try to

2 get in by right or by special exception or some form which

3 is not permitted, is traditionally not permitted, a

4 special hearing is filed, so a special hearing is not

5 necessary for those lawful uses in a B.M. zone, or any

6 other zone in Baltimore County, so that's why this case is

7 in litigation.

8 There is no used car dealership operating in

9 Baltimore County in a B.M. zone. That's why the

10 petitioner is here. And to confirm that, I attached to my

11 memo a Baltimore County note through the legislation

12 session 2001, and those notes and work sessions were

13 conducted in August, and the County Council clearly said,

14 under current law, new automobile salesrooms are permitted

15 in the B.M. zone as a matter of right, while used cars

16 still are permitted by special exception in the B.R.

17 zones.

18 A recent decision by the County Board of Appeals

19 has caused some confusion in this area. So the Board, the

20 County Board of Appeals, has decided since there is no

21 definition of the term "automobile salesroom," both new

1 So there is no vested rights here, and that's

2 what Judge Cathell was trying to say in the Powell case,

3 when something is in litigation, you cannot establish that

4 vested right. If you proceed, you're proceeding so at

5 your own risk.

6 So in a situation where authority was given to

7 operate a use, and that decision was appealed, and the

8 petitioner went ahead anyhow and started the use, he did

9 so at his own risk.

10 If the decision were reversed, as I said before,

11 his use would have to stop. If the decision were

12 approved, it's not a vested rights case then. It's just a

13 matter that the use was lawful, and it's not a question of

14 vested rights, and that's the same situation here.

The petitioner proceeded, relied on GD&RL, relied

16 upon the Zoning Commissioner's approval. He does so at

17 his own risk. He needs authority, some authority, to

18 operate there, and that's why he filed the petition for

19 special hearing. And the zoning office does not agree

20 necessarily with the interpretation proposed by the

21 petitioner. Otherwise, they wouldn't have required a

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1 and used car facilities are permitted as a matter of right

2 in the B.M. zone.

Well, as a practical matter, if the County

4 Council had agreed with the Board's decision, it didn't

5 have to do anything. It would say, Fine, that's the

6 decision of the Board of Appeals. If it stands, fine. If

7 it doesn't stand, we'll amend the law and allow a used car

8 dealership by right. It didn't do that. It didn't have

9 to take any action. But it did, because it did not agree,

10 the County Council that is, with the Board of a Appeals'

11 decision.

12 Also, with regard to the Board of Appeals, this

13 Board has said on numerous occasions it doesn't make the

14 law, it interprets the law subject to appellate court

15 review. It doesn't make the law.

16 So no petitioner has the right to proceed under a

17 Board of Appeals' decision until it's a final decision.

18 The petitioner here has no right to follow the decision by

19 the Board of Appeals or by the Zoning Commissioner anymore

20 than it has a right to rely on the Zoning Commissioner's

21 decision that's under appeal.

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1 special hearing. They would have given him his permit and

2 the burden would have been on someone else to file a

3 petition for special hearing if they disagreed. The

4 zoning office didn't do that. He was required to file a

5 petition for special hearing.

As I said before, if a use is permitted by right,

7 no litigation need be instituted. We wouldn't have these

8 petitions for special hearing by right. So the petitioner

9 here had no right to rely on GD&RL or any other decision.

The special hearing, once it was filed, it was in

11 the litigation process. It could have stopped at any

12 point. If our office didn't file an appeal and he had the

13 Deputy Zoning Commissioner's authority to proceed, then he

14 could proceed subject to someone citing him for a

15 violation under the law, but he doesn't have that final

16 authority, and that's a key thing here.

And, as I pointed out, again, there's nothing

18 grandfathering this petitioner. There is nothing that

19 says if a used car dealership in a B.M. zone was approved

20 by the Zoning Commissioner prior to the effective date of

21 this law, then that use was protected.

Page 44 Page 42 You know, I think this Board probably -- and I So, therefore, even if it doesn't have a 2 know I have seen legislation which contains that kind of 2 grandfather clause, that's totally irrelevant to our 3 language, language for statutes which grandfather certain 3 client, because our client was doing something which, when 4 petitions, or certain development plans in the process, 4 the new legislation came into effect, merely turns it into 5 those that are already in the wheel, and it works. That's 5 a nonconforming use, so the grandfather clause doesn't 6 why the Denbow case is different. It was a lawful use 6 matter at all. Thank you. 7 because it was a final approval. That's not the situation THE CHAIRMAN: Thank you very much. A very good 8 here. 8 argument from both counsel. The Board will review the So vested rights apply to all those cases which 9 briefs and its notes on the oral argument, and we'll have 10 are in the wheel, in the litigation process. That's why 10 a public deliberation on this matter and you will all be 11 they apply. And there's no vested rights here because 11 notified. 12 there's no valid permit. It's still on appeal. It's The Board will then write a decision, and you 13 still going through the legislative process. 13 will have the right to appeal that decision in accordance And if the new law comes into effect while in the 14 with Maryland Rules within thirty days after the written 15 legislative process, then the new law would apply, and I 15 decision comes out, not thirty days of our deliberation. 16 think it's very simple. And I think Judge Cathell didn't 16 So if there's nothing further, we are adjourned. 17 mince any words. He's very clear in his decision and (Hearing concluded.) 18 written opinion. 18 So I think, in that case, and it clearly applies 19 19 20 to the instant case, and there should be no 20 21 differentiation between a special hearing and a special 21

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2 permission to go forward, it's tantamount to a special 3 exception. It's not a use permitted by right. Thank you. THE CHAIRMAN: Mr. Adler? MR. ADLER: Just very briefly. In the Denbow 6 case, there was no final authority, there was no final 7 permission in that case, and that's really why our case is 8 like Denbow. The special hearing in this case did not give us 10 permission to do something. It merely confirms what we 11 were doing was permitted, it was allowed. And that's 12 Denbow, because in Denbow, again, no one gave final 13 authority. They were operating as a use permitted, and 14 then the law changed, and that's what happened in this 15 case. We were operating as a use permitted which, 16 17 again, gets us to the point about why the new legislation 18 which has a grandfather clause, the grandfather clause has

19 no application to us in this case because we were doing

20 something which was permitted, which makes you a

21 non-conforming use.

1 exception. Even if petitioner felt they needed some

